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August 24, 2016

The Honorable Geraldine Valentino-Smith  
427 House Office Building  
Annapolis, Maryland 21401-1991

Dear Delegate Valentino-Smith:

You have asked for advice concerning the ability of health care providers to give information to the parents or custodian of a person over the age of 18 who is having a mental health crisis.<sup>1</sup> As described below, State law is somewhat more strict than federal law with respect to these issues. It is also worth noting that the application of both laws may vary in specific fact situations. *See* 89 *Opinions of the Attorney General* 81 (2004).

In general, the age of majority in Maryland is 18 years and an individual who has attained that age “has the same legal capacity, rights, powers, privileges, duties, liabilities, and responsibilities that an individual at least 21 years old had before July 1, 1973,” unless specifically provided otherwise by statute. General Provisions Article, § 1-401(a)(1) and (2). Neither the Maryland Medical Records Law nor the regulations promulgated under the federal Health Insurance Portability and Accountability Act (“HIPAA”) provide for an age of majority other than the age of 18.

The HIPAA regulations permit a health care provider to maintain a directory for a facility that contains the names of individuals in the facility, the location of each individual in the facility, and the condition of each individual in general terms that do not communicate specific medical information about the individual. 45 C.F.R. § 164.510(a)(1)(i). This information may be disclosed to persons who inquire about an individual patient by name. 45 C.F.R. § 164.510(a)(1)(ii)(B). The inclusion of information about specific individuals, however, is subject to a requirement that the individual have the ability to object to the inclusion of some or all of the permitted information. 45 C.F.R. § 163.510(a)(2).

The Maryland Medical Records Law as it relates to mental health records is more restrictive than the federal law on this subject. Health - General Article (“HG”), § 4-302(c), provides that a

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<sup>1</sup> You have also asked about the ability of particular programs to impose medication compliance requirements and whether parents can play a role. That issue will be addressed in a separate letter of advice.

“health care provider may disclose directory information about a patient without the authorization of a person in interest, except if the patient has instructed the health care provider in writing not to disclose directory information.” “Directory information” is defined as “information concerning the presence and general health condition of a patient who has been admitted to a health care facility or who is currently receiving emergency health care in a health care facility,” HG § 4-301(b)(1). The term does not, however, include “health care information developed primarily in connection with mental health services.” HG § 4-301(b)(2).<sup>2</sup> This provision has been described as preventing disclosure or redisclosure “of the mere fact that a person is receiving psychiatric treatment at all.” *Maryland State Board of Physicians v. Eist*, 176 Md. App. 82, 122 (2007). Maryland law does, however, permit a facility where a person is receiving mental health care to confirm or deny the presence of a patient to a parent, guardian, next of kin, or any individual who has a significant interest in the status of the patient if the person making the request has filed a missing persons report regarding the patient. HG § 4-307(j)(1)(iv).

Thus, the Maryland law is more restrictive than the federal law with respect to directory information regarding mental patients. While federal law has some preemptive effect with respect to State law, it does not preempt State laws that relate to the privacy of individually identifiable health information and are more stringent than the comparable provision of the HIPAA regulations. 45 C.F.R. § 160.203(b). Thus, the HIPAA regulations would not preempt State law in this respect and directory information would not be available with respect to individuals in Maryland who are receiving mental health services except to a person listed in HG § 4-307(j)(1)(iv) who has filed a missing persons report. This law could, of course, be altered to adopt one that is less restrictive, so long as it is not less restrictive than the federal law.

The HIPAA regulations permit a health care provider to disclose protected health information to a family member, other relative, or a close personal friend of the individual, or any person identified by the individual if the information is directly relevant to that person’s involvement with the patient’s care or payment related to that care. 45 C.F.R. § 164.510(b)(1)(i). Generally this type of disclosure is limited to circumstances where the patient is present and has the capacity to make health decisions and agrees to the disclosure, or does not object to the disclosure when given an opportunity to do so, or the health care provider reasonably infers from the circumstances, based on

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<sup>2</sup> “Mental health services” is defined as “health care rendered to a recipient primarily in connection with the diagnosis, evaluation, treatment, case management, or rehabilitation of any mental disorder.” HG § 4-301(j)(1). With respect to acute general hospital services, however, “mental health services are considered to be the primarily rendered service only if service is provided pursuant to Title 10, Subtitle 6 or Title 12” of the Health - General Article. HG § 4-301(j)(2). Thus, an acute hospital would be prohibited from communicating with a patient’s parents only if the patient was a voluntary or involuntary admission to a psychiatric service in that hospital or a patient was in the emergency room because of an emergency petition or as a person committed under Title 3 of the Criminal Procedure Article (which is the successor to Title 12 of the Health - General Article).

the exercise of professional judgment, that the patient does not object. 45 C.F.R. § 164.510(b)(2). If the patient is not present or it is not practical to get agreement or give an opportunity to object, the health care provider may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care. 45 C.F.R. § 164.510(b)(3).

The Maryland Medical Records Law has a similar provision, but as in the case of directory information, it is more limited than the federal HIPAA regulations. The Maryland law, permits, but does not require, a health care provider to disclose a medical record to immediate family members of a patient or to any other individual with whom the patient is known to have a close personal relationship if the disclosure is made in accordance with good medical or other professional practice. HG § 4-305(a) and (b)(7). This provision does not apply, however, if the patient has instructed the health care provider not to make the disclosure or if the record has been developed primarily in connection with the provision of mental health services. HG § 4-305(b)(7). Maryland law does, however, permit an individual to make an advance directive for mental health services. HG § 5-602.1. Such an advance directive may include “[i]nstruction regarding the notification of third parties and the release of information to third parties about mental health services provided to the” individual. HG § 5-602.1(d)(4). In the absence of an advance directive with such directions, however, Maryland law imposes barriers to disclosure of mental health records that are not a part of the federal law.<sup>3</sup> This provision is also subject to change as long as it is not less restrictive than federal law.

The federal HIPAA regulations require a health care provider to treat a personal representative of a person as the individual for the purposes of disclosure of protected health information. 45 C.F.R. § 164.502(g)(1). Thus, a person who has authority to act on behalf of an individual who is an adult or emancipated minor in making decisions related to health care is entitled to disclosure to the same extent as the person themselves. 45 C.F.R. § 164.502(g)(2). I am not aware of any Maryland law to the contrary.

Where a parent, guardian, or other person acting *in loco parentis* has authority to act on behalf of an unemancipated minor in making decisions related to health care, that person is entitled

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<sup>3</sup> The federal law does limit disclosure of psychotherapy notes in that it requires express approval for their disclosure except in limited circumstances, 45 C.F.R. § 164.508(a)(2), and need not be disclosed even to the patient, 45 C.F.R. § 164.524(a)(1)(i). Moreover, the definition of “psychotherapy notes” is significantly more narrow than mental health records as it refers only to “notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record.” 45 C.F.R. § 164.501.

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to disclosure of health records “except that such person may not be a personal representative of an unemancipated minor, and the minor has the authority to act as an individual, with respect to protected health information pertaining to a health care service” if the minor consents to the health care service and no other consent to the health care service is required by law, and the minor has not requested that the person be treated as a personal representative or the health care service is one that the minor may obtain without the consent of a parent, guardian, or other person acting *in loco parentis*, and the minor, a court, or other person authorized by law consents to such health care service. 45 C.F.R. § (g)(3)(A) and (B). Maryland law grants a minor who is 16 years older or older the same capacity as an adult to consent to consultation, diagnosis, and treatment of a mental or emotional disorder by a health care provider or clinic. HG § 20-104(b)(1).<sup>4</sup> This provision expressly grants a health care provider the authority to give information to a parent, guardian, or custodian about treatment needed by or provided to the minor, even if the minor has not consented or has objected. HG § 20-104(c)(1). This type of disclosure provision is expressly permitted by the HIPAA regulations. 45 C.F.R. § 164.510(g)(3)(ii).

Sincerely,



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Assistant Attorney General

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<sup>4</sup> This authority does not extend to the right to refuse such treatment if a parent, guardian, or custodian has given consent. HG § 20-104(b)(2).