

## Deflection: Obtaining Information From Medical Providers

Can a post-overdose response/outreach deflection program obtain protected health information (PHI) from an emergency medical services (EMS) agency about an individual who suffered a nonfatal overdose without violating the Health Insurance Portability and Accountability Act (HIPAA)?

### Response

Medical records containing PHI are safeguarded by HIPAA. Accordingly, a post-overdose response/outreach team, or any type of deflection program seeking PHI from a HIPAA-covered entity, must rely on one of three options. Two of the options are straightforward: (1) get the HIPAA-covered entity to secure an authorization (i.e., consent) form signed by the individual prior to sharing the information or (2) obtain the information from a non-HIPAA-covered entity.

The third option is a possibility in cases where the HIPAA-covered entity is a deflection initiative partner. In that situation, the non-HIPAA-covered entity initiative partners can become business associates of the HIPAA-covered entity by entering into a comprehensive business associate agreement (BAA), so long as all deflection initiative partners, and their legal counsel, consider this to be sufficient. A fourth option, mentioned below, is theoretically possible, although it does not currently appear to be available in practice.

This analysis remains the same regardless of the type of HIPAA-covered entity involved, whether an EMS agency, outpatient health clinic, physician, hospital, or other health care provider.

### Additional Discussion

The situation underlying this question may come up in different contexts. The most likely instance is where a deflection initiative relies on a HIPAA-covered entity, such as EMS, to provide basic identifying information (e.g., name, address, telephone number) about an individual who suffered a nonfatal overdose to conduct the initial outreach. Another possibility is in a situation where a deflection team seeks additional PHI regarding a known individual either before or after the initial outreach.

The first option for a deflection team seeking information on an individual is to have the HIPAA-covered entity in possession of the information obtain the patient's signed authorization to share certain specified PHI with the team. One method for accomplishing this is for the deflection initiative to enter into a memorandum of understanding (MOU) with the HIPAA-covered entity that specifies that the entity will obtain, or attempt to obtain, patient authorization to provide the patient's contact information to the initiative for the sole purpose of allowing a deflection team to follow up with the patient after a nonfatal overdose. The MOU should limit the PHI disclosed to only the information necessary for the deflection team to conduct the initial outreach visit.

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If the HIPAA-covered entity is unable or unwilling to obtain the individual's authorization, the deflection initiative can seek overdose incident information from non-HIPAA-covered entities. For example, law enforcement is not a HIPAA-covered entity. Therefore, if law enforcement learns the identity of an overdose survivor directly from observation or another method (such as through dispatch calls) and reports it to the deflection initiative, they are not restricted by HIPAA from disclosing PHI (state laws may be more restrictive, however).<sup>1</sup>

Should neither of the above two options prove viable, a deflection initiative might consider using a BAA to allow a HIPAA-covered entity member of the initiative to pass PHI to the remainder of the initiative partners prior to contacting the individual. Using a BAA is not as clear-cut as the first two options discussed because non-HIPAA-covered entities involved in a deflection initiative do not clearly constitute business associates, as that term is defined by HIPAA, of a HIPAA-covered entity member of the initiative.<sup>2</sup> Although this is legal gray area, BAAs are used for this purpose by certain deflection initiatives.<sup>3</sup> Importantly, deflection initiatives choosing to use this route should confirm that all deflection initiative partners, and their legal counsel, consider the BAA agreement legal and binding. Because of the lack of clarity about the scope of the "business associate" definition, the BAA is not recommended for deflection teams that seek PHI from a HIPAA-covered entity that is not part of the initiative.

Finally, HIPAA provides that patient authorization to use or disclose PHI is not required if such use or disclosure is "required by law" and "the use or disclosure complies with, and is limited to, the relevant requirements of such law."<sup>4</sup> Accordingly, based on this language, deflection initiatives can obtain PHI from a HIPAA-covered entity through some type of legal authority, such as a state statute, state regulation, or local ordinance, that specifically requires the HIPAA-covered entity to share information with the initiative. Recent research suggests that no such authority currently exists in state statutes.<sup>5</sup> To the extent that this changes in the future, deflection initiatives and teams will be able to obtain PHI based on this option.

### Definitions

**Business associate [45 Code of Federal Regulations (CFR) § 160.103]**—A person or entity that performs certain functions or activities that involve the use or disclosure of protected health information on behalf of, or in providing services to, a covered entity.<sup>6</sup>

**Deflection initiative**—A collaborative intervention designed to (1) connect law enforcement agencies and/or other first responder entities with public health/behavioral health systems to create pathways to community-based treatment, recovery support services, housing, case management, or other services for individuals with substance use disorders, mental health disorders, or co-occurring disorders; and

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<sup>1</sup> If law enforcement learns of the overdose indirectly, such as via a permitted disclosure under HIPAA, there may be limits on their ability to redisclose that information; however, that exception to the general rule is unlikely to apply in these circumstances.

<sup>2</sup> See 45 CFR § 160.103.

<sup>3</sup> An example is the HIPAA Privacy and Security Agreement for Huntington Quick Response Team Project Members BAA that is used by the Quick Response Team project in Huntington, West Virginia.

<sup>4</sup> 45 CFR § 164.512(a) (2020).

<sup>5</sup> See *Deflection Programs: Summary of State Laws*, Legislative Analysis and Publication Policy Association, July 2021, <https://legislativeanalysis.org/deflection-programs-summary-of-state-laws/>.

<sup>6</sup> See "Business Associates," U.S. Department of Health and Human Services, April 2003, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html>.

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(2) keep these individuals out of the criminal justice system, when possible, by addressing their unmet health needs. Throughout the country, particular types of deflection initiatives are referred to by a host of names, including pre-arrest diversion, pre-booking diversion, law enforcement diversion, co-responder teams, crisis intervention teams, and mobile crisis teams.

**HIPAA-covered entity [45 CFR § 160.103]**—A health plan, health care clearinghouse, or health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA.

**Individually identifiable health information [45 CFR § 160.103]**—Health information that:

- Identifies the individual or provides a reasonable basis to identify the individual.
- Relates to (1) the individual's past, present, or future physical health or condition; (2) the provision of health care to the individual; or (3) the individual's past, present, or future payment for health care.

**Protected health information [45 CFR § 160.103]**—Subject to a few exceptions, PHI is individually identifiable health information that is maintained or transmitted in any form or media. In the context of HIPAA-protected information, PHI does not include information about a person deceased for more than 50 years.