

**STATE OF NEW JERSEY
DEPARTMENT OF CHILDREN AND FAMILIES**

DEPARTMENT POLICY: DCF.P1.15-2016

EFFECTIVE DATE: April 1, 2016

SUBJECT: **Health Insurance Portability and Accountability Act of 1996 (HIPAA)
and Business Associate Agreement (BAA)**

I. PURPOSE

The Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) governs how certain businesses and organizations disclose the Protected Health Information (PHI) of individuals they serve. The obligations and responsibilities imposed under HIPAA belong primarily to organizations that are defined as Covered Entities. DCF is regarded as a Covered Entity under the provision of HIPAA and, as such, the HIPAA Regulations affect the Department's Third Party Social Service Contracts. This policy explains how a Departmental Component determines if a Provider Agency is a Covered Entity and mandates when a Business Associates Agreement (BAA) shall be executed with a Provider.

II. SCOPE

This policy applies to all DCF Third Party Social Service Contracts executed with organizations defined as a Business Associate.

III. DEFINITIONS

Business Associate is a person or entity, other than a member of the workforce of a Covered Entity, who performs functions or activities on behalf of, or provides certain services to, a Covered Entity that involves access by the Business Associate to Protected Health Information (PHI). This definition is also applicable to a subcontractor that creates, receives, maintains, or transmits Protected Health Information (PHI) on behalf of another Business Associate.

Business Associates Agreement (BAA) sets forth the responsibilities of a Provider Agency, as a Covered Entity, in relationship to Protected Health Information (PHI), as those terms are defined and regulated by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the regulations adopted thereunder by the Secretary of the United States Department of Health and Human Services with the intent that the Covered Entity shall, at all times, be in compliance with HIPAA and the underlying regulations. The Business Associate Agreement (BAA) is entered into for the purpose of the Business Associate providing services on behalf of the Covered Entity.

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Covered Entity means a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by the regulations. In reference to the Business Associate Agreement (BAA), Covered Entity shall mean the New Jersey Department of Children and Families (DCF).

Health Insurance Portability and Accountability Act of 1996 (HIPAA) Regulations shall mean the regulations promulgated under HIPAA by the U.S. Department of Health and Human Services, including, but not limited to, the Privacy Rule and the Security Rule, and shall include the regulations codified at 45 CFR Parts 160, 162, and 164.

Hybrid Entity under HIPAA is a larger entity with subdivisions that may have distinct missions with certain subdivisions providing health-related treatment services, while other subdivisions within the same entity may not.

Protected Health Information (PHI) is individually identifiable health information that is transmitted by electronic media or transmitted or maintained in any other form or medium.

IV. POLICY

Through the Department's Third Party Social Service Contracts, DCF may share or disclose an individual's Protected Health Information (PHI) with Providers who may, in turn, use or disclose the PHI. Under the provisions of HIPAA, such Providers may be defined as Business Associates. As a consequence, many of the Department's Third Party Social Service Contracts may require the establishment of a formal Business Associate Agreement (BAA) with the Provider as an addendum to their DCF Contract(s). The 2013 amendments to the HIPAA Regulations now require a Business Associate to execute BAAs with their subcontractors. However, these changes do not require a Covered Entity to execute a BAA with the subcontractor of a Business Associate.

To comply with the provisions of the HIPAA Regulations, DCF has developed a standard language BAA that shall be used for many of the Department's Third Party Social Service Contracts. The following are guidelines to be used in determining which Contracts require a BAA.

A. Questions for Consideration

The following questions should be considered when assessing the applicability of executing a BAA with a Provider:

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Does the Departmental Component provide the Provider with an individual's PHI, or is it reasonably foreseeable that the Provider will collect or use PHI during the provision of services on behalf of the Department?

1. If no, then a BAA is not necessary
2. If yes, then a BAA is required.

B. General Exclusions/Inclusions/Special Circumstances

1. The definition of a Business Associate excludes those entities that disclose PHI for treatment purposes. Accordingly, a BAA is not required if the Provider is also a Covered Entity. The Provider must give satisfactory assurances that they safeguard all disclosed PHI. DCF policy and the professional judgment of Department administration will dictate reasonable assurances.

Exclusions for which a BAA is not mandatory, but DCF may require a BAA, are health-related treatment services rendered through contracts by other HIPAA Covered Entities such as:

- i. Psychologists
- ii. Psychiatrists
- iii. Physicians
- iv. Licensed Social Workers
- v. Licensed Counselors
- vi. Nurses
- vii. Mental Health Clinics
- viii. Hospitals
- ix. Residential Treatment Centers
- x. Substance Abuse Treatment Programs
- xi. Home Health and Homemaker Providers

2. Inclusions for which a BAA is required:

- i. Domestic Violence Shelters
- ii. Treatment Homes
- iii. Group Homes
- iv. Contracted Foster Care Homes
- v. Case Management Service Providers
- vi. Transportation Companies to whom DCF provides PHI for the purposes of transporting individuals to doctors, hospitals, and clinics

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- vii. Any entity where the receipt, logging, and/or transmission of PHI is necessary to administer services
3. Special Circumstances:
- i. Multi-Service Providers – If services to be rendered pursuant to a Contract include both health-related treatment service and non-health-related treatment services, then a BAA will likely still be required.
 - ii. Hybrid Entities – Where the Department has contracted with a large agency that has subdivisions which provide health-related treatment services, while other subdivisions with the same entity may not and the security of PHI among the Provider’s subdivisions is in question or of concern, then the execution of a relevant BAA is highly recommended.
 - iii. Multiple Contracts with a Provider – Each Contract is assessed on its own unique provisions. BAAs are to be executed for each individual Contract, as appropriate.

As a general rule, the execution of a BAA is always permissible, even where exclusions can apply. A BAA is always recommended when a provider, even if a covered entity, follows privacy and notification procedures that are adverse to the policies of DCF.

The DCF standard language HIPAA Business Associate Agreement (BAA) can be found on the DCF website at <http://nj.gov/dcf/providers/contracting/forms/>. When questioning the applicability of a BAA to an overall agreement, please contact the DCF Privacy Officer with DCF’s Office of Grants Management, Auditing, and Records.