In the Supreme Court of the United States

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, Petitioner,

v.

E.H., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Enacted under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), the federal Privacy Rule sets a federal floor for the privacy of medical records. The Rule generally prohibits healthcare providers from disclosing patient records without patient authorization. It expressly preempts any "contrary" state law unless that law provides "more stringent" privacy protection or one of certain narrow exceptions applies.

The West Virginia Supreme Court of Appeals held below that the Privacy Rule does not preempt West Virginia state law that requires broad disclosures. The court interpreted state law to mandate that state-run psychiatric hospitals disclose nearly all patient records to an independent organization without patient authorization. But, relying solely on the summary assertion of one state executive agency that this state law is more protective of patient privacy than the Privacy Rule, the court found the state law not preempted.

The questions presented are:

- 1. Whether a court may abdicate to a state executive agency its duty under the Supremacy Clause to determine whether state law has been preempted.
- 2. Whether the Privacy Rule, which *forbids* the disclosure of a patient's records without patient authorization, preempts West Virginia state law, which *requires* the disclosure of patient records without patient authorization.

PARTIES TO THE PROCEEDING

Petitioner West Virginia Department of Health and Human Resources runs the West Virginia state psychiatric health system through the Bureau for Behavioral Health and Health Facilities. Below, the Department was the petitioner in the West Virginia Supreme Court of Appeals. Originally, the Department was the respondent to a petition for a writ of mandamus in the Circuit Court for Kanawha County.¹

Respondents E.H., M.R., L.S., and S.W. are former patients of the Department's psychiatric hospitals. Below, they were the respondents in the West Virginia Supreme Court of Appeals and were originally the petitioners for a writ of mandamus in the Circuit Court for Kanawha County.

Respondent West Virginia Advocates intervened in the Circuit Court for Kanawha County in support of E.H., M.R., L.S., and S.W. West Virginia Advocates was not a party in the West Virginia Supreme Court of Appeals.

¹ State courts have treated the Department as the respondent to this mandamus action against two Department officers: the Cabinet Secretary and the Clinical Director at Mildred Mitchell-Bateman Hospital. Originally, these officers were Clark Hansbarger and Khan Matin. Today, they are Karen L. Bowling and Bobby A. Miller, II.

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OPINIONS BELOW

In the decision under review, the Supreme Court of Appeals of West Virginia affirmed the Circuit Court of Kanawha County's order requiring West Virginia's state-run psychiatric hospitals to disclose all patient files, except for psychiatrist notes, to Legal Aid of West Virginia, an independent organization. This opinion is reported at 778 S.E.2d 728 and 236 W.Va. 279, and is reprinted in the Appendix at App. 1.

The earlier decision of the Supreme Court of Appeals of West Virginia staying the orders of the Circuit Court of Kanawha County pending appeal is not reported and is reprinted in the Appendix at App. 53.

The opinion of the Circuit Court of Kanawha County denying the motion of the West Virginia Department of Health and Human Resources seeking a stay and entry of partial final judgment as to the Circuit Court's amended patient confidentiality order is not reported and is reprinted at App. 55.

The amended merits order of the Circuit Court of Kanawha County on patient confidentiality is reported informally at 2014 WL 10021963 and is reprinted at App. 65.

The opinion of the Circuit Court of Kanawha County denying the Department's initial Motion for Stay and Entry of Partial Final Judgment as to the Circuit Court's original patient confidentiality order is reported informally at 2014 WL 10021969 and is reprinted at App. 87.

The original merits order of the Circuit Court of Kanawha County on patient confidentiality is reported informally at 2014 WL 10021968 and is reprinted at App. 97.

The preliminary oral ruling of the Circuit Court of Kanawha County on patient confidentiality is not reported and is reprinted at App. 119.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The judgment of the West Virginia Supreme Court of Appeals was entered on October 15, 2015. On December 29, 2015, the Chief Justice granted Petitioner's application to extend the deadline to file this Petition to March 11, 2016. No. 15A673. This Petition is timely filed within that deadline.

STATUTORY AND REGULATORY PROVISIONS

Article VI of the Constitution provides that the United States "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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. VI, cl. 2.

Section 262(a)(1) of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA); Pub. L. 104–191, 110 Stat. 1936, enacted August 21, 1996, provides—

[A] provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall supersede any contrary provision of State law, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.

42 U.S.C. § 1320d–7(a)(1).

Section 262(a) to (c) of the Act provides—

(a) Not later than the date that is 12 months after the date of the enactment of this Act,

the Secretary of Health and Human Services shall submit to the Committee on Labor and Human Resources and the Committee on Finance of the Senate and the Committee on Commerce and the Committee on Ways and Means of the House of Representatives detailed recommendations on standards with respect to the privacy of individually identifiable health information.

- (b) The recommendations under subsection (a) shall address at least the following:
 - (1) The rights that an individual who is a subject of individually identifiable health information should have.
 - (2) The procedures that should be established for the exercise of such rights.
 - (3) The uses and disclosures of such information that should be authorized or required.
- (c) (1) If legislation governing standards with respect to the privacy of individually identifiable health information transmitted in connection with the transactions described in section 1173(a) of the Social Security Act (as added by section 262) is not enacted by the date that is 36 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall promulgate final regulations containing such standards not later than the date that is 42 months after the date of the enactment of

this Act. Such regulations shall address at least the subjects described in subsection (b).

(2) 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.

42 U.S.C. § 1320d-2 (1996).

The federal Department of Health and Human Services (HHS) has adopted a federal Privacy Rule under this delegated rule-making power. See Department of Health & Human Resources, Standards for Privacy of Individually Identifiable Health Information (Privacy Rule), 45 C.F.R. Part 160 & Part 164, subpart A & E; 42 U.S.C. § 1320d–2 (1996).

The Privacy Rule to HIPAA provides a basic authorization requirement for the disclosure of patient records—

Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section.

45 C.F.R. § 164.508(a)(1).

The Privacy Rule also provides for preemption of any contrary state laws—

A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met:

* * *

(b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

* * *

45 C.F.R. § 160.203.

The Privacy Rule then provides the following definitions—

Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means:

(1) A covered entity or business associate would find it impossible to

comply with both the State and Federal requirements; or

(2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act, section 264 of Public Law 104–191, or sections 13400–13424 of Public Law 111–5, as applicable.

More stringent means, in the context of a comparison of a provision of State law and a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter, a State law that meets one or more of the following criteria:

- (1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter . . . ,
- (2) With respect to the rights of an individual, who is the subject of the individually identifiable health information, regarding access to or amendment of individually identifiable health information, permits greater rights of access or amendment, as applicable.

* * *

(4) With respect to the form, substance, or the need for express

legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, asapplicable.

* * *

(6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

Relates to the privacy of individually identifiable health information means, with respect to a State law, that the State law has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way.

State law means a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.

45 C.F.R. § 160.202.

Section 64-59-11 of the West Virginia Code of State Regulations, entitled "Behavioral Health Client Rights: Confidentiality and Records," provides that—

11.4.1. A clinical record shall be maintained at a behavioral health facility for each client treated by the facility. The record shall contain all matters relating to the admission, legal status, treatment of the client and all pertinent documents relating to the client, including detailed results of: (1) periodic examinations; (2) individualized treatment programs, including the written, dated, individualized plan of care stating the specific outcome of treatment goals and the progress made towards realizing those goals, and dated notations of any change of outcome, treatment goals or plan of care; (3) evaluations and re-evaluations; (4) orders for treatment; and (5) orders for application of mechanical or chemical restraints seclusion.

* * *

11.5.1. Records shall only be disclosed:

* * *

11.5.1.d. To providers of health, social, or welfare services involved in caring for or rehabilitating the client. The information shall be kept confidential and used solely for the benefit of the client. No written consent is necessary for employees of the department,

comprehensive behavioral health centers serving the client, or advocates under contract with the department[.]

* * *

W. Va. Code St. R. § 64-59-11 (emphasis added).

Section 64-59-20 of the West Virginia Code of State Regulations, entitled "Behavioral Health Client Rights: Client Advocacy and Grievance Procedure," provides—

20.1. Client Advocacy. There shall be persons designated as client (or patient or resident) advocates who are independent of the facility management in every behavioral health facility.

20.2. Right to File A Grievance. A grievance may be initiated by a client, a client or patient advocate, a member of a client's family, a facility employee or other individual on behalf of any client of a behavioral health facility. A grievance may involve any aspect of a client's care, treatment, housing, services, accommodations, etc. and is not restricted to alleged violations of a client's rights or abuse of the client.

* * *

20.2.9. Abuse/Neglect Investigation. All grievances of abuse and/or neglect shall be investigated by the facility client or patient advocate or an outside advocate as

appropriate. Upon receipt of an abuse/neglect grievance, the advocate shall immediately interview the client and review the situation. Within the next eight (8) regular working hours, the advocate shall make a written report to the facility administrator. As part of the investigative process the advocate shall have access to all staff members, pertinent records and documents and shall interview take witnesses and statements appropriate. The advocate shall not have access to employee personnel records; all investigations shall be based on evidence related to the grievance under investigation only.

* * *

20.2.16.b. Client or patient advocates shall assist clients in registering and filing grievances, acknowledge grievances, conduct investigations ofgrievances, notify the administrator of results of grievance assure that abuse/neglect investigations, grievances have been reported to Adult Protective Services, educate staff regarding client rights and maintain accurate documentation of grievances all and investigations.

* * *

W. Va. Code St. R. § 64-59-20.

GLOSSARY

App. Petitioner's Appendix

Apl't App. Appendix Upon Direct Appeal to

the West Virginia Supreme Court of Appeals, W. Va. DHHR v. E.H.,

No. 14-0965

DHHR West Virginia Department of

Health and Human Resources

HHS United States Department of

Health and Human Services

HIPAA The Health Insurance Portability

and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29 &

42 U.S.C.)

Privacy Rule Standards for Privacy of

Individually Identifiable Health Information, 45 C.F.R. Pts. 160 &

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PETITION FOR CERTIORARI

This Court's intervention is needed to correct a state high court that has shown an unprecedented disregard for its duty under the Supremacy Clause. Unlike in any other case of this Court or any other court of which Petitioner is aware, the state court below abdicated entirely to a state executive agency the decision whether certain state law is preempted by federal law. In a discussion consisting of merely six sentences, the court found no preemption based solely on the fact that a state executive agency had previously determined in a guidance document that state law was not preempted. Like the state high court recently reversed in James v. City of Boise, 136 S. Ct. 685 (2016), the West Virginia Supreme Court of Appeals has shown an astonishing disregard for federal law and the constitutional order, and should be reversed, as well.

The federal Privacy Rule—promulgated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)—sets a federal floor on the privacy of medical records. Under the Rule, healthcare providers generally may not disclose patient records without patient authorization. Any contrary state law is expressly preempted, unless the state law more stringently protects patient privacy or one of several narrowly-defined exceptions to the Privacy Rule applies. 45 C.F.R. § 160.203.

At issue here are provisions of West Virginia state law that mandate just what the Privacy Rule forbids: the disclosure of patient records without patient authorization. As interpreted by the West Virginia Supreme Court of Appeals below, these provisions of state law require state-run psychiatric hospitals to provide permanent access to all patient records, except for psychiatrist notes, to an independent advocacy organization, Legal Aid of West Virginia, without first requiring patient authorization or even providing notice to the patient. App. 3, 32. State law could not be more contrary to the Privacy Rule.

Over a strong dissent, the West Virginia high court refused—with no independent analysis—to find state law preempted. App. 27–29, 31. After finding that no exception to the Privacy Rule applies, the court held that the Privacy Rule did not preempt West Virginia's law solely because one state executive agency—that was not even a party to the case—had "determined" in a guidance chart that state law protects patient privacy more stringently. Id. at 28. In a column labeled "preempted," the chart states "no," and in a column labeled "HIPAA or state law more stringent," the chart states "state law." Id. at 133, 137. The court undertook no analysis of its own. The West Virginia Supreme Court of Appeals did not itself compare state and federal law, but rather uncritically accepted the bare conclusion of a state agency—unadorned by any legal reasoning.

As explained by the dissenting justice, the majority has demonstrated a "complete disregard of federal law" and effectively eviscerated the Supremacy Clause. *Id.* at 34. "Under the majority opinion's mind-boggling yardstick, all that any state must do to get around HIPAA is unilaterally proclaim that its laws are more stringent than HIPAA." *Id.* at 41. Moreover, had the majority

"performed but a scintilla of the legal analysis that is required," *id.* at 33, it would have found that state law does not "provide greater privacy protection" than HIPAA because state law "exposes all patient information to a private legal entity in the absence of patient consent," *id.* at 51.

This Court should grant this Petition to make clear that state courts cannot abdicate their duty to faithfully apply the Supremacy Clause. Indeed, the error is so fundamental that this Court should consider summarily reversing the judgment below, as it has done in other cases where state high courts have shown a similarly casual disregard for federal law and the constitutional order. See, e.g., James v. City of Boise, 136 S. Ct. 685, 686 (2016); Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012); Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1202 (2012).

STATEMENT

I. Statutory and Regulatory Background

A. HIPAA

In 1996, Congress enacted the Health Insurance Portability and Accountability Act directing the federal Department of Health and Human Services (HHS) to enact regulations to protect "the privacy of individually identifiable health information."2 These regulations were to require health care providers to respect as a matter of federal law, under penalty of imprisonment, patients' control of the use and disclosure of their personal information.³ The "paramount" purpose of the law was to "[p]rotect[] the privacy of individuals."4 To that end, Congress expressly preempted any contrary state privacy laws that are not "more stringent." 5

Pursuant to Congress's directive, HHS promulgated what came to be known as the Privacy

² HIPAA §§ 261, 264(b), (c)(1), Pub. L. No. 104–191, 110 Stat 1936 (1996); 42 U.S.C. § 1320d–2 (1996).

³ 42 U.S.C. §§ 1320d–1(a), 1320d–5, 1320d–6; see *S. Carolina Med. Ass'n v. Thompson*, 327 F.3d 346, 348–49 (4th Cir. 2003) (outlining HIPAA and its history); Jonathan P. Tomes, *Individual Criminal Liability for HIPAA Violations: Who Is Potentially Liable? Or Should We Say, Who Isn't?*, 9 J. Health Care Compliance 5, 8–11 (2007) (describing HIPAA's expansive criminal liability).

⁴ H.R. Rep. No. 104-496(I), at 100 (1996), reprinted in U.S.C.C.A.N. 1865, 1900.

⁵ HIPAA, Pub. L. No. 104–191, § 264(c), 110 Stat. 1936, 2033–34; see also HIPAA § 1178(a)(1), 42 U.S.C. § 1320d–7(a)(1) (preempting state laws contrary to any part of HIPAA).

Rule to "protect and enhance" patients' privacy. 6 The nation's first set of comprehensive federal privacy regulations, the Privacy Rule constitutes "the most significant, extensive, and detailed [attempt] by the federal government to protect the privacy of personal information." In the view of some commenters, it is "a long overdue federalization of medical records privacy."8 Before the Privacy Rule, many States did "not extend comprehensive protections to people's medical records" and frequently protected only "certain health conditions such as mental illness."9 The Privacy Rule streamlined $_{
m this}$ incomplete, and often inconsistent" patchwork of state laws with a uniform set of minimum federal standards that placed the patient squarely in control of his or her information.¹⁰

At the heart of the Privacy Rule is the requirement that a healthcare provider "not use or disclose" a patient's information "without an authorization" from the patient, unless an exception

⁶ Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462-01, 82,463 (Dec. 28, 2000), (codified at 45 C.F.R. Pts. 160 & 164); see Citizens for Health v. Leavitt, 428 F.3d 167, 172–74 (3d Cir. 2005) (collecting regulatory history).

⁷ Peter A. Winn, Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law, 33 Rutgers L.J. 617, 639 (2002).

 $^{^8}$ Edward F. McArdle, $Health\ Law,\ 54$ Syracuse L. Rev. 1179, 1193 (2004).

⁹ 65 Fed. Reg. at 82,463–64 (quotation omitted).

¹⁰ 65 Fed. Reg. at 82,462–64; Grace Ko, Note, Partial Preemption Under the Health Insurance Portability and Accountability Act, 79 S. Cal. L. Rev. 497, 498–99 (2006).

applies. 11 The exceptions are the result of numerous, specific proposals that drew more than 50,000 comments.¹² They are narrowly crafted accommodate various needs to use patient information, including for treatment, payment, public health oversight, reporting of abuse and neglect allegations, law enforcement, and litigation.¹³

Because Congress intended the Privacy Rule to be a "federal floor" and not a ceiling, the Privacy Rule's preemption provision is designed to yield to "the law that is most protective of privacy control." 14 Any state law "contrary" to the Privacy Rule is preempted unless the state law "is more stringent." 15 State law includes any state "constitution, statute, regulation, rule, common law, or other State action having the force and effect of law."16 A state law is "contrary" to the Privacy Rule if a covered entity would find it "impossible to comply with both" the state and the federal law, or if "[s]tate law stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Privacy Rule.¹⁷ And a contrary state law is "more stringent" than the Privacy Rule if, "in the context of a

¹¹ 45 C.F.R. § 164.508(a)(1); see also *id*. § 164.502(a) (A covered entity "may not use or disclose protected health information, except as permitted or required by [these regulations].").

 $^{^{12}}$ 65 Fed. Reg. 82,462 (Dec. 28, 2000); 67 Fed. Reg. 53,182 (Aug. 14, 2002).

¹³ 45 C.F.R. §§ 160.203(c), 164.502(a), 164.506(c)(1), 164.512.

¹⁴ 65 Fed. Reg. at 82,471, 82,580.

¹⁵ 45 C.F.R. § 160.203; 65 Fed. Reg. at 82,581.

¹⁶ 45 C.F.R. § 160.202.

¹⁷ 45 C.F.R. § 160.202(1)–(2).

comparison of a provision of [s]tate law," the state law:

- "prohibits or restricts a use or disclosure" where the Privacy Rule would permit use or disclosure;
- provides the patient with "greater rights of access" to information;
- narrows the "scope or duration" of the use or disclosure of personal information;
- "increase[s] the privacy protections afforded";
- "reduce[s] the coercive effect of the circumstances surrounding" the patient's grant of "express legal permission"; or
- otherwise "provides greater privacy protection for the individual."

B. West Virginia State Law

West Virginia state law provides rules and privacy guidelines for state-run behavioral healthcare services under the West Virginia Department of Health and Human Resources (Department or DHHR).

a. The Department's Bureau for Behavioral Health and Health Facilities operates two psychiatric hospitals, Mildred-Mitchell Bateman Hospital and William R. Sharpe, Jr. Hospital.¹⁹ These hospitals serve as a setting of last resort for civilly committed patients (individuals who pose a danger to their own welfare) and forensic patients

¹⁸ 45 C.F.R. § 160.202.

¹⁹ See DHHR, Bureau for Behavioral Health and Health Facilities, About Us, http://www.dhhr.wv.gov/bhhf/Sections/Pages/Sections.aspx (last visited Mar. 8, 2016); see W. Va. Code § 27-2-1.

(criminal defendants who are incompetent to stand trial or who are considered not legally responsible for their actions).²⁰

Through a grant agreement, the state hospitals fund independent advocates, who bring patients' grievances to the hospitals' attention upon patient request. App. 4–5. This advocacy program began in 1983 with hospital employees serving as advocates and since 1990, has continued with independent nonlawyers serving as advocates. *Ibid*.²¹ One long-term grantee providing patients with advocates is Legal Aid of West Virginia, a private organization. *Id.* at 5. Court orders from 1990 and 2009 state that under state law the hospitals will continue to fund advocates and that Legal Aid will intermittently audit hospital care. Id. at 4-8. State hospital regulations, which have the force of law,²² provide that "[n]o written consent is necessary for . . . advocates under contract with the department" to view patient records.²³ Legal Aid's grant agreement contemplates the same. *Id.* at 50–51.

b. Since 2006, the state Health Care Authority, an "autonomous division" created by the West Virginia legislature,²⁴ has housed a state privacy

²⁰ W. Va. Code ch. 27, arts. 4, 5 & 6a.

²¹ See W. Va. Code R. §§ 64-59-20.1, 64-59-1.4.

²² These state regulations have the force of law because they are approved and passed by the state legislature. See, *e.g.*, W. Va. Code § 29A-1-2 *et seq.*; *Swiger v. UGI/AmeriGas, Inc.*, 613 S.E.2d 904, 911 (W. Va. 2005).

²³ W. Va. Code St. R. § 64-59-11.5.1.

West Virginia Health Care Authority, About the West Virginia Health Care Authority,

office responsible for "protecting the privacy of confidential and personally identifiable information collected and maintained by Executive Branch agencies."²⁵

The Health Care Authority publishes an annual "legal advisory chart" analyzing "state law provisions which appear to implicate" HIPAA's preemption provisions. Id. at 121, 134, 141. This advisory chart is a "working document" prepared by a private law firm for the authority and is annually "subject to review and revision." Id. at 122, 135, 142. It is not a "comprehensive list of all applicable West Virginia" regulations" but rather just a "guide" to whether may be preempted: "anv determination on whether [a] state regulation is preempted would have to be the result of court action or decision." *Id.* at 121–22, 134–36, 141–42.

In 2013 and 2014, this advisory guide stated that HIPAA does not preempt state regulations governing the state psychiatric hospitals. *Id.* at 133, 137. Each year, the chart includes one entry for the state psychiatric hospital regulations contained in Title 64, Series 59 of the West Virginia Code of State Rules. *Ibid.* In the entry labeled "effect on protected health information," the chart exclusively discusses the sections of Series 59 dealing with disclosures during involuntary evaluations, court proceedings,

http://www.hca.wv.gov/About/Pages/default.aspx (last visited Mar. 8, 2016). The Health Care Authority is administratively classified with the Department but is not subject to its control. See W. Va. Code § 16-29B-5.

 $^{^{25}}$ Governor J. Manchin, Exec. Order No. 6-06, at 2 (W. Va. Aug. 16, 2006).

and hospital treatment. *Ibid*. In the column labeled "preempted," the chart states "no," and in the column labeled "HIPAA or state law more stringent," the chart states "state law." *Ibid*.

II. The Proceedings Below

A. In June 2014, a newly appointed privacy officer at the Department's psychiatric hospitals discovered that Legal Aid of West Virginia, an outside entity available for patient advocacy, had full access to all patient files. App. 8-9, 37 & n.2. Specifically, the privacy officer learned that Legal Aid's advocates had live network access to all electronic records, as well as physical access to all patient rooms. without seeking authorization. *Ibid*. She explained that advocates had a practice of "fishing" in patient files without any basis in a pending grievance. Apl't App. 76, 235, 238. This practice apparently had begun in 1990 and despite the intervening promulgation of HIPAA and the Privacy Rule, had never been reexamined. App. 5, 8-9, 37 & n.2.

Believing that the hospitals' practice of disclosing all patient records without any case-specific justification or patient authorization violated the Privacy Rule, the privacy officer immediately revoked Legal Aid's access and required Legal Aid to submit a signed, written consent form to view records in the future. *Id.* at 37 n.2.

Respondents challenged the privacy officer's assessment of HIPAA before a court that, for the last 35 years, has been effectively overseeing the State's psychiatric hospitals. App. 2–3. In 1981,

Respondents, who were then patients of the hospitals (but are not now), brought a mandamus action against the hospitals seeking across-the-board changes to hospital governance. E. H. v. Matin, 284 S.E.2d 232, 233 (W. Va. 1981). Since then, state courts have directed and monitored hospital care, jurisdiction maintaining to address ongoing developments. Dkt. No. 81-MISC-585 (Cir. Ct. Kanawha Cnty.); App. 4, 6. In this case, Respondents alleged that Legal Aid does not need patient authorization to view patient files. App. 3, 9.

The hospitals offered three overarching defenses of their new policy of making Legal Aid obtain patient authorization to view records. Apl't App. 76– 85. Admitting that they had departed from years of past practice, the hospitals first argued that state law, properly understood, did not require the hospitals to disclose patient records without patient consent. Id. at 80–85. Further, they explained that their new privacy officer had determined that HIPAA's Privacy Rule makes no exception for Legal Aid, and that they believed the changed policy was necessary to come into compliance after years of inadvertently violating the Privacy Rule.²⁶ *Ibid*. The hospitals also argued that in any event, blanket disclosure would violate patients' Fourteenth Amendment right to informational privacy (a right assumed by this Court to exist in cases such as

²⁶ The hospitals' brief argued in detail that the "Department is under a federal law obligation to protect patients' right to privacy" because "HIPAA requires the advocates have limited access to patient records" and the "advocates are not exempted from HIPAA requirements." Apl't App. 77, 80, 85 (capitalization altered); see also DHHR Br. on Appeal at 18–40.

National Aeronautics & Space Administration v. Nelson, 562 U.S. 134, 151 (2011)). Apl't App. 77, 375.²⁷

B. In August 2014, the Circuit Court of Kanawha County ordered the state hospitals to grant Legal Aid carte blanche access to patient records, holding that state law requires disclosure and that Legal Aid falls under six substantive exceptions to the Privacy Rule and one preemption exception. App. 65–86. The circuit court held that Legal Aid: (1) was the hospitals' business associate²⁸; (2) conducted "public health surveillance, investigation, or intervention"29; (3) conducted health oversight activities³⁰; furthered the hospitals' health care operations³¹; (5) abuse and neglect allegations³²; (6) conducted immediate law enforcement activities³³; and (7) was authorized by court order to receive information.³⁴ App. 76–83. The only records that the court allowed to be withheld were psychiatrist notes, 35 as well as any records that patients had affirmatively instructed the hospitals not to disclose to Legal Aid. App. 81, 86. The circuit court did not rule on the hospitals' constitutional objection. Id. at 74–85.

²⁷ See also DHHR Br. on Appeal at 14–18.

²⁸ 45 C.F.R. § 164.502(a).

²⁹ 45 C.F.R. § 160.203(c).

³⁰ 45 C.F.R. § 164.512(d)(1).

³¹ 45 C.F.R. § 164.506(c)(1).

³² 45 C.F.R. § 164.512(a) & (c).

³³ 45 C.F.R. § 164.512(c)(1)(iii)(B).

³⁴ 45 C.F.R. § 164.512(e)(1)(i).

^{35 45} C.F.R. § 164.506.

The hospitals sought and received a stay of the circuit court's order from the West Virginia Supreme Court of Appeals, pending an appeal to that court. *Id.* at 9, 53. The circuit court had denied a stay, partly because it believed that its order was not final. *Id.* at 55–64, 87–96. The Supreme Court of Appeals, however, granted a stay without explanation. *Id.* at 9, 53–54.

C. In October 2015, the West Virginia Supreme Court of Appeals affirmed the circuit court's order requiring state hospitals to disclose to Legal Aid all patient records, other than psychiatrist notes, without patient authorization. App. 1–32. As a threshold matter, the Supreme Court of Appeals agreed with the hospitals that state law provided appellate jurisdiction to review the circuit court's order because that order "approximate[s] a final order by its nature and effect." App. 2, 10-11 (quoting Syl. Pt. 1, West Virginia Dep't of Health & Human Resources v. E.H., 778 S.E.2d 643 (W. Va. 2015)). On the merits, the Supreme Court of Appeals found "wholly inapplicable" each exception to the Privacy Rule on which the circuit court relied. App. 3.36 But, by a 4 to 1 vote, the court concluded that the

³⁶ The court found that Legal Aid was not the hospitals' business associate, was not a public health oversight agency, does not conduct the hospitals' own health care operations, was not a public agency receiving mandatory disclosures of abuse and neglect allegations, does not conduct law enforcement activities, and was not authorized by court order to access records. App. 16–27.

circuit court's order was consistent with state law and *not* preempted by the Privacy Rule. App. 2–3.³⁷

First, the Supreme Court of Appeals interpreted West Virginia state law to require state hospitals to provide Legal Aid access to patient records without patient authorization. App. at 29–32. The State's privacy regulations, the court noted, "provide that '[n]o written consent is necessary for employees of the department, comprehensive behavioral health centers serving the client or advocates under contract with the department." Id. at 29 (quoting W. Va. Code St. R. § 64-59–11.5.1.d) (emphasis in original). Neither state hospital regulations nor Legal Aid's grant agreement, the court also held, impose any prior consent requirement. Id. at 29–30. And the hospitals' "long term practice of providing unlimited record access to the patient advocates, agreed to by the parties and sanctioned by the [circuit] court" had become "part of the rule of this case." *Id.* at 30–31. This interpretation of state law is, of course, not subject to this Court's review.³⁸

Second, the Supreme Court of Appeals held that HIPAA and the Privacy Rule do not preempt the provisions of state law that, in the court's view,

³⁷ The court also rejected the hospitals' argument that statemandated disclosure of patient records violates the patients' Fourteenth Amendment rights to informational privacy. App. 11–16 (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Nixon v. Adm'r of Gen'l Servs.*, 433 U.S. 425, 458–60 (1977)). The hospitals do not seek review of this adverse holding.

³⁸ Hortonville Joint School Dist. No. 1. v. Hortonville Edu. Ass'n, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [State] law by the highest court of the State.").

require the hospitals to disclose patient records to Legal Aid. App. at 27–29, 31. The court recognized that "the HIPAA Privacy Rule is viewed as a floor of privacy protections for individuals," and it observed that both HIPAA and Privacy Rule preempt contrary state laws unless state laws protect patient privacy more stringently. *Id.* at 28. But in just six sentences in the 28-page published opinion, the majority concluded that "our state [laws] are not preempted by HIPAA" based solely on the fact that the state health care authority had "determined" in its annual guide that the state law in question was "more stringent." *Id.* at 28–29.

In full, the court's astonishingly brief preemption discussion is as follows:

From the record of this case, it is clear that this state undertakes to examine our codified law on an annual basis to analyze whether our state laws are more stringent than HIPAA's for preemption purposes.[n.32] . . . From the record submitted in this case, the protections set forth in Title 64, Series 59 have been determined to be more stringent than those required by federal law.[n.33] Accordingly, our state regulations set forth in Title 64, Series 59 are not preempted by HIPAA. See 45 C.F.R. §§ 160.202, –203.

Id. at 28–29. The two footnotes are:

[n.32] This annual analysis is required by HIPAA.

[n.33] Analyses completed in 2013 and 2014 entitled West Virginia Health Care Privacy Laws and HIPPA [sic] Preemption Analysis for the DHHR conclude that our state regulations set forth in 64 C.S.R. § 59 are not preempted by HIPPA [sic] as our provisions are more stringent. The 2015 analysis reached the same conclusion.

Id. at 28–29 nn. 32–33.

The opinion includes no further preemption analysis. The majority did not discuss, acknowledge, or attempt to apply the HHS regulation that sets forth specific standards for determining whether a state law is "more stringent" than the Privacy Rule.³⁹ Nor did the majority cite any authority to support its complete abdication of the preemption analysis to a state agency—much less to a state agency that is not a party to this litigation, and that described its preemption analysis as just a "guide" with no legal effect in court.

The majority did, however, explain at length the policy reasons for its conclusion. "There is a clear need," the majority asserted, "for non-grievance related review of patient records to identify systemic issues" for court oversight. App. at 31; see id. at 4–6. The majority candidly admitted that it saw the Department as having "undeniably blocked" the "improvement of the quality of health care" by

³⁹ 45 C.F.R. § 160.202.

"institut[ing] wholly unwarranted roadblocks in the path of the patient advocates." *Id.* at 31–32.

Finally, though the majority's holding clearly relies on a conclusion about the preemptive scope of *federal law*, it baldly asserted that its "decision to affirm is grounded solely on state law." *Id.* at 3.

D. The dissenting justice argued that by deferring uncritically to the state health care authority, the majority had abandoned responsibility under the Supremacy Clause to enforce an express preemption clause under federal law. App. 33–52. When Congress expressly preempts state laws, the dissent explained, a court must "identify the domain expressly pre-empted" and then actually analyze whether state law falls within that preempted domain. Id. at 34–35, 40–41. In sharp "[t]he majority opinion reached conclusion that our State law was more stringent than HIPAA without performing any legal analysis." Id. at 40 (emphasis in original). The dissent stressed the absurd consequences of the majority's lack of reasoning: "Under the majority opinion's mindboggling yardstick, all that any state must do to get around HIPAA is unilaterally proclaim that its laws are more stringent than HIPAA." Id. at 41. "Surely Congress did not mean for [federal statutes] and the Supremacy Clause to be defeated in such a selfserving manner." Id.

The dissent charged the majority with an "arrogant and complete disregard of federal law." App. at 34. The "majority knew," the dissent asserted, that "state law is not more stringent than HIPAA." *Id.* at 52. In the dissent's view, "that is why

[the majority] opinion completely ignored 45 C.F.R. § 160.202"—the HHS regulation that sets forth specific standards for determining whether a state law is "more stringent" than the Privacy Rule. *Id.* at 51–52.

"[Ilf the majority opinion had performed but a scintilla of the legal analysis that is required," it "would have found" that West Virginia law "does not provide greater privacy protection" than HIPAA. App. at 33, 51. Even a "cursory review of what the relevant state law allows clearly shows that it was not more stringent than HIPAA." Id. at 50. The state law, the dissent explained, "exposes all patient information to a private legal entity in the absence of patient consent for either representation by the agency or the disclosure of their medical records to the agency." Id. at 51. By "forc[ing] disclosure without a court order, or the patient's consent, [this state law] is not "more stringent" than the HIPAA regulations." Ibid. (quoting Law v. Zuckerman, 307 F. Supp. 2d 705, 711 (D. Md. 2004)).

REASONS FOR GRANTING THE PETITION

This Court's intervention is needed in this case independent reasons. First, unprecedented abdication of its duty under the Supremacy Clause and in conflict with every express preemption precedent of this Court, the West Virginia Supreme Court of Appeals abandoned to a state executive agency the determination of whether state law is preempted by federal law. Second, the below has effectively rendered preemption clause in an important federal medical privacy law a nullity. This Court should grant certiorari and consider summarily reversing the judgment below.

- I. The West Virginia Supreme Court of Appeals abandoned its duty under the Supremacy Clause to enforce federal law over contrary state law.
 - A. The preemption decision below is an unprecedented abdication of a court's responsibility to a state executive agency.

It is a "familiar and well-established principle" that the Supremacy Clause requires all courts including state courts—to "invalidate[] state laws" that "interfere with" or are "contrary to" federal law. Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712–13 (1985) (citing Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824) (Marshall, C.J.)). The Supremacy Clause provides that federal law "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. VI, cl. 2 (emphasis added). Accordingly, since M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), "it has been settled that state law that conflicts with federal law is 'without effect," Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (citation omitted)—a result "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

Critically, federal law includes not just the Constitution and statutes. but also agency regulations. Since Congress may delegate its rulemaking powers, an "agency regulation with the force of law can pre-empt conflicting state requirements" just as much a federal statute. Wyeth v. Levine, 555 U.S. 555, 576 (2009); see also Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153–54 (1982).

To determine whether state law is preempted, this Court has always followed the same general methodology. Congress's purpose is "the ultimate touchstone in every pre-emption case." Wyeth, 555 U.S. at 565 (quotations omitted); see also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541–42 (2001). Where a "statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993). The Court seeks initially "to identify the domain expressly preempted." Lorillard Tobacco Co., 533 U.S. at 541. It then closely examines state law to determine whether it falls within the preempted domain. See id. at 546-51; see also PLIVA, Inc. v. Mensing, 131 S. 2573 (2011) ("Pre-emption analysis requires us to compare federal and state law."). This "inquiry" requires the Court to "consider the relationship between state and federal laws as they are interpreted and applied." Jones, 430 U.S. at 526.

For example, in Lorillard Tobacco this Court spelled out in detail what it understood state and

federal law to require, and then determined that the state regulations at issue were expressly preempted. The case concerned whether the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted Massachusetts certain cigarette advertising regulations. This Court began by defining the scope of the FCLAA's express preemption provision, examining not only the statutory text but also the "context in which the . . . preemption provision was adopted." 533 U.S. at 546. Then, this Court turned to ofanalysis the state regulations. independently weighing and rejecting several advanced by the State arguments against preemption. Id. at 547 (considering whether the "cigarette advertising regulations are not with respect to' advertising and promotion); id. at 546–47 (considering whether "the cigarette advertising regulations are not 'based on smoking and health'); id. at 547 (considering whether "the State's outdoor point-of-sale advertising regulations cigarettes are not pre-empted because they govern the location, and not the content, of advertising").

This Court followed the same methodology this Term in *Goibelle v. Liberty Mutual Insurance Company*, No. 14–181 (Mar. 1, 2016), a case involving express preemption under the Employee Retirement Income Security Act of 1974 (ERISA). This Court began with "the necessary starting point": the "text of ERISA's express pre-emption clause." *Goibelle*, slip op. 5. It defined "the potential reach of th[e] clause," *id.* at 6, and then addressed at length whether the Vermont law at issue fell within that reach. This Court independently concluded that "[t]he State's law and regulation govern plan

reporting. disclosure. and—by necessary implication—recordkeeping." all "fundamental components of ERISA's regulation of administration." Id. at 9-10. And though "Vermont dispute[d] the pre-emption of its reporting regime on several fronts," id. at 10, this Court considered and rejected each of the State's arguments. *Ibid*. (rejecting State's argument that "respondent has not demonstrated that the reporting regime in fact has caused it to suffer economic costs"); id. at 11 (rejecting State's argument "that ERISA does not pre-empt the state statute and regulation because the state reporting scheme has different objectives"); id. at 12 (rejecting State's invocation of "the State's traditional power to regulate in the area of public health").

Though this Court has not yet had a case concerning HIPAA preemption, every lower court that has faced this issue has applied this Court's "express preemption" framework. Murphy v. Dulay, 768 F.3d 1360, 1367 (11th Cir. 2014) (noting that "[b]oth the HIPAA statute and its regulations contain express preemption provisions"). Each court has independently assessed the scope of the HIPAA preemption clause and compared it to the state law at issue. E.g., id. at 1368, 1372 (outlining "the relevant HIPAA regulations and then analyz[ing] whether" state law is "contrary"); Caldwell v. Chauvin, 464 S.W.3d 139, 153 (Ky. 2015) ("[I]f a "contrary" law requires a more stringent standard of HIPAA's preemption provisions inapplicable and state law controls. So we must undertake an analysis of Kentucky law to determine what law controls the instant dispute.") (emphasis omitted); S. Carolina Med. Ass'n v. Thompson, 327 F.3d 346, 355 (4th Cir. 2003) ("In order to determine what state laws will be preempted under HIPAA, we look to the regulations promulgated pursuant to the non-preemption provision.").

Unlike any previous preemption decision of this Court or any other court of which Petitioner is aware, however, the West Virginia Supreme Court of did not follow this straightforward Appeals methodology in this case. The court never sought to "identify the domain expressly pre-empted." Lorillard Tobacco Co., 533 U.S. at 541. Indeed, it did not even acknowledge the HHS regulation that sets forth specific standards for evaluating. preemption purposes, whether a state law is "more stringent" than the Privacy Rule. 45 C.F.R. § 160.202. Nor did the court ever itself analyze or explain how state law is actually more protective of privacy than federal law. Instead, in just six sentences, the court uncritically adopted a conclusory assertion found in a state agency's internal and nonfinal preemption "guide." The court's preemption analysis was based not on its own legal analysis, but entirely upon "the record submitted [by the parties] in this case," which the court simply accepted as having "determined" "the [state-law] protections set forth in Title 64, Series 59 . . . to be more stringent than those required by federal law." App. 28; see pp. 26-28, supra.

In short, the state high court completely abdicated its responsibility under the Supremacy Clause to a state executive agency. As this Court has noted, "state courts have the coordinate authority and

consequent responsibility to enforce the supreme law of the land." Howlett By and Through Howlett v. Rose, 496 U.S. 356, 369 n.16 (1990) (emphasis added). That follows from both "the language of the Supremacy Clause—which directs that 'the Judges in every State shall be bound thereby . . . '—and [this Court's] cases." Ibid. But the West Virginia Supreme Court of Appeals ignored all of that, abandoning to the state health care authority the first and last word on whether state law is preempted.

There is no merit to the passing suggestion by the Supreme Court of Appeals that HIPAA preemption uniquely permits courts to rely on a state agency's annual preemption analysis. App. 28 n.32 (noting that the "annual analysis" on which it relied "is required by HIPAA"). No court has ever held as much, and rightly so. These summary charts "do not constitute legal advice and have no force of law," are "created without guidance from the agencies charged with enforcing the Privacy Rule," "have different levels of credibility," and often provide "conflicting information." Grace Ko, Note, Partial Preemption Health Insurance Portabilit vAccountability Act, 79 S. Cal. L. Rev. 497, 509-10 (2006). Indeed, the charts at issue here are prepared by outside law firms, describe themselves as "working document[s]" and "guide[s]," and disclaim any legal effect in court. App. 121–22, 134–36, 141– 42. Even worse, the charts at issue here did not even intend to opine specifically on the state regulations governing disclosures to patient advocates: the charts included one entry for all hospital regulations contained in Title 64, Series 59 of the West Virginia Code of State Rules. Id. at 133, 137.

B. The state high court's approach to preemption is a fundamental error of constitutional magnitude that requires reversal.

Proper respect for the Supremacy Clause is critical to the constitutional order. As Alexander Hamilton wrote in Federalist No. 33, the Supremacy Clause ensures that federal law retains force throughout the country. Without the Supremacy Clause, "[i]t is evident [that federal law] would amount to nothing. . . . [and] be a mere treaty, dependent on the good faith of the parties, and not a government." The Federalist No. 33, p. 207 (J. Cooke ed. 1961) (A. Hamilton). "The public mischiefs that would attend such a state of things would be truly deplorable." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 348, 4 L. Ed. 97 (1816).

But as the dissenting justice explained, the majority's approach to preemption would eviscerate the Supremacy Clause. "Under the majority opinion's mind-boggling vardstick, all that any state must do to get around HIPAA is unilaterally proclaim that its laws are more stringent than HIPAA." App. 41. Moreover, as the majority showed in this case, a state court seeking to reach a particular result could simply "look over the heads of the crowd and pick out its friends." Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting). Here, the majority deferred entirely to a state agency that is not even a party to this case and that did not even intend to address the preemption question in this case. See pp. "Surely Congress did not mean for 21–22, *supra*. [federal statutes] and the Supremacy Clause to be defeated in such a self-serving manner." App. 41.

In the past, this Court has summarily reversed this sort of disregard by a state court for federal law and the constitutional order, and it should consider doing so here, as well. For example, just this Term, this Court summarily reversed the Idaho Supreme Court in James v. City of Boise for concluding that state courts are "not bound by this Court's interpretation" of federal civil rights laws. 136 S. Ct. 685, 686 (2016). This Court stressed the "mischieff" that would result were it to permit such a flagrant dereliction of duty by a state high court to stand. *Ibid.* (quotations omitted). "It is this Court's responsibility to say what a [federal] statute means," this Court explained tersely, "and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." Ibid. (quotations omitted; emphasis added). Similarly, this Court rejected in American Tradition Partnership v. Bullock the Montana Supreme Court's failure to apply the holding of Citizens United v. FEC, 558 U.S. 310 (2010), to Montana state law. 132 S. Ct. 2490, 2491 (2012). So, too, in Marmet Health Care Center, Inc. v. Brown, this Court summarily reversed the West Virginia Supreme Court of Appeals for "misreading and disregarding the precedents of this Court" about the Federal Arbitration Act. 132 S. Ct. 1201, 1202 (2012).

These summary reversals of state supreme courts reflect this Court's understanding that a state court will sometimes have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to" require this Court's intervention. William Baude, Foreword: The Supreme Court's Shadow Docket, 9

N.Y.U. J.L. & Liberty 1, 36 (2015) (quotations omitted). A state court's disregard of federal law and the constitutional order, as here, is precisely such a situation. If state courts were "permitted to disregard" their duty to apply the Supremacy Clause, "the laws, the treaties, and the constitution would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." *James*, 136 S. Ct. at 686 (quoting *Martin*, 1 Wheat. 304, 348, 4 L. Ed. 97). An error of such fundamental and constitutional magnitude must be swiftly corrected by this Court.

II. The West Virginia Supreme Court of Appeals effectively rendered the preemption clause of an important federal privacy law a nullity.

As the dissenting justice explained, even a "cursory review of what the relevant state law allows clearly shows that it was not more stringent than HIPAA." App. 50. The HIPAA Privacy Rule creates a "federal floor" of privacy protection that generally forbids healthcare providers from disclosing private information without patient authorization. See 45 C.F.R. § 164.508(a)(1); 65 Fed. Reg. 82462, 82,471, 82,580 (Dec. 28, 2000). Any contrary state laws are preempted unless they provide patients "more stringent" privacy protections. 45 C.F.R. § 160.203. Under federal regulations, "more stringent" is defined, for example, as prohibiting a disclosure that the Privacy Rule allows or by narrowing the scope of a permissible disclosure. 45 C.F.R. §§ 160.202, 160.203; see also 42 U.S.C. § 1320d-7(a)(1). But as interpreted by the West Virginia Supreme Court of Appeals, state law mandates "providing unlimited record access to the patient advocates." App. 30. That mandatory *unrestricted* access under state law simply cannot be considered "more stringent" than the Privacy Rule, whether evaluated under the HHS's regulatory definition of "more stringent" or the ordinary understanding of that phrase.

Unsurprisingly, the decision below cannot be with any other ruling on preemption. The state law that the West Virginia high court found to be "more stringent" than the Privacy Rule provides patients less control by requiring disclosure without patient authorization. In contrast, every other court to consider HIPAA preemption has held that "more stringent" means "laws that afford patients more control over their medical records." Law v. Zuckerman, 307 F. Supp. 2d 705, 709 (D. Md. 2004) (emphasis in original); Allen v. Wright, 644 S.E.2d 814, 816 (Ga. 2007) (same); see also, e.g., OPIS Mgmt. Res., LLC v. Sec'y, Florida Agency for Health Care Admin., 713 F.3d 1291, 1296 (11th Cir. 2013) (finding a state statute "preempted by the more stringent privacy protections of HIPAA and the Privacy Rule" because it "authorizes sweeping disclosures . . . without any need for authorization"); Miguel M. v. Barron, 950 N.E.2d 107, 110 (N.Y. 2011) (HIPAA and the Privacy Rule "say that contrary state laws are preempted unless they offer privacy protections that are "more stringent" than those of the federal law; New York does not offer any more stringent protection that is relevant here"); Belote v. Strange, No. 262591, 2005 WL 2758007, at *5 (Mich. Ct. App. Oct. 25, 2005) ("Because the requirements and standards imposed

by HIPAA are stricter and afford more protection for a patient's health information than MCL 600.2157 and the Michigan Court Rules, HIPAA controls."); Nat'l Abortion Fed'n v. Ashcroft, No. 03 CIV. 8695 (RCC), 2004 WL 555701, at *3 (S.D.N.Y. Mar. 19, 2004) ("Because New York law requires patient consent before disclosure and HIPAA provides for certain exceptions to that rule, New York law is more stringent.").

This erroneous reasoning provides a second, independent reason for this Court's intervention because it effectively renders the Privacy Rule's preemption clause a nullity. As interpreted by the West Virginia high court, the state law at issue here requires the opposite of the Privacy Rule. West Virginia state law mandates the disclosure of patient records without patient authorization, while the Privacy Rule forbids the same. App. 27–29, 31. If the state law in this case is considered "more stringent" than the Privacy Rule and therefore not preempted, it is hard to imagine any state law that would fail that test.

The effect would be to undermine privacy protections that Congress thought "paramount," and to restore in West Virginia the "patchwork" of state law that Congress sought to displace through HIPAA and the Privacy Rule. 65 Fed. Reg. at 82,462–64; H.R. Rep. 104-496, 100, 1996 U.S.C.C.A.N. 1865, 1900. In this case specifically, the West Virginia Supreme Court of Appeals has affirmed a lower court order requiring state-run psychiatric hospitals to release to an independent organization all patient information, except for psychiatrist notes, without

any prior patient authorization or even patient knowledge. These are patients present in the hospitals against their will through civil or criminal commitment processes. HIPAA is designed precisely to protect the privacy of these sorts of individuals. Nor would the effect of this decision be limited just to the psychiatric hospitals. The upside-down logic of the decision below would allow any state law requiring the disclosure of medical information to escape HIPAA preemption.

Moreover, absent reversal by this Court, there is nothing to stop the West Virginia high court from applying its backward understanding of the phrase "more stringent" to other federal statutes. HIPAA's exception to preemption for "more stringent" state law is found in many other federal preemption clauses. E.g., 21 U.S.C. § 360k (No "State may establish or continue in effect with respect to a [medical] device intended for human use any requirement . . . which is different from, or in addition to, any requirement applicable under this chapter to the device" unless "the requirement is more stringent than a requirement under this chapter."); 49 U.S.C. § 20106 ("A State may adopt or continue in force an additional or more stringent law. rule, regulation, order, or standard relating to railroad safety . . . when not incompatible with any Federal law, rule, regulation, order, or standard.").

III. The Attempt By the West Virginia Supreme Court of Appeals To Insulate Its Decision From Review Lacks Merit.

Perhaps recognizing the merit of the dissenting justice's call for this Court's review, App. 52, the

majority baldly asserted in the opening paragraph of its opinion that its decision "is grounded solely on state law rather than an amalgam of state and federal law." App. 3; see also id. at 27 ("[O]ur state law provides an independent basis to support the lower court's ruling."). But there is no merit to this transparent effort to insulate its decision from review. As evidenced by the legion of preemption cases decided by this Court, the West Virginia high court's decision about federal preemption is without dispute a matter of federal law over which this Court has jurisdiction. This Court has previously rejected similar "declar[ations] [by state courts] that [their] decision[s] rest[] on adequate and independent state grounds," Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 502 (2012), and it should do so here, as well.

Nor is there any other obstacle to this Court's review. The question of federal preemption was raised and thoroughly briefed by the hospitals. See Apl't App. 76–86. The court below also rejected every other ground that the circuit court offered as justification for the disclosures. App. at 3, 16–27, 33. And though the court disagreed with the hospitals' argument regarding the Fourteenth Amendment right to informational privacy, the hospitals are not seeking review of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Supreme Court of Appeals of West Virginia should be reversed or summarily reversed.

Respectfully submitted,

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March 11, 2016

App. 1

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2015 Term

No. 14-0965

WEST VIRGINIA DEPARTMENT of HEALTH and HUMAN RESOURCES, BUREAU for BEHAVIORAL HEALTH and HEALTH FACILITIES, Petitioners

v.

E.H., et al., Respondents

Appeal from the Circuit Court of Kanawha County Honorable Louis H. Bloom Civil Action No. 81-MISC-585

AFFIRMED

Submitted: September 15, 2015 Filed: October 15, 2015

Patrick Morrisey, Esq.
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Lydia C. Milnes, Esq. Mountain State Justice, Inc. Charleston, West Virginia Counsel for Respondents JUSTICE LOUGHRY delivered the Opinion of the Court.

JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

SYLLABUS

- 1. "In the context of institutional reform litigation, this Court may choose to exercise its appellate jurisdiction over an order entered by the circuit court that it deems to approximate a final order by its nature and effect." Syl. Pt. 1, West Virginia Dep't of Health and Human Resources v. E.H., Nos. 14-0664, 14-0845, ___ W.Va. ___, __ S.E.2d ___ (Oct. 7, 2015).
- 2. A written agreement between the Department of Health and Human Resources and the provider of patient advocacy services that specifies the legal obligations of the parties, including the manner of payment and the duties associated with the provision of patient advocacy services, constitutes a contract within the meaning of 64 C.S.R. § 59-11.5.1.d. [sic] for purposes of permitting patient advocates to access records without the written consent of individuals hospitalized with mental health issues in state facilities.

LOUGHRY, Justice:

The West Virginia Department of Health and Human Resources, the Bureau for Behavioral Health and Health Facilities ("DHHR"), seeks to reverse the August 27, 2014, order of the Circuit Court of Kanawha County, through which the DHHR was directed

to immediately restore access to patients and patient records to the patient advocates working at this state's two psychiatric hospitals. In challenging this ruling, the DHHR argues that the circuit court's order violates both the patients' constitutional rights to privacy and the Federal Health Insurance Portability and Accountability Act ("HIPAA"). The respondent advocates for patients at Sharpe and Bateman Hospitals (sometimes referred to as the "hospitals") insist that the directives of the circuit court should be affirmed due to the clear lack of constitutional or HIPAA violations. Having reviewed the record in this case to verify the absence of constitutional infirmity as well as the lack of state or federal privacy law violations stemming from the access historically afforded to patient advocates at these facilities, we affirm the circuit court's decision to restore the access afforded to the patient advocates to the level they experienced prior to the abrupt change of course in June 2014. Given the lower court's partial reliance on certain HIPAA definitions and exclusions that we find to be wholly inapplicable, our decision to affirm is grounded solely on state law rather than an amalgam of state and federal law.2

¹ Mildred Mitchell Bateman ("Bateman") and William R. Sharpe, Jr. ("Sharpe").

² See Syl. Pt. 3, Barnett v. Wolfolk, 149 W.Va. 246, 140 S.E.2d 466 (1965) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless (Continued on following page)

I. Factual and Procedural Background

The underlying litigation had its genesis in 1981 with a petition for a writ of mandamus filed by a group of institutionalized individuals to address the civil rights of patients with mental disabilities. See E.H. v. Matin (known as "Hartley" or "Matin I"), 168 W.Va. 248, 284 S.E.2d 232 (1981). This Court remanded the Hartley case to the Kanawha County Circuit Court to achieve the legislative mandate of providing appropriate care and treatment to those individuals who are involuntarily hospitalized. See W.Va. Code § 27-5-9 (2013). To that end, the West Virginia Behavioral Health System Plan ("BHSP"), a comprehensive mental health plan, which addressed the various standards, conditions, and facilities, was accepted by the circuit court in 1983.4 See E.H. v. Matin ("Matin II"), 189 W.Va. 102, 104, 428 S.E.2d 523, 525 (1993). As part of the BHSP, the DHHR was required to establish a patient advocacy system within the state hospitals to protect the rights of institutionalized patients on an ongoing basis. Originally, the

of the ground, reason or theory assigned by the lower court as the basis for its judgment.").

³ See W.Va. Code § 27-5-9 (2013) (providing, *inter alia*, that "[e]ach patient of a mental health facility . . . shall receive care and treatment that is suited to his or her needs and administered in a skillful, safe and humane manner with full respect for his or her dignity and personal integrity").

⁴ This plan, a 330-page document, was reached by agreement among the parties. *See Matin II*, 189 W.Va. at 104 n.2, 428 S.E.2d at 525 n.2.

patient advocates were DHHR employees who maintained offices within the hospitals. Due to issues that arose in the late 1980s stemming from improper personal relationships between the patient advocates and the hospital administrators, the court monitor formally recommended that the DHHR be required to contract with an external entity to perform the patient advocacy services. No one objected to this proposal and the recommendation was adopted by order, entered on February 20, 1990 (the "1990 order").⁵

In accordance with its obligations under the 1990 order, the DHHR immediately contracted with Legal Aid of West Virginia ("Legal Aid") to provide patient advocacy services. In this role, which it has occupied since its selection in 1990, Legal Aid assists with and investigates individual grievances, conducts abuse and neglect investigations, educates staff and patients about patient civil rights, and monitors Sharpe and Bateman for the purpose of ensuring compliance with this state's guarantee of patient civil rights. See W.Va. Code § 27-5-9. Legislative rules expressly designed to "establish[] the rights of clients of State-operated behavioral health facilities" were adopted in 1995. See 64 C.S.R. § 59-1.1. Those rules specify procedures that pertain to the mandated provision of

⁵ Pursuant to that order, the DHHR was directed to "contract with an entity outside State government for the provision of advocacy."

⁶ These rules were adopted under authority of West Virginia Code § 27-5-9(g).

patient advocacy services⁷ and delineate a litany of patient rights that the hospitals are required to observe, including confidentiality. *See id.* at §§ 59-1 to -20.

Court monitoring of the Hartley case continued until 2002 when, by agreement of the parties, the case was removed from the active docket of the court.8 See E.H. v. Matin ("Matin III"), 189 W.Va. 445, 432 S.E.2d 207 (1993) (approving continued circuit court monitoring). In that same year, the DHHR decided to create the Office of the Ombudsman ("Ombudsman")an office charged with overseeing compliance with the statutory duties related to operation of the state hospitals. As the direct result of the Ombudsman's July 3, 2008, report, documenting deplorable conditions and treatment of patients at Sharpe and Bateman, the circuit court reopened the Hartley case. See State ex rel. Matin v. Bloom ("Matin IV"), 223 W.Va. 379, 383-84, 674 S.E.2d 240, 244-45 (2009) (identifying issues of overcrowding, lack of privacy, and denial of patients' daily grooming and cleanliness needs).

Systemic violations of patient rights, including the use of "chemical restraints," were demonstrated during a two-day evidentiary hearing held before the

⁷ "There shall be persons designated as client (or patient or resident) advocates who are independent of the facility management in every behavioral health facility." 64 C.S.R. § 59-20.1.

 $^{^{\}rm s}$ Court monitoring was resumed in 2009 based on reports of both the conditions and treatment of patients at Sharpe and Bateman.

circuit court in April 2009. At the conclusion of the hearing, the trial court ordered the parties to participate in mediation which resulted in an agreement between the parties covering multiple issues. Under that court-approved agreement, commonly referred to as the "2009 Agreed Order," the Ombudsman is charged with the duty to oversee implementation of the specific terms of the agreement. Included in those terms is a provision requiring Sharpe and Bateman to fully comply with the state regulations that address issues of patient care and patient advocacy services. See 64 C.S.R. §§ 59-1 to -20. The 2009 Agreed Order requires that "[p]eriodic review shall be established for compliance with [specified] sections." In recognition of this duty, the DHHR contracted with Legal Aid to "produce a report to inform Judge Bloom, [and] the Hartley Court Monitor . . . of any progress or lack of progress in implementing areas of Legislative Rule Title 64 Code of State Rules (CSR) Series 59 ... within Sharpe and Bateman by the end of the grant period."10

On January 5, 2010, the parties agreed that the patient advocates would create an assessment tool for the hospital audits necessary to enable the DHHR to

⁹ Those sections are 64 C.S.R. §§ 59-12, -13, -14, -15.1.7, -15.1.12, -15.2, -15.3, and -16.4.2.

¹⁰ This language appears in each of the annual grant documents in the record of this case. Those documents set forth the duties of Legal Aid in relation to the patient advocacy services and provide the necessary funding for such services.

comply with the periodic review contemplated by the 2009 Agreed Order. On March 31, 2010, the DHHR agreed that quarterly audits should be conducted by providing the patient advocates with complete access to at least two patients from each unit independent of any actual grievances filed. On May 5, 2010, the parties agreed that the audit instrument was finalized and the patient advocates were instructed "to begin implementation."

For more than a decade, the DHHR provided the patient advocates with full access to computerized patient records, to the patient wards, and other areas of the hospitals. Then, in June 2014, with no prior notice, the DHHR began requiring the patient advocates to obtain signed releases from each patient, the patient's guardian, and/or the person with the medical power of attorney before obtaining any information from or about the patient. Under the altered procedures, a newly-executed release specifying the basis of inquiry was required each time the advocates sought to review a patient's records. Legal Aid stated that even if the inquiry pertained to a previously-authorized matter, a new release was required for each successive day a patient advocate sought access

¹¹ The decision to alter access was made by the DHHR's Privacy Officer, Lindsey McIntosh. Before making this change in tack, Ms. McIntosh acknowledged she did not investigate the role or needs of the advocates; she did not visit Bateman or Sharpe; she did not speak to Legal Aid; and she did not review any of the orders pertaining to this case.

to a patient's records.¹² In addition to this novel procedure of requiring a release in advance of any records inspection, Legal Aid was denied access to the network of patient records—access required for conducting the systemic reviews or audits of the two facilities.

In response to this abrupt change of policy regarding access to patient records, the patient advocates filed a motion for emergency relief with the circuit court and a hearing was held on August 1, 2014. After finding no violation of federal or state law, the circuit court directed the DHHR, by order of August 24, 2014, to immediately restore Legal Aid to the previous levels of access at Sharpe and Bateman. On August 29, 2014, the circuit court denied the DHHR's motion for stay of the August 27, 2014, amended ruling. By order of September 17 [sic], 2014, this Court stayed the lower court's order and granted the appeal filed by the DHHR.

¹² According to the DHHR's representation in its response to the Motion for Emergency Relief, each authorization was good for 180 days.

¹³ Minor changes were made to the previous ruling. The only substantive amendments were to remove the reference to the patient advocates as having been created by both federal and state law (they were created solely under state law) and to recognize that grievances may be initiated independently by a patient advocate separate from a patient's allegation of abuse or assertion of a civil rights violation.

II. Standard of Review

Given our conclusion that the August 27, 2014, amended ruling constitutes a final order notwithstanding the trial court's contrary ruling, 14 we review the subject order pursuant to our well-established standard of examining questions of law de novo while reversing factual determinations only upon a showing of clear error. See Syl. Pt. 2, Walker v. W.Va. Ethics Comm'n, 201 W.Va. 108, 492 S.E.2d 167 (1997). This Court recently dispelled any concerns with regard to its right to consider this matter by means of an appeal¹⁵ with our recent holding in syllabus point one of West Virginia Department of Health and Human Services et al. v. E.H., ___ W.Va. ___, __ S.E.2d ___, Nos. 14-0664, 14-0845 (Oct. 7, 2015), wherein we held that "[i]n the context of institutional reform litigation, this Court may choose to exercise its appellate jurisdiction over an order entered by the circuit court that it deems to approximate a final order by its nature

¹⁴ By order entered on August 29, 2014, the circuit court refused to grant the DHHR's request to have the August 27, 2014, order deemed a final order. The rationale for its ruling is clear: the trial court was trying to prevent the DHHR from belatedly seeking relief from its previously unappealed 1990 Order. Because the court's ruling was not impelled by the need to address additional issues arising from reduced access (i.e. a lack of finality) and because there are no further issues to be resolved concerning access, we deem the August 27, 2014, ruling to be final for purposes of allowing this Court to address the issues before us through the subject appeal.

¹⁵ Cf. Syl. Pt. 5, Riffe v. Armstrong, 197 W.Va. 626, 477 S.E.2d 535 (1996).

and effect." Accordingly, we proceed to determine whether the trial court erred in issuing the ruling under review.

III. Discussion

A. Constitutional Privacy Rights

In support of its position that the lower court's order improperly requires unfettered disclosure of patient records to the patient advocates, the DHHR maintains that the Fourteenth Amendment has been recognized to protect an individual's right to privacy with regard to avoiding disclosure of personal matters. See Whalen v. Roe, 429 U.S. 589, 599 (1977); accord Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994) ("Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over."). Because the trial court failed to employ a balancing test to assess the reasonableness of the privacy intrusion that flows from the sweeping access mandated by the order at issue, the DHHR argues that the constitutional rights of patients at Sharpe and Bateman outweigh Legal Aid's interest in accessing patient files. See Nixon v. Adm'r of Gen'l Servs., 433 U.S. 425, 458-60 (1977) (utilizing balancing test to measure privacy intrusion against reasonableness of governmental actions). Emphasizing the enhanced need to conduct this inquiry when a realistic probability

of public disclosure exists as in this case, the DHHR posits that the circuit court erred by failing to consider the applicability of constitutionally-based protections for the health information contained in the patient records.

Legal Aid contends that the DHHR improperly seeks to inject constitutional error into this matter with an issue never addressed by the circuit court.¹⁶ Not only does Legal Aid concur with the tenets of privacy law articulated by the DHHR, but it fully agrees with the petitioners' statement that "the Fourteenth Amendment's right to informational privacy forbids the indiscriminate disclosure of state psychiatric records." Legal Aid emphasizes that the patient advocates neither seek the indiscriminate disclosure of patient records nor do they conduct their advocacy services in a manner inconsistent with the patients' privacy rights. Dismissing the need for an extended discourse about the existence of privacy rights, Legal Aid states that the issue presented is simply whether the disclosure of patient records

¹⁶ Legal Aid asserts that the DHHR did not raise the issue of constitutional error at the August 1, 2014, hearing. In response, the DHHR states that the evidentiary proceeding was not the forum in which to assert legal error. The record demonstrates that the DHHR advanced the issue of constitutional error in its response to Legal Aid's Motion for Emergency Relief. Citing *Griswold v. Connecticut*, 381 U.S. 479 (1965), the DHHR asserted that unlimited access to patient records absent patient consent is a violation of the right to privacy judicially deemed to arise under the First Amendment.

pursuant to state and federal laws enacted to protect patient rights runs afoul of those acknowledged rights. Or stated in the converse, do provisions of federal and/or state law permit the disclosure of patient records to the patient advocates under contract with DHHR to provide advocacy services at Bateman and Sharpe.

At the outset, we observe that the constitutional concerns raised by the DHHR are confined to the previous longstanding practice of permitting the advocates to review patient records for purposes of assessing overall hospital conditions. The DHHR does not raise the possibility of constitutionally-based privacy violations with regard to individual grievances or complaints of abuse and neglect. What the DHHR challenges is the circuit court's directive that allows the advocates to have access to patient files unrelated to specific complaints or grievances. This access was authorized, consistent with past practice and the agreement of the parties, for purposes of

¹⁷ It is difficult for this Court to avoid the conclusion that, while seeking to prevent access to the patient advocates under the guise of privacy concerns, the DHHR's true objective is to make the discovery of systemic problems more difficult for the advocates to identify.

¹⁸ Legal Aid asserts that the new policy implemented by the DHHR prevents Legal Aid from complying with the time constraints pertaining to the investigation of abuse and neglect complaints under state law. *See* 64 C.S.R. § 59-20.2.9 (requiring submission of written report by patient advocate "[w]ithin the next eight (8) regular working hours" of receipt of abuse or neglect grievance).

discerning systemic issues related to the patient rights established by state regulation. ¹⁹ See 64 C.S.R. §§ 59-1 to -20. Pursuant to the governing Grant Agreement that outlines the duties the DHHR requires of the patient advocates, an annual report reflecting the results of the systemic review is required to be tendered to the circuit court judge, court monitor, the DHHR, and Mountain State Justice. ²⁰

Inherent in the DHHR's argument is a presumption that the systemic review of patients' records necessarily results in the wrongful disclosure of medical information. Given that the first and only complaint concerning an alleged violation of HIPAA was filed in 2014 by the DHHR-almost twenty years after the federal act became law-it is clear that inappropriate disclosure of patient information has

These periodic reviews, required by the 2009 Agreed Order, have been performed by the patient advocates. Additionally, as noted by the trial court in both its August 18 and 27, 2014, rulings, the "Respondents [DHHR] agreed to the Formal Recommendations [of the Court Monitor], which set forth that systemic advocacy will be pursued by LAWV [Legal Aid], without objection, thereby allowing them to take on the force of Court Order."

During the evidentiary hearing held in this matter on August 1, 2014, the DHHR's privacy officer, Lindsey McIntosh, was questioned as to how the patient advocates were going to do the systemic audits "without access to records or patients or have conversations with staff without individual releases specifying specific grievances." She answered the query by stating, "I don't know how you're going to conduct audits if you have to do that."

not been taking place as implied by the DHHR. Not only have there been no complaints filed until the DHHR instituted one,²¹ but the state privacy officers whose responsibility it is to oversee these matters have failed to either independently identify or confirm the existence of any issues concerning the level of access historically afforded to the patient advocates.

In seeking to convince this Court that the provision of advocacy services over the past two decades has just recently become a matter of constitutional significance, the DHHR ignores the annual HIPAA training, the executed confidentiality agreements, and state law provisions all designed for the purpose of, and apparently successful at, imposing a high level of confidentiality upon the patient advocates with regard to their review of sensitive health information. As Legal Aid explained, the review undertaken by the patient advocates is conducted in confidence without public disclosure of any protected health information. Critically, there has never been any complaint filed by a Bateman or Sharpe patient, or the patient's representative, associated with the wrongful dissemination of confidential health information.²²

²¹ Finding it to be baseless, the trial court ordered the DHHR to dismiss its complaint. A review of the complaint demonstrates that even the DHHR was dubious about the violation given its statement in the complaint that the "level of harm" was unclear.

In contrast, there have been patient-initiated complaints since the DHHR imposed the new, limited access provisions. (Continued on following page)

Because the record in this case wholly fails to demonstrate the indiscriminate disclosure of confidential information by the patient advocates—let alone any disclosure of protected health information, we are not persuaded that a meritorious issue exists with regard to Legal Aid's dissemination of confidential health information.²³ Accordingly, we reject the DHHR's contention that the trial court erred in failing to address whether the access afforded to Legal Aid violates the constitutionally-based rights of privacy of patients at Sharpe and Bateman.

B. HIPAA

Pursuant to HIPAA's Privacy Rule ("Privacy Rule"), "[a] covered entity or business associate may not use or disclose²⁴ protected health information" barring either a regulatory exemption or written authorization from the subject of the information or his/her representative. 45 C.F.R. § 164.502(a) (2014) (footnote added). The DHHR argues that the patient advocates do not come within any exemptions provided

According to Legal Aid, the patients were frustrated by their inability to gain immediate access to the advocates, who were no longer permitted to freely roam the facilities where patients could easily seek them out when needed.

²³ As Legal Aid observes, there is no greater risk posed by the patient advocates than by any of the Hospital employees who have access to patient records.

²⁴ Disclosure is "the release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information." 45 C.F.R. § 160.103 (2014).

under HIPAA that would eliminate the need to obtain patient consent before viewing medical records. Specifically, the DHHR disagrees with the trial court's decision that Legal Aid falls within the HIPAA definition for a "business associate," a "health oversight agency," or "health care operations." The DHHR also objects to the trial court's reliance on the HIPAA exemption pertaining to disclosures "required by law." Each of these HIPAA definitions and its respective applicability to the matter before us will be examined in turn.

1. "Business Associate"

Under HIPAA, a "business associate" relates to and is defined in reference to a "covered entity." The Privacy Rule's construct of a "covered entity" extends to: (1) a health plan, (2) a health care clearinghouse, or (3) a health care provider who transmits any health information in electronic form in connection with a covered transaction. *See* 45 C.F.R. § 160.103 (2014). As the circuit court correctly ruled in its August 27th order, both Bateman and Sharpe qualify as covered entities under HIPAA. With scant analysis, ²⁵ the trial court and Legal Aid simply adopted the

²⁵ The trial court ruled that Legal Aid is a "business associate" as set forth in its contract with the DHHR and also due to its receipt of protected health information for quality assurance, patient safety, and other health care operations. As discussed *infra*, the DHHR'S description of Legal Aid as a "business associate" is neither controlling nor accurate. The review of (Continued on following page)

position that the patient advocates necessarily meet the HIPAA definition of a "business associate." An examination of the pertinent regulations addressing the nature of a "business associate" clearly refutes this conclusion.

Legal Aid repeatedly refers to itself as a "business associate" of the DHHR. Because the DHHR is not a "covered entity" under HIPAA, the relationship between Legal Aid and the DHHR is not controlling. To come within HIPAA's exclusionary language, Legal Aid must be a "business associate" of Sharpe and Bateman. In further explanation of what is necessary to qualify as a "business associate," the regulations provide that it is a person who:

(i) On behalf of such covered entity ... but other than in the capacity of a member of the workforce of such covered entity or arrangement, creates, receives, maintains, or transmits protected health information for a function or activity regulated by this subchapter, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities listed at 42 CFR 320, billing, benefit management, practice management, and repricing; or

protected health information as part of the provision of advocacy services at Sharpe and Bateman does not impel the conclusion that Legal Aid is a "business associate."

(ii) Provides, other than in the capacity of a member of the workforce of such covered entity, legal, actuarial, accounting, consulting, data aggregation . . . , management, administrative, accreditation, or financial services to or for such covered entity. . . .

45 C.F.R. § 160.103.

The DHHR argues, and we agree, that the patient advocacy services performed at Bateman and Sharpe are not performed on behalf of either of those facilities within the meaning of the Privacy Rule. See id. In purveying the list of activities that constitute services typically performed by a "business associate" for a "covered entity," patient advocacy is noticeably absent. Rather than serving the interests of the hospitals in terms of providing managerial assistance with their operations, the patient advocates serve the personal interests of the patients who reside at those facilities. From the beginning, the provision of patient advocacy services was created to protect the interests of individual patients. See W.Va. Code § 27-5-9; 64 C.S.R. § 59-20.1 (mandating patient advocates in every behavioral health facility who are independent of facility management). Despite the expanded role of the patient advocates with regard to systemic auditing, the primary objective in conducting these reviews is compliance with patient-oriented rights.²⁶

The fact that the institutions may benefit from the provision of these auditing services does not alter the wholly (Continued on following page)

While it might be tempting to view the provision of patient advocacy services as improving the operations of the facilities under discussion, the pivotal inquiry is whether the advocacy services are being offered by Legal Aid on behalf of the hospitals. That Legal Aid is not operating on behalf of Sharpe and Bateman is easily demonstrated by considering the adversity inherent to the role the patient advocates occupy in relation to those facilities. Rather than advancing the hospitals' interests, the advocates are responsible for investigating individual grievances against the hospitals and identifying instances of the hospitals' failure to comply with the civil rights afforded to institutionalized patients under state law. By design, the patient advocates operate independently of the hospitals' interests and, most decidedly, not on their behalves. We further observe that the improper characterization of Legal Aid as "business associates" in the Grant Agreement does not serve to repair the underlying definitional disconnect.27 As the DHHR properly acknowledges, its identification of Legal Aid as a "business associate," in an admitted and overly-expansive attempt to comply with HIPAA,28 has no corresponding ability to

independent and individual-oriented nature of the advocacy actions at issue.

 $^{^{\}rm 27}$ The Grant Agreement makes clear that "Business Associate shall have the meaning given to such term in 45 CFR $\S~160.103.$ "

²⁸ The DHHR stated that boilerplate business associate addendums were regularly attached to all grant agreements, (Continued on following page)

make the characterization a reality under the law. Based on the foregoing, we conclude that the trial court erred in finding that Legal Aid is a "business associate" of a "covered entity" under HIPAA.

2. "Health Oversight Agency"

Cherry picking parts of the HIPAA definition of a "health oversight agency," the trial court concluded that Legal Aid is such an agency because it "is authorized by law to oversee the health care system . . . or government programs . . . or to enforce civil rights laws for which health information is relevant." The DHHR argues that no state law invests Legal Aid, a private entity, with public oversight authority. The individualized advocate role that Legal Aid performs, emphasizes the DHHR, is not on par with the public health concerns that a health oversight agency is charged to superintend. With regard to the auditing

even when unnecessary, in an effort to comply with HIPAA's "stern mandate to have an agreement in place with any business associate."

 $^{^{29}}$ A "health oversight agency" is defined as

an agency or authority of the United States, a State, ... or a person or entity acting under a grant of authority from or contract with such public agency, ... that is authorized by law to oversee the health care system ... 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.

⁴⁵ C.F.R. § 164.501 (2014).

function that Legal Aid performs, that duty is similarly not authorized by state law. Furthermore, Legal Aid has no enforcement power with regard to the civil rights of the patients.

From the list of agencies recognized to engage in health oversight activities, such as state insurance commissions, state health professional licensure agencies, state Medicaid fraud control units, the Pension and Welfare Benefit Administration, the HHS Office for Civil Rights, 30 it is clear that Legal Aid does not qualify as such an agency. Inherent to the concept of a "health oversight agency" is a charge by law to oversee matters involving public health or for which public health information is intrinsic to the public-oriented duties at hand. Here, the advocacy duties Legal Aid provides do not have at their core a concern for public health or a need to review public health information for eligibility purposes. See 45 C.F.R. § 164.512(d) (2014) (approving disclosure to health oversight agency of protected health information to determine eligibility for government benefit programs).

While state regulations authorize patient advocates to investigate and ensure compliance with civil rights guaranteed by West Virginia Code § 27-5-9, that authority does not imbue Legal Aid with health oversight authority within the meaning of HIPAA.

³⁰ See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462-01, 82492.

See 64 C.S.R. § 59-20. Unlike the United States Department of Justice, the HHS Office for Civil Rights, and the United States Equal Employment Opportunity Commission, Legal Aid has no enforcement powers pertinent to the patient civil rights it is charged with overseeing. See 65 Fed. Reg. 82462-01, 82492 (identifying entities with civil rights enforcement powers). In the instance of a civil rights violation, Legal Aid lacks authority to sua sponte correct the deficiencies giving rise to the violation or to impose sanctions or penalties. Consequently, we conclude that the trial court committed error in ruling that Legal Aid comes within the definition of a "health oversight agency" under HIPAA.

3. "Health Care Operations"

An additional HIPAA provision that the trial court found applicable is the exemption which permits a "covered entity" to "use or disclose protected health care information for its own treatment, payment, orhealth care operations." 45§ 164.506(c)(1) (2014) (emphasis added). Because "health care operations" are defined to include "[c]onducting quality assessment," "auditing functions, including ... abuse detection and compliance programs," and "[r]esolution of internal grievances," the trial court ruled that the advocacy and auditing services provided by Legal Aid are part of the hospitals' covered health care operations. See 45 C.F.R. § 164.501 (2014).

Once again, the trial court has deemed a HIPAA exemption to apply based on a flawed interpretation of the subject definition. Reading from the bottom up, the trial court simply concludes that because auditing and compliance functions are part of "health care operations," then the services performed by Legal Aid must necessarily be covered by this exemption. What the trial court overlooks is the critical distinction, similar to the limitation imposed on a "business associate," that these services, by definition, are those that are performed at the direction of or on behalf of the facility as part of its own internal operating procedures. "[H]ealth care operations are the listed activities undertaken by the covered entity that maintains the protected health information." 65 Fed. Reg. 82462-01, 82490 (emphasis supplied). The auditing and compliance functions performed by an independent entity such as Legal Aid-an entity charged by law to uncover violations of patient rights by the facilities rather than to assist a facility with the management of its operations-do not fall within the meaning of "health care operations" as that term is defined by HIPAA. See 45 C.F.R. § 164.501.

Further distinguishing between the activities that constitute "health care operations" and those that do not, the DHHR explains that a hospital can access patient records within the meaning of the subject exemption to resolve internal grievances. In contrast, the initiation of a grievance by Legal Aid is an activity external to the facility and thus beyond the scope of the exemption. In the same vein, a facility may

access patient records for its own internal audits, but external audits such as those performed by Legal Aid fall outside the scope of the facility's operations and thus the applicability of the exemption. Accordingly, we find that the trial court erred in reasoning that the "health care operations" exemption under HIPAA is available to Legal Aid.

4. "Required by Law"

In generalized fashion, the trial court relied upon the HIPAA exemption that permits disclosure without written consent where "such use or disclosure is required by law." 45 C.F.R. § 164.512(a). For more specific support, the trial court cited the provision of HIPAA that permits a covered entity to disclose protected health information to a government authority when the covered entity reasonably believes that the information pertains to a victim of abuse or neglect. See id. at § 164.512(c). Seeking further authority for its ruling, the trial court concluded that "the disclosure may be made in response to an express authorization by court order." See 45 C.F.R. § 164.512(e)(1)(i).

As the DHHR clarifies, the exemption laced to a legal directive both contemplates and requires "a

³¹ The trial court looked additionally to the subsection permitting disclosure in the instance of incapacity when awaiting consent would materially and adversely impact an immediate enforcement activity. *See* 45 C.F.R. § 164.512(c)(1)(iii)(B).

mandate contained in law that compels a covered entity to make a use or disclosure of protected health information . . . that is enforceable in a court of law." 65 Fed. Reg. 82462-01, 82497. Application of this exemption is specifically constrained by the requirement that "the use or disclosure complies with and is limited to the relevant requirements of such law." 45 C.F.R. § 164.512(a). The DHHR contends that this exemption does not apply because there is no state law that requires the hospitals to disclose patient records in the unfettered fashion decreed by the trial court. We agree. While state regulations authorize patient advocates to gain access to patient records in the process of investigating grievances without express consent, there is no state-enacted law or regulation that expansively directs facilities such as Bateman and Sharpe to disclose all patient records to Legal Aid without consent. See 64 C.S.R. § 59-11.5.1.d. The abuse and neglect provision is similarly inapplicable as it concerns disclosure to a governmental authority rather than to a private entity such as Legal Aid.

In its reach to come within the parameters of the "required by law" exemption, the trial court suggests that HIPAA's requirements may be avoided with the entry of a court order. Not only is this deduction erroneous but it ignores the additional requirement that a court-directed disclosure applies only to "expressly authorized" disclosures made "in the course of any judicial or administrative proceeding." 45 C.F.R. § 164.512(e)(1)(i). A ruling that seeks to broadly

sanction disclosure not expressly linked to a specific judicial or administrative matter falls outside the framework of the HIPAA exemption which permits disclosure pursuant to judicial authorization. See id. Moreover, as HIPAA makes clear, the provision for directives issued in the course of specific judicial and administrative proceedings "do[es] not supersede other provisions of this section that otherwise permit or restrict use or disclosure of protected health information. 45 C.F.R. § 164.512(e)(2). We have little difficulty concluding that the HIPAA exemption premised on a judicial ruling has no application to the prospective disclosures contemplated by the August 27th decree as such disclosures would be made outside the framework of an ongoing proceeding. Accordingly, we find that the trial court erred in its reliance on the HIPAA exemptions pertaining to legal mandates or rulings. See 45 C.F.R. §§ 164.512(a), 512(e)(1)(i).

C. State Law

Having determined that federal law does not provide the necessary authority for disclosure of patients' records to Legal Aid without consent, we proceed to determine if our state law provides an independent basis to support the lower court's ruling. As the DHHR acknowledges, HIPAA's preemption clause provides that the federal act "shall supersede any contrary provision of State law," unless state law is more stringent or if one of several other exceptions applies. 42 U.S.C. § 1320d-7 (2012); 45 C.F.R.

§§ 160.202,-203 (2014) (listing exceptions to preemption). If no exception applies, "State laws are contrary to HIPAA if: (1) it would be impossible for the health care provider to comply simultaneously with HIPAA and the state directive; or (2) the state provision stands as an obstacle to the accomplishment of the full objectives of HIPAA." *Wade v. Vabnick-Wener*, 922 F.Supp.2d 679, 686 (W.D. Tenn. 2010).

From the record of this case, it is clear that this state undertakes to examine our codified law on an annual basis to analyze whether our state laws are more stringent than HIPAA's for preemption purposes. Because the HIPAA Privacy Rule is viewed as a floor of privacy protections for individuals, state laws may provide greater or more stringent protections. In those instances where state law is determined to be more stringent because it imposes enhanced or more detailed protections, the state law is not preempted by HIPAA. From the record submitted in this case, the protections set forth in Title 64, Series 59 have been determined to be more stringent than those required by federal law. Accordingly, our state

³² This annual analysis is required by HIPAA.

³³ Analyses completed in 2013 and 2014 entitled West Virginia Health Care Privacy Laws and HIPPA [sic] Preemption Analysis for the DHHR conclude that our state regulations set forth in 64 C.S.R. § 59 are not preempted by HIPPA [sic] as our provisions are more stringent. The 2015 analysis reached the same conclusion.

regulations set forth in Title 64, Series 59 are not preempted by HIPAA. See 45 C.F.R. §§ 160.202, -203.

Within our state regulations that were adopted to provide "skillful, safe and humane" care to incarcerated patients with mental health issues, the confidentiality of patient records is addressed at length. W.Va. Code § 27-5-9. The regulations specify in detail what information is deemed confidential and when a patient's records may be disclosed. See 64 C.S.R. § 59-11.1. While a patient may authorize the release of his or her records to any person or entity, those records may also be obtained by the "providers of health, social, or welfare services involved in caring for or rehabilitating the client." 64 C.S.R. § 59-11.5.1.d. Under this same provision, it is provided that "[n]o written consent is necessary for employees of the department, comprehensive behavioral health centers serving the client or advocates under contract with the department." Id. (emphasis supplied).

In an obvious attempt to thwart legislative intent, the DHHR denies that it has a contract with Legal Aid. The DHHR maintains that the Grant Agreement pursuant to which it employs Legal Aid on an annual basis to provide advocacy services for the patients at Sharpe and Bateman does nothing but address the exchange of money. Our review of the record demonstrates quite the opposite. In the initial sixteen pages of the Grant Agreement, standard contractual matters such as scope, term, cancellation, remedies, and assignment are addressed. Through a separate but expressly incorporated, ten-page

document, the services and activities required of Legal Aid are delineated. A review of the Grant Exhibit, along with the multiple attached exhibits, wholly disproves the DHHR's position that the document fails to address the legal obligations of the parties. As a result, we hold that a written agreement between the DHHR and the provider of patient advocacy services that specifies the legal obligations of the parties, including the manner of payment and the duties associated with the provision of patient advocacy services, constitutes a contract within the meaning of 64 C.S.R. § 59-11.5.1.d. for purposes of permitting patient advocates to access records without the written consent of individuals hospitalized with mental health issues in state facilities. This conclusion is specifically premised on the fact that the DHHR is required by the 1990 Order to employ external patient advocates for purposes of complying with the mandate contained in West Virginia Code § 27-5-9.

Returning to the trial court's ruling, we affirm the lower court's ruling that the DHHR's revocation of patient advocate access to patients, staff, and patient records absent express written consent violates state law. The long term practice of providing unlimited record access to the patient advocates, agreed to by the parties and sanctioned by the court through the 2009 Agreed Order, has become part of the rule of this case. See generally Keller v. Norfolk & W. Ry. Co., 113 W.Va. 286, 167 S.E. 448 (1932). Thus, for the DHHR to act in violation of that established practice was

contrary to the rule of law which governs this case. Furthermore, the policy adopted by the DHHR is not required by HIPAA as this state's laws set forth in 64 C.S.R. § 59-1 to -20 are more stringent than those set forth in HIPAA.³⁴ As a result, we are convinced that the confidentiality protections, including the annual training that the patient advocates undergo along with hospital staff, all combine as designed to protect the interests of the patients at Sharpe and Bateman.

We further affirm the trial court's ruling that the patient advocates shall have access to patient records without limitation except when patients expressly request limitations on the disclosure of their individual, identifiable health information. There is a clear need for non-grievance related review of patient records to identify systemic issues of noncompliance with the regulations that address issues of patient care. Furthermore, the inclusion of language in the Grant Agreement that requires the preparation and submission of a report to both the circuit court judge and the court monitor, as well as the parties, documents the duty imposed on Legal Aid to review patient records independent of specific grievances. A common thread that exists in both West Virginia § 27-5-9 and HIPAA is the improvement of the quality of health care. 35 That objective was undeniably blocked when the DHHR instituted wholly unwarranted

³⁴ See supra note 33.

³⁵ See 65 Fed. Reg. 82462-01, 82463.

roadblocks in the path of the patient advocates. Without unrestricted access to patient records, access that the Legislature expressly approved, the patient advocates were effectively blocked from discovering violations of the patients' civil rights. HIPAA was never intended to serve as a hindrance to patient services or civil rights; it was designed to prevent the inappropriate use or dissemination of protected health information.³⁶ In the case before us, the DHHR has failed to demonstrate that Legal Aid has disseminated any protected health information in violation of federal or state law.

IV. Conclusion

Based on the foregoing, the August 27, 2014, order of the Circuit Court of Kanawha County is affirmed with regard to its multiple directives concerning the restoration of access without limitation by patient advocates to patients at Sharpe and Bateman.³⁷

Affirmed.

³⁶ See supra note 35.

³⁷ Consistent with the trial court's directives, that access is subject to the right of patients to place limitations on the disclosure of their health information.

(Filed Oct. 22, 2015)

Davis, Justice, dissenting:

In this proceeding, Legal Aid sought to force DHHR to continue to allow Legal Aid to have complete access to patient records, without patient consent, at the Bateman and Sharpe psychiatric facilities. Before this Court, DHHR argued that it was violating federal law, specifically HIPAA, when it previously authorized Legal Aid to have complete access to patient records without the consent of the patients. The circuit court and majority opinion disagreed with DHHR. The circuit court found that Legal Aid did not need patient consent to have unfettered access to patient records, because Legal Aid came under the following exceptions recognized by HIPAA: business associate, health oversight agency, health care operations, and legal requirement. The majority opinion correctly found that not one of the exceptions relied upon by the trial court applied to Legal Aid. Rather than stopping there and reversing the circuit court's order, the majority opinion affirmed the circuit court on a different ground. With absolutely no legal analysis, the majority opinion determined that Legal Aid could have unfettered access to patient information because of the "more stringent" State law exception found under HIPAA.

As I will demonstrate below, if the majority opinion had performed but a scintilla of the legal analysis that is required to determine whether a State law is more stringent than HIPAA, it would have reversed the circuit court's order. Consequently, for the reasons set out below, I dissent.

The Majority Decision Authorizes Legal Aid to Violate Federal Law

Because of the arrogant and complete disregard of federal law by the majority opinion, I must start my dissent with a review of some basic legal principles. To begin, it has been noted that "[t]he preemption doctrine has its origin in the Supremacy Clause of the United States Constitution[.]" Hartley Marine Corp. v. Mierke, 196 W. Va. 669, 673, 474 S.E.2d 599, 603 (1996). See also Harrison v. Skyline Corp., 224 W. Va. 505, 510, 686 S.E.2d 735, 740 (2009) ("[T]he preemption doctrine has its roots in the supremacy clause of the United States Constitution and is based on the premise that federal law can supplant inconsistent state law."). The Supremacy Clause of the federal constitution provides that the laws of the United States "shall be the supreme law of the Land; ... anything in the Constitution or laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. We have recognized that "[t]he Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal law." Syl. pt. 1, Cutright v. Metropolitan Life Ins. Co., 201 W. Va. 50, 491 S.E.2d 308 (1997). Pursuant to the Supremacy Clause, federal preemption of state law occurs if: (1) Congress expressly preempts state law; (2) Congress has completely supplanted state law in that field;

(3) adhering to both state and federal law is not possible; or (4) state law impedes the achievement of the objectives of Congress. See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct. 2288, 2293-94, 147 L. Ed. 2d 352 (2000). "Although Congressional intent is commonly the starting point for federal preemption analysis, the existence of an express preemption provision in a statute nullifies the need for further analysis." Wade v. Vabnick-Wener, 922 F. Supp. 2d 679, 686 (internal citations omitted). See also Syl. pt. 4, Morgan v. Ford Motor Co., 224 W. Va. 62, 680 S.E.2d 77 (2009) ("When it is argued that a state law is preempted by a federal law, the focus of analysis is upon congressional intent. Preemption is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."). HIPAA sets out an express preemption provision; therefore, no further analysis is necessary to discern Congressional intent. See Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517, 112 S. Ct. 2608, 2618, 120 L. Ed. 2d 407 (1992) ("When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. . . . Therefore, we need only identify the domain expressly pre-empted by each of those sections." (internal quotations and citations omitted)).

Congress enacted HIPAA in 1996, in part, to protect the privacy of individually identifiable health information. See Jennifer Guthrie, "Time Is Running Out-The Burdens and Challenges of HIPAA Compliance: A Look at Preemption Analysis, the 'Minimum Necessary' Standard, and the Notice of Privacy Practices," 12 Annals Health L. 143, 146 (2003) ("The main premise of HIPAA is to protect individually identifiable health information. This means that certain information will not be revealed without a patient's express authorization, in an effort to contain important information to as few people as possible."). For purposes of HIPAA, protected health information "is any health information, oral or recorded, that is individually identifiable and transmitted or maintained by a covered entity in any form or medium." Holman v. Rasak, 486 Mich. 429, 435-36, 785 N.W.2d 98, 102 (2010). The Secretary of Health and Human Services was directed by Congress to promulgate regulations setting privacy standards for health information. See Northwestern Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 924 (7th Cir. 2004) ("Section 264 of HIPAA, 42 U.S.C. § 1320d ..., directs the Secretary of Health and Human Services to promulgate regulations to protect the privacy of medical records[.]"). In 2000, the Secretary responded by issuing

¹ Actually, "HIPAA mandated the passage of comprehensive privacy legislation by Congress within three years, otherwise the Department of Health and Human Services was required to step in and create privacy regulations." Guthrie, "Time Is Running Out," 12 Annals Health L. at 144.

the Standards for Privacy of Individually Identifiable Health Information, known as the "Privacy Rule" and codified at 45 C.F.R. 160, 164. See Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm., 372 N.J. Super. 105, 111 n.2, 855 A.2d 608, 612 n.2 (2003) ("On December 28, 2000, pursuant to a mandate under the 'administrative simplification' provisions of HIPAA, the Department of Health and Human Services issued new standards for privacy of individually identifiable health information (IIHI) called 'The Final Privacy Rule' as published in the Federal Register."). Compliance with the Privacy Rule was

² It is important that I point out the significance of the year in which HIPAA was created, 1996, and the date the Privacy Rule was created, 2000, because this will help explain the initial broad authority DHHR gave to Legal Aid. When the litigation originally began in this case, 1981, HIPAA did not exist-no expansive patient privacy rights existed. It was in 1990, pre-HIPAA, that DHHR first contracted to have Legal Aid monitor patient health care services at Bateman and Sharpe. It was only after the creation of HIPAA that DHHR realized that, in order for Legal Aid to continue to have access to patient records without patient consent, Legal Aid had to come under an exception to HIPAA. It appears that, initially, DHHR believed that Legal Aid came under the "business associate" exception created by the Privacy Rule. The majority opinion acknowledged this fact in footnote 28. However, in 2014, an astute Privacy Officer at DHHR realized that it was permitting Legal Aid to violate HIPAA, because Legal Aid did not come under the "business associate" exception to the privacy requirements. It was only after this determination, which even the majority opinion conceded was correct, that DHHR began requiring Legal Aid comply with HIPAA by obtaining patient consent before it could review patient records. There was nothing sinister in this, as was suggested by the majority opinion. DHHR simply was (Continued on following page)

not required until 2003. See United States v. Sutherland, 143 F. Supp. 2d 609, 612 (W.D. Va. 2001) ("Although the Standards were effective April 14, 2001, compliance is not required until April 14, 2003."). Specific to the case at hand, the Secretary promulgated a federal regulation on HIPAA's preemptive effect. See Morgan v. Ford Motor Co., 224 W. Va. 62, 70, 680 S.E.2d 77, 85 (2009) ("[T]he U.S. Supreme Court has recognized that an agency regulation with the force of law can explicitly or implicitly preempt conflicting state regulations."). This regulation states that "[a] standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law." 45 C.F.R. § 160.203. See Nat'l Abortion Fed'n v. Ashcroft, No. 03 Civ. 8695 (RCC), 2004 WL 555701, at *3 (S.D.N.Y. March 19, 2004) ("Recognizing that HIPAA's privacy provisions might differ from state regulations, Congress directed that all state laws contrary to the regulations promulgated by HHS be preempted, unless the state laws fall within the exception created by HIPAA[.]"). It has been

trying to comply with federal law-something the majority believes is not necessary in spite of the Supremacy Clause.

³ For ease in understanding, I will refer to HIPAA and the Privacy Rule collectively as HIPAA.

⁴ The regulations define State law as "a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law." 45 C.F.R. § 160.202. See Crenshaw v. MONY Life Ins. Co., 318 F. Supp.2d 1015, 1028 (S.D. Cal.2004).

recognized that the regulations "restrict and define the ability of health plans, health care clearinghouses, and most health care providers to divulge patient medical records." *United States v. Sutherland*, 143 F. Supp. 2d 609, 612 (W.D. Va. 2001).

"[T]he intent of HIPAA is to ensure the integrity and confidentiality of patients' [medical] information and to protect against unauthorized uses or disclosures of the information[.]" In re Antonia E. [sic], 838 N.Y.S.2d 872, 874-75 (2007) (internal quotations and citations omitted). Under HIPAA, the general rule is that a covered entity may not use or disclose protected health information without a written authorization from the individual. See 45 CFR 164.508. However, as recognized by the majority opinion, HIPAA enumerates several specific situations in which a covered entity may use or disclose protected health information without the written authorization of the individual. See Pal v. New York Univ., No. 06Civ.5892 (BSJ)(FM), 2007 WL 1522618, at *3 (S.D.N.Y. May 22, 2007) ("HIPAA permits the disclosure of 'protected health information' without a patient's consent in a variety of circumstances."). The majority opinion found that only one of HIPAA's exceptions to the general privacy of health information applied to the facts of this case. 5 That exception involves a State law

⁵ I previously noted that the majority opinion correctly found that the exceptions for business associate, health oversight agency, health care operations, and [sic] required by law did not apply.

that is "more stringent" than HIPAA. See 45 C.F.R. § 160.203(b) ("The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter."). That is, "courts have recognized that HIPAA does not preempt 'more stringent' privacy protections guaranteed under state law." Pac. Radiation Oncology, LLC v. Queen's Med. Ctr., 47 F. Supp. 3d 1069, 1081 (D. Haw. 2014). Accord Citizens for Health v. Leavitt, 428 F.3d 167, 174 (3d Cir. 2005).

The majority opinion reached the conclusion that our State law was more stringent than HIPAA without performing *any* legal analysis of this complex issue. The majority opinion, in a rather awkward way, merely pointed out that DHHR had annually "conclud[ed] that our state laws set forth in 64 CSR § 59 are not preempted by HIPAA as our provisions are more stringent." The majority opinion then went on to provide:

From the record submitted in this case, the protections set forth in Title 64, Series 59 have been determined to be more stringent than those required by federal law. Accordingly, our state regulations set forth in Title 64, Series 59 are not preempted by HIPAA.

This was the sum total of how and why the majority opinion determined that our State law was more stringent than HIPAA. This total lack of analysis makes no sense. It is illogical to rely on a general finding by DHHR that its regulations are more stringent than HIPAA, when DHHR already had realized its disclosures to Legal Aid violated HIPAA, and DHHR tried to correct the violation by asserting that no authority exists for Legal Aid to indiscriminately access patient information. More fundamentally, the yard stick used by the majority opinion to determine whether a State law is more stringent than HIPAA is absurd! Under the majority opinion's mind-boggling yardstick, all that any state must do to get around HIPAA is unilaterally proclaim that its laws are more stringent than HIPAA. Surely Congress did not mean for HIPAA and the Supremacy Clause to be defeated in such a self-serving manner. Indeed, as I will demonstrate below, this absolutely was not what Congress intended.

"[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 set forth in the rules and regulations." Bayne v. Provost, 359 F. Supp. 2d 234, 237-38 (N.D.N.Y. 2005) (internal quotations and citations omitted). See also Wade v. Vabnick-Wener, 922 F. Supp. 2d 679, 686 ("To meet the 'more stringent' requirement, a state law must 'provide greater protection for the individual who is the subject of the individually identifiable health information' than the standard set forth by HIPAA and its regulations."). More importantly, it has been recognized that, under federal law, "'[m]ore stringent,' as defined in 45 C.F.R. § 160.202, means, that the state law meets any

one of six criteria." Law v. Zuckerman, 307 F. Supp. 2d 705, 709 (D. Md. 2004). See also Webb v. Smart Document Sols., LLC, 499 F.3d 1078, 1087 (9th Cir. 2007) ("'More stringent' laws are defined."). The six criteria under HIPAA that define "more stringent," have been summarized by the Fourth Circuit as follows:

[1] the state law prohibits or restricts a use or a disclosure of information where HIPAA would allow it; [2] the state law provides an individual with greater rights of access or amendment to his medical information than provided under HIPAA; [3] the state law provides an individual with a greater amount of information about a use, a disclosure, rights and remedies; [4] [state law provides requirements that narrow the scope or duration, increase the privacy protections afforded, or reduce the coercive effect of the circumstances surrounding the express legal permission of an individual to disclose information]; [5] the state law provides for the retention or reporting of more detailed information or for a longer duration; or [6] the state law provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

South Carolina Med. Ass'n v. Thompson, 327 F.3d 346, 355 (4th Cir. 2003). Accord In re Antonia E., 838 N.Y.S.2d 872, 876 (2007).

Simply put, in order for a court to determine that a State law is more stringent than HIPAA, it *must*

find that the State law satisfies one of the six definitions of "more stringent" contained under 45 C.F.R. § 160.202. The majority opinion in this case literally failed to even cite, let alone discuss, the mandatory six criteria set out under 45 C.F.R. § 160.202. Ignoring the law, or pretending the law does not exist, should not be a license to manipulate and corrupt the law.

My research revealed that other courts called upon to decide whether a State law was more stringent than HIPAA have complied with federal law and applied the six criteria under 45 C.F.R. § 160.202. For example, a case which examined all six criteria under 45 C.F.R. § 160.202 is *State v. La Cava*, No. CR060128258S, 2007 WL 1599888 (Conn. Super. Ct. May 17, 2007). In *La Cava*, the court was asked to decide whether a Connecticut statute, which authorized disclosure of patient information in a judicial proceeding and in certain other circumstances, was more stringent than HIPAA. The Connecticut statute allowed:

(1) any patient who has been treated in a private hospital, public hospital society or corporation receiving state aid to, upon the demand, examine and/or copy her hospital record, including the history, bedside notes, charts, pictures and plates kept in connection with her treatment and authorize her physician or attorney to do the same; (2) a hospital, society or corporation that is served with a subpoena issued by competent authority directing the production of a hospital

record to deliver such record or a copy thereof to the clerk of such court where it will remain sealed except upon the order of a judge
of the court concerned; (3) any and all parts
of the hospital record or copy that is not otherwise inadmissible to be admitted in evidence without the necessity of having a
witness from the hospital identity [sic] the
records as ones kept in the usual course of
business by the hospital.

La Cava, 2007 WL 1599888, at *3. The decision in *La Cava* summarily applied the six criteria under 45 C.F.R. § 160.202 and determined that the Connecticut statute was not more stringent than HIPAA:

In comparison to [HIPAA's requirements for disclosures for judicial and administrative proceedings], [the state statute] does not: (1) prohibit or restrict a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under the federal rule; (2) permit greater rights of access or amendment to the individual who is the subject of the individually identifiable health information; (3) provide a greater amount of information to the individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies; (4) provide requirements that narrow the scope or duration, increase the privacy protections afforded, or reduce the coercive effect of the circumstances surrounding the need for express legal permission from the individual who is the subject of the individually identifiable

health information with respect to the form, substance, or the need for express legal permission; (5) provide for the retention or reporting of more detailed information or for a longer duration with respect to recordkeeping or requirements relating to accounting of disclosures; and (6) provide greater privacy protection for the individual who is the subject of the individually identifiable health information with respect to any other matter. Accordingly, the state statute is not more stringent than the federal regulation.

Because [the state statute] is a contrary state law that is not more stringent than the Privacy Rule, it is preempted in accordance with 45 C.F.R. § 160.203 (2007).

La Cava, 2007 WL 1599888, at *3.

In *U.S. ex rel. Stewart v. Louisiana Clinic*, No. CivA. 99-1767, 2002 WL 31819130 (E.D. La. Dec. 12, 2002), the defendants attempted to prevent disclosure of patient information in a judicial proceeding by invoking the protections of a Louisiana statute. The disclosure was allowed under HIPAA, but was not allowed under Louisiana law. The opinion in *Stewart* framed the issue as follows:

Defendants argue that HIPAA does not preempt Louisiana law concerning disclosure of nonparty patient records without patient consent. . . .

Defendants focus solely on the "more stringent" element of this regulatory test and on paragraph (4) of the definition of "more stringent." "More stringent" means a State law that meets one or more of the following criteria: . . .

(4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable.

Defendants argue that the Louisiana health care provider/patient privilege law is more stringent than the federal regulations. They contend that the Louisiana statute increases the privacy protections afforded to individual patients by requiring either patient consent for the disclosure or, in the absence of consent, that a "court shall, issue an order for the production and disclosure of a patient's records . . . only: after a contradictory hearing with the patient . . . and after a finding by the court that the release of the requested information is proper."

Stewart, 2002 WL 31819130, at *4-5. The court in Stewart found that, based upon the defendants' reliance solely on the fourth criterion of 45 C.F.R.

§ 160.202, Louisiana law was not more stringent than HIPAA:

Defendants' argument fails because this provision of Louisiana law does not address "the form, substance, or the need for express legal permission from an individual," as required by 45 C.F.R. § 160.202 for the exception to apply. Rather, the Louisiana statute provides a way of negating the need for such permission. In other words, although the individual patient may attend the contradictory hearing, the Louisiana provision states that the court shall issue an order for disclosure (despite the patient's lack of consent), if the court finds that release of the information is proper. Because the Louisiana statute does not fit within the exception from preemption cited by defendants, it preempted by the HIPAA regulations. Therefore, Louisiana law does not apply in this pure federal question case.

Stewart, 2002 WL 31819130, at *5.

A case which illustrates a State statute that was actually found to be more stringent than HIPAA is Wade v. Vabnick-Wener, 922 F. Supp. 2d 679. In Wade, the court was called upon to decide whether Tennessee's privacy law, on ex parte communication with a plaintiff's treating physician was more stringent than HIPPA [sic]. The opinion relied upon the sixth criterion of 45 C.F.R. § 160.202. That is, "a state law must 'provide greater protection for the individual who is the subject of the individually identifiable

health information' than the standard set forth by HIPAA and its regulations." *Wade*, 922 F. Supp. 2d at 686. The opinion determined that, based upon the sixth criterion, Tennessee's law was more stringent than HIPAA:

It is therefore clear that Tennessee law is more stringent than HIPAA's privacy rules concerning ex parte communications with health care providers. Absent a plaintiff's express consent, Tennessee law prohibits informal communications with the plaintiff's treating physician to obtain health information. On the contrary, HIPAA only bars such communications prior to the entry of a qualified protective order. After the requisite protective order is entered, whether by consent or over the plaintiff's objection, defendant is free to utilize informal discovery, including specifically ex parte interviews, under HIPAA.

Accordingly, because the laws of Tennessee are more stringent than HIPAA concerning defense counsels ability to make use of informal discovery methods, HIPAA does not preempt Tennessee's ban on ex parte communications with a plaintiff's non-party treating physician.

Wade, 922 F. Supp. 2d at 691-92. See Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *4 (N.D. Ill. Feb. 6, 2004) ("Because we find that Illinois law is more stringent than HIPAA's disclosure requirements and that it would be impossible for

Northwestern to comply with both Judge Casey's HIPAA-pursuant Order and various provisions of Illinois law, Illinois's nonparty patient privacy laws are not preempted by HIPAA and its subsequent regulations."); Pal v. New York Univ., 2007 WL 1522618, at *3 ("Because New York law requires patient consent before disclosure and HIPAA provides for certain exceptions to that rule, New York law is more stringent."); Tyson v. Warden, No. CV064001202, 2007 WL 4171583, at *2 (Conn. Super. Ct. Nov. 5, 2007) ("It is clear to this court that § 52-146k and 52-1460 prohibit disclosure where the HIPAA regulation relied upon by the petitioner would allow it. Sections 52-146k and 52-146o provide greater protection of the victim's private health information and are therefore not preempted by HIPAA."); In re Antonia E., 838 N.Y.S.2d 872, 876 (2007) ("Upon consideration of the physician-patient privilege and the broad provisions for court ordered disclosure under HIPAA, this Court finds that HIPAA provisions do not supersede New York law.").

The above cases clearly demonstrate that a court cannot determine that a State statute is more stringent than HIPAA by relying solely on a state agency's statement that a particular state law is more stringent than HIPAA. If that was true, as the majority opinion concludes, then there would have been no reason to define "more stringent" under 45 C.F.R. § 160.202. The term "more stringent" is defined for a purpose. That purpose, to me, is quite clear. The definition is designed to narrow the circumstances in

which a state law may be categorized as more stringent than HIPAA. "[W]e are not free to rewrite HIPAA's mandates; we are required to follow them." *Holman v. Rasak*, 486 Mich. 429, 458, 785 N.W.2d 98, 114 (2010) (Hathaway, J., dissenting). The majority opinion in this case has made a mockery of the unambiguous and mandatory language contained in 45 C.F.R. § 160.202.

I can surmise only that the majority opinion ignored the law as dictated under 45 C.F.R. § 160.202 because it wanted to reach a result that simply could not be reached by following the law. A cursory review of what the relevant state law allowed in this case clearly shows that it was not more stringent than HIPAA.

What should be clearly understood is that, for purposes of the "more stringent" requirement of HIPAA, "any state law providing greater privacy protection for the individual who is the subject of the individually identifiable health information is a more stringent state law." Natalie F. Weiss, "To Release or Not to Release: An Analysis of the HIPAA Subpoena Exception," 15 Mich. St. U.J. Med. & L. 253, 260 (2011) (emphasis added). This point needs to be emphatically understood—the "more stringent" requirement under HIPAA can never be satisfied by a State law that provides lesser privacy protection. In this case, the majority opinion has indicated that the applicable state law is found in 64 C.S.R. § 59-11.5.1.d, which provides:

No written consent is necessary for employees of the department, comprehensive behavioral centers serving the client or advocates under contract with the department.

In sum, this state regulation allows Legal Aid, as an "advocate," to have complete access to patient information without the consent of the patient. On its face, it is clear that this law does not provide greater privacy protection. Instead, it exposes all patient information to a private legal entity in the absence of patient consent for either representation by the agency or the disclosure of their medical records to the agency.

It has correctly been observed that "[i]f state law can force disclosure without a court order, or the patient's consent, it is not 'more stringent' than the HIPAA regulations." Law υ. Zuckerman, F. Supp. 2d 705, 711 (D. Md. 2004). Through a summary application of HIPAA's six criteria, it is clear that the state regulation at issue in this matter does not: (1) prohibit or restrict a use or a disclosure of information where HIPAA would allow it; (2) provide an individual with greater rights of access or amendment to his medical information than provided under HIPAA; (3) provide an individual with a greater amount of information about a use, a disclosure, rights and remedies; (4) provide requirements that narrow the scope or duration, increase the privacy protections afforded, or reduce the coercive effect of the circumstances surrounding the express legal permission of an individual to disclose information;

(5) provide for the retention or reporting of more detailed information or for a longer duration; or (6) provide greater privacy protection for the individual who is the subject of the individually identifiable health information. Insofar as the state regulation does not satisfy any of the above six factors contained in 45 C.F.R. § 160.202, the state law is not more stringent than HIPAA. The majority knew this, and that is why its opinion completely ignored 45 C.F.R. § 160.202. See In re Funderburke, No. 687-0026, 1988 WL 1607927, at *4 (S.D. Ga. Jan. 18, 1988) ("[T]he record shows that the [majority] did nothing except to assume the position of an ostrich with its head in the sand and ignore [the law] which [was] readily available to it.").

Finally, I wish to point out that the majority opinion conceivably has opened the floodgates for civil litigation, because of the unlawful access it has given Legal Aid to patient hospital information. This Court recently held that "[c]ommon-law tort claims based upon the wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996." Syl. pt. 3, R.K. v. St. Mary's Med. Ctr., Inc., 229 W. Va. 712, 735 S.E.2d 715 (2012). If the majority opinion is not appealed to the United States Supreme Court, I have no doubt that civil law suits will follow in the wake of the misguided majority opinion.

For the reasons so stated, I dissent.

STATE OF WEST VIRGINIA

At a regular term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 17th day of September, 2014, the following order was made and entered:

West Virginia Department of Health and Human Resources, and Bureau for Behavioral Health and Health Facilities, Petitioners

vs.) No. 14-0867

E.H., et al., Respondents

ORDER

On September 3, 2014, the petitioner, West Virginia Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities, by Daniel W. Greear, Chief Counsel for the Office of the Attorney General, presented to the Court a motion to stay the August 18, 2014 order and the August 27, 2014 amended order entered in the Circuit Court of Kanawha County, as set forth therein. Thereafter, on September 12, 2014, the respondents, E.H., et al., by counsel Jennifer S. Wagner and Lydia C. Milnes, Mountain State Justice, Inc., filed a written response in opposition thereto.

Upon consideration whereof, the Court is of the opinion to and does hereby grant the motion to stay the August 18, 2014 and August 27, 2014 orders entered in the Circuit Court of Kanawha County

(Case No. 08-MISC-585) which required the Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities to allow patient advocates full access to patient records. It is therefore ordered that the August 18, 2014 order and August 27, 2014 amended order, shall be, and hereby are, stayed, pending resolution of this appeal.

A True Copy [SEAL]

Attest: /s/ Rory L. Perry II, Clerk

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,

Petitioners,

v.

Civil Action No. 81-MISC-585 Judge Louis H. Bloom

MATIN et al., Respondents.

ORDER

(Filed Aug. 29, 2014)

Pending before the Court is a Motion for Stav and Entry of Partial Final Judgment as to the August 27, 2014, Patient Confidentiality Order (Motion) filed by the Respondent, West Virginia Department of Health and Human Resources (Respondents or DHHR), on August 28, 2014. The Respondents move the Court to declare final and stay its Amended Order entered on August 27, 2014, which requires the Respondents to (1) restore the patient advocates' access to patients and patient units immediately and without limitation, (2) restore access to all patient records immediately and without limitation except when patients request limitations, and (3) discontinue limiting patient advocate conversations with Respondents' staff. The Court denies the Respondents' *Motion* for the following reasons.

FINDINGS OF FACT

- 1. On February 20, 1990, this Court entered an order directing the Respondents to implement an "external advocate system [and] contract with an entity outside State government" to do so. The Respondents never appealed this order.
- 2. Beginning in 1990, the Respondents allowed patient advocates unfettered access to patient records pursuant to legislative rule and this Court's 1990 order.²
- 3. The Health Insurance Portability and Accountability Act (HIPAA) was passed in 1996 and amended in 2002.
- 4. In June 2014, the Respondents, unprompted by any change in law or circumstance, began restricting patient advocates' access to patients, patient units, and patient records, citing HIPAA as their impetus for change.³
- 5. On July 22, 2014, the Petitioners filed a *Motion for Emergency Relief* requesting the Court to direct the Respondents to permit patient advocates access to patients and electronic patient records without written authorization.

¹ Order, Feb. 20, 1990 (attached hereto).

 $^{^{^{2}}}$ See W. Va. Code St. R. §§ 64-59-11.5, -20; see also W. Va. Code § 27-5-9.

 $^{^{}_{3}}$ Lindsey McIntosh Test., Hr'g Tr. 89-90, Aug. 1, 2014; $Order~\P\P~1\text{-}25, Aug.~18, 2014.$

- 6. On August 1, 2014, the parties appeared for a hearing on the Respondents' decision to restrict patient advocate access to the Hospitals and patient records.
- 7. This Court entered an *Order* on August 18, 2014, and an *Amended Order* on August 27, 2014, finding that HIPAA does not require the Respondents to restrict patient advocates' access to patients, patient units, or patient records. The Court hereby adopts and incorporates the findings of fact and conclusions of law as contained in the August 27, 2014, *Amended Order*.

DISCUSSION & CONCLUSIONS OF LAW

- 8. In considering a motion for stay, the Court analyzes the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.⁴
- 9. In support of their *Motion*, the Respondents first assert they will likely succeed on the merits because HIPAA and the Constitution forbid the Respondents from allowing patient advocates unfettered

 $^{^4}$ Nhen v. Holder, 556 U.S. 418, 426 (2009); W. Va. R. Civ. P. 62(i); W. Va. R. App. P. 28(a).

access to patient records, and no rule states otherwise.

The Court disagrees. The Respondents are not required by HIPAA to restrict patient advocates' access to patients, patient units, or patient records for reasons more thoroughly described in the August 18 Order and the August 27 Amended Order and briefly recounted as follows. First, W. Va. Code St. R. § 64-59-11.5.1.d states, "No written consent is necessary for ... advocates under contract with the department." Second, the patient advocates satisfy HIPAA's preemption exception as the advocates are charged with monitoring and investigating patients' health at the Hospitals.⁶ Third, Legal Aid of West Virginia (LAWV) is a business associate of DHHR. Fourth allowing patient advocates to have unfettered access to patient records is the "minimum necessary" to satisfy the advocates' purpose of monitoring and investigating patients at the Hospitals.8 Fifth, the Court has ordered the Respondents to allow patient advocates to

⁵ It is axiomatic that patient advocates be allowed to access patient records considering the provision in W. Va. Code St. R. § 64-59-20.2 that allows a patient advocate to file a grievance on behalf of a patient even if the patient has not alleged abuse or a violation of a right. Without access to patient records, patient advocates are divested of the resources necessary to help vulnerable patients who may not be able to help themselves.

⁶ See 45 C.F.R. § 160.203(c).

⁷ See 45 C.F.R. § 164.502(e)(1).

⁸ See 45 C.F.R. § 164.502(b)(1).

have unfettered access to patient records.⁹ Sixth, LAWV is a "health oversight agency" under HIPAA.¹⁰ Seventh, disclosing patient records to the patient advocates furthers the Respondents' health care operations.¹¹ Eighth, the Respondents' actions exceed and violate HIPAA by requiring patient advocates to provide reasons for wanting to review patient records, by requiring advocates to obtain written authorizations for each day the advocate seeks to review a patient record, and by requiring patient advocates to obtain a signature of a health care surrogate and/or medical power of attorney on each authorization.¹²

- 11. With regard to the second factor, the Respondents assert that they will suffer irreparable injury absent a stay because this Court's *Order* interferes with their constitutional powers to manage the Hospitals and violates the rights of the patients.
- 12. The Court disagrees. First, the Respondents identify no constitutional provision that will be violated by complying with the Court's *Order*. Second, Title 64 of the West Virginia Code of State Rules establishes and authorizes patient advocates' monitoring of the Hospitals and investigation of patient grievances to ensure that the Respondents are not

⁹ See 45 C.F.R. §§ 164.502(b)(2), .512(a).

¹⁰ See 45 C.F.R. §§ 164.501, .512(d)(1).

¹¹ See 45 C.F.R. §§ 164.501, .506(c)(1).

¹² See 45 C.F.R. § 164.508(c).

violating patients' rights, which the advocates have done since 1990.¹³

- 13. With regard to the third factor, the Respondents assert that the patients will not be injured if a stay is granted because "[e]xpanding access . . . could lead to irreparable privacy violations, would supersede the best judgment of the Department, and may give rise to liability for the Department."
- 14. The Court disagrees. The Respondents have identified no instances of liability caused by the patient advocates; the Respondents have identified no harm suffered by the patients at the hands of the patient advocates. However, the patients have identified harm caused by the instant controversy. Evidence adduced at the August 1, 2014, hearing showed that the Respondents, by revoking patient advocates' access to patients and their records, have haltered patients' ability to have their complaints and grievances timely and effectively investigated or resolved. Consequently, an entire unit of patients at one of the Hospitals has filed a grievance to redress the Respondents' revocation of patient advocate access.¹⁴
- 15. With regard to the fourth factor, the Respondents assert "public interest . . . supports ensuring that DHHR/BHHF, as the democratically-accountable

¹³ See W. Va. Code St. R. § 64-59-20.1; W. Va. Code § 27-5-9.

¹⁴ Sharoon Reed Test., Hr'g Tr. 166-167, Aug. 1, 2014 ("Their concern [is] that we can't immediately access their records; therefore, we can't give them immediate help.").

officials charged with administrative [sic] the state hospitals, protects these rights."

- 16. The Court disagrees. The Court and the West Virginia Legislature have identified the public's need for patient advocates to monitor and investigate the Hospitals and its patients to ensure the patients are receiving quality care and to ensure the patients' rights are protected.
- 17. Having considered the requisite elements, the Court finds and concludes that the Respondents have not satisfied the elements necessary for the issuance of a stay.
- 18. The Respondents also move the Court to declare its August 27 *Order* to be a final judgment, asserting, "This Court has already resolved all merits issues of liability, has ordered immediate remedial action, has reduced its order to writing, and has ordered the immediate implementation of its order. This Court has also made clear that it does not intend to revisit its decisions on this subject."
- 19. The Court disagees. The *Order* entered in 1990 was final and not appealed. In June 2014, the Respondents took action to violate the 1990 *Order*, which resulted in the Petitioners filing a *Motion for Emergency Relief* and which resulted in this Court entering its August 18 *Order* and its August 27 *Amended Order*, both of which reinforce its 1990 *Order*. The Respondents cannot now render the 1990 *Order* appealable by violating it. As such, the Court denies the Respondents' request to declare the

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August 18 *Order* and subsequent August 27 *Order* a final judgment.

DECISION

Accordingly, the Court does hereby **ORDER** that the Respondents' request for a stay be **DENIED**. The Court does again hereby **DECLARE** that this Court's *Order* and *Amended Order* entered on August 18 and 27, 2014, respectively, are **NOT FINAL**. The Clerk is **DIRECTED** to send a certified copy and fax forthwith a copy of this *Order* to the counsel of record and the Office of the Court Monitor.

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ENTERED this 29 day of August 2014.

/s/ Louis H. Bloom

Louis H. Bloom, Judge

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E. H., et al.,

Petitioners,

CIVIL ACTION NO.

v.

MISC.-81-585

KHAN MATIN, et al.,

Respondents.

ORDER

This day came the Court Monitor and submitted to the Court his recommendations arising out of the investigation into the Facility Patient Advocate System. These recommendations were made on January 25, 1990, and there has been no objection by any of the parties.

Thereupon, the Court finding that the external, advocate system should be implemented to fulfill the requirements of the Plan, it is hereby ORDERED that on or before May 1, 1990, the Division of Health shall contract with an entity outside State government for the provision of advocacy in the four State facilities: Colin Anderson Center, Greenbrier Center, Huntington State Hospital, and Weston State Hospital at the current level of five full time equivalent, to begin on or before said date.

ENTER this 20th day of February, 1990.

/s/ A. Andrew MacQueen
JUDGE

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al., Petitioners,

v.

CIVIL ACTION NO. 81-MISC-585

MATIN, et al., Respondents.

AMENDED ORDER

(Filed Aug. 27, 2014)

On August 1, 2014, the parties appeared for an evidentiary hearing on Petitioner's *Motion for Emergency Relief* relating to Respondents' revocation of patient advocate access to patient records, patients, and staff. At the hearing, Respondents' Commissioner of the Bureau for Behavioral Health and Health Facilities, Respondents' Privacy Officer, and a Behavioral Health Advocate stationed in William R. Sharpe Hospital testified, and various exhibits were introduced. Based on the record and the legal memoranda filed herein, the Court finds as follows.

FINDINGS OF FACT

Background on Patient Advocates

- 1. On February 20, 1990, the Court ordered the Respondents to "contract with an entity . . . for the provision of advocacy in the four state facilities."
- 2. Respondents are further required, by *Agreed Order in* the instant suit, to comply fully with Title 64 of the Code of State Rules, and to establish periodic review for this purpose.²
- 3. Since 1990, pursuant to legislative rule and said *Orders* entered in 1990 and 2009, Respondents have contracted with Legal Aid of West Virginia (LAWV) to provide advocacy services, to assist with and investigate individual grievances, conduct abuse and neglect investigations, educate staff and patients about patient civil rights, and monitor and ensure overall compliance with patient civil rights at William R. Sharpe Hospital and Mildred M. Bateman Hospital (collectively, the Hospitals).³

¹ Order, E.H. v. Matin, 81-MISC-585 (Feb. 20, 1990).

 $^{^{^2}}$ Agreed Order \P 10(d), E.H. v. Matin, 81-MISC-585 (July 2, 2009).

³ See Hr'g Tr. 79:24-80:3, 134:14-17, 158:8-20, 172:16-20, Aug. 1, 2014; Pet'r's Ex. 2, Grant Agreement & Ex. A attached thereto; Report to the Court and the Parties, E.H. v. Matin, 81-MISC-585 (May 1, 2011) (noting that Respondent contracts with LAWV to provide advocacy services); W. Va. Code St. R. §§ 64-59-20.1, 64–59-20.2.16.b.

- 4. Respondents' contract with LAWV sets forth that LAWV is a "business associate" under HIPAA.⁴
- 5. Prior to late June 2014, Respondents provided the patient advocates with full access to computerized patient records, the patient wards, and other areas of the Hospitals.⁵ Access to patient records allowed the advocates to fulfill their responsibilities to investigate grievances and resolve complaints without revealing the nature of such to Respondents, to timely investigate abuse and neglect allegations, and to review overall compliance with patient rights, such as monitoring the Respondents' use of seclusion and chemical or physical restraints.⁶
- 6. Pursuant to their role and to protect patient rights, patient advocates are trained annually on the Federal Health Insurance Portability and Accountability Act (HIPAA) and enter into confidentiality agreements with Respondents. In this regard, the advocates receive the same training as Hospital staff. In addition, further responsibilities relating to patient confidentiality are set forth in the business associate addendum to the contract between Respondents and LAWV for advocacy services.

⁴ Pet'r Ex. 2 & Ex. L attached thereto.

⁵ Hr'g Tr. 102:15-103:7, Aug. 1, 2014.

⁶ See, e.g., Reg. Tr. 176:1-16.

⁷ Hr'g Tr. 166:4-7,123:1-2, 166:8-12, Aug. 1, 2014.

⁸ Hr'g Tr. 166:16-18.

⁹ Pet'r Ex. 2 & Ex. L attached thereto.

7. HIPAA was passed in 1996 and amended in 2002. Respondents, and their various Privacy Officers, did not determine in 1996 or 2002, or at any point until June 2014, that the provision of access to patients and patient records to the patient advocates violated HIPAA.¹⁰

Denial of Timely Access

- 8. In late June 2014, Respondents revoked the ability of the advocates to immediately access to [sic] patient records.¹¹
- 9. Days after revoking access, Respondents set forth new requirements with which the advocates must comply in order to access patient records and information.¹² Respondents now require that the advocates obtain signed releases from each patient, the patient's guardian, and a person with medical power of attorney for that patient. Advocates are only advised of the identity of a guardian or health care surrogate after they receive a signed release from the

¹⁰ The Hospitals each have a Privacy Officer. The Hospital Privacy Officers report to the Privacy Officer for the Bureau for Behavioral Health and Health Facilities, who, in turn, reports to the Privacy Officer located in the Office of General Counsel for the Department of Health and Human Resources (DHHR). DHHR's Privacy Officer reports to the State Privacy Office, which is located in the Healthcare Authority. Hr'g Tr. 111:2-9, 113:6-9, 113:13-22, Aug. 1, 2014.

¹¹ Hr'g Tr. 93:20-22, 159:13-14, 168:8-10, Aug. 1, 2014.

¹² Hr'g Tr. 161:14-15.

patient; Respondents require that the advocates obtain the signature of the guardian and/or surrogate regardless of whether the individual has been declared incompetent.¹³ The signed release must disclose the precise reason for the record review, and the release must be tied to a specific grievance.¹⁴ Respondents further require that the release set forth exactly what documents the advocate is requesting.¹⁵ In addition, Respondents require that the end-date for any release must be the date on which the release is submitted. As a result, if the patient files another grievance the following day, a new release must be obtained as well as another signature from the guardian or surrogate, which may be time intensive.¹⁶

10. As of June 2014, Respondents began denying advocates access to patient records to review the Hospitals for systemic violations of patient rights. For instance, advocates can no longer view records to ensure that Respondents are not systematically medicating patients to respond to agitation as the result of overcrowding or understaffing at the

¹³ Hr'g Tr. 162:15-22.

¹⁴ Hr'g Tr. 105:8-11, 130:24-131:1, 164:21-24.

¹⁵ Hr'g Tr. 168:2-7.

¹⁶ Hr'g Tr. 170:18-171:4.

facilities.¹⁷ These facts were central evidence in this case in 2009.¹⁸

- 11. In addition, Respondents no longer permit Hospital staff to talk to the advocates without signed releases specific to each conversation or interaction.¹⁹
- 12. Respondents further will not permit the advocates to speak with patients without first obtaining a signed release from the patient regarding the specific grievance. Advocates are also no longer advised of when patients enter or are discharged from the Hospitals. 121
- 13. During the week of July 28, 2014, Respondents revoked the patient advocates' keys that provided them with access [sic] visit patient *wards* and to move about the Hospitals freely.²² Patient advocates may now only enter the units escorted by an employee of Respondents.²³ Pursuant to Respondents' direction, the patient advocates are no longer permitted to walk around the units, converse with patients,

¹⁷ Hr'g Tr. 142:5-14.

¹⁸ See, e.g., Order Regarding Case Management Services 5 ¶ 14, E.H. v. Matin, 81-MISC-585 (Aug. 7, 2009) (citing record for finding that overcrowding was resulting in violations of patient rights).

¹⁹ Hr'g Tr. 161:15-17.

²⁰ Hr'g Tr. 161:17-19.

²¹ Hr'g Tr. 164:16-18.

²² Hr'g Tr. 84:20-85:10, 119:10-14, 159:14-18, 168:11-13.

²³ Hr'g Tr. 86:12-1.5, 159:14-18.

or sit in the common areas at times that they choose.²⁴ Patient advocates now are only permitted to talk or meet with patients if the patient specifically requests a meeting with an advocate.²⁵

- 14. Pursuant to the recent change, patient advocates are no longer advised of the staffing plans. As a result, the advocates are unaware of which staff are present at any given time or in any given unit of the Hospitals, which hinders the advocates' ability to investigate grievances and resolve informal concerns raised by patients.²⁶
- 15. These changes in procedure occurred at the direction of Respondents' Privacy Officer.²⁷ Prior to revoking access to patients and their records, the Privacy Officer was not aware of the advocates' roles within the Hospitals as authorized by law and Court orders.²⁸
- 16. Respondents have not consulted with the Federal Office of Civil Rights to determine whether a HIPAA violation has occurred, nor has it notified the

²⁴ Hr'g Tr. 88:12-16.

²⁵ Hr'g Tr. 94:16-24.

²⁶ Hr'g Tr. 164:13-15.

²⁷ Hr'g Tr. 114-116.

 $^{^{28}}$ Hr'g Tr. 117:7-10, 132:14-20, 132:21-133.2, 135:6-136:4, 144:15-22, 145:16-24, 171:17-24.

federal government or patients and their families of the purported breach of confidentiality.²⁹

17. Respondents have not revoked access to records and patients for other contracted agencies located within the Hospitals, such as liaisons with the comprehensive behavioral health care agencies.³⁰

Impact on Advocacy Services & Patient Care

- 18. Because patients have limitations that make it difficult to read or contact advocates independently and because the advocates cannot freely speak with patients and freely enter the units, patients are inhibited from lodging appropriate grievances.³¹
- 19. The Respondents [sic] recent practice of requiring advocates to be escorted by employees unduly hinders the advocates from having confidential conversations with patients and gaining and maintaining patient trust.³²
- 20. By eliminating access to patient records, patient units, and patients, Respondents have eliminated the advocates' ability to investigate the Hospitals' compliance with patient rights, *e.g.*, to monitor

²⁹ Hr'g Tr. 89:6-12, 1553:7-17 [sic], 154:20-21.

³⁰ Hr'g Tr. 97-101.

³¹ Hr'g Tr. 160:7-22, 163:9-164:12.

³² Hr'g Tr. 159:21-160:1.

the use of seclusion and chemical or physical restraints.³³

- 21. The requirement that advocates must set forth the purpose of a record request on the authorization violates confidentiality because it requires that the advocate disclose to Respondents the nature of the allegation and investigation.³⁴ In addition, it is very difficult for patient advocates to identify the specific records that are necessary to conduct an investigation because records are entered inconsistently by Respondents' staff.³⁵
- 22. Respondents' requirement that the advocates obtain written authorization signed by a healthcare surrogate, guardian, and/or durable power of attorney severely hinders patient advocates' ability to conduct abuse and neglect investigations within the time period outlined by law.³⁶ Abuse and neglect allegations are further not being properly or timely reported to the advocates because staff no longer cooperate or speak with advocates.³⁷
- 23. The timely resolution of other grievances is similarly impacted.³⁸

³³ See, e.g., Hr'g Tr. 176:1-16.

³⁴ Hr'g Tr. 165:1-5.

³⁵ Hr'g Tr. 168:2-7.

³⁶ Hr'g Tr. 162:1-6.

³⁷ Hr'g Tr. 162:9-12, 169:1-10.

³⁸ Hr'g Tr. 162:5-6.

- 24. Without access to records and with the time limits and other limitations placed on the authorizations, advocates can no longer investigate whether a patient is being provided appropriate, quality care.³⁹
- 25. Patients at the Hospitals have submitted grievances setting forth their concerns that the new procedure has undermined the advocacy services provided at the Hospitals, including the advocates' ability to resolve grievances timely.⁴⁰ One such grievance was signed by all of the patients on a unit.⁴¹

DISCUSSION & CONCLUSIONS OF LAW

- 26. The West Virginia Legislature has determined that "there shall be persons designated as client (or patient or resident) advocates who are independent of the facility management in every behavioral health facility."
- 27. Pursuant to W. Va. Code St. R. § 64-59-11.5.1.d, the advocates are required to:

assist clients in registering and filing grievances, acknowledge grievances, conduct investigations of grievances, notify the administrator of results of grievance investigations, assure that abuse/neglect grievances

³⁹ Hr'g Tr. 171:8-16.

⁴⁰ Hr'g Tr. 167:2-13 & Pet'r's Ex. 3.

⁴¹ *Id*

⁴² W. Va. Code St. R. § 64-59-20.1.

have been reported to Adult Protective Services, educate staff regarding client rights and maintain accurate documentation of all grievances and investigations.⁴³

- 28. Under W. Va. Code St. R. § 64-59-20, a grievance may be initiated independently by a patient advocate on behalf of a patient even if the patient has not alleged abuse or violation of a right.
- 29. To enable the advocates to fulfill their responsibilities, Legislative Rule further sets forth:

Records shall only be disclosed: ... To providers of health, social, welfare services involved in caring for or rehabilitating the client. The information shall be kept confidential and used solely for the benefit of the client. No written consent is necessary for employees of the department, comprehensive behavioral health centers serving the client, or advocates under contract with the department.⁴⁴

- 30. Respondents are required, by order in the instant suit, to "contract with an entity . . . for the provision of advocacy in the four state facilities"
- 31. Respondents are further required, by *Agreed Order* in the instant suit, to comply fully with

⁴³ W. V. Code St. R. § 64-59-20.2.16.b.

⁴⁴ W. Va. Code St. R. § 64-59-11.5.1.d (emphasis added).

⁴⁵ Order, E.H. v. Matin, 81-MISC-585 (Feb. 20, 1990).

Title 64 of the Code of State Rules and to establish periodic review for this purpose.⁴⁶

- 32. Finally, Respondents are required pursuant to this suit to advocate for patients on systemic issues and to ensure system-wide compliance with patient rights.⁴⁷
- 33. Respondents assert that they may not release information to advocates without specific written and signed authorization pursuant to HIPAA. However, Respondents must disclose this information to LAWV advocates to enable them to fulfill their function. As set forth below, this disclosure is expressly authorized under several provisions of HIPAA.

<u>Whether HIPAA's Preemption Provision</u> <u>Provides an Exception for the Advocates</u>

34. Under 45 C.F.R. § 160.203, any state law contrary to HIPAA is preempted, However, certain exceptions apply. The following exception is particularly pertinent to the instant matter:

 $^{^{46}}$ See, e.g., Agreed Order \P 10(d), E.H. v. Matin, 81-MISC-585 (July 2, 2009).

⁴⁷ See, e.g., A Report of Legal Aid Advocacy at William R. Sharpe Hospital & Formal Recommendations of the Court Monitor, E.H. v. Matin, 81-MISC-585 (Mar. 1, 2011). Respondents agreed to the Formal Recommendations, which set forth that systemic advocacy will be pursued by LAWV without objection, thereby allowing them to take on the force of Court Order. See, e.g., Order Appointing Court Monitor, E.H. v. Matin, 81-MISC-585 (July 30, 2009).

This general [preemption] rule applies, except if one or more of the following conditions is met: . . . (c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury . . . or for the conduct of public health surveillance, investigation, or intervention. 48

- 35. Elsewhere in the Code of Federal Regulations, "public health authority" is defined as being "authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury . . . and the conduct of public health surveillance, public health investigations, and public health surveillance."
- 36. Here, the advocates are created and organized by state law and authorized by Court order to monitor and investigate the Hospitals in order to ensure quality care and prevent injury to the patients. The advocates therefore satisfy the above exception to HIPAA's preemption provision. Thus, this Court is of the opinion that the advocates are entitled to access the Hospitals, patients, and patient records whether or not the laws of this State contradict HIPAA. Notwithstanding the preemption exception, the Court finds that the advocates are entitled to access patient records, patients, and the Hospitals for the following reasons.

⁴⁸ 45 C.F.R. § 160.203(c).

Whether Respondents May Disclose Protected Health Information (PHI) to LAWV Because LAWV Is a Business Associate

- 37. HIPAA regulates the disclosure of PHI by "a covered entity or business associate."
 - 38. The Hospitals are "covered entities." 50
- 39. LAWV is a "business associate" as set forth in its contract with Respondents and as defined by HIPAA because it "creates, receives, maintains, or transmits protected health information for a function or activity regulated by [HIPAA]," namely for quality assurance, patient safety, and other health care operations as defined.⁵¹
- 40. Respondents' Hospitals are permitted to disclose PHI to business associates, including LAWV, when appropriate safeguards are present, as they are in the instant matter.⁵²
- 41. Disclosures of PHI must be limited "to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request." However,

⁴⁹ 45 C.F.R. § 164.502(a).

⁵⁰ 45 C.F.R. § 160.103. Respondents are a "hybrid entity" because it engages in both covered and non-covered functions. 45 C.F.R. § 164.103. The requirements of HIPAA apply solely to the covered functions (i.e., the functions of the Hospitals).

⁵¹ 45 C.F.R. §§ 160.103, 164.501.

⁵² 45 C.F.R. § 164.502(e)(1).

⁵³ 45 C.F.R. § 164.502(b)(1); see also 45 C.F.R. § 164.514(d).

the "minimum necessary" requirement does not apply to "uses or disclosures that are required by law, as described by [45 C.F.R. § 164.512(a)]," which states in pertinent part: "A covered entity may disclose protected health information in the course of any judicial or administrative proceeding. . . . In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected information expressly authorized by such order."

- 42. The patient advocates' role includes completing timely investigates [sic] of grievances, quickly investigating abuse and neglect allegations, and ensuring overall compliance of the Hospitals with state law protecting patients' rights. In order to fulfill this role, advocates must have access to all patient treatment and clinical records, which is the minimum disclosure necessary for this purpose.
- 43. Patient confidentiality is protected by the advocates' obligation to comply with HIPAA and state law requiring that they keep PHI confidential, including the requirements set forth in 45 C.F.R. § 164.504(e)(1) & (2).
- 44. Further, Respondents may disclose PHI without setting forth specifications in the contract with LAWV because LAWV's activities are "required by law" and, further, are specifically described in the definition of "business associate."⁵⁴

⁵⁴ 45 C.F.R. §§ 164.103, 164.504(e)(3)(ii).

45. Thus, disclosure is appropriate because LAWV is a business associate.

Whether Respondents May Disclose PHI to LAWV Because the Disclosure is for Health Oversight Activities

46. In addition, HIPAA permits disclosure of PHI without authorization

to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; . . . civil, administrative, or criminal proceedings or actions; or other activities necessary for oversight of (i) [t]he health care system; . . . or (iv) entities subject to civil rights laws for which health information is necessary for determining compliance. ⁵⁵

47. LAWV is a "health oversight agency" because it is "acting under a grant of authority from or contract with such public agency" and "is authorized by law to oversee the health care system . . . 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."

⁵⁵ 45 C.F.R. § 164.512(d)(1).

 $^{^{56}}$ 45 C.F.R. \S 164.501; see 42 U.S.C. \S 10841 (setting forth the rights of mental health patients).

- 48. Namely, LAWV is acting under contract and grant of authority from Respondents and is authorized by Title 64 to investigate and ensure compliance with the patient civil rights established by West Virginia Code and Title 64 of the Code of State Rules.
- 49. Further, this Court is of the opinion that the Legal Aid of West Virginia patient advocate is a health oversight authority created and organized by state law whose mission is to enforce civil rights for which access to health information is necessary. The advocates have the authority to investigate incidents of abuse and neglect of patients at the Hospitals and pursue legal and administrative remedies to ensure the protection of the patients. As a result, Respondents are authorized under HIPAA to disclose PHI without authorization to LAWV in furtherance of its oversight role, which includes the investigation of individual grievances and the review of the Hospitals' overall compliance with Title 64.

Whether Respondents May Disclose PHI to LAWV Because the Disclosure Is in Furtherance of Health Care Operations

50. In addition, Respondents' Hospitals may disclose PHI (with the exception of psychotherapy notes)⁵⁷ without written authorization when the

 $^{^{57}}$ Other exceptions exist but are not relevant here. Psychotherapy notes may be released with written authorization. See 45 C.F.R. \S 164.506.

disclosure is for the Hospitals' "own treatment, payment, or health care operations." 58

- 51. "Health care operations" include "conducting quality assessment and improvement activities . . . ; patient safety activities . . . ; and related functions that do not include treatment." "Health care operations" also include "[c]onducting or arranging for . . . legal services, auditing functions, including . . . abuse detection and compliance programs," and "[r]esolution of internal grievances."
- 52. The advocacy and auditing services provided in accordance with legislative rule and the law of this case are part of the covered health care operations of Respondents. Although these activities are contracted out to LAWV, rather than conducted by Respondents' employees, they are in furtherance of the Hospitals' health care operations. As a result, disclosure of PHI without written authorization, excluding psychotherapy notes, to LAWV is appropriate for the advocacy and auditing services provided by LAWV.

⁵⁸ 45 C.F.R. § 164.506(c)(1).

⁵⁹ 45 C.F.R. § 164.501.

⁶⁰ *Id*.

Whether Respondents May Disclose PHI to LAWV Because the Disclosure Is Required to Investigate by Law, Court Order, and to Investigate Abuse and Neglect Allegations

- 53. Under HIPAA, PHI may be disclosed without authorization "to the extent that such use or disclosure is required by law."
- 54. In addition, PHI may be disclosed for an abuse and neglect investigation if the individual is unable to agree because of incapacity and waiting for authorization would materially and adversely impact the investigation. ⁶² This provision applies to the abuse and neglect investigations undertaken by LAWV when a patient has been declared legally incompetent and the signature of a legal guardian would otherwise be required.
- 55. Further, the disclosure may be made in response to an express authorization by court order. 63
- 56. The disclosures specified herein are required by West Virginia law and by the law of this case to enable the advocates to assist Respondents in ensuring that patients' rights are not being violated. 64

^{61 45} C.F.R. § 164.512(a).

^{62 45} C.F.R. § 164.512(c).

^{63 45} C.F.R. § 164.512(e)(1)(i).

 $^{^{64}}$ See, e.g., W. Va. Code St. R. \S 64-59-20; W. Va. Code St. R. \S 64-59-11.5.1.d.

Whether the Requirements Set forth [sic] by Respondents Violate the Law

- 57. As set forth above, Respondents may provide the patient advocates with access to patients, staff, and patient records without violating HIPAA.
- 58. Respondents' revocation of said access seriously and fundamentally undermines the ability of the advocates to fulfill their legal and contractual responsibilities.
- 59. In order to fulfill their role, the advocates must be able to access patient records, patients, and staff. This access is the minimum necessary to enable the advocates to fulfill their responsibilities.
- 60. Patients' rights are protected by their right to request privacy protection under certain circumstances, pursuant to 45 C.F.R. § 164.522, as well as by the other protections set forth above.
- 61. Notably, even if signed authorizations were required which they are not the requirements set forth by Respondents are unduly restrictive and violate the law. Specifically, requiring the advocates to provide a purpose for access to records rather than providing access "at the request of the individual" is not required by HIPAA; in contrast, Respondents require LAWV to divulge the purpose of the request. 65 HIPAA similarly does not require that the end-date

⁶⁵ See 45 C.F.R. § 164.508(c)(iv).

for an authorization be the date the authorization is provided; in contrast, Respondents require LAWV to end an authorization on the date it is submitted. Further, only in very limited circumstances must an authorization be signed by a medical surrogate or medical power of attorney representative; in contrast, Respondents require the signature of the health care surrogate and medical power of attorney on each authorization. For the date of the health care surrogate and medical power of attorney on each authorization.

62. Respondents' misapplication of the law violates patient confidentiality necessary for an appropriate and meaningful investigation to be conducted. It further creates an undue burden on the legally required activities of the advocates, making it unduly difficult for them to fulfill their function of protecting patient rights within the Hospitals.

DECISION

Accordingly, the Court hereby finds and concludes that Respondents' revocation of the patient advocates' access to patients, staff, and patient records violates West Virginia law and is not required by HIPAA. Accordingly, the Court hereby **ORDERS** as follows:

⁶⁶ See 45 C.F.R. § 164.508(c).

 $^{^{67}}$ See W. Va. Code §§ 16-30-3, 6-7; State ex rel. AMFM, LLC v. King, 740 S.E.2d 66 (W. Va. 2013).

- 1. Respondents shall restore the patient advocates' access to patients and patient units immediately and without limitation;
- 2. Respondents shall restore access to patient records immediately and without limitation except when patients request limitations on the disclosure of their individual, identifiable health information. Access shall include all medical records of all patients committed to the Hospitals.
- 3. Respondents shall not limit patient advocate conversations or discussions with Respondents' staff.

The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record and the Court Monitor.

ENTERED this <u>27th</u> day of August, 2014.

/s/ Lewis H. Bloom
Louis H. Bloom, Judge

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al., Petitioners,

v.

Civil Action No. 81-MISC-585 Judge Louis H. Bloom

MATIN, et al., Respondents.

ORDER

(Filed Aug. 27, 2014)

Pending before the Court is a Motion for Stay and Entry of Partial Final Judgment as to the August 18, 2014, Patient Confidentiality Order (Motion) filed by the Respondent, West Virginia Department of Health and Human Resources (Respondents or DHHR), on August 26, 2014. The Respondents move the Court to declare final and stay its Order entered on August 18, 2014, which requires the Respondents to (1) restore the patient advocates' access to patients and patient units immediately and without limitation, (2) restore access to all patient records immediately and without limitation except when patients request limitations, and (3) discontinue limiting patient advocate conversations with Respondents' staff. The Court denies the Respondents' *Motion* for the following reasons.

FINDINGS OF FACT

- 1. On February 20, 1990, this Court entered an order directing the Respondents to implement an "external advocate system [and] contract with an entity outside State government" to do so. The Respondents never appealed this order.
- 2. Beginning in 1990, the Respondents allowed patient advocates unfettered access to patient records pursuant to legislative rule and this Court's 1990 order.²
- 3. The Health Insurance Portability and Accountability Act (HIPAA) was passed in 1996 and amended in 2002.
- 4. In June 2014, the Respondents, unprompted by any change in law or circumstance, began restricting patient advocates' access to patients, patient units, and patient records, citing HIPAA as their impetus for change.³
- 5. On July 22, 2014, the Petitioners filed a *Motion for Emergency Relief* requesting the Court to direct the Respondents to permit patient advocates access to patients and electronic patient records without written authorization.

¹ Order, Feb. 20, 1990 (attached hereto).

 $^{^{\}scriptscriptstyle 2}$ See W. Va. Code St. R. §§ 64-59-11.5, -20; see also W. Va. Code § 27-5-9.

 $^{^{}_{3}}$ Lindsey McIntosh Test., Hr'g Tr. 89-90, Aug. 1, 2014; $Order~\P\P$ 1-25, Aug. 18, 2014.

- 6. On August 1, 2014, the parties appeared for a hearing on the Respondents' decision to restrict patient advocate access to the Hospitals and patient records.
- 7. This Court entered an *Order* on August 18, 2014, and an *Amended Order* on August 27, 2014, finding that HIPAA does not require the Respondents to restrict patient advocates' access to patients, patient units, or patient records. The Court hereby adopts and incorporates the findings of fact and conclusions of law as contained in the August 27, 2014, *Amended Order*.

DISCUSSION & CONCLUSIONS OF LAW

- 8. In considering a motion for stay, the Court analyzes the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.⁴
- 9. In support of their *Motion*, the Respondents first assert they will likely succeed on the merits because HIPAA and the Constitution forbid the Respondents from allowing patient advocates unfettered

⁴ Nken v. Holder, 556 U.S. 418, 426 (2009); W. Va. R. Civ. P. 62(i); W. Va. R. App. P. 28(a).

access to patient records, and no rule states otherwise.

The Court disagrees. The Respondents are not required by HIPAA to restrict patient advocates' access to patients, patient units, or patient records for reasons more thoroughly described in the August 18 Order and the August 27 Amended Order and briefly recounted as follows. First, W. Va. Code St. R. § 64-59-11.5.1.d states, "No written consent is necessary for ... advocates under contract with the department." Second, the patient advocates satisfy HIPAA's preemption exception as the advocates are charged with monitoring and investigating patients' health at the Hospitals.⁶ Third, Legal Aid of West Virginia (LAWV) is a business associate of DHHR.7 Fourth. allowing patient advocates to have unfettered access to patient records is the "minimum necessary" to satisfy the advocates' purpose of monitoring and investigating patients at the Hospitals.8 Fifth, the Court has ordered the Respondents to allow patient

⁵ It is axiomatic that patient advocates be allowed to access patient records considering the provision in W. Va. Code St. R. § 64-59-20.2 that allows a patient advocate to file a grievance on behalf of a patient even if the patient has not alleged abuse or a violation of a right. Without access to patient records, patient advocates are divested of the resources necessary to help vulnerable patients who may not be able to help themselves.

⁶ See 45 C.F.R. § 160.203(c).

⁷ See 45 C.F.R. § 164.502(e)(1).

⁸ See 45 C.F.R. § 164.502(b)(1).

advocates to have unfettered access to patient records. Sixth, LAWV is a "health oversight agency" under HIPAA. Seventh, disclosing patient records to the patient advocates furthers the Respondents' health care operations. Eighth, the Respondents' actions exceed and violate HIPAA by requiring patient advocates to provide reasons for wanting to review patient records, by requiring advocates to obtain written authorizations for each day the advocate seeks to review a patient record, and by requiring patient advocates to obtain a signature of a health care surrogate and/or medical power of attorney on each authorization. Each day the advocates on each authorization.

- 11. With regard to the second factor, the Respondents assert that they will suffer irreparable injury absent a stay because this Court's *Order* interferes with their constitutional powers to manage the Hospitals and violates the rights of the patients.
- 12. The Court disagrees. First, the Respondents identify no constitutional provision that will be violated by complying with the Court's *Order*. Second, Title 64 of the West Virginia Code of State Rules establishes and authorizes patient advocates' monitoring of the Hospitals and investigation of patient grievances to ensure that the Respondents are not

⁹ See 45 C.F.R. §§ 164.502(b)(2), 512(a).

¹⁰ See 45 C.F.R. §§ 164.501, 512(d)(1).

¹¹ See 45 C.F.R. §§ 164.501, 506(c)(1).

¹² See 45 C.F.R. § 164.508(c).

violating patients' rights, which the advocates have done since 1990.¹³

- 13. With regard to the third factor, the Respondents assert that the patients will not be injured if a stay is granted because "[e]xpanding access . . . could lead to irreparable privacy violations, would supersede the best judgment of the Department, and may give rise to liability for the Department."
- 14. The Court disagrees. The Respondents have identified no instances of liability caused by the patient advocates; the Respondents have identified no harm suffered by the patients at the hands of the patient advocates. However, the patients have identified harm caused by the instant controversy. Evidence adduced at the August 1, 2014, hearing showed that the Respondents, by revoking patient advocates' access to patients and their records, have haltered patients' ability to have their complaints and grievances timely and effectively investigated or resolved. Consequently, an entire unit of patients at one of the Hospitals has filed a grievance to redress the Respondents' revocation of patient advocate access.¹⁴
- 15. With regard to the fourth factor, the Respondents assert "public interest supports ensuring that DHHR/BHHF, as the democratically-accountable

¹³ See W. Va. Code St. R. § 64-59-20.1; W. Va. Code § 27-5-9.

¹⁴ Sharoon Reed Test., Hr'g Tr. 166-167, Aug. 1, 2014 ("Their concern [is] that we can't immediately access their records; therefore, we can't give them immediate help.").

officials charged with administrative [sic] the state hospitals, in fact runs these hospitals in the way DHHR/BHHF deems best."

- 16. The Court disagrees. The Court and the West Virginia Legislature have identified the public's need for patient advocates to monitor and investigate the Hospitals and its patients to ensure the patients are receiving quality care.
- 17. Having considered the requisite elements, the Court finds and concludes that the Respondents have not satisfied the elements necessary for the issuance of a stay.
- 18. The Respondents also move the Court to declare its August 18 *Order* to be a final judgment, asserting, "This Court has already resolved all merits issues of liability, has ordered remedial action, has reduced its order to writing, and has ordered the immediate implementation. This Court has also made clear that it does not intend to revisit any prior orders on this subject."
- 19. The Court disagrees. The *Order* entered in 1990 was final and not appealed. In June 2014, the Respondents took action to violate the 1990 *Order*, which resulted in the Petitioners filing a *Motion for Emergency Relief* and which resulted in this Court entering its August 18 *Order* and its August 27 *Amended Order*, both of which reinforce its 1990 *Order*. The Respondents cannot now render the 1990 *Order* appealable by violating it. As such, the Court denies the Respondents' request to declare the August

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18 Order and subsequent August 27 Order a final judgment.

DECISION

Accordingly, the Court does hereby **ORDER** that the Respondents' request for a stay be **DENIED**. The Court does hereby **DECLARE** that this Court's *Order* and *Amended Order* entered on August 18 and 27, 2014, respectively, are **NOT FINAL**. The Clerk is **DIRECTED** to send a certified copy and fax forthwith a copy of this *Order Denying Motion for Stay* to the counsel of record and the Office of the Court Monitor.

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ENTERED this 27 day of August 2014.

/s/ Louis H. Bloom

Louis H. Bloom, Judge

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E. H., et al.,

Petitioners,

CIVIL ACTION NO. MISC.-81-585

v.

KHAN MATIN, et al.,

Respondents.

ORDER

This day came the Court Monitor and submitted to the Court his recommendations arising out of the investigation into the Facility Patient Advocate System. These recommendations were made on January 25, 1990, and there has been no objection by any of the parties.

Thereupon, the Court finding that the external, advocate system should be implemented to fulfill the requirements of the Plan, it is hereby ORDERED that on or before May 1, 1990, the Division of Health shall contract with an entity outside State government for the provision of advocacy in the four State facilities: Colin Anderson Center, Greenbrier Center, Huntington State Hospital, and Weston State Hospital at the current level of five full time equivalent, to begin on or before said date.

ENTER this 20th day of February, 1990.

/s/ A. Andrew MacQueen
JUDGE

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,

Petitioners,

CIVIL ACTION NO. 81-MISC-585

v.

MATIN, et al.,

Respondents.

ORDER

(Filed Aug. 18, 2014)

On August 1, 2014, the parties appeared for an evidentiary hearing on Petitioner's *Motion for Emergency Relief* relating to Respondents' revocation of patient advocate access to patient records, patients, and staff. At the hearing, Respondents' Commissioner of the Bureau for Behavioral Health and Health Facilities, Respondents' Privacy Officer, and a Behavioral Health Advocate stationed in William R. Sharpe Hospital testified, and various exhibits were introduced. Based on the record and the legal memoranda filed herein, the Court finds as follows.

FINDINGS OF FACT

Background on Patient Advocates

- 1. On February 20, 1990, the Court ordered the Respondents to "contract with an entity . . . for the provision of advocacy in the four state facilities."
- 2. Respondents are further required, by *Agreed Order* in the instant suit, to comply fully with Title 64 of the Code of State Rules, and to establish periodic review for this purpose.²
- 3. Since 1990, pursuant to legislative rule and said *Orders* entered in 1990 and 2009, Respondents have contracted with Legal Aid of West Virginia (LAWV) to provide advocacy services, to assist with and investigate individual grievances, conduct abuse and neglect investigations, educate staff and patients about patient civil rights, and monitor and ensure overall compliance with patient civil rights at William R. Sharpe Hospital and Mildred M. Bateman Hospital (collectively, the Hospitals).³

¹ Order, E.H. v. Matin, 81-MISC-585 (Feb. 20, 1990).

 $^{^2}$ Agreed Order \P 10(d), E.H. v. Matin, 81-MISC-585 (July 2, 2009).

³ See Hr'g Tr. 79:24-80:3, 134:14-17, 158:8-20, 172:16-20, Aug. 1, 2014; Pet'r's Ex. 2, Grant Agreement & Ex. A attached thereto; Report to the Court and the Parties, E.H. v. Matin, 81-MISC-585 (May 1, 2011) (noting that Respondent contracts with LAWV to provide advocacy services); W. Va. Code St. R. §§ 64-59-20.1, 64-59-20.2.16.b.

- 4. Respondents' contract with LAWV sets forth that LAWV is a "business associate" under HIPAA.⁴
- 5. Prior to late June 2014, Respondents provided the patient advocates with full access to computerized patient records, the patient wards, and other areas of the Hospitals.⁵ Access to patient records allowed the advocates to fulfill their responsibilities to investigate grievances and resolve complaints without revealing the nature of such to Respondents, to timely investigate abuse and neglect allegations, and to review overall compliance with patient rights, such as monitoring the Respondents' use of seclusion and chemical or physical restraints.⁶
- 6. Pursuant to their role and to protect patient rights, patient advocates are trained annually on the Federal Health Insurance Portability and Accountability Act (HIPAA) and enter into confidentiality agreements with Respondents. In this regard, the advocates receive the same training as Hospital staff. In addition, further responsibilities relating to patient confidentiality are set forth in the business associate addendum to the contract between Respondents and LAWV for advocacy services.

⁴ Pet'r Ex. 2 & Ex. L attached thereto.

⁵ Hr'g Tr. 102:15-103:7, Aug. 1, 2014.

⁶ See, e.g., Hr'g Tr. 176:1-16.

⁷ Hr'g Tr. 166:4-7, 123:1-2, 166:8-12, Aug. 1, 2014.

⁸ Hr'g Tr. 166:16-18.

⁹ Pet'r Ex. 2 & Ex. L attached thereto.

7. HIPAA was passed in 1996 and amended in 2002. Respondents, and their various Privacy Officers, did not determine in 1996 or 2002, or at any point until June 2014, that the provision of access to patients and patient records to the patient advocates violated HIPAA.¹⁰

Denial of Timely Access

- 8. In late June 2014, Respondents revoked the ability of the advocates to immediately access to [sic] patient records.¹¹
- 9. Days after revoking access, Respondents set forth new requirements with which the advocates must comply in order to access patient records and information. Respondents now require that the advocates obtain signed releases from each patient, the patient's guardian, and a person with medical power of attorney for that patient. Advocates are only advised of the identity of a guardian or health care surrogate after they receive a signed release from the

¹⁰ The Hospitals each have a Privacy Officer. The Hospital Privacy Officers report to the Privacy Officer for the Bureau for Behavioral Health and Health Facilities, who, in turn, reports to the Privacy Officer located in the Office of General Counsel for the Department of Health and Human Resources (DHHR). DHHR's Privacy Officer reports to the State Privacy Office, which is located in the Healthcare Authority. Hr'g Tr. 111:2-9, 113:6-9, 113:13-22, Aug. 1, 2014.

¹¹ Hr'g Tr. 93:20-22, 159:13-14, 168:8-10, Aug. 1, 2014.

¹² Hr'g Tr. 161:14-15.

patient; Respondents require that the advocates obtain the signature of the guardian and/or surrogate regardless of whether the individual has been declared incompetent. The signed release must disclose the precise reason for the record review, and the release must be tied to a specific grievance. Respondents further require that the release set forth exactly what documents the advocate is requesting. In addition, Respondents require that the end-date for any release must be the date on which the release is submitted. As a result, if the patient files another grievance the following day, a new release must be obtained as well as another signature from the guardian or surrogate, which may be time intensive.

10. As of June 2014, Respondents began denying advocates access to patient records to review the Hospitals for systemic violations of patient rights. For instance, advocates can no longer view records to ensure that Respondents are not systematically medicating patients to respond to agitation as the result of overcrowding or understaffing at the facilities. These facts were central evidence in this case in 2009.

¹³ Hr'g Tr. 162:15-22.

¹⁴ Hr'g Tr. 105:8-11, 130:24-131:1, 164:21-24.

¹⁵ Hr'g Tr. 168:2-7.

¹⁶ Hr'g Tr. 170:18-171:4.

¹⁷ Hr'g Tr. 142:5-14.

¹⁸ See, e.g., Order Regarding Case Management Services 5 ¶ 14, E.H. v. Matin, 81-MISC-585 (Aug. 7, 2009) (citing record (Continued on following page)

- 11. In addition, Respondents no longer permit Hospital staff to talk to the advocates without signed releases specific to each conversation or interaction.¹⁹
- 12. Respondents further will not permit the advocates to speak with patients without first obtaining a signed release from the patient regarding the specific grievance.²⁰ Advocates are also no longer advised of when patients enter or are discharged from the Hospitals.²¹
- 13. During the week of July 28, 2014, Respondents revoked the patient advocates' keys that provided them with access [sic] visit patient wards and to move about the Hospitals freely.²² Patient advocates may now only enter the units escorted by an employee of Respondents.²³ Pursuant to Respondents' direction, the patient advocates are no longer permitted to walk around the units, converse with patients, or sit in the common areas at times that they choose.²⁴ Patient advocates now are only permitted to

for finding that overcrowding was resulting in violations of patient rights).

¹⁹ Hr'g Tr. 161:15-17.

²⁰ Hr'g Tr. 161:17-19.

²¹ Hr'g Tr. 164:16-18.

²² Hr'g Tr. 84:20-85:10, 119:10-14, 159:14-18, 168:11-13.

²³ Hr'g Tr. 86:12-15, 159:14-18.

²⁴ Hr'g Tr. 88:12-16.

talk or meet with patients if the patient specifically requests a meeting with an advocate.²⁵

- 14. Pursuant to the recent change, patient advocates are no longer advised of the staffing plans. As a result, the advocates are unaware of which staff are present at any given time or in any given unit of the Hospitals, which hinders the advocates' ability to investigate grievances and resolve informal concerns raised by patients.²⁶
- 15. These changes in procedure occurred at the direction of Respondents' Privacy Officer.²⁷ Prior to revoking access to patients and their records, the Privacy Officer was not aware of the advocates' roles within the Hospitals as authorized by law and Court orders.²⁸
- 16. Respondents have not consulted with the Federal Office of Civil Rights to determine whether a HIPAA violation has occurred, nor has it notified the federal government or patients and their families of the purported breach of confidentiality.²⁹
- 17. Respondents have not revoked access to records and patients for other contracted agencies

²⁵ Hr'g Tr. 94:16-24.

²⁶ Hr'g Tr. 164:13-15.

²⁷ Hr'g Tr. 114-116.

 $^{^{28}}$ Hr'g Tr. 117:7-10, 132:14-20, 132:21-133:2, 135:6-136:4, 144:15-22, 145:16-24, 171:17-24.

²⁹ Hr'g Tr. 89:6-12, 1553:7-17 [sic], 154:20-21.

located within the Hospitals, such as liaisons with the comprehensive behavioral health care agencies.³⁰

Impact on Advocacy Services & Patient Care

- 18. Because patients have limitations that make it difficult to read or contact advocates independently and because the advocates cannot freely speak with patients and freely enter the units, patients are inhibited from lodging appropriate grievances.³¹
- 19. The Respondents [sic] recent practice of requiring advocates to be escorted by employees unduly hinders the advocates from having confidential conversations with patients and gaining and maintaining patient trust.³²
- 20. By eliminating access to patient records, patient units, and patients, Respondents have eliminated the advocates' ability to investigate the Hospitals' compliance with patient rights, *e.g.*, to monitor the use of seclusion and chemical or physical restraints.³³
- 21. The requirement that advocates must set forth the purpose of a record request on the authorization violates confidentiality because it requires that

³⁰ Hr'g Tr. 97-101.

³¹ Hr'g Tr. 160:7-22, 163:9-164:12.

³² Hr'g Tr. 159:21-160:1.

³³ See, e.g., Hr'g Tr. 176:1-16.

the advocate disclose to Respondents the nature of the allegation and investigation.³⁴ In addition, it is very difficult for patient advocates to identify the specific records that are necessary to conduct an investigation because records are entered inconsistently by Respondents' staff.³⁵

- 22. Respondents' requirement that the advocates obtain written authorization signed by a health-care surrogate, guardian, and/or durable power of attorney severely hinders patient advocates' ability to conduct abuse and neglect investigations within the time period outlined by law.³⁶ Abuse and neglect allegations are further not being properly or timely reported to the advocates because staff no longer cooperate or speak with advocates.³⁷
- 23. The timely resolution of other grievances is similarly impacted.³⁸
- 24. Without access to records and with the time limits and other limitations placed on the authorizations, advocates can no longer investigate whether a patient is being provided appropriate, quality care.³⁹

³⁴ Hr'g Tr. 165:1-5.

³⁵ Hr'g Tr. 168:2-7.

³⁶ Hr'g Tr. 162:1-6.

³⁷ Hr'g Tr. 162:9-12, 169:1-10.

³⁸ Hr'g Tr. 162:5-6.

³⁹ Hr'g Tr. 171:8-16.

25. Patients at the Hospitals have submitted grievances setting forth their concerns that the new procedure has undermined the advocacy services provided at the Hospitals, including the advocates' ability to resolve grievances timely.⁴⁰ One such grievance was signed by all of the patients on a unit.⁴¹

DISCUSSION & CONCLUSIONS OF LAW

- 26. The West Virginia Legislature has determined that "there shall be persons designated as client (or patient or resident) advocates who are independent of the facility management in every behavioral health facility."
- 27. Pursuant to W. Va. Code St. R. § 64-59-11.5.1.d, the advocates are required to:

assist clients in registering and filing grievances, acknowledge grievances, conduct investigations of grievances, notify the administrator of results of grievance investigations, assure that abuse/neglect grievances have been reported to Adult Protective Services, educate staff regarding client rights and maintain accurate documentation of all grievances and investigations.⁴³

⁴⁰ Hr'g Tr. 167:2-13 & Pet'r's Ex. 3.

⁴¹ *Id*.

⁴² W. Va. Code St. R. § 64-59-20.1.

⁴³ W Va. Code St. R. § 64-59-20.2.16.b.

28. To enable the advocates to fulfill their responsibilities, Legislative Rule further sets forth:

Records shall only be disclosed: ... To providers of health, social, welfare services involved in caring for or rehabilitating the client. The information shall be kept confidential and used solely for the benefit of the client. No written consent is necessary for employees of the department, comprehensive behavioral health centers serving the client, or advocates under contract with the department.⁴⁴

- 29. Respondents are required, by order in the instant suit, to "contract with an entity . . . for the provision of advocacy in the four state facilities."
- 30. Respondents are further required, by *Agreed Order* in the instant suit, to comply fully with Title 64 of the Code of State Rules and to establish periodic review for this purpose.⁴⁶
- 31. Finally, Respondents are required pursuant to this suit to advocate for patients on systemic issues and to ensure system-wide compliance with patient rights.⁴⁷

⁴⁴ W. Va. Code St. R. § 64-59-11.5.1.d (emphasis added).

⁴⁵ Order, E.H. v. Matin, 81-MISC-585 (Feb. 20, 1990).

 $^{^{46}}$ See, e.g., Agreed Order \P 10(d), E.H. v. Matin, 81-MISC-585 (July 2, 2009).

⁴⁷ <u>See, e.g.,</u> A Report of Legal Aid Advocacy at William R. Sharpe Hospital & Formal Recommendations of the Court (Continued on following page)

32. Respondents assert that they may not release information to advocates without specific written and signed authorization pursuant to HIPAA. However, Respondents must disclose this information to LAWV advocates to enable them to fulfill their function. As set forth below, this disclosure is expressly authorized under several provisions of HIPAA.

Whether HIPAA's Preemption Provision Provides an Exception for the Advocates

33. Under 45 C.F.R. § 160.203, any state law contrary to HIPAA is preempted. However, certain exceptions apply. The following exception is particularly pertinent to the instant matter:

This general [preemption] rule applies, except if one or more of the following conditions is met: . . . (c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury . . . or for the conduct of public health surveillance, investigation, or intervention. 48

Monitor, E.H. v. Matin, 81-MISC-585 (Mar. 1, 2011). Respondents agreed to the Formal Recommendations, which set forth that systemic advocacy will be pursued by LAWV, without objection, thereby allowing them to take on the force of *Court Order. See, e.g., Order Appointing Court Monitor, E.H. v. Matin*, 81-MISC-585 (July 30, 2009).

⁴⁸ 45 C.F.R. § 160.203(c).

- 34. Elsewhere in the Code of Federal Regulations, "public health authority" is defined as being "authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury . . . and the conduct of public health surveillance, public health investigations, and public health surveillance."
- 35. Here, the advocates are created and organized by federal and state law and authorized by Court order to monitor and investigate the Hospitals in order to ensure quality care and prevent injury to the patients. The advocates therefore satisfy the above exception to HIPAA's preemption provision. Thus, this Court is of the opinion that the advocates are entitled to access the Hospitals, patients, and patient records whether or not the laws of this State contradict HIPAA. Notwithstanding the preemption exception, the Court finds that the advocates are entitled to access patient records, patients, and the Hospitals for the following reasons.

Whether Respondents May Disclose Protected Health Information (PHI) to LAWV Because LAWV Is a Business Associate

36. HIPAA regulates the disclosure of PHI by "a covered entity or business associate."

⁴⁹ 45 C.F.R. § 164.502(a).

- 37. The Hospitals are "covered entities." 50
- 38. LAWV is a "business associate" as set forth in its contract with Respondents and as defined by HIPAA because it "creates, receives, maintains, or transmits protected health information for a function or activity regulated by [HIPAA]," namely for quality assurance, patient safety, and other health care operations as defined.⁵¹
- 39. Respondents' Hospitals are permitted to disclose PHI to business associates, including LAWV, when appropriate safeguards are present, as they are in the instant matter.⁵²
- 40. Disclosures of PHI must be limited "to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request." However, the "minimum necessary" requirement does not apply to "uses or disclosures that are required by law, as described by [45 C.F.R. § 164.512(a)]," which states in pertinent part: "A covered entity may disclose protected health information in the course of any judicial or administrative proceeding. . . . In response to an order of a court or administrative tribunal, provided

⁵⁰ 45 C.F.R. § 160.103. Respondents are a "hybrid entity" because it engages in both covered and non-covered functions. 45 C.F.R. § 164.103. The requirements of HIPAA apply solely to the covered functions (i.e., the functions of the Hospitals).

⁵¹ 45 C.F.R. §§ 160.103, 164.501.

⁵² 45 C.F.R. § 164.502(e)(1).

⁵³ 45 C.F.R. § 164.502(b)(1); see also 45 C.F.R. § 164.514(d).

that the covered entity discloses only the protected information expressly authorized by such order."

- 41. The patient advocates' role includes completing timely investigates [sic] of grievances, quickly investigating abuse and neglect allegations, and ensuring overall compliance of the Hospitals with state law protecting patients' rights. In order to fulfill this role, advocates must have access to all patient treatment and clinical records, which is the minimum disclosure necessary for this purpose.
- 42. Patient confidentiality is protected by the advocates' obligation to comply with HIPAA and state law requiring that they keep PHI confidential, including the requirements set forth in 45 C.F.R. § 164.504(e)(1) & (2).
- 43. Further, Respondents may disclose PHI without setting forth specifications in the contract with LAWV because LAWV's activities are "required by law" and, further, are specifically described in the definition of "business associate."⁵⁴
- 44. Thus, disclosure is appropriate because LAWV is a business associate.

⁵⁴ 45 C.F.R. §§ 164.103, 164.504(e)(3)(ii).

<u>Whether Respondents May Disclose</u> <u>PHI to LAWV Because the Disclosure</u> is for Health Oversight Activities

45. In addition, HIPAA permits disclosure of PHI without authorization

to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; . . . civil, administrative, or criminal proceedings or actions; or other activities necessary for oversight of (i) [t]he health care system; . . . or (iv) entities subject to civil rights laws for which health information is necessary for determining compliance. ⁵⁵

- 46. LAWV is a "health oversight agency" because it is "acting under a grant of authority from or contract with such public agency" and "is authorized by law to oversee the health care system . . . 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."⁵⁶
- 47. Namely, LAWV is acting under contract and grant of authority from Respondents and is authorized by Title 64 to investigate and ensure compliance

⁵⁵ 45 C.F.R. § 164.512(d)(1).

 $^{^{56}}$ 45 C.F.R. \S 164.501; see 42 U.S.C. \S 10841 (setting forth the rights of mental health patients).

with the patient civil rights established by West Virginia Code and Title 64 of the Code of State Rules.

48. Further, this Court is of the opinion that the advocates, formally titled West Virginia Advocates, is a health oversight authority created and organized by federal and state law whose mission is to enforce civil rights for which access to health information is necessary. The advocates have the authority to investigate incidents of abuse and neglect of patients at the Hospitals and pursue legal and administrative remedies to ensure the protection of the patients. As a result, Respondents are authorized under HIPAA to disclose PHI without authorization to LAWV in furtherance of its oversight role, which includes the investigation of individual grievances and the review of the Hospitals' overall compliance with Title 64.

Whether Respondents May Disclose PHI to LAWV Because the Disclosure Is in Furtherance of Health Care Operations

49. In addition, Respondents' Hospitals may disclose PHI (with the exception of psychotherapy notes)⁵⁸ without written authorization when the disclosure is

 $^{^{57}}$ See 42 U.S.C. §§ 10801-10807 (1991) (establishing the authority under which West Virginia Advocates operates); W. Va. Code St. R. § 64-59-20.1; see also 42 C.F.R. § 51.42 (allowing West Virginia Advocates' access to facilities and residents).

 $^{^{58}}$ Other exceptions exist but are not relevant here. Psychotherapy notes may be released with written authorization. See 45 C.F.R. \S 164.506.

for the Hospitals' "own treatment, payment, or health care operations." ⁵⁹

- 50. "Health care operations" include "conducting quality assessment and improvement activities . . . ; patient safety activities . . . ; and related functions that do not include treatment." "Health care operations" also include "[c]onducting or arranging for . . . legal services, auditing functions, including . . . abuse detection and compliance programs," and "[r]esolution of internal grievances."
- 51. The advocacy and auditing services provided in accordance with legislative rule and the law of this case are part of the covered health care operations of Respondents. Although these activities are contracted out to LAWV, rather than conducted by Respondents' employees, they are in furtherance of the Hospitals' health care operations. As a result, disclosure of PHI without written authorization, excluding psychotherapy notes, to LAWV is appropriate for the advocacy and auditing services provided by LAWV.

⁵⁹ 45 C.F.R. § 164.506(c)(1).

^{60 45} C.F.R. § 164.501.

 $^{^{61}}$ Id.

Whether Respondents May Disclose PHI to LAWV Because the Disclosure Is Required to Investigate by Law, Court Order, and to Investigate Abuse and Neglect Allegations

- 52. Under HIPAA, PHI may be disclosed without authorization "to the extent that such use or disclosure is required by law."
- 53. In addition, PHI may be disclosed for an abuse and neglect investigation if the individual is unable to agree because of incapacity and waiting for authorization would materially and adversely impact the investigation. This provision applies to the abuse and neglect investigations undertaken by LAWV when a patient has been declared legally incompetent and the signature of a legal guardian would otherwise be required.
- 54. Further, the disclosure may be made in response to an express authorization by court order.⁶⁴
- 55. The disclosures specified herein are required by West Virginia law and by the law of this case to enable the advocates to assist Respondents in ensuring that patients' rights are not being violated. 65

^{62 45} C.F.R. § 164.512(a).

⁶³ 45 C.F.R. § 164.512(c).

⁶⁴ 45 C.F.R. § 164.512(e)(1)(i).

 $^{^{65}}$ See, e.g., W. Va. Code St. R. \S 64-59-20; W. Va. Code St. R. \S 64-59-11.5.1.d.

Whether the Requirements Set forth by Respondents Violate the Law

- 56. As set forth above, Respondents may provide the patient advocates with access to patients, staff, and patient records without violating HIPAA.
- 57. Respondents' revocation of said access seriously and fundamentally undermines the ability of the advocates to fulfill their legal and contractual responsibilities.
- 58. In order to fulfill their role, the advocates must be able to access patient records, patients, and staff. This access is the minimum necessary to enable the advocates to fulfill their responsibilities.
- 59. Patients' rights are protected by their right to request privacy protection under certain circumstances, pursuant to 45 C.F.R. § 164.522, as well as by the other protections set forth above.
- 60. Notably, even if signed authorizations were required—which they are not—the requirements set forth by Respondents are unduly restrictive and violate the law. Specifically, requiring the advocates to provide a purpose for access to records rather than providing access "at the request of the individual" is not required by HIPAA; in contrast, Respondents require LAWV to divulge the purpose of the request. 66 HIPAA similarly does not require that the end-date

⁶⁶ See 45 C.F.R. § 164.508(c)(iv).

for an authorization be the date the authorization is provided; in contrast, Respondents require LAWV to end an authorization on the date it is submitted.⁶⁷ Further, only in very limited circumstances must an authorization be signed by a medical surrogate or medical power of attorney representative; in contrast, Respondents require the signature of the health care surrogate and medical power of attorney on each authorization.⁶⁸

61. Respondents' misapplication of the law violates patient confidentiality necessary for an appropriate and meaningful investigation to be conducted. It further creates an undue burden on the legally required activities of the advocates, making it unduly difficult for them to fulfill their function of protecting patient rights within the Hospitals.

DECISION

Accordingly, the Court hereby finds and concludes that Respondents' revocation of the patient advocates' access to patients, staff, and patient records violates West Virginia law and is not required by HIPAA. Accordingly, the Court hereby **ORDERS** as follows:

⁶⁷ See 45 C.F.R. § 164.508(c).

 $^{^{68}}$ See W. Va. Code §§ 16-30-3, 6-7; State ex rel. AMFM, LLC v. King, 740 S.E.2d 66 (W. Va. 2013).

- 1. Respondents shall restore the patient advocates' access to patients and patient units immediately and without limitation;
- 2. Respondents shall restore access to patient records immediately and without limitation except when patients request limitations on the disclosure of their individual, identifiable health information. Access shall include all medical records of all patients committed to the Hospitals.
- 3. Respondents shall not limit patient advocate conversations or discussions with Respondents' staff.

The Clerk is **DIRECTED** to send a certified copy of this *Order* to all counsel of record and the Court Monitor.

ENTERED this <u>18</u> day of August, 2014.

/s/ Louis H. Bloom
Louis H. Bloom, Judge

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E. H., et al,

Petitioners,

vs.

CASE NO. 81-MISC-585

K. M., et al.,

(Evidentiary Hearing)

Respondents.

BEFORE: The Honorable Louis H. Bloom, Judge, in the Kanawha County Judicial Annex, beginning on August 1, 2014.

APPEARANCES:

For the Petitioners: MS. JENNIFER S. WAGNER and MS. LYDIA MILNES; Mountain State Justice; Charleston, West Virginia.

MS. REGENIA L. MAYNE; Charleston, West Virginia.

MS. TERESA BROWN; Hurricane, West Virginia.

For the Respondents: MR. DANIEL W. GREEAR and MR. JAMES W. WEGMAN, Assistant Attorneys General.

DWAYNE PRICE OFFICIAL REPORTER

* * *

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[179:10-24] THE COURT: All right.

I want to do two things. First of all, I want to order from the bench that the patients -- the patient advocates have access to the patients; that they be permitted to meet, discuss and talk with the patients unsupervised; that they be permitted to wander the hall, sit in the group areas where they watch television -- I don't know what they call those rooms -- but as you said, at least for the limited purpose of this, the access that would beget any employee not medically inclined they would have at the -- with the patients.

So, in other words, they're to be admitted to the hall promptly upon their presentation and have access to the hall for as long as they want.

The other issues, we're going to look at the law, [180:1-3] we're going to look at the agreements, we're going to look at the memoranda you guys are going to submit to me--or proposed orders, actually.

* * *

Flaherty Sensabaugh Bonasso PLLC ATTORNEYS AT LAW

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2013 West Virginia Health Care Privacy Laws and HIPAA Preemption Analysis

This chart provides an overview of the West Virginia health care privacy related laws and an analysis of the preemption issues arising under the Privacy, Security, and Enforcement Rules (45 C.F.R. Parts 160, 162, and 164) of the Health Insurance Portability and Accountability Act of 1996, as amended by and including the regulations issued by the Department of Health and Human Services by the Health Information Technology for Economic and Clinical Health Act, Subtitle D- Privacy (§§ 13400 – 13424) (HIPAA). To assist healthcare providers and other entities in the complicated task of determining whether West Virginia state statutes have been preempted by HIPAA, this legal advisory chart provides an analysis of those state law provisions which appear to implicate HIPAA. In addition, the chart is a general reference guide to many of the health care related laws in West Virginia.

This survey is in matrix consisting of seven columns. The first column is a general reference to the subject matter of the state law. The second column is the specific West Virginia Code citation or citations, which include embedded links to the complete statutory language from the West Virginia Code located on the West Virginia Legislature's website. The third column discusses the impact of each state law upon the privacy or security of protected health information as defined in HIPAA. In the fourth column is the corresponding HIPAA citation. The fifth column states whether HIPAA has preempted this state law. If the answer is yes, the extent to which state law is preempted is sometimes described in the "Comments" column, along with other general comments regarding the law. The sixth column indicates whether state law is more stringent or more detailed or whether HIPAA is more stringent.

Covered entities, as defined under HIPAA, should generally follow the law that is more stringent, but may have to comply with both laws in some cases. Where the remark is "Both" in the sixth column, the comments describe which part of the state law is more stringent or HIPAA is more stringent. Finally, the last column provides any commentary relevant to this analysis of the state law. However, the assessment of whether a state law is preempted or not is only a guide and any final determination on whether such state law is preempted would have to be the result of court action or decision. The new West Virginia Code sections added or revised to the 2013 update are highlighted in "blue."

This preemption analysis chart is a working document that is subject to review and revision. All individuals and entities that review this document are encouraged to provide feedback to Sallie H. Milam, Chief Privacy Officer for the West Virginia Executive Branch, West Virginia Health Care Authority at: SMilam@hcawv.org.

In addition to the preemption chart below, other useful information and links related to HIPAA and health care privacy and security can be found at the following:

- 1. West Virginia State Privacy Office: http://www.privacy.wv.gov
- 2. U.S. Department of Health and Human Services (HHS), Office for Civil Rights, Health Information Privacy: http://www.hhs.gov/ocr/privacy/index.html
- 3. The Office of the National Coordinator for Health Information Technology: http://www.healthit.gov/providers-professionals/ehr-privacy-security

Last Updated by Flaherty Sensabaugh Bonasso PLLC: July 15, 2013.

* * *

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
Mental Health Hospitals – Inspections	§ 27-1A-6	Authorizes the Bureau of Health to inspect, license, and supervise any hospital, center, or institution which provides in-patient care and treatment to the mentally ill, intellectually disabled, or both; also authorizes the Bureau to develop programs for the care, treatment, and rehabilitation of alcoholics and drug abusers.	164.512(d)	No	State law	
Operation of State Hospitals for Mentally Ill/ Mentally Retarded	§ 27-2-1; § 27-2-5	Authorizes the establishment of State hospitals for the care and treatment of the mentally ill and mentally retarded; requires the superintendent of each such State hospital to furnish information concerning admissions, discharges, deaths, and other matters to the Department of Health to enable the Department to have current information concerning the extent of mental illness in the State; prohibits the names of patients from being accessible to anyone except by permission of the Department of Health or by court order.	160.203(c) 164.512(a), (b)	No	State law	
Operation of Comprehensive Community Health/ Intellectual	§ 27-2A-1	Authorizes the Department of Health and Human Resources to establish and operate comprehensive community mental health/intellectual disability	164.506	No	HIPAA	

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
Disability		centers throughout the State; requires such centers to maintain accurate medical and other records for all patients receiving services.				
Mental Health Records – Uses and Disclosures	§ 27-3-1; § 27-3-2	Provides for confidentiality of all communications and information obtained in treatment of mental health patient, including the fact that a person has received such treatment; confidentiality restriction does not apply to information which does not identify the patient; exception for involuntary commitment proceedings; exception for disclosure pursuant to a court order which finds the interests in disclosure outweigh the importance of maintaining confidentiality; exception for disclosures to comply with Brady Handgun Violence Prevention Act; exception to protect against clear and substantial danger of imminent injury to patient or another; exception for treatment or internal review purposes; exception for uses and disclosures to carry out treatment, payment, or health care operations without consent for a period of 30 days after admission to a mental health facility if certain other	164.506 164.508 164.512(a), (e), (j), (k) 160.203(b)	No	Both	HIPAA more stringent for authorizations and deidentification State more stringent for release of mental health records (as defined under State law) under 164.512 "Uses and disclosures for which an authorization or opportunity to agree or object is not required" (including, required by law; public health activities; victims of abuse, neglect or domestic violence; health oversight activities; judicial and

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SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	STATE MORE	COMMENTS
		conditions are satisfied; all other disclosures must be pursuant to a signed authorization; a health care provider may not condition mental health treatment upon receipt of such authorization.			STRINGENT	administrative proceedings; law enforcement; and decedents) State more stringent for release of mental health records for treatment, payment and health care operations. Note: The definition of "mental health record" under State law is broader than the definition of "psychotherapy notes" under HIPAA.
Involuntary Hospitalization	§ 27-5-2; § 27-5-3; § 27-5-4	Provides for involuntary hospitalization of individual who, because of mental illness or addiction, is likely to cause serious harm to himself or others; provides that application or related documents are not open to inspection unless authorized by the individual and provides for certain disclosures; authorizes court to	160.203(c) 164.512(a), (b), (e), (j)	No	State law	

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		order examinations of such individuals by physicians, psychologists, clinical social workers, or physician assistants, the results of which shall be provided to the court; provides that medical evidence obtained pursuant to such examinations are not privileged for purposes of any hearing involving involuntary hospitalization; provides for all proceedings to be held in chambers; provides for the reporting and recording of all proceedings involving involuntary hospitalization; authorizes a court to transmit evidence adduced at the hearing to a court in the county of the individual's residence; requires all admissions to mental health facilities to be reported to the Secretary of DHHR.				
Mental Health Patient Rights – Uses and Disclosure	§ 27-5-9	The general confidentiality requirements applicable to clinical records maintained by State facilities for treatment of mental illness, intellectual disability, or addiction were deleted from this statute as a result of amendments in 2007.		No		
Alternative Procedures for	§ 27-5-11	Generally provides for alternative procedures that may be	160.203(c) 164.512(a),	No	State law	

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
Involuntary Hospitalization – Uses and Disclosures		implemented for use of a treatment compliance order in lieu of involuntary hospitalization for an individual who has been involuntarily committed at least twice in the last 24 months for mental illness, addiction or both, or has been convicted of violent crimes during that time period; authorizes courts to order examinations of such individuals by physicians or psychologists, the results of which shall be provided to the court; authorizes the court to convert the proceeding into an involuntary commitment proceeding, where appropriate.	(b), (e), (j)			
Criminal Defendants – Criminal Responsibility Determinations	§ 27-6A-1 § 27-6A-4 § 27-6A-5 § 27-6A-11	In the context of proceedings to determine criminal responsibility for criminal defendants, authorizes court to order examination of defendant by a psychiatrist and/or psychologist; authorizes release of report of such examination to be made available to the court, prosecuting attorney, and counsel for defendant; authorizes commitment to mental health facility for up to 15 days for observation period; if defendant is determined not guilty by reason of mental illness, court shall maintain	160.203(c) 164.512(a), (b), (e), (f), (j), (k)	No	State law	

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		jurisdiction over defendant for the period of the maximum sentence he or she could have received; requires court to commit defendant/acquitee to mental health facility that is the least restrictive environment to manage defendant/acquitee and that will allow for protection of the public; requires notification of court and prosecuting attorney prior to proposed release or conditional release of defendant/acquitee from a mental health facility; requires all medical expenses incurred in such proceedings to be paid by the State.				
Criminal Defendants – Consent to Treatment by Criminal Defendants	§ 27-6A-10	States that criminal defendant with health care decision-making capacity may refuse medications or other medical management unless court-ordered, or unless a treating clinician determines that medication or other medical management is necessary in emergencies or to prevent danger to individual or others.	160.203(c) 164.512(a), (b), (j), (k)	No	State law	
Involuntary Hospitalization – Release and Discharge of Patients	§ 27-7-1 § 27-7-2 § 27-7-3 § 27-7-4	Requires the chief medical officer of a mental health facility to make a report to the circuit court or mental hygiene commissioner of the county in which involuntary hospitalization was ordered, and to	164.512(a),	No	State law	

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		the circuit court or mental hygiene commissioner of the county wherein the patient is a resident, in the following circumstances: (1) upon discharge of an involuntarily hospitalized patient; (2) upon release on convalescent status of an involuntarily hospitalized patient; (3) upon release as unimproved of an involuntarily hospitalized patient; and (4) when the readmission of a formerly involuntarily hospitalized patient is believed to be in the best interest of the patient.				
Mental Health Hospitals – Investigations, Inspections	§ 27-9-1	Authorizes the Secretary of DHHR to investigate and inspect any hospital, center, or institution licensed to provide inpatient or outpatient services to the mentally ill or intellectually disabled.	164.512(a) 164.512(d)	No	State law	
Interstate Compact on Mental Health	§ 27-14-1	Provides for the appointment of an administrator to act as a contact person with respect to issues involving the mentally ill who may require services in another state; requires compact administrator to notify another state when it is determined that a patient receiving mental health services in West Virginia would benefit from receiving such services in that	160.203(c) 164.506 164.512(a), (b)	No	State law	

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SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		other state; in making such contact, the compact administrator must act in the best interests of the patient and avoid jeopardizing the public safety; also requires any mental health institution to notify all appropriate authorities within and without West Virginia of the escape of a patient who is determined to be dangerous or potentially dangerous; such notice should be calculated to facilitate the speedy apprehension of the escaped patient.				
Interstate Compact on the Mentally Disordered Offender	§ 27-15-1	Establishes interstate compact dealing with individuals who have been adjudicated to be mentally ill, and who are under sentence for the commission of a crime; authorizes the state to enter into contracts with other states for the delivery and retaking of mentally disordered offenders for care, treatment, or rehabilitation of the offender; any such transfers are to be based upon a court hearing to determine the public interest, the condition of the offender, the prospects for more satisfactory care, treatment, or rehabilitation elsewhere, and other relevant factors; requires the receiving state	164.506 164.512(e), (k)	No	State law	

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		to provide regular reports to the sending state relative to such transferred offenders, including the psychiatric and behavioral record of his or her treatment in the receiving state.				
Sterilization of Incompetents	<u>§ 27-16-1</u>	Repealed July 8, 2013				
Group Residential Facilities for the Disabled – Investigations, Inspections	§ 27-17-3	Requires residential facilities for the developmentally or behaviorally disabled to obtain license from the Director of the Department of Health; authorizes the Director to investigate and inspect any such facilities to determine compliance with applicable laws.	164.512(d)	No	State law	
Treatment of Adult Offenders for Substance Abuse	\$ 62-15-7 \$ 62-15-8 \$ 62-15-10	Authorizes the creation of drug courts, under which adult offenders can be diverted into drug treatment programs; requires any person wishing to participate in such diversion be assessed and diagnosed, the results of which shall be reported to the drug court with treatment recommendations; requires treatment programs to timely report the drug offender's progress or lack of progress in treatment; requires the drug offender to submit to frequent and random drug testing to monitor abstinence; requires the drug court		No	State law	

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SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		to maintain privacy of all information regarding drug offender in accordance with federal and state confidentiality laws.				
Behavioral Health Patient Rights Rule	64 C.S.R. 59	Establishes the rights of clients of state-operated behavioral health facilities; also sets forth standards for the confidentiality of client records and the disclosure of client records in the following circumstances: 11.2.1(a) in a proceeding under W.Va. Code § 27-5-4 to disclose the results of an involuntary examination made pursuant to W.Va. Code § 27-5-2 or W.Va. Code § 27-5-3; (b) in a proceeding under W.Va. Code § 27-6A-1, et seq. to disclose the results of an involuntary examination made pursuant thereto; (c) pursuant to an order of any court; (d) to protect against a clear and substantial danger of imminent injury by a client. [sic]	164.512(a) 164.512(c)	No	State law	

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Last updated by Flaherty Sensabaugh Bonasso PLLC: July 15, 2013

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[Jackson Kelly PLLC]

2014 West Virginia Health Care Privacy Laws and HIPAA Preemption Analysis

This chart provides an overview of the West Virginia health care privacy related regulations and an analysis of the preemption issues arising under the Privacy, Security, Breach Notification, and Enforcement Rules (45 C.F.R. Parts 160, 162, and 164) of the Health Insurance Portability and Accountability Act of 1996, as amended by and including the regulations issued by the Department of Health and Human Services by the Health Information Technology for Economic and Clinical Health Act, Subtitle D- Privacy (§§ 13400 - 13424) (HIPAA). To assist healthcare providers and other entities in the complicated task of determining whether West Virginia state regulations have been preempted by HIPAA, this legal advisory chart is a new addition to the preemption analysis of applicable West Virginia state law provisions which appear to implicate HIPAA; therefore this chart will be updated with applicable West Virginia state regulations on a going forward basis as they are implemented by the legislature. Please note that this is not a comprehensive list of all applicable West Virginia regulations which may implicate a HIPAA analysis.

This survey is in matrix consisting of seven columns. The first column is a general reference to the subject matter of the regulation. The second column is the specific West Virginia Code of State Rules citation or citations, which include embedded links to the complete regulatory language located on

the West Virginia Secretary of State's website. The third column discusses the impact of each state regulation upon the privacy or security of protected health information as defined in HIPAA. In the fourth column is the corresponding HIPAA citation. The fifth column states whether HIPAA has preempted this state regulation. If the answer is yes, the extent to which the state regulation is preempted is sometimes described in the "Comments" column, along with other general comments regarding the law. The sixth column indicates whether the state regulation is more stringent or more detailed or whether HIPAA is more stringent.

Covered entities, as defined under HIPAA, should generally follow the law that is more stringent, but may have to comply with both laws in some cases. Where the remark is "Both" in the sixth column, the comments describe which part of the state regulation is more stringent or HIPAA is more stringent. Finally, the last column provides any commentary relevant to this analysis of the state regulation. However, the assessment of whether a state regulation is preempted or not is only a guide and any final determination on whether such state regulation is preempted would have to be the result of court action or decision.

This preemption analysis chart is a working document that is subject to review and revision. All individuals and entities that review this document are encouraged to provide feedback to Sallie H. Milam, Chief Privacy Officer for the West Virginia

Executive Branch, West Virginia Health Care Authority at: <u>SMilam@hcawv.org.</u>

In addition to the preemption chart below, other useful information and links related to HIPAA and health care privacy and security can be found at the following:

- 1. West Virginia State Privacy Office: http://www.privacy.wv.gov
- 2. U.S. Department of Health and Human Services (HHS), Office for Civil Rights, Health Information Privacy: http://www.hhs.gov/ocr/privacy/index.html
- 3. The Office of the National Coordinator for Health Information Technology: http://www.healthit.gov/providers-professionals/ehr-privacy-security

Last Updated by Jackson Kelly PLLC: August 15, 2014.

** This is a new compilation of West Virginia regulations that will be updated annually on a going-forward basis. This is not a comprehensive list of State regulations.

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SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
Behavioral Health Patient Rights Rule	64 C.S.R. 59	Establishes the rights of clients of state operated behavioral health facilities; also sets forth standards for the confidentiality of client records and the disclosure of client records in the following circumstances: 11.2.1(a) in a proceeding under W. Va. Code § 27-5-4 to disclose the results of an involuntary examination made pursuant to W. Va. Code § 27-5-2 or W. Va. Code § 27-5-3; (b) in a proceeding under W. Va. Code § 27-6A-1, et seq. to disclose the results of an involuntary examination made pursuant thereto; (c) pursuant to an order of any court; (d) to protect against a clear and substantial danger of imminent injury by a client to himself or herself or another; and for treatment of internal review purposes to staff of the behavioral health facility.	164.512(a) 164.512(c)	No	State law	
Health Information Network– Uses and Disclosures	65 W. Va. C.S.R. 28 § 65-28-1 et seq.	Permits access to network only to designated authorized users within participating organizations; identifies an inquiry by a participating organization for a permitted purpose or a point-to-	164.506 164.508 164.510 164.512(a)- (k) 160.203(b)	No	Both	W. Va. Code § 16- 29G-8 requires compliance with both state confidentiality laws and HIPAA.

^{**} This is a new compilation of West Virginia regulations that will be updated annually on a going-forward basis. This is not a comprehensive list of State regulations.

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SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		point disclosure between two participating organizations as the only two types of protected health information transactions; requires that either type of transaction designate the permissible purpose of the disclosure and use; forbids the Network from selling protected health information to third parties without authorization from the affected party; requires patients to be provided with the option to opt-out of the Network; even when opted out the Network will still disclose protected health information to state or federal agencies for public health reporting.				
State Board of Examiners for Licensed Practical Nurses	W. Va. C.S.R. § 10-2- 14.2.e	When the Board reviews medical records during a complaint or investigation for licensing, all patient identifying information must be removed or redacted prior to introduction as evidence.	164.512(d)	No	Both	
State Board of Examiners or Speech– Language	W. Va. C.S.R. § 29- 1.15.4.j	Prohibits individuals from revealing professional or personal information about the person served professionally; exceptions	160.203 164.512(a), (b), (c)	No	Both	Rule requires compliance with both state confidentiality

^{**} This is a new compilation of West Virginia regulations that will be updated annually on a going-forward basis. This is not a comprehensive list of State regulations.

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SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
Pathology and Audiology	§ 29-5- 2.4.b.9	include when authorized by individual, when required to do so by law, or unless doing so is necessary to protect the welfare of the person or the community; mandates telepractice providers comply with all laws, rules, and regulations governing maintenance of patient/client records and confidentiality requirements.				laws and HIPAA.
Medical Examiner – Pronouncement, Investigation, Certification of Deaths, and Autopsy Reports	W. Va. C.S.R. § 64-84-8.2 § 64-84- 19.2	Permits the Office of the Chief Medical Examiner and the County Examiner to obtain and review medical records of the deceased to identify the body or when review of medical records may help determine the cause of death or answer material questions during an investigation; original medical records may not be incorporated into the medical examiners file; copies of medical records may only become part of the file at the discretion of the prosecutor and may not be released upon any request or subpoena; copies not maintained in the final medical examiner file shall be returned to the original institution or destroyed	164.512(g)	No	Both	

^{**} This is a new compilation of West Virginia regulations that will be updated annually on a going-forward basis. This is not a comprehensive list of State regulations.

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SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		at the time the case is closed; autopsy reports shall not include medical records of the deceased.				

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Last updated by Jackson Kelly PLLC: August 15, 2014

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[Jackson Kelly PLLC]

2014 West Virginia Health Care Privacy Laws and HIPAA Preemption Analysis

This chart provides an overview of the West Virginia health care privacy related laws and an analysis of the preemption issues arising under the Privacy, Security, Breach Notification, and Enforcement Rules (45 C.F.R. Parts 160, 162, and 164) of the Health Insurance Portability and Accountability Act of 1996, as amended by and including the regulations issued by the Department of Health and Human Services by the Health Information Technology for Economic and Clinical Health Act, Subtitle D- Privacy (§§ 13400 – 13424) (HIPAA). To assist healthcare providers and other entities in the complicated task of determining whether West Virginia state statutes have been preempted by HIPAA, this legal advisory chart provides an analysis of those state law provisions which appear to implicate HIPAA. In addition, the chart is a general reference guide to many of the health care related laws in West Virginia.

This survey is in matrix consisting of seven columns. The first column is a general reference to the subject matter of the state law. The second column is the specific West Virginia Code citation or citations, which include embedded links to the complete statutory language from the West Virginia Code located on the West Virginia Legislature's website. The third column discusses the impact of each state law upon the privacy or security of protected health information as defined in HIPAA. In the fourth column is the

corresponding HIPAA citation. The fifth column states whether HIPAA has preempted this state law. If the answer is yes, the extent to which state law is preempted is sometimes described in the "Comments" column, along with other general comments regarding the law. The sixth column indicates whether state law is more stringent or more detailed or whether HIPAA is more stringent.

Covered entities, as defined under HIPAA, should generally follow the law that is more stringent, but may have to comply with both laws in some cases. Where the remark is "Both" in the sixth column, the comments describe which part of the state law is more stringent or HIPAA is more stringent. Finally, the last column provides any commentary relevant to this analysis of the state law, However, the assessment of whether a state law is preempted or not is only a guide and any final determination on whether such state law is preempted would have to be the result of court action or decision. The new West Virginia Code sections added or revised to the 2014 update are highlighted in "blue."

This preemption analysis chart is a working document that is subject to review and revision. All individuals and entities that review this document are encouraged to provide feedback to Sallie H. Milam, Chief Privacy Officer for the West Virginia Executive Branch, West Virginia Health Care Authority at: SMilam@hcawv.org.

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In addition to the preemption chart below, other useful information and links related to HIPAA and health care privacy and security can be found at the following:

- 1. West Virginia State Privacy Office: http://www.privacy.wv.gov
- 2. U.S. Department of Health and Human Services (HHS), Office for Civil Rights, Health Information Privacy: http://www.hhs.gov/ocr/privacy/index.html
- 3. The Office of the National Coordinator for Health Information Technology: http://www.healthit.gov/providers-professionals/ehr-privacy-security

Last Updated by Jackson [sic] Kelly PLLC: August 15, 2014.

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SUBJECT	WV	EFFECT ON PROTECTED	HIPAA	PREEMPTED	HIPAA OR	COMMENTS
	CODE	HEALTH INFORMATION	CITES		STATE MORE STRINGENT	
Mental Health Hospitals – Inspections	§ 27-1A-6	Authorizes the Bureau of Health to inspect, license, and supervise any hospital, center, or institution which provides in-patient care and treatment to the mentally ill, intellectually disabled, or both; also authorizes the Bureau to develop programs for the care, treatment, and rehabilitation of alcoholics and drug abusers.	164.512(d)	No	State law	
Operation of State Hospitals for Mentally Ill/ Mentally Retarded	§ 27-2-1; § 27-2-5	Authorizes the establishment of State hospitals for the care and treatment of the mentally ill and mentally retarded; requires the superintendent of each such State hospital to furnish information concerning admissions, discharges, deaths, and other matters to the Department of Health to enable the Department to have current information concerning the extent of mental illness in the State; prohibits the names of patients from being accessible to anyone except by permission of the Department of Health or by court order.	160.203(c) 164.512(a), (b)	No	State law	
Operation of Comprehensive Community Health/ Intellectual	§ 27-2A-1	Authorizes the Department of Health and Human Resources to establish and operate comprehensive community mental health/intellectual disability	164.506	No	HIPAA	

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SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
Disability		centers throughout the State; requires such centers to maintain accurate medical and other records for all patients receiving services.				
Mental Health Records – Uses and Disclosures	§ 27-3-1; § 27-3-2	Provides for confidentiality of all communications and information obtained in treatment of mental health patient, including the fact that a person has received such treatment; confidentiality restriction does not apply to information which does not identify the patient; exception for involuntary commitment proceedings; exception for disclosure pursuant to a court order which finds the interests in disclosure outweigh the importance of maintaining confidentiality; exception for disclosures to comply with Brady Handgun Violence Prevention Act; exception to protect against clear and substantial danger of imminent injury to patient or another; exception for treatment or internal review purposes; exception for uses and disclosures to carry out treatment, payment, or health care operations without consent for a period of 30 days after admission to a mental health facility if certain other	164.506 164.512(a), (e), (j), (k) 160.203(b)	No	Both	HIPAA more stringent for authorizations and deidentification State more stringent for release of mental health records (as defined under State law) under 164.512 "Uses and disclosures for which an authorization or opportunity to agree or object is not required" (including, required by law; public health activities; victims of abuse, neglect or domestic violence; health oversight activities; judicial and

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SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		conditions are satisfied; all other disclosures must be pursuant to a signed authorization; a health care provider may not condition mental health treatment upon receipt of such authorization.				administrative proceedings; law enforcement; and decedents). [sic] State more stringent for release of mental health records for treatment, payment and health care operations. Note: The definition of "mental health record" under State law is broader than the definition of "psychotherapy notes" under HIPAA.
Involuntary Hospitalization	§ 27-5-2; § 27-5-3; § 27-5-4	Provides for involuntary hospitalization of individual who, because of mental illness or addiction, is likely to cause serious harm to himself or others; provides that application or related documents are not open to inspection unless authorized by the individual and provides for certain disclosures; authorizes court to	160.203(c) 164.512(a), (b), (e), (j)	No	State law	

App. 147

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		order examinations of such individuals by physicians, psychologists, clinical social workers, or physician assistants, the results of which shall be provided to the court; provides that medical evidence obtained pursuant to such examinations are not privileged for purposes of any hearing involving involuntary hospitalization; provides for all proceedings to be held in chambers; provides for the reporting and recording of all proceedings involving involuntary hospitalization; authorizes a court to transmit evidence adduced at the hearing to a court in the county of the individual's residence; requires all admissions to mental health facilities to be reported to the Secretary of DHHR.				
Mental Health Patient Rights – Uses and Disclosure	§ 27-5-9	The general confidentiality requirements applicable to clinical records maintained by State facilities for treatment of mental illness, intellectual disability, or addiction were deleted from this statute as a result of amendments in 2007.		No		See § 27-3-1
Alternative Procedures for	§ 27-5-11	Generally provides for alternative procedures that may be	160.203(c) 164.512(a),	No	State law	

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SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
Involuntary Hospitalization – Uses and Disclosures		implemented for use of a treatment compliance order in lieu of involuntary hospitalization for an individual who has been involuntarily committed at least twice in the last 24 months for mental illness, addiction or both, or has been convicted of violent crimes during that time period; authorizes courts to order examinations of such individuals by physicians or psychologists, the results of which shall be provided to the court; authorizes the court to convert the proceeding into an involuntary commitment proceeding, where appropriate.	(b), (e), (j)			
Criminal Defendants – Criminal Responsibility Determinations	§ 27-6A-1 § 27-6A-4 § 27-6A-5 § 27-6A-11	In the context of proceedings to determine criminal responsibility for criminal defendants, authorizes court to order examination of defendant by a psychiatrist and/or psychologist; authorizes release of report of such examination to be made available to the court, prosecuting attorney, and counsel for defendant; authorizes commitment to mental health facility for up to 15 days for observation period; if defendant is determined not guilty by reason of mental illness, court shall maintain	160.203(c) 164.512(a), (b), (e), (f), (j), (k)	No	State law	

App. 149

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		jurisdiction over defendant for the period of the maximum sentence he or she could have received; requires court to commit defendant/acquitee to mental health facility that is the least restrictive environment to manage defendant/acquitee and that will allow for protection of the public; requires notification of court and prosecuting attorney prior to proposed release or conditional release of defendant/acquitee from a mental health facility; requires all medical expenses incurred in such proceedings to be paid by the State.				
Criminal Defendants – Consent to Treatment by Criminal Defendants	§ 27-6A-10	States that criminal defendant with health care decision-making capacity may refuse medications or other medical management unless court-ordered, or unless a treating clinician determines that medication or other medical management is necessary in emergencies or to prevent danger to individual or others.	160.203(c) 164.512(a), (b), (j), (k)	No	State law	
Involuntary Hospitalization –Release and Discharge of Patients	\$ 27-7-1 \$ 27-7-2 \$ 27-7-3 \$ 27-7-4	Requires the chief medical officer of a mental health facility to make a report to the circuit court or mental hygiene commissioner of the county in which involuntary hospitalization was ordered, and to	164.512(a),	No	State law	

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SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		the circuit court or mental hygiene commissioner of the county wherein the patient is a resident, in the following circumstances: (1) upon discharge of an involuntarily hospitalized patient; (2) upon release on convalescent status of an involuntarily hospitalized patient; (3) upon release as unimproved of an involuntarily hospitalized patient; and (4) when the readmission of a formerly involuntarily hospitalized patient is believed to be in the best interest of the patient.				
Mental Health Hospitals – Investigations, Inspections	§ 27-9-1	Authorizes the Secretary of DHHR to investigate and inspect any hospital, center, or institution licensed to provide inpatient or outpatient services to the mentally ill or intellectually disabled.	164.512(a) 164.512(d)	No	State law	
Interstate Compact on Mental Health	§ 27-14-1	Provides for the appointment of an administrator to act as a contact person with respect to issues involving the mentally ill who may require services in another state; requires compact administrator to notify another state when it is determined that a patient receiving mental health services in West Virginia would benefit from receiving such services in that	160.203(c) 164.506 164.512(a), (b)	No	State law	

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SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		other state; in making such contact, the compact administrator must act in the best interests of the patient and avoid jeopardizing the public safety; also requires any mental health institution to notify all appropriate authorities within and without West Virginia of the escape of a patient who is determined to be dangerous or potentially dangerous; such notice should be calculated to facilitate the speedy apprehension of the escaped patient.				
Interstate Compact on the Mentally Disordered Offender	§ 27-15-1	Establishes interstate compact dealing with individuals who have been adjudicated to be mentally ill, and who are under sentence for the commission of a crime; authorizes the state to enter into contracts with other states for the delivery and retaking of mentally disordered offenders for care, treatment, or rehabilitation of the offender; any such transfers are to be based upon a court hearing to determine the public interest, the condition of the offender, the prospects for more satisfactory care, treatment, or rehabilitation elsewhere, and other relevant factors; requires the receiving state	164.506 164.512(e), (k)	No	State law	

App. 152

SUBJECT	WV CODE	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		to provide regular reports to the sending state relative to such transferred offenders, including the psychiatric and behavioral record of his or her treatment in the receiving state.				
Sterilization of Incompetents	§ 27-16-1	LAW WAS REPEALED IN	2013	LAW WAS REPEALED IN 2013		
Group Residential Facilities for the Disabled – Investigations, Inspections	§ 27-17-3	Requires residential facilities for the developmentally or behaviorally disabled to obtain license from the Director of the Department of Health; authorizes the Director to investigate and inspect any such facilities to determine compliance with applicable laws.	164.512(d)	No	State law	

Last updated by Jackson Kelly PLLC: August 15, 2014