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MEMORANDUM (DMS-09)

To: All Providers

From: Division of Medical Services (DMS)

Date: March 23, 2020

Re: Guidance on HIPAA during the COVID-19 Public Health Emergency

The Division of Medical Services (DMS), is sending out this memorandum to alert Medicaid Providers to the guidance issued regarding the Health Insurance Portability and Accountability Act (HIPAA) requirements during the COVID-19 Outbreak. For more information and to read the U.S. Department of Health and Human Services (HHS) guidance, please go to <https://www.hhs.gov/hipaa/index.html>.

Pursuant to President Trump's and Secretary Azar's declaration of a national health emergency, effective on March 1, 2020, HHS has waived sanctions and penalties against covered hospitals that don't comply with the following provisions of the HIPAA Privacy Rule due to the emergency:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care. See 45 CFR 164.510(b).
- the requirement to honor a request to opt out of the facility directory. See 45 CFR 164.510(a).
- the requirement to distribute a notice of privacy practices. See 45 CFR 164.520.
- the patient's right to request privacy restrictions. See 45 CFR 164.522(a).
- the patient's right to request confidential communications. See 45 CFR 164.522(b).

The waiver *only* applies:

1. In the emergency area identified in the public health emergency declaration;
2. To hospitals that have instituted a disaster protocol; and
3. For up to 72 hours from the time the hospital implements its disaster protocol. (When the emergency declaration/s terminate, the hospitals must then comply with all requirements of the Privacy Rule for any patient still under care, even if 72 hours haven't elapsed since implementation of the disaster protocol.)

Additionally, HHS announced it will waive HIPAA penalties for good faith use of telemedicine during the COVID-19 national emergency. Providers who use audio or video technologies to provide telehealth to patients during the COVID-19 national emergency can use any non-public facing remote communication product that is available to communicate with patients. This applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health

conditions related to COVID-19. Under this Notice, covered providers may provide telehealth using popular applications that allow for video chats. Example of such applications include:

- Apple FaceTime
- Facebook Messenger video chat
- Google Hangouts video
- Skype

Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications. However, *public facing applications*, such as Facebook Live, Twitch, TikTok, and others *must not be used* in the provision of telehealth by covered health care providers.

To read the full notice and guidance, please go to <https://www.hhs.gov/about/news/2020/03/17/ocr-announces-notification-of-enforcement-discretion-for-telehealth-remote-communications-during-the-covid-19.html>.

DMS encourages all providers who wish to use telemedicine to read the guidance documents issued by CMS and HHS on the use of telemedicine to provide services during the COVID-19 emergency. **To ensure quality and consistency of care to Medicaid beneficiaries, DMS will coordinate with the Office of the Medicaid Inspector General (OMIG) to conduct retrospective reviews and audits prior authorization extensions granted during this time. Please keep all records of services as required by Medicaid billing rules.**