

14-0965

2014 AUG 27 AM 11:30
CATHY E. GAYSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

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

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.¹ 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

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. 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.

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

³ Lindsey McIntosh Test., Hr'g Tr. 89-90, Aug. 1, 2014; *Order* ¶¶ 1-25, Aug. 18, 2014.

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

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 access to patient records, and no rule states otherwise.

10. 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."⁵ 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 advocates to 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

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).

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).

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 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.

¹² See 45 C.F.R. § 164.508(e).

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

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/BHMF, as the democratically-accountable officials charged with administrative the state hospitals, in fact runs these hospitals in the way DHHR/BHMF 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 18 *Order* and subsequent August 27 *Order* a final judgment.

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.").

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.

Louis H. Bloom, Judge

8/20/14
Certified true and correct copy of original filed by _____
D. Greear } faxed
L. Milnes }
J. Wegman }
D. Sudbeck }
C. Edens }

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. PATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF OFFICE ON THIS _____ DAY OF _____ 2014.
CATHY S. PATSON
CIRCUIT COURT ONE KANAWHA COUNTY, WEST VIRGINIA
C. Edens

AUG. 27. 2014 12:12PM

CIRCUIT CLERK

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
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CIRCUIT CLERK
KANAWHA COUNTY WEST VIRGINIA

E. H., et al.,
Petitioners,

v. CIVIL ACTION NO. MISC.-81-585

KHAN MATIN, et al.,
Respondents.

ORDER

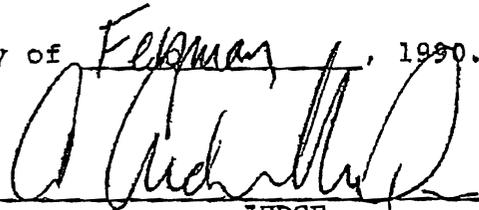
This day came the Court Monitor and submitted to the Court his recommendations arising out of the investigation into the Facility Patient Advocate System. These recommendations were made on January 25, 1990, and there has been no objection by any of the parties.

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.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.

ENTER this 20th day of February, 1990.

I Cathy S. Gibson, Clerk of Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.



JUDGE

Given under my hand and seal of said Court this 20 day of February 1990

Cathy S. Gibson
CIRCUIT CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA COUNTY CIRCUIT COURT

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

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."¹
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

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

² *Agreed Order* ¶ 10(d), *E.H. v. Matin*, 81-MISC-585 (July 2, 2009).

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

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.⁷ In this regard, the advocates receive the same training as Hospital staff.⁸ 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.⁹

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 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 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 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

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.

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.

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 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.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 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

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 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.

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 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

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, 155:7-17, 154:20-21.

³⁰ Hr'g Tr. 97-101.

19. The Respondents 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 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

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.

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."⁴²

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

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:

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.

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

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.”⁴⁵

31. 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

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.

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

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:

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

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* ¶ 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).

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.

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.”⁴⁹

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

⁴⁸ 45 C.F.R. § 160.203(c).

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).

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.”⁵³ 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 that the covered entity discloses only the protected information expressly authorized by such order.”

42. The patient advocates’ role includes completing timely investigations 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).

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).

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

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."⁵⁶

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

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

⁵⁵ 45 C.F.R. § 164.512(d)(1).

⁵⁶ 45 C.F.R. § 164.501; *see* 42 U.S.C. § 10841 (setting forth the rights of mental health patients).

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 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."⁵⁹ "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."⁶⁰

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.

⁵⁷ Other exceptions exist but are not relevant here. Psychotherapy notes may be released with written authorization. See 45 C.F.R. § 164.506.

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.”⁶¹

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

Whether the Requirements Set forth 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.

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. § 64-59-20; W. Va. Code St. R. § 64-59-11.5.1.d.

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 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.⁶⁶ 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.⁶⁷

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.

⁶⁵ See 45 C.F.R. § 164.508(c)(iv).

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).

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA **FILED**

E.H., et al.,

Petitioners,

v.

MATIN, et al.,

Respondents.

2014 AUG 18 PM 3:56

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

CIVIL ACTION NO. 81-MISC-585 *UHM*

ORDER

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."¹
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

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

² *Agreed Order* ¶ 10(d), *E.H. v. Matin*, 81-MISC-585 (July 2, 2009).

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

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.⁷ In this regard, the advocates receive the same training as Hospital staff.⁸ 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.⁹

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 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 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 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

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.

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.

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 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.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 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

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 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.

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 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

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, 154:20-21.

³⁰ Hr'g Tr. 97-101.

19. The Respondents 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 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

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.

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."⁴²

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

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**

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.

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

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.”⁴⁵

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

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

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* ¶ 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).

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

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

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.

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."⁵³ 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 that the covered entity discloses only the protected information expressly authorized by such order."

41. The patient advocates' role includes completing timely investigations 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.

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).

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

Whether Respondents May Disclose PHI to LAWV Because the Disclosure 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 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.⁵⁷ 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

⁵⁵ 45 C.F.R. § 164.512(d)(1).

⁵⁶ 45 C.F.R. § 164.501; *see* 42 U.S.C. § 10841 (setting forth the rights of mental health patients).

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).

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 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."⁶⁰ "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."⁶¹

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.

⁵⁸ Other exceptions exist but are not relevant here. Psychotherapy notes may be released with written authorization. See 45 C.F.R. § 164.506.

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.”⁶²

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.⁶³ 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

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.

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. § 64-59-20; W. Va. Code St. R. § 64-59-11.5.1.d.

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 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.

⁶⁶ See 45 C.F.R. § 164.508(c)(iv).

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).

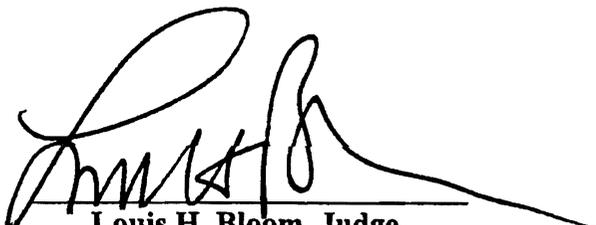
DECISION

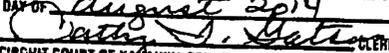
Accordingly, the Court hereby finds and concludes that Respondents' revocation of the patient advocates' access to patients, staff, and patient records violates West Virginia law and is not required by HIPAA. Accordingly, the Court hereby **ORDERS** as follows:

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 18 day of August, 2014.


Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 18
DAY OF August 2014

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK