

May 26, 2005 Opinion Regarding Denial of Records to the Indiana Protection and Advocacy Services Agency (“IPAS”) by the Division of Mental Health and Addiction (“DMHA”)

May 26, 2005

John Davis  
General Counsel  
Indiana Family and Social Services Administration  
402 West Washington Street, W451  
Indianapolis, IN 46204

*Re: Informal Inquiry Response; Alleged Violation of the Access to Public Records Act  
by the Division of Mental Health and Addiction*

Dear Mr. Davis:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request. You have asked for my opinion concerning whether the Division of Mental Health and Addiction (“DMHA”) is required to release certain records to the Indiana Protection and Advocacy Services agency (“IPAS”).

You contacted me after receiving a letter dated March 31, 2005 from Mr. Gary Ricks, an attorney with the IPAS. In his letter, Mr. Ricks stated that the IPAS had been denied records regarding the death of a patient at Madison State Hospital, a state mental health facility that had treated the patient on an inpatient basis during the time immediately preceding her death. I refer to this patient as “the MSH patient.”

Following your receipt of this letter, you, Katherine Gregory, Gary Ricks, Milo Gray of the IPAS and I met on April 14. I learned from the discussions at the meeting that the IPAS believes that it has been denied certain records concerning the MSH patient. In addition, IPAS indicated in the meeting that in the past, requests for records on other patients that IPAS was investigating had been declined by DMHA. Two discrete types of records concerning particular patients had been withheld: 1) peer review records that resulted from the formal peer review procedure at IC 34-30-15, and 2) investigative or incident reports created by FSSA or DMHA outside of the formal peer review process. DMHA claims that peer review records are protected from disclosure to IPAS under IC 34-30-15. Further, it claims discretion to not disclose investigative reports under IC 5-14-3-4(b)(6), the “deliberative materials” exception. The IPAS

disputes that state law takes precedence over the mandate of federal law at 42 U.S.C. §10801 et seq., the “Protection and Advocacy for Individuals with Mental Illness Act.” (“PAIMI”). Enacted in 1986, the PAIMI granted broad access to protection and advocacy agencies to patient records maintained by providers of mental health services. This would include the records requested on the MSH patient, IPAS claims.

You have asked for my guidance with respect to whether the DMHA may continue to withhold the records sought by the IPAS.

Under the Access to Public Records Act, any person may inspect and copy the public records of any public agency during the agency’s regular business hours, except as provided in section 4 of the APRA. IC 5-14-3-3(a). There are two exceptions cited by DMHA that are applicable to the MSH patient or other DMHA patient records. Under Ind. Code 5-14-3-4(a)(1), a public agency may not disclose records that are declared confidential by state statute. This exemption applies to records that are part of the peer review process that may be undertaken under IC 34-30-15. In particular, under IC 34-30-15-8, records of a peer review committee may only be disclosed under certain circumstances to certain entities, and shall otherwise be kept confidential for use only within the scope of the committee’s work. The IPAS is not one of the entities entitled to disclosure of the records of a peer review committee under IC 34-30-15-8.

DMHA or FSSA also creates investigative reports when those entities are investigating an incident regarding the care of a patient receiving mental health services. This investigation is not undertaken by a peer review committee, so the records are not protected by the peer review statute at IC 34-30-15. However, for these investigative or incident reports, DMHA claims that the reports are nondisclosable at the discretion of DMHA under IC 5-14-3-4(b)(6). This exemption in the APRA is for

“records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.”

The IPAS has taken the position that federal law establishing and funding “eligible systems” (protection and advocacy agencies) that monitor and protect the rights of the mentally ill under the Protection and Advocacy for Individuals with Mental Illness Act (42 U.S.C. §10801 et seq.) takes precedence over state law, for both peer review records and investigative reports. IPAS points to the text of the PAIMI and to several federal cases that hold that the federal PAIMI Act preempts the state peer review statutes at issue in those jurisdictions. *See Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10<sup>th</sup> Cir. Colo. 2003); *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3<sup>rd</sup> Cir. Pa.); *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Kirk*, 354 F. Supp.2d 196 (Dist. Conn. 2005).

Under PAIMI, the state’s protection and advocacy agency has the authority to have access to “all records of...any individual,” 42 U.S.C. §10805(a)(4)(A)-(C), including

reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.

*42 U.S.C. §10806(b)(3)(A)(defining the term “records”).*

Any records obtained by the state’s protection and advocacy agency pursuant to PAIMI are subject to the same federal or state confidentiality regulations that are applicable to providers of mental health services under applicable federal or state law. *42 U.S.C. §10806(a)*. DMHA does not dispute that IPAS is the protection and advocacy agency in Indiana authorized to investigate incidents of abuse and neglect of individuals with mental illness.

The three federal cases cited above held that 1) the PAIMI requires disclosure of peer review reports; and 2) the state’s peer review statutes were preempted by the PAIMI law, because the PAIMI expressly states that it preempts contrary state laws after May 23, 1988.<sup>1</sup> Those cases also held that there is no ambiguity in the federal statute that would allow consideration of legislative history that the law was not meant to preempt state peer review laws.<sup>2</sup> *Connecticut Office v. Kirk at 201, citing Center for Legal Advocacy v. Hammons, 323 F.3d at 1270; and Houstoun, 228 F.2d at 427*. Also, the federal case authorities rejected as an unreasonable interpretation the regulation promulgated by United States Health and Human Services, *42 C.F.R. §51.41(c)(2)*, that states that “nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.” *Id.*

Cited by DMHA is *Disabilities Rights Center, Inc. v. Commissioner, New Hampshire Department of Corrections*, 143 N.H. 674, 732 A.2d 1021 (1999). The New Hampshire Supreme Court held that a New Hampshire law protecting peer review records was not preempted by PAIMI, where the federal regulation and legislative history indicated Congress’ intent to not preempt state laws protecting records of peer review committees. However, the New Hampshire holding was rejected by *Hammons, at 1269* and *Conn. Office at 201*, because the New Hampshire high court had not held that the statutory language was ambiguous, a precondition to the court’s considering the legislative history to construe the statute.

I found no contrary federal courts of appeal or district court cases on the question of preemption of state law by PAIMI. Therefore, in my opinion, the PAIMI law preempts the

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<sup>1</sup> “If the laws of a State prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with [42 USC §10805(a)(4)] and this section, [42 USC §10805(a)(4)] and this section shall not apply to such system before...the expiration of the 2-year period beginning on the date of the enactment of this Act [May 23, 1986].” *42 U.S.C. §10806(b)(2)(C)*. Thus, after May 23, 1988, the federal law applies regardless of the laws of the state.

<sup>2</sup> Congress reauthorized the PAIMI in 1991; the House committee report accompanying the reauthorization legislation states that “it is the Committee’s intent that the [PAIMI] Act does not preempt state law regarding disclosure of peer review/medical review records relating to the proceedings of such committees.” H.R. Rep. No. 102-319. Congress did not amend the law itself in 1991.

Indiana statute at IC 34-30-15. Consequently, the exemption at IC 5-14-3-4(a) would not apply to peer review records, and the peer review records of DMHA are disclosable to IPAS under the PAIMI.

To the extent that investigative or incident reports concerning a patient of DMHA meet the statutory definition of “deliberative material,” the exemption for those records is not applicable to IPAS either. No preemption analysis is necessary here, because IC 5-14-3-4(b)(6) does not conflict with PAIMI. The APRA states that “nothing contained in subsection (b) [of IC 5-14-3-4] shall limit or affect the right of a person to inspect and copy a public record required or directed to be made by any statute or by any rule of a public agency.” IC 5-14-3-4(c). Because the federal statute requires that a public record be made available to a protection and advocacy agency, the APRA is not an impediment to the disclosure of “deliberative material” to IPAS.

DMHA believes that prior to disclosing the peer review and other records, IPAS should agree to and sign a confidentiality agreement. As cited above, the PAIMI provides that a protection and advocacy system which has access to records that under federal or state law are required to be maintained in a confidential manner by a provider of mental health services shall, except as provided in subsection (b), maintain the confidentiality of such records to the same extent as is required of the provider of such services. *42 U.S.C. 10806(a)*.

Hence, by virtue of the federal statute, IPAS may not disclose peer review records that it obtains pursuant to the PAIMI statute. There are also confidentiality protections for other records that have been made available previously to IPAS such as medical charts and records of patients. The confidentiality protections are found in state law (IC 16-39); in the APRA itself (IC 5-14-3-4(a)(9)); and in the *Standards for Privacy of Individually Identifiable Health Information*, 45 CFR Parts 160 and 164. Also, the APRA provides that a public agency that receives a confidential public record from another public agency shall maintain the confidentiality of the public record. IC 5-14-3-6.5. IPAS is a public agency under the APRA. IC 5-14-3-2.<sup>3</sup>

Accordingly, while IPAS’s willingness to enter into a confidentiality agreement with DMHA on agreed-upon terms is a good practice, I do not believe that DMHA can make signing such an agreement a condition to disclosing the records. In any event, I recommend that DMHA, prior to disclosing records, identify what records or parts of records are subject to statutory privilege, and what privilege pertains to the record.

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<sup>3</sup> I note that these provisions would not apply to the investigative reports or incident reports as a whole, because the material is nondisclosable at the agency’s discretion rather than confidential. However, the failure of the federal law to extend the confidentiality provisions to merely deliberative material does not vitiate the clear mandate of the statute to make such records available to IPAS.

Please feel free to contact me if you have any questions regarding this guidance.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Gary Ricks, Indiana Protection and Advocacy Services  
Milo Gray, Indiana Protection and Advocacy Services  
Katherine Gerber Gregory