

States Shouldn't Fear HIPAA When Improving Gov't Services

By **Jodi Daniel** (March 15, 2023, 6:11 PM EDT)

Across the country, state governments will soon face an inflection point that will offer them an opportunity to look holistically at government benefit programs and better use the data they already have to improve access to health care, enhance nutrition programs and streamline processes to provide better services to individuals.

The looming end of the COVID-19 public health emergency has jump-started states' focus on using their data to streamline the process for individuals seeking or accessing public benefits, and to more efficiently and effectively provide government services in the future.



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However, questions have been raised regarding whether and the extent to which federal health care privacy laws allow for sharing of individually identifiable information to offer more efficient government services.

Similarly, questions have arisen regarding the ability to disclose protected health information from Medicaid to support enrollment in other government programs for individuals, including those who have benefited from continued Medicaid coverage but who may lose such coverage after the public health emergency.

Ultimately, federal health care privacy law — the Health Insurance Portability and Accountability Act — does not get in the way of states using and sharing health information to offer more efficient services. Here's why.

Data Sharing Across Government Programs to Improve Efficiency

The issues of enrollment in state benefit programs are top of mind as the COVID-19 public health emergency, which began in March 2020, is coming to an end this spring.

For example, many government health care programs, including Medicaid, waived or changed requirements to enable continuation of health care coverage and need to address eligibility and benefits as these waivers cease.

The Families First Coronavirus Response Act prohibited states from disenrolling any Medicaid recipient during the public health emergency in order to qualify for a 6.2 percentage-point increase in their federal share of Medicaid spending.

The number of individuals covered by Medicaid has grown 27% during this time.[1] Now that the public health emergency is coming to a close, Medicaid recipients will be required to complete the redetermination process that is typically necessary to verify ongoing eligibility. States will need to accurately review eligibility to ensure that individuals currently enrolled in Medicaid remain eligible.

However, the sheer volume and complexity of Medicaid redeterminations are likely to pose significant operational challenges to many states.[2] Thus, the Centers for Medicare & Medicaid Services has provided states the option to obtain temporary waivers for states to renew coverage for individuals based on Supplemental Nutrition Assistance Program and Temporary Assistance for Needy Families eligibility.

As of Dec. 6, 2022, only 12.6% of the 153 temporary waivers approved by CMS were for the above strategy.[3] This low uptake indicates that there's more opportunity for states to use data from other public benefit programs to support their post-public health emergency Medicaid redetermination efforts.

Aside from the public health emergency expiring, there will also continue to be new individuals that become eligible for Medicaid coverage or other government benefits. States may be interested in facilitating enrollment in other government programs that the individual may qualify for in order to reduce the impact of the transition and support individuals in need.

And many other government programs in education, housing and public safety all rely on data to support healthy, safe and prosperous communities — yet data is often not effectively and securely used out of fear that HIPAA prevents these efficiencies.

HIPAA and State Government Programs

HIPAA does not prohibit state government programs from sharing eligibility data. In some cases, HIPAA does not even apply. Where HIPAA does apply, this type of data sharing is explicitly permitted. Let's walk through these two concepts.

When does HIPAA apply?

HIPAA applies to covered entities, including health plans and most health care providers. State health departments generally will be covered entities because state Medicaid programs meet the definition of a "health plan."

However, government-funded programs that do not have as their principal purpose the provision of or payment for health care are not health plans.

For example, agencies that administer the Special Supplemental Nutrition Program for Women, Infants and Children, or WIC, as well as education, public safety, transportation and myriad other government services are not covered under HIPAA, meaning they don't need to comply with the HIPAA privacy rule.[4]

If the state health department performs some covered functions and some noncovered functions, it is a hybrid entity; the state may designate those components that perform HIPAA-covered functions and only comply with HIPAA for those covered components.

This means a state can choose to only comply with regard to covered programs, such as Medicaid, and HIPAA would not apply to other benefit programs, such as WIC.

In some states, data to determine eligibility for, or enrollment in, a government program may be obtained by another agency or another program administered by the state health department. This may involve the collection of individually identifiable health information.

The U.S. Department of Health and Human Services has stated that an agency or component of an agency that is not a covered entity or covered component does not become a covered entity or a business associate because it determines eligibility or enrollment or collects enrollment information as authorized by law.[5]

This means that even if a state program that is not otherwise covered by HIPAA provides data to determine eligibility in accordance with state law for a HIPAA-covered program, such as Medicaid, it is still not subject to HIPAA simply by supporting eligibility or enrollment.

Ultimately, HIPAA only applies to government entities that provide coverage for, or offer, health care services. HIPAA simply doesn't apply to other government agencies.

What does HIPAA allow?

When HIPAA does apply, the HIPAA privacy rule specifically permits a Medicaid program to share protected health information related to eligibility or enrollment with another government program in certain circumstances. Generally, where the state law authorizes such disclosure it is permitted by HIPAA.

Specifically, HIPAA authorizes state health plans to share protected health information related to eligibility for, or enrollment in, the health plan with other government programs providing public benefits if a statute or regulation requires or expressly authorizes such sharing or the use of one combined data system.[6]

Furthermore, if a government agency that administers a public benefits program, such as Medicaid, is a covered entity under HIPAA, that agency may disclose protected health information relating to the program to another such agency as long as the programs serve the same or similar populations and the disclosure of protected health information is needed to coordinate the programs' covered functions.[7]

In addition, HIPAA permits covered entities, such as Medicaid, to disclose protected health information to a state health oversight agency for oversight of government benefit programs for which health information is relevant to beneficiary eligibility.[8]

Finally, while not specific to government programs, HIPAA permits covered entities, including Medicaid, to disclose information for health care operations, including case management or care coordination, of the Medicaid program.[9]

The Office for Civil Rights has interpreted that disclosures to social service entities could be permissible if for the purpose of supporting the individual's health or mental health care.[10] In this case, the minimum necessary requirements under HIPAA would apply, so there would need to be policies implemented to limit disclosures.

Conclusion

The bottom line is that for many government services, HIPAA simply doesn't apply.

When it does, HIPAA permits state agencies to share protected health information between government programs for important purposes, including for determinations of eligibility and enrollment in government benefit programs and to coordinate agencies' covered functions in certain circumstances, as described above.

Disclosures of protected health information between government programs for these purposes is explicitly permitted and no business associate agreement is required.

As the U.S. emerges from the public health emergency and states face continuing pressures to more effectively deliver government services, effective use of their data is critical to better resident experiences. States can meet their goals and — when it applies — still meet both the letter and spirit of HIPAA.

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[1] CMS, Medicaid & CHIP: Monthly Application and Eligibility Reports, updated November 29, 2022.

[2] <https://www.medicaid.gov/covid-19-public-health-emergency-unwinding-section-1902e14a-waiver-approvals/index.html>.

[3] <https://www.medicaid.gov/covid-19-public-health-emergency-unwinding-section-1902e14a-waiver-approvals/index.html>.

[4] 65 Fed. Reg. 82,462, 82,578 (Dec. 28, 2000).

[5] 45 C.F.R. § 160.103, definition of Business Associate (4)(iii).

[6] 45 C.F.R. § 164.512(k)(6)(i).

[7] 45 C.F.R. § 164.512(k)(6)(ii).

[8] 45 C.F.R. § 164.512(d)(1)(ii).

[9] 45 C.F.R. § 164.506(c)(4).

[10] See generally, HHS-OCR FAQ 3008, Does HIPAA permit health care providers to share PHI about an individual with mental illness with a third party that is not a health care provider for continuity of care purposes?, <https://www.hhs.gov/hipaa/for-professionals/faq/3008/does-hipaa-permit-health-care-providers-share-phi-individual-mental-illness-third-party-not-health-care-provider-continuity-care-purposes/index.html>.