

Indiana Juvenile Mental Health Screening, Assessment and Treatment Pilot Project

Addendum/Statement of Clarification to The Indiana Protocol on Appropriate Policies and Procedures in Mental Health Screening, Assessment and Treatment of Youths in Detention¹

I. Pilot Project Goals

National, state and local data indicate that large numbers of youth entering the juvenile justice system through detention have serious mental health needs. One important goal of the Indiana Juvenile Mental Health Screening, Assessment and Treatment Pilot Project (“Pilot Project”) is to provide a framework that allows juvenile justice officials to obtain necessary mental health services for youth while in their care in detention; and at the same time ensure that the youth’s mental health information is maintained confidentially by the detention center, other involved juvenile justice agencies (including probation, prosecutor and judge (to the extent their participation is necessary in order to initiate services and participate in diversion decisions)) (collectively, “Juvenile Justice Agencies”) and youth’s defense counsel. Other Pilot Project goals are to identify opportunities for the diversion of appropriate detention center youth into community-based mental health services, and to provide youth leaving detention (upon release) with adequate links to follow-up care in the community.

In accordance with the Pilot Project goals, the Indiana Protocol on Appropriate Policies and Procedures in Mental Health Screening, Assessment and Treatment of Youths in Detention (“Protocol”) “was developed to provide the most protection for records of the screening, assessment, and mental health treatment of youth in secure detention, adopting as best practices the standards embodied in state law (I.C. 16-39-2) and federal law (HIPAA).” Protocol, at 2. The Protocol setting forth agreed best practices was not intended to create, and did not create, statutory requirements that do not exist under law. Id., at 3. Finally, the Protocol was not intended to alter detention center practices or procedures in providing routine counseling services, or emergency mental health services, in caring for youth in detention.

II. Key Confidentiality and Information Sharing Documents

The Indiana Protocol on Appropriate Policies and Procedures in Mental Health Screening, Assessment and Treatment of Youths in Detention (“Protocol”) and the related Business Associate Agreement (“BAA”) are important documents that provide the access/disclosure framework for managing the detention center’s participation as the principle “coordinator” of services for youth at county Pilot Project sites. Each county pilot project site is expected to have the detention center, all participating Juvenile Justice Agencies and youth’s defense counsel sign the Pilot Project Memorandum of Understanding (“MOU”) and the BAA as Business Associates, memorializing their commitment to work cooperatively through the Pilot Project to ensure that confidentiality is maintained throughout the entire process of delivering mental health care services to youth in detention. Each county Pilot Project site is also expected to have all mental health providers (“Providers”) sign the Pilot Project MOU and the BAA.² These Providers are not signing the BAA as Business Associates, but rather as participants with knowledge and understanding of the Pilot Project framework.

¹ This Addendum, as is the Protocol itself, is incorporated into the BAA.

² For purposes of the Pilot Project, the term “Providers” includes all entities that provide mental health assessment and treatment services for youth in detention, including those which operate internally within the detention centers, whether pursuant to a contractual arrangement or employment relationship. These internal “Providers” are signatories to the BAA as well, because they perform an important gate keeping role in the flow of information in the detention center.

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The BAA relationship – which originates with the Provider and extends through the detention center – performs an important function regulating security of the protected health information (“PHI”) among all the signatories. It imposes important HIPAA obligations on the detention center and other signatories, which implicates the reciprocal responsibility of the Provider to ensure that third parties receive only that health information which is essential to their carrying out a “treatment” function (coordinating and managing the care of the youth in the detention center). The existence of the BAA among the Juvenile Justice Agencies binds them to HIPAA principles and assures the Provider that inappropriate re-disclosures will not occur. In other words, because the detention center is not a covered entity, but is essential to the coordination of services, the BAA is necessary to bind the detention center and other signatories to HIPAA principles, which prevent inappropriate re-disclosures.³ In turn, requiring other Juvenile Justice Agencies and defense counsel to sign the BAA as Business Associates should protect the detention center against inappropriate demands for access to confidential information about youth in detention from other parts of the criminal justice system.

Juvenile detention facilities – because they are charged with the duty to provide care for the immediate health needs of those youth in their custody – are pivotal to the process of initiating, coordinating and managing the mental health care of youth in their charge. Through the Pilot Project, the detention center is assigned the role of clearinghouse for the limited PHI necessary to obtain mental health assessment and treatment for youth in detention. However, personally-identifiable mental health information that is maintained in detention facilities does not fall under the purview of state or federal medical records law and privacy provisions. This is in stark contrast to the regulation of health care information held by Providers. Recognition of this situation, and the potential adverse impact a lack of confidentiality has on the ability to get services to youth while in detention, has led the Pilot Project to adopt a framework that borrows the “best practices” that are encompassed in the privacy provisions of HIPAA; the Pilot Project seeks to create a “privacy protected health care environment” in the detention center in which a youth can seek help.

Importantly, the fact that the Providers are signing the BAA does not mean that the BAA supersedes the Providers’ obligations under state and federal law governing the security of PHI. The BAA should be read consistent with state and federal medical records law. The BAA does not require nor even permit Providers to release PHI, unless such releases would otherwise be permitted or required by state and federal law.⁴ Therefore, the Pilot Project assumes that the Provider will only release PHI regarding a youth in detention to the detention center following the

³ Referring to HIPAA, 45 C.F.R. 164.502 (a)(1)(ii) specifies three exceptions to consent: treatment, payment and health care operations. 45 C.F.R. 164.501 contains a definition of “treatment” which is broader than provider to provider and recognizes the need for the provider to share PHI with a third party (such as detention centers) for the coordination of health care. However, the Provider needs to know that information shared will not be inappropriately re-disclosed and that is the reason for the BAA, to bind the third party (detention center) to HIPAA principles. Once the detention center arranges for services with the Provider, the Provider will arrange for a parent or legal guardian to sign both a consent for treatment and a consent for release of information to the detention center through the Pilot Project. The information specified in the Provider’s consent through the Pilot Project should follow the limited disclosure principles mandated by HIPAA. See discussion in Section III C below.

⁴ See Protocol, Section IV(C) (“The mental health records of youth in detention will be maintained confidentially, and may not be shared except for limited disclosures explicitly permitted in accordance with I.C. 16-39-2 and HIPAA”). Note that neither the BAA nor the Protocol relieves the Provider from obtaining HIPAA required consents. To clarify any possible confusion, Section IV(E) of the Protocol is intended to regulate the access of information from the detention center to Juvenile Justice Agencies and defense counsel involved in the initial decision to procure services for a youth in detention; accordingly, these individuals and entities would have reason to know and thus gain access to limited information about the initial mental health screening results warranting services to be procured.

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Provider's receipt of either the appropriate HIPAA-required consents signed by a parent or legal guardian, or a court order.⁵

III. Pilot Project Framework

A. Before the Provider is Involved

As the Pilot Project counties are initiating their practices and procedures in the Pilot Project, it is important to review the framework of how mental health assessments and treatment will be handled in the Pilot Project. The detention centers in each Pilot Project county will provide routine mental health screening with the MAYSI-2 screen as provided in the Protocol. (See Protocol, Section II(A).) When the results of the MAYSI-2 screen trigger the need for a mental health assessment, the detention center will either obtain any necessary parental or guardian consent to refer the youth for a mental health assessment or follow statutory procedures for obtaining a court-ordered mental health assessment of the youth. (See Protocol, Sections II(B)(7) and III(A)(8).) Under the Protocol, the detention center may only share the results of the MAYSI-2 screen⁶ with the youth's attorney, probation, prosecutor, and/or the judge, without the consent of the youth's parent or guardian, to the extent each Juvenile Justice Agency has signed both the MOU and the BAA (See Protocol, Section II(B)(9).) However, even with a BAA in place, the detention center is expected to attempt to obtain parental or guardian consent before releasing screening results, and to keep records of what information is released to whom and for what purpose. (See Protocol, Section II(B)(9).) See Consent of Parent or Guardian, Attachment E to the Protocol.

Although the Protocol recognizes that mental health assessments may be conducted inside or outside the detention center,⁷ some of the related documentation was prepared anticipating that mental health assessments of youth would take place outside the detention center. When a detention center arranges for a mental health assessment of youth to take place within the detention center,⁸ the detention center need not obtain consent to refer the youth for a mental health assessment, although there still must be parental or guardian consent or a court order to treat before the mental health assessment is performed (barring emergency situations in which the detention center is authorized under law to act without consent or court order). Both federal and state law require consent to treat when conducting a mental health assessment, and consent to release when disseminating PHI beyond the Provider. Thus, whether or not the

⁵ All entities that provide mental health assessment and treatment services for youth in detention pursuant to the Pilot Project, including those which provide on-site services, or operate internally as a clinic or treatment provider within the detention center, whether through a contractual arrangement or employment relationship, are expected to obtain these consents, just as HIPAA-covered entity Providers are legally required to do. See discussion in Section III B below.

⁶ A critical concept to the proper functioning of the Pilot Project is that participants agree not to seek nor disclose more than the amount of information necessary to help the youth obtain mental health services. The sharing of MAYSI-2 results among Juvenile Justice Agencies is limited to the list of clinical scales on the MAYSI-2 which the youth scored at either the "caution" or "warning" levels. Neither the youth's actual responses to the 52-question screening device, nor information gathered through a screening process, are to be disclosed to the Juvenile Justice Agency participants.

⁷ Protocol, at 9 ("Each county will identify the individual in the detention facility and/or the agency responsible for conducting assessments of youth in detention.").

⁸ The mental health assessments referred to in this paragraph are distinguishable from counseling services routinely provided by detention centers. Unless otherwise required by law, a detention center does not need to follow the Pilot Project's procedures for obtaining parental or guardian consent, or a court order, to provide counseling services for its youth in detention.

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Provider who conducts the mental health assessment is a HIPAA-covered entity does not change the need to obtain consent.

Some detention centers have also been experiencing difficulty arranging for a parent or guardian to come into the detention center and sign the consent to refer the youth for a mental health assessment outside the detention center in advance of the actual mental health assessment. For this situation, detention centers may develop their own forms for detention center staff to record verbal authority from a youth's parent or guardian to make the necessary arrangements and transport the youth to the outside mental health assessment. However, the detention center staff should obtain the signed consent to refer youth for a mental health assessment from the youth's parent or guardian at the time of the assessment.

B. After the Provider is Involved

In terms of the flow of PHI in the Pilot Project, the information-sharing relationship *is* a bilateral one between the Provider and the detention center, with the detention center arranging for services to be initiated (after having obtained parental or guardian consent through its own forms or by court order). The Pilot Project assumes that a Provider involved in assessing or treating youth in detention through the Pilot Project is complying with applicable state and federal law in obtaining consent to treat and release information. The Provider's obligation to obtain consent to treat is the same under the Pilot Project regardless of whether the Provider is a private contractor offering services on- or off-site, or is a detention center employee responsible for providing treatment as the facility mental health staff. Because of the detention center's coordinating role, HIPAA permits the Provider to work with the detention center to arrange the initial visit, and allows the Provider to obtain appropriate HIPAA consents at the time services are actually provided. Those consents provide the legal authority for disclosing PHI to the detention center through the Pilot Project.

Involvement of multiple Juvenile Justice Agencies (probation and in some instances prosecutor) is often necessary to initiate the process to get services to youth in detention. The Pilot Project documents have been devised to allow the detention center to initiate services for youth in a collaborative manner that safeguards the youth's expectation of privacy and protection against self-incrimination by all those officials involved in initiating the "health care" process. These documents are intended to include the Providers as active participants and signatories to the Pilot Project. This is so even though the signing of the BAA (which incorporates policies and procedures of the state protocol) does not authorize the detention center to obtain PHI from a Provider in the absence of consent signed by the parent or legal guardian.

Although successful collaboration among Providers, detention centers, Juvenile Justice Agencies, and defense counsel is essential to the success of the Pilot Project, the resulting information access agreement (BAA) signed among the participants does not relieve the parties to the agreement from the obligation to minimize the risk of re-disclosure. This risk is minimized by participants agreeing not to seek nor disclose through the Pilot Project more than the minimal amount of information necessary to help the youth obtain mental health services, *i.e.*, mental health assessment and/or treatment. The BAA does not obviate the Provider's need to obtain appropriate legal consents to authorize limited releases of mental health information. *The* Pilot Project does not contemplate nor permit wholesale release of records between Provider and detention center. The Pilot Project assumes that all Providers, as signatories to the BAA and participants in the Pilot Project, will only release PHI regarding a youth in detention to the detention center through the Pilot Project following the Provider's receipt of appropriate consents, or a court order.

C. Limited Disclosure of PHI Shared Through the Pilot Project

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The extent and type of PHI shared with the detention center through the Pilot Project should be narrowly limited to the detention center's role in coordinating and managing care for youth in detention. Thus, the Pilot Project embraces the concept of limited sharing of authorized disclosures of PHI from the Provider to the detention center, and then from the detention center to or among entities involved in the provision of services while the youth is in detention. The form and extent of disclosures by the detention center with other signatories varies with the extent of involvement by the different participants. Critically, all information shared with Juvenile Justice Agencies through the Pilot Project should be summary in nature and tailored to the actual need they have for the information in order to help initiate, obtain or deliver services for the youth while in detention. See Protocol, Section IV(D).

The scope of the PHI released by consents from the Provider to the detention center through the Pilot Project should be in line with the limited scope of disclosure of PHI provided for in the detention center's Consent of Parent or Guardian, Attachment E to the Protocol. In order to facilitate a uniform release of limited disclosure from Providers to detention centers in the Pilot Project, attached as Exhibit 1 to this Addendum is a template for Providers providing mental health services to youth in detention through the Pilot Project to use in Provider consent forms presented to parents or guardians for the release of information to detention centers. Specifically, releases of PHI should be limited to summary information concerning diagnosis, prognosis, special health or safety concerns, prescribed medications, and recommendations and arrangements for continuing care, future treatment or follow-up care, including specific recommendations on counseling, treatment, and programming while the youth is held in detention.

The Pilot Project does not prevent a detention center from obtaining more comprehensive PHI about youth in detention, if the detention center determines that this additional information is necessary to provide the best care for the youth or to make appropriate health and safety decisions for the youth while in detention. In accordance with the detention center's obligations toward the youth in its care, the detention center may enter into separate arrangements for additional PHI from Providers, such as discharge summaries. The detention center should (1) seek and obtain this additional information through a separate consent signed by the youth's parent or guardian, (2) maintain this information confidentially in the youth's medical file in the detention center, and (3) restrict access on an "as needed basis" among detention center staff to the facility director and those individuals directly involved in the managing and coordinating of services within the facility. Importantly, this additional information shall not be shared with the Juvenile Justice Agencies involved in obtaining mental health services for youth in detention through the Pilot Project.

D. Limited Scope of the Pilot Project

The framework for sharing mental health information about youth in detention through the Pilot Project is limited to the context of providing mental health assessment and treatment needed by youth in detention. This framework does not prevent the counties from entering into other arrangements for obtaining information about youth in detention for other purposes. Accordingly, nothing in the Protocol or the BAA restricts any party's ability to gather, release or use records designated as PHI by otherwise available means as provided by law. The BAA does not prohibit the use of PHI, obtained by other lawful means, for modifications or disposition, except that the MAYSI-2 screening results may not be used for purposes other than assisting with the provision of services.