

**IN THE SUPREME COURT OF OHIO**

	)	Case No. 2009-0121
	)	
IN THE MATTER OF:	)	On Appeal from the Geauga County
	)	Probate Court of Appeals, Eleventh
THE GUARDIANSHIP OF	)	Appellate District
JOHN SPANGLER	)	
	)	Court of Appeals
	)	Case Nos. 2007-G-2800
	)	2007-G-2802
	)	

**REPLY BRIEF OF  
APPELLANT GEAUGA COUNTY BOARD OF DEVELOPMENTAL DISABILITIES**

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**I. THE GEAUGA COUNTY DD BOARD HAD THE DUTY AND AUTHORITY TO FILE THE MOTION TO REMOVE THE GUARDIAN**

John Spangler and his parents Joseph and Gabriele Spangler<sup>1</sup> seek to limit the authority of DD Boards to carry out those functions which are literally stated in statute. The Spanglers' effort ignores clear directives of the Supreme Court of Ohio which permit public entities to exercise powers which are not explicitly defined in statute but which are necessary to implement express legislative duties. If the Spanglers' reasoning were followed, all of the Geauga DD Board's briefs filed in this Court would be improper, beyond the Geauga DD Board's authority to file, and could not be considered by the Court. This would be so because, there is no express language in any statute which authorizes a DD Board to file any briefs in the Supreme Court of Ohio or any other appellate court.

As the ensuing discussion shows, Ohio law does not limit the authority of DD boards in the way that John's Merit Brief describes. To the contrary, the law provides that the boards not only may, but must, take action to protect the health and safety of their clientele: the very action taken in this case.

**A. Ohio Law Expressly Requires the Geauga County DD Board to Take Appropriate Action to Protect Health and Safety**

**1. Legislative Mandates to Protect Health and Safety**

The legislature imposed a clear duty on DD Boards to protect health and safety of individuals receiving services from DD Boards. The language of the legislature includes no limit on the scope of this duty and no restrictions on how a DD Board should discharge its duty:<sup>2</sup>

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<sup>1</sup> The Brief of John Spangler will be referred to as "John's Merit Brief"; the Brief of Gabriele and Joseph Spangler will be referred to as "Parents' Merit Brief". Both briefs were filed on September 14, 2009.

<sup>2</sup> The statutes are analyzed in section I.A of the Geauga County DD Board's Brief on the Merits filed August 3, 2009 ("Board Merit Brief"), pp. 12-16.

- DD Boards must “monitor the [Medicaid supported] services provided to the individual [with DD] and *ensure* the individual’s health, safety and welfare.” R.C. 5126.055(A)(4) (emphasis added);
- If an eligible individual receiving adult day services or residential services is at risk, DD Boards must take “*immediate actions as necessary* to maintain the health, safety, and welfare of the individuals receiving the services.” R.C. 5126.14(D) (emphasis added);
- Residential services provided by DD Boards include “housing, food, clothing, habilitation, staff support, and related support services *necessary for the health, safety, and welfare of the individuals.*” R.C. 5126.01(O) (emphasis added);
- Supported living services include “Housing, food, clothing, habilitation, staff support, professional services, and any related support services *necessary to ensure the health, safety, and welfare of the individual receiving the services.*” R.C. 5126.01(U)(2)(a). (emphasis added).

## 2. Ohio Rules Reflect Legislative Mandates

The rules promulgated by the Ohio Department of Developmental Disabilities (“DoDD”) reflect these legislative directives:

- DD Boards “shall monitor the services provided to the individual to *ensure* the individual's health, safety, and welfare.” Ohio Adm.Code 5123:2-9-04(C)(9) (emphasis added);
- DD Boards must verify that Individual service plans are implemented in a manner to protect the health, safety and welfare of the individual. Ohio Adm.Code 5123:2-1-11(N)(1)(a) (emphasis added);
- When an individual is a risk, DD Boards must “take necessary action, in accordance with applicable requirements, to ensure the health, safety and welfare of individuals served.” Ohio Adm.Code 5123:2-9-04(C)(9);

John’s counsel correctly quote Ohio Adm.Code 5123:2-9-04(J) (cited in the Board Merit Brief p. 15) which states that, when an individual is at risk, a DD Board “may take immediate action to ensure the health, safety and welfare of an individual receiving [Medicaid waiver services] where there is substantial risk of immediate harm to the individual *only as expressly provided for in law*” (emphasis added). The rule clarifies that the language is not intended to limit what a DD Board is legally authorized to do: “[n]othing in this rule shall limit the authority

of county boards to take immediate action to ensure an individual's health, safety, and welfare as provided for under law.” Ohio Adm.Code 5123:2-9-04(J).

The rule supports the actions of the Geauga County DD Board, given the DD Board’s express duties under R.C. Chapter 5126, its implied authority to take actions necessary to carry out these duties, its duty, as – recognized by the Ohio Supreme Court in *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2 – to take actions to protect the health and safety of its disabled clientele, and the broad authority for interested parties to initiate actions in Probate Court. To the extent that the administrative rule limits the clearly stated duties set forth in statute, the statutory language must prevail. *Hoffman v. State Medical Bd. of Ohio*, 113 Ohio St. 3d 376, 2007-Ohio-2201, 865 N.E.2d 1259 (“an administrative rule may not add to or subtract from a legislative enactment. ... If it does, it creates a clear conflict with the statute and the rule is invalid.” *Id.* at ¶17 (citations omitted)); *Williams v. Spitzer Autoworld Canton L.L.C.*, 2009-Ohio-3354 at ¶18.

### 3. Common Law Duty of Care

The Supreme Court of Ohio recognizes and enforces the duty of care on DD Boards which DD Boards owe to individuals receiving services from such boards. In *Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 150 Ohio App.3d 383, 2002-Ohio-6344, 781 N.E.2d 1034; *aff’d Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, the First District Court of Appeals held that the DD Board had a duty of care to the individual who died. The point of citing this case was not, as John Spangler asserts (John’s Merit Brief at pp. 23-24), whether there was a proper finding of immunity for the DD Board; the point of this case is that courts recognize a duty of care to individuals being served by DD Boards. The Supreme Court of Ohio recognized the common law duty of DD Boards to protect its clients.

The Supreme Court also reviewed whether the immunity conferred on a political subdivision could be overcome under R.C. 2744.02(B)(5).<sup>3</sup> Because no sections of R.C. Chapter 5126 expressly impose *liability* (*Ridley* at ¶ 24), the DD Board's immunity was preserved. *Id.* at ¶ 28. There can be no reasonable dispute that DD Boards have a duty of care to take reasonable steps to protect eligible individuals receiving care from the DD Boards.

#### 4. Role of Other Entities

DD Boards are not alone in their duty to individuals under their care; the participation of other entities in the safety net devised by the legislature does not diminish the importance of the duty of DD Boards to protect the health, safety and welfare of individuals under their care.

John's Merit Brief (pp. 9-11) places the role of DD Boards in a broader context and correctly observes that DD Boards must collaborate with the Ohio DoDD, local Job and Family Service Departments, law enforcement and other public entities in protecting citizens with disabilities. The participation of the DD Boards in a larger context does not dilute the express duties of DD Boards to protect individuals with DD.

Among all the public entities listed in John's Merit Brief, DD Boards are, in essence, the "boots on the ground" with the duty to maintain frequent, regulated contact with individuals being served and the duty to take action to "ensure" the health, safety and welfare of individuals receiving DD Board services. R.C. 5126.055(A)(4) (emphasis added). As Advocacy and

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<sup>3</sup> R.C. 2744.02(B)(5) states: "In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property ***when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code***, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision. Emphasis supplied.

Protective Services (“APSI”) observed in its *amicus* brief: “APSI has an interest in the outcome of this case because its long experience has demonstrated that the MR/DD population receives, from a county board's ability to participate in all stages of the guardianship process, an additional and indispensable measure of protection against abuse and neglect.”

**B. There is Implied Authority to File the Motion to Remove**

There is no expectation in Ohio law that the Revised Code will “answer each and every administrative concern” that a county board of mental retardation and developmental disabilities has about its disabled clientele. Nor is there a requirement that the Legislature specify every action that an agency is authorized to take in furtherance of its legislative and regulatory mandate. *Frisch’s Restaurants, Inc. v. Ryan*, 114 Ohio St. 3d 1477, 2009-Ohio-2, 870 N.E.2d 730. Not every “possible circumstance” in which a board may have to act to promote the health and well-being of its clientele need be, or can be, spelled out in the Revised Code. *Cuyahoga County Support Enforcement Agency v. Lazoda* (1995), 102 Ohio App. 3d 442, 450, 657 N.E. 2d 372. This Court has consistently deferred to “permissible construction” of the statutes and regulations that guide agency operations, *State ex rel. Turner v. Eberlin*, 117 Ohio St. 3d 381, 2008-Ohio-1117, 884 N. E. 2d 39, at ¶17. Were the law otherwise, the agency would be unable to apply the rules and the agency would be unable to act in novel situations.

Accordingly, the Supreme Court of Ohio has recognized that a DD Board’s powers may be implied from the express statutory duties.<sup>4</sup> The Court’s holdings are discussed in the Board’s Merit Brief pp. 18-19. John’s Merit Brief argues, correctly, that, in the absence of an express

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<sup>4</sup> *Cuyahoga Cty. Bd. of Mental Retardation v. Cuyahoga Cty. Bd. of Commrs.* (1975), 41 Ohio St.2d 103, 106, 322 N.E.2d 885; *State ex rel Fairfield Cty. Bd. of Mental Retardation & Developmental Disabilities v. Fairfield Cty. Budget Comm.* (1984), 10 Ohio St.3d 123, 461 N.E.2d 1297; *Hamilton County Board of MR/DD v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 545 N.E.2d 1260.

power, there can be no grant of an implied power. John Spangler concedes that this Court, in *Cuyahoga Cty. Bd. of Mental Retardation v. Cuyahoga Cty. Bd. of Commrs.* (1975), 41 Ohio St.2d 103, 106, 322 N.E.2d 885, properly found authority for the Cuyahoga County Board of MR/DD to file a mandamus action – in the absence of any statutory provision for a Board to file any such action – because this Court found an express duty to “provide such funds as are necessary” for the operation of DD Board programs and facilities. *Id.* 41 Ohio St.2d at 105. John Spangler fails, however, to accept that the duties of the Geauga County DD Board to protect the health and safety of individuals under its care creates an implied power to seek the removal of a guardian.

The decision in *Cuyahoga Cty. Bd. of Mental Retardation* was based on a broad statutory language to provide funds. The Geauga County DD Board has a similarly broad statutory duty to “ensure the individual’s health, safety and welfare” (R.C. 5126.055(A)(4)) and, when an individual is at risk, to take “immediate actions as necessary to maintain the health, safety, and welfare of the individuals receiving the services.” R.C. 5126.14(D). These statutory requirements, as well as the other statutory and regulatory provisions cited in section I.A, are the fulfillment – the very point of the duty to provide funding – which supported this Court’s finding implied powers to bring a mandamus action. It would be contrary to law and logic to imply a power to take actions to obtain funding, while refusing authority to take action in fulfillment of one of the purposes of obtaining that funding – that of protecting the health, safety and welfare of John Spangler, and others like him.

This Court’s ruling in *D.A.B.E. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E. 2d 536, cited in John’s Merit Brief, is consistent with a finding of implied powers in the present case. In *D.A.B.E* the Court held that a county Board of Health

did not have authority under R.C. 3709.21 to impose a smoking ban on all public places in the county. The Court found that “in promulgating the Clean Indoor Air Regulation, petitioners engaged in policy-making requiring a balancing of social, political, economic, and privacy concerns. Such concerns are legislative in nature, and by engaging in such actions, petitioners have gone beyond administrative rule-making and usurped power delegated to the General Assembly.” *Id.* at ¶41. The Court held that R.C. 3709.21 is a rules-enabling statute which confers administrative and procedural authority to the Board of Health. *Id.* at ¶45.

It is significant that the *D.A.B.E.* opinion did not alter any prior rulings of this Court and left undisturbed the Court’s rulings (listed in footnote 4) which inferred the power of DD Boards to initiate legal proceedings in various courts. In contrast to *D.A.B.E.*, the actions of the Geauga County DD Board in the case under review do not involve the kind of “balancing of social, political, economic, and privacy concerns” which the *D.A.B.E.* court found to be the exclusive province of the legislature. Rather the Geauga County DD Board brought concerns about John’s safety and welfare in a formal way to the attention of the Probate Court. The Geauga County DD Board’s action was procedural in nature and fully consistent with the Supreme Court’s affirmation of a DD Board’s authority to initiate legal actions.

**C. R.C. 305.14(C) Recognizes a DD Board’s Authority to Initiate Legal Actions**

The authority of a DD Board to file actions is further supported by R.C. 305.14(C) which shows clear legislative intent to allow a DD Board to initiate “any action” in which the DD Board has “an interest” (See discussion in Board Merit Brief at p. 20). This section establishes that the legislature expects that a DD Board may initiate legal action and defines the circumstances which allow a DD Board to obtain outside counsel to do so. The section

conspicuously lacks any limits on the type of legal action which a DD Board may undertake, if the process for hiring outside counsel is followed.

The court in *Hurst v. Hankinson* (December 20, 1994), Ohio Ct. App., Perry No. CA-474, 1994 Ohio App. LEXIS 5922, cited in John's Merit Brief, did not address the authority of a DD Board to bring a specific type of action. The Court simply reviewed whether the DD Board had followed the requirements of R.C. 305.14 and other pertinent statutes in hiring outside counsel. Hence it does not contradict the DD Board's argument that R.C. 305.14(C) implies a broad legal authority to pursue actions in which it has "an interest."

**D. The Geauga County DD Board's Authority is Not Limited to Providing Services and Developing the ISP**

DD Boards are, without question, required to provide services to eligible individuals to the extent resources are available. R.C. 5126.05. John Spangler argues that the duty of DD Boards to provide services is the primary, if not the sole, function of DD Boards. John Spangler further argues that DD Boards have no authority to take steps to protect individuals except through the change of services either through the ISP process or through R.C. 5126.33.<sup>5</sup>

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<sup>5</sup> In the Merit Brief of Appellee John Spangler filed Sept. 14, 2009 ("John's Merit Brief"), John's counsel assert:

This repeated focus on the provision of "programs and services" represents the primary legislative directive on the scope of a DD Board's powers. A DD Board may exercise its powers and duties *only within this scope - providing programs and services* to individuals with developmental disabilities.

*Id.* p. 7 (emphasis added). John's Merit Brief further states that the ISP is *the* fundamental tool which DD Boards must use to ensure health, safety and welfare. *Id.* pp. 7-8. When an individual is a risk, the ISP must be amended to change services. *Id.* p. 8. When a DD Board is unable to provide appropriate services because of resistance from the guardian or caretaker, the DD Board has one and only one recourse: filing an action under R.C. 5126.33 which allows a Probate Court to enter an order imposing services. *Id.* p. 9.

This view of the DD Boards' authority is based more on ideology than law. John Spangler's argument improperly limits the scope of authority given to DD Boards by the legislature and ignores the clear imposition of a DD Board's duty to ensure the health, safety and welfare of individuals served by DD Boards (see citations in section I.A.1 above). These provisions of the Revised Code focus unequivocally on the health, safety and welfare of *individuals*, not the quality or type of services. The legislature placed a duty on certain professionals and others to report suspected cases of abuse, neglect and exploitation to DD Boards in R.C. 5123.61. This duty to report focuses on what an individual is suffering, not the service plan.

**E. R.C. 5126.33 Is Not an Appropriate, Complete or Exclusive Remedy.**

R.C. 5126.33 is, without question, an important and useful tool for DD Boards to discharge their statutory duties, including the duty to protect individuals. Under the circumstances of this case, however – and contrary to the assertions of John Spangler and his Parents – the remedy available under R.C. 5126.33 was neither appropriate nor complete. The Geauga County Board was asking the Probate Court to address the guardian's actions, not the appropriateness of services. When the suitability of a guardian is at issue and the actions of a legally appointed guardian pose a risk to an individual, changing the service plan is not an appropriate remedy.

A DD Board is not precluded from seeking a court order to remove a guardian simply because the legislature has defined a tool to be used under different circumstances.

1. R.C. 5126.33 does not provide an appropriate or complete remedy

Given the limitations on the scope of relief under R.C. 5126.33, neither John Spangler nor the Parents have successfully shown that appropriate relief was available to the Geauga DD

Board through R.C. 5126.33. The Probate Court made explicit findings that the guardian's *behavior*, hence her suitability – *not services* – were at the root of the problems:

Over the past year John's mother has frequently been at odds with case workers and care providers that are providing services for John. She has repeatedly, impulsively sought changes in John's placements and services without giving due consideration to the opinion of professionals working with John and without having first secured alternative more appropriate services.

Joseph and Gabriele Spangler seem not to appreciate that there are times when John's contact with family members serves as a trigger for John's violent and destructive behaviors. There is disagreement at times between family members and care providers over the nature and extent of contact that John should have with various family members.

Over the course of the past year Joseph Spangler has shown that he is either unable or unwilling to intercede objectively and assertively in disputes that have arisen between care providers and his wife.

*In the Matter of the Guardianship of John Spangler* (Aug. 15, 2007), Geauga Probate Court No. 06 PG 000245, at p. 4 (App. E).

If all of the statutory requirements are met, the Court's sole authority under that R.C. 5126.33 is to "issue an order authorizing the board to arrange for protective services". R.C. 5126.33(D)(1). Changing a service plan, which Appellees agree is the sole focus of relief under R.C. 5126.33 (see e.g. John's Merit Brief at pp. 3, 12-14, 30; Parents' Merit Brief at p. 17) does not address the central concerns articulated by the Probate Court in its opinion. Where, as in this case, the guardian's repeated and inappropriate interference with case plans was the central issue, the procedures in R.C. 5126.33 are irrelevant and inapplicable because removal of a guardian is not among the remedies allowed under R.C. 5126.33.

Even if the case involved a dispute over services and could reasonably be brought under R.C. 5126.33 the express language of R.C. 5126.33(D)(1)(c) states that no order can be issued unless there is clear and convincing evidence, *inter alia*, that there is a substantial risk to the adult of immediate physical harm or death. The Parents concede this point in their Merit Brief at p. 19.

R.C. 5126.33 offers no relief where, as here, there is no threat of immediate physical harm or death, but a significant emotional threat and a documented history of disruption in services.

It is further undisputed that any order under R.C. 5126.33 cannot be in effect for more than a year. Given the limitations on further orders under R.C. 5126.33, after August 2008 no-one in the case under review – not the Geauga DD Board; not the Probate Court – could take action to control inappropriate actions of the guardian or to alter the mix of services without the guardian’s consent.

While it is correct, as John Spangler asserts (John’s Merit Brief at p. 15), that a Probate Court can overcome a guardian’s refusal to consent to services (assuming all other elements are present), the guardian remains in place and is in a position to object at any point in the future. As shown above, once the year has passed, the guardian’s actions are beyond review under R.C. 5126.33.<sup>6</sup>

## 2. R.C. 5126.33 is not an exclusive remedy

DD Boards are creatures of statute and are limited by the terms of their authority as defined in statute (John’s Merit Brief at p. 15. Parents’ Merit Brief at p. 20). The authority is not however, wholly limited by what the words of the statute explicitly prescribed; powers may be inferred to carry out explicit requirements. See discussion in Board Merit Brief section I.B.

The availability of one remedy provided by the legislature does not preclude a DD Board from taking other reasonable steps to implement its express duties. Nothing in the language of R.C. 5126.33 dictates such an outcome; neither John nor his Parents addressed the absence of any language in R.C. 5126.33 which declares the remedy in that section to be the exclusive

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<sup>6</sup> There is no basis whatever in statute or case law for the baffling assertion of the Parents that a ward has a right to refuse services which are ordered by the Court, whether under R.C. Chapter 2111 or R.C. 5126.33. See Parents' Merit Brief at p. 18.

remedy for DD Boards. As discussed in the Board Merit Brief at p. 23, the legislature is quite capable of identifying remedies as exclusive. The legislature did not see fit to identify the section as an exclusive remedy in any of the original or revised versions of R.C. 5126.33.

**F. John Spangler's Rights were Fully Protected and His Wishes Were Appropriately Considered by the Probate Court**

It is interesting that the Parents argue so strongly that the Geauga DD Board somehow violated the “integrity of [John’s] basic human rights and autonomy” (Parents' Merit Brief at p. 10) by filing the emergency motion to remove Mrs. Spangler as guardian. Counsel for the parents was present at the emergency hearing to remove Mrs. Spangler, six days after the Geauga DD Board filed its motion. Counsel for the parents not only failed to object to the authority of the Geauga DD Board to have filed the motion, but *stipulated* to the temporary removal of Mrs. Spangler and to the appointment of APSI as an interim guardian for six months. (T. 10/31/06 pp. 5-7; Supp. pp. 41-43). The Parents cannot credibly argue that what they stipulated as appropriate in October, 2007 is now to be considered a violation of John’s “basic human rights and autonomy.”

Notwithstanding the belated claims of John’s Parents, the Probate Court did give John and his guardian full due process rights. The Probate Court took careful steps to determine John’s wishes and entered orders which reflected John’s choices. There is no basis for John’s claims – raised in his Merit Brief for the first time – that his rights to confidentiality were violated.

1. The Court Provided Full Due Process

John Spangler's due process rights were fully protected by the Probate Court which not only held hearings over three days but consulted privately with John and John's counsel in chambers.<sup>7</sup>

A hearing was held six days after the Probate Court issued an emergency order removing Mrs. Spangler. If the Parents had any issues with the Probate Court's process or protection of John's rights, they failed to raise them during the October 31, 2006 hearing. The hearing, in fact, led to a stipulation by counsel for the Parents and the Board that Mrs. Spangler would be removed for six months and APSI would be appointed interim guardian during that period. (T. 10/31/06 pp. 5-7; Supp. pp. 41-43).

When problems with John's placement arose in early 2007, the Probate Court set the matter for a full hearing which occurred on April 24, June 13 and July 24, 2007. The Probate Court met with John and his counsel *in camera* on August 9, 2007. There was full opportunity for all parties to present direct testimony and written evidence. All parties had full opportunity to cross examine opposing witnesses. All elements of due process were provided at all stages of review of the Geauga DD Board's Motion to Remove.

The Geauga DD Board did not ever "compel its will" upon John as his Parents assert in Parents' Merit Brief at p. 22. The Geauga DD Board filed a motion in Probate Court which asserted that the actions of John's guardian showed that she was no longer suitable and should be removed. The Probate Court, not the Geauga DD Board, decided what was in John's best interest and entered an order removing Mrs. Spangler.

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<sup>7</sup> The full transcript of the *in camera* discussion is in the Board's Second Supplement. References to this transcript and the corresponding pages in the Second Supplement will be "T. 8/9/07, Bd. 2d Supp."

The Probate Court was not required to give ten days written notice to Mrs. Spangler prior to entering the emergency order of removal (the Parents' argument to the contrary is at Parents' Merit Brief at p. 23-24). A Probate Court's authority to remove is based on R.C. 2101.24(A)(1)(e). There are no procedures in R.C. Chapters 2101, 2111 or 2109 which define the process which a Probate Court must follow in removing a guardian. *In re Constable*, 2007-Ohio-3346 at ¶7; 2 Merrick-Rippner Probate Law (2008) section 67.2. While courts in the past had relied on R.C. 2109.24 to guide removal of guardians, the Probate Court below properly determined that changes to that statute in 2007 raised issues about whether that statute remained a relevant to guardianship proceedings.<sup>8</sup> *In the Matter of the Guardianship of John Spangler*, (Aug. 15, 2007), Geauga Probate Court No. 06 PG 000245 at p. 2. (App. E).

R.C. 2111.50(A)(2)(c), which is clearly applicable to guardianships, states "For good cause shown, the probate court may *limit or deny, by order or rule, any power that is granted to a guardian* by a section of the Revised Code or relevant decisions of the courts of this state" (emphasis added). The emergency order of the Probate Court denied all powers to the guardian; there is nothing in this language which requires prior notice to the guardian.

## 2. John's Wishes were Appropriately Considered

The transcript of the judge's August 9 *in camera* interview with John confirms, contrary to the Parents' assertion, that John participated in decisions that affected his life and that the Court considered John's "needs, desires and preferences". Parents' Merit Brief at p. 16; R.C.

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<sup>8</sup> In 2007 H.B. 416 altered R.C. 2109.24 as follows (strikeout for deleted language and underlined caps for additions):

The court may remove any ~~such~~ fiduciary, after giving the fiduciary not less than ten days' notice, for habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the PROPERTY, TESTAMENTARY trust, OR ESTATE THAT THE FIDUCIARY IS RESPONSIBLE FOR ADMINISTERING demands it, or for any other cause authorized by law.

5126.043. T. 8/9/07, Bd. 2d Supp at pp. 1-14. John stated he had no quarrel with the decisions which APSI had made on his behalf:

THE COURT: Okay. Russell and his Agency, APSI is the Agency, have been making decisions for you now. Are there any decisions that he's made in the last couple of months that you didn't like? Are you aware of any?

JOHN SPANGLER: No.

T. 8/9/07 p. 7, Bd. 2d Supp. p. 7

John also stated that he agreed with his current placement:

THE COURT: Hey, John, how do you like living where you are now?

JOHN SPANGLER: Good.

T. 8/9/07 pp. 9-10, Bd. 2d Supp. pp. 9-10.

John described his dismay at his mother's drunken visit late in the night of October, 24 2006 (the incident is summarized in the Board Merit Brief at pp. 4-5):

JOHN SPANGLER: And I, at some times, don't get along with [Mrs. Spangler], ... She opens the door, and I was just doing homework and she closed the door on me and turned the lights off, the lights off on me when I was sleeping in my room. And she just barged in without asking, she just opened the door, and I was like, what, are you crazy or something?

THE COURT: Who did that?

JOHN SPANGLER: My mom.

T. Aug. 9 07 p. 12, Bd. 2d Supp. p. 12.

### 3. There was No Violation of John's Confidentiality

John's assertion that his rights to confidentiality were violated (John's Merit Brief at p. 1, note 1) has never been raised at any stage of the Probate or appellate proceedings. When Mrs. Spangler brought the Geauga DD Board into her guardianship proceedings in the two hearings

June 19 and July 15, 2006 (see summary in Board Merit Brief pp. 3-4) there was no objection on her part to the Geauga DD Board's participation nor any concern expressed for John's confidentiality when Geauga DD Board staff testified that Mrs. Spangler was a suitable guardian.

The Geauga DD Board brought an emergency motion describing Mrs. Spangler's drunken behavior on October 24, 2006 (Board Merit Brief at pp. 4-6). The focus of that motion was Mrs. Spangler's behavior and her intoxicated state, not John's condition or protected health information. In fact, Mrs. Spangler described John's condition and behavior in great detail to the Probate Court in the prior guardianship hearings (some of her testimony is summarized in Parents' Merit Brief at pp. 1-2).

Whatever the significance of Mrs. Spangler's disclosures and the failure to object, the Geauga DD Board did not violate HIPAA rules. 45 CFR 164.512(j)<sup>9</sup> permits the Geauga DD Board, as a covered entity, to disclose protected health information, based on the good faith belief that the disclosure was necessary to prevent or lessen a serious and imminent threat to John's health or safety. The disclosure was made to the Probate Judge, a person reasonably able to prevent or lessen the threat; therefore, HIPAA was not violated.

## **II. THE PROBATE COURT HAD THE AUTHORITY TO RULE ON THE GEAUGA COUNTY DD BOARD'S MOTION TO REMOVE THE GUARDIAN**

The State of Ohio, as *amicus curiae* cogently rebuts the attempts by Appellees to limit authority of the Probate Court to hear the Motion to Remove filed by the Geauga DD Board:

Under Ohio law, the probate court is "the superior guardian" of wards like John Spangler, and appointed guardians "shall obey all orders of the court that concern their wards or guardianships." R.C. 2111.50(A)(1). The probate court also has "exclusive jurisdiction" to "remove guardians." R.C. 2101.24(A)(1)(e). The law is clear on how the court should exercise that authority: "The probate court has *plenary power* at law and in equity to dispose fully of any matter that is properly before the court, unless that power is

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<sup>9</sup> The complete rule is attached in the Appendix; section (j) is on pp. 9-10 of the Appendix.

expressly otherwise limited or denied by a section of the Revised Code." R.C. 2101.24(C) (emphasis added).

\* \* \*

The court's "plenary power" to supervise and remove guardians necessarily includes the discretion to receive relevant information concerning the guardians, no matter the source. Nor does the form of the complaint matter; it could come a motion, an informal letter, or a phone call. The fact remains that when a probate court receives information that a guardian is not acting in the best interests of the ward, the court has clear discretion under state law to consider that information, schedule a hearing, and, if necessary, remove the guardian.

Merit Brief of *Amicus Curiae* State of Ohio in support of Appellant Geauga County Board of Mental Retardation and Developmental Disabilities filed July 31, 2009 at pp. 1-2.

The combined analyses in the Merit Briefs submitted by John and his Parents ignore these legislative directives. The Spanglers, instead, are asking this Court to declare that the Probate Court is powerless to initiate proceedings to remove a guardian (without a request from the ward) unless and until the Probate Judge independently discovers facts justifying removal. The Spanglers urge this Court to rule that no interested party other than the ward has standing to file an motion seeking removal proceedings<sup>10</sup> and that the Geauga DD Board has no authority or standing to file a motion for *any* proceeding in Probate Court apart from R.C. 5126.33<sup>11</sup> which, John and his Parents concede, on its face does not permit removal of a guardian.<sup>12</sup> If the Probate Court learns of a problem from a letter written by the Geauga DD Board, the Parents agree that the Court may take action to remove a guardian;<sup>13</sup> if the same DD Board provides the same

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<sup>10</sup> John's Merit Brief at p. 25; Parents' Merit Brief at p. 25.

<sup>11</sup> John's Merit Brief at pp. 18-27; Parents' Merit Brief at pp. 18-23.

<sup>12</sup> See discussion at section I.E.2 above.

<sup>13</sup> The Spanglers had conceded in oral argument that the Geauga County DD Board could have properly written a letter to the Probate Court with the same information as in the Board's motion and "the end result would have been the same." *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶97.

information in the form of a motion, rather than a letter, the Spanglers then assert that the Probate Court is deprived of authority to rule on the motion.

**A. The Court Had Full Authority to Remove John’s Guardian**

The legislature has clearly given Probate Courts Broad Authority in guardianship matters:

The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by statute.

R.C. 2101.24(C). Matters properly before the probate court include those listed in R.C. 2101.24(A) and include the power “[t]o appoint and remove guardians and ... direct and control their conduct ...” R.C. 2101.24(A)(4). See full discussion in Board Merit Brief at pp. 30-32.

John and his Parents argue that Judge Trapp in the Eleventh District Court of Appeals<sup>14</sup> was correct in finding that the Probate Court has no authority to review a motion to remove a guardian filed by an interested party because there is no express statutory language which permits an interested party to file that particular type of motion.<sup>15</sup> Such a narrow interpretation is wholly contrary to the legislative grant of plenary powers to the Probate court.

**B. The Geauga County DD Board Has Standing to Participate in the Probate Action as an “Interested Party”**

The Geauga DD Board’s interest in participating in this case arises from the explicit statutory duties to ensure John’s health, safety and welfare, discussed in the Board Merit Brief at 12-20. The Board’s interest is further established by its common law duty to protect individuals under its care as reviewed in the Board Merit Brief at pp. 15-16 and above in section I.A.3.

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<sup>14</sup> *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶74-75.

<sup>15</sup> John's Merit Brief at p. 25-26 (“Ohio courts have not recognized that an interested party may move for the removal of a guardian under R.C. 2109.24); Parents' Merit Brief at p. 25.

Neither John nor his Parents offer any reasoned rebuttal to the Probate Court's allowing the Geauga DD Board to participate as an interested party.

John Spangler concedes that there is no statutory definition of "interested party" (John's Merit Brief at p. 24) and concedes that the concept of interested party has been broadly applied. *Id.* at pp. 24-25. John acknowledges the ruling in *In re Constable*, 2007-Ohio-3346 which stated that "in fact, review of Ohio case law reveals no instance in which a moving party was found to be uninterested for purposes of participating in a guardianship proceeding." *Id.* at ¶9.

John asserts that "the DD Board fails to cite a single case in which a DD Board, or any other governmental agency, has been granted interested party status in order to remove a guardian." John's Merit Brief at p. 25. The Geauga DD Board in fact described in detail *In re Riccardi*, Sandusky App. No. S-04-024, 2006-Ohio-24, where the Sandusky County DD Board filed a motion to remove a guardian because of her erratic decisions. The guardian filed a motion to dismiss the petition of the DD Board alleging that the DD Board lacked standing. The Magistrate rejected the motion to dismiss, finding that the DD Board had obligations to Elizabeth under R.C. 5126.15(B) that "appeared fiduciary in nature and as such [the DD Board] had standing as a next friend and real party in interest to file a petition to remove the guardian." *Id.* at ¶7. The probate court affirmed that the DD Board had standing and proceeded to remove Mary as guardian. *Id.* See full discussion in Board Merit Brief at pp. 28-29.

Appellees did not address the finding in *In re Guardianship of Elizabeth Friend* (Dec. 16, 1993), 8th Dist. No. 64018, 1993 Ohio App. LEXIS 6025 at \*15, unreported. In that case, the Eighth District Court of Appeals ruled that the trial court acted within its plenary powers in allowing an attorney from the Department of Human Services to participate in the guardianship proceedings as a party despite the absence of any filing of a formal protective services complaint or prior notice. *Id.* at \*12.

Fiduciary status is not a prerequisite for being an interested party in proceedings before Probate Court. The Parents argue correctly that the Geauga DD Board is not a fiduciary in the strict sense as used in the context of Probate Court proceedings.<sup>16</sup> However, they cite no authority to support their claim that the lack of fiduciary status precludes participation in Probate proceedings as an interested party. In *In re Estate of Rice*, 161 Ohio App.3d 847, 2005-Ohio-3301, 832 N.E.2d 139, an individual who had no interest in the estate and was not a beneficiary participated as a party in the trial and appellate proceedings to remove an executor. The absence of any fiduciary interest did not affect standing.

*In re Guardianship of Santrucek*, 120 Ohio St. 3d 67, 2008-Ohio-4915, 896 N.E.2d 683 is not relevant to the determination that the Geauga DD Board has standing to file a motion to remove a guardian. The Supreme Court of Ohio in *Santrucek* ruled that a person who did not file an application to be appointed guardian and who was not otherwise made a party to the guardianship proceeding has no standing to appeal the probate court's ruling. The Geauga DD Board in this case had been made a party by Court order. *In the Matter of the Guardianship of John Spangler*, (Aug. 15, 2007), Geauga Probate Court No. 06 PG 000245, (App. F); *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶10 (App. C).

### III. CONCLUSION

For the reasons stated above and in the Board's Merit Brief, the decision of the Eleventh District Court of Appeals should be reversed.

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<sup>16</sup> Parents' Merit Brief at pp. 15-16.

Respectfully Submitted,



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A copy of the foregoing Reply Brief of Appellant Geauga County DD Board was served upon the following by ordinary U.S. Mail on this 1<sup>st</sup> day of October 2009:

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**APPENDIX  
TO REPLY BRIEF OF GEAUGA COUNTY BOARD OF  
DEVELOPMENTAL DISABILITIES**

45 CFR 160.512.....1

45 CFR 160.512

§ 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) Standard: Uses and disclosures required by law. (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

(b) Standard: uses and disclosures for public health activities. (1) Permitted disclosures. A covered entity may disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is 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, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority;

(ii) A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect;

(iii) A person subject to the jurisdiction of the Food and Drug Administration (FDA) with respect to an FDA-regulated product or activity for which that person has responsibility, for the purpose of activities related to the quality, safety or effectiveness of such FDA-regulated product or activity. Such purposes include:

(A) To collect or report adverse events (or similar activities with respect to food or dietary supplements), product defects or problems (including problems with the use or labeling of a product), or biological product deviations;

(B) To track FDA-regulated products;

(C) To enable product recalls, repairs, or replacement, or lookback (including locating and notifying individuals who have received products that have been recalled, withdrawn, or are the subject of lookback); or

(D) To conduct post marketing surveillance;

(iv) A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation; or

(v) An employer, about an individual who is a member of the workforce of the employer, if:

(A) The covered entity is a covered health care provider who is a member of the workforce of such employer or who provides health care to the individual at the request of the employer:

(1) To conduct an evaluation relating to medical surveillance of the workplace; or

(2) To evaluate whether the individual has a work-related illness or injury;

(B) The protected health information that is disclosed consists of findings concerning a work-related illness or injury or a workplace-related medical surveillance;

(C) The employer needs such findings in order to comply with its obligations, under 29 CFR parts 1904 through 1928, 30 CFR parts 50 through 90, or under state law having a similar purpose, to record such illness or injury or to carry out responsibilities for workplace medical surveillance; and

(D) The covered health care provider provides written notice to the individual that protected health information relating to the medical surveillance of the workplace and work-related illnesses and injuries is disclosed to the employer:

(1) By giving a copy of the notice to the individual at the time the health care is provided; or

(2) If the health care is provided on the work site of the employer, by posting the notice in a prominent place at the location where the health care is provided.

(2) Permitted uses. If the covered entity also is a public health authority, the covered entity is permitted to use protected health information in all cases in which it is permitted to disclose such information for public health activities under paragraph (b)(1) of this section.

(c) Standard: Disclosures about victims of abuse, neglect or domestic violence. (1) Permitted disclosures. Except for reports of child abuse or neglect permitted by paragraph (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:

(i) To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;

(ii) If the individual agrees to the disclosure; or

(iii) To the extent the disclosure is expressly authorized by statute or regulation and:

(A) The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or

(B) If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against the individual and that an immediate

enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

(2) Informing the individual. A covered entity that makes a disclosure permitted by paragraph (c)(1) of this section must promptly inform the individual that such a report has been or will be made, except if:

(i) The covered entity, in the exercise of professional judgment, believes informing the individual would place the individual at risk of serious harm; or

(ii) The covered entity would be informing a personal representative, and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect, or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(d) Standard: Uses and disclosures for health oversight activities. (1) Permitted disclosures. A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:

(i) The health care system;

(ii) Government benefit programs for which health information is relevant to beneficiary eligibility;

(iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or

(iv) Entities subject to civil rights laws for which health information is necessary for determining compliance.

(2) Exception to health oversight activities. For the purpose of the disclosures permitted by paragraph (d)(1) of this section, a health oversight activity does not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or other activity does not arise out of and is not directly related to:

(i) The receipt of health care;

(ii) A claim for public benefits related to health; or

(iii) Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services.

(3) Joint activities or investigations. [Notwithstanding] paragraph (d)(2) of this section, if a health oversight activity or investigation is conducted in conjunction with an oversight activity or investigation relating to a claim for public benefits not related to health, the joint activity or investigation is considered a health oversight activity for purposes of paragraph (d) of this section.

(4) Permitted uses. If a covered entity also is a health oversight agency, the covered entity may use protected health information for health oversight activities as permitted by paragraph (d) of this section.

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an

order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

(2) Permitted disclosures: Limited information for identification and location purposes. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

(i) The covered entity may disclose only the following information:

- (A) Name and address;
- (B) Date and place of birth;
- (C) Social security number;
- (D) ABO blood type and rh factor;
- (E) Type of injury;
- (F) Date and time of treatment;
- (G) Date and time of death, if applicable; and

(H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

(ii) Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

(3) Permitted disclosure: Victims of a crime. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime, other than disclosures that are subject to paragraph (b) or (c) of this section, if:

(i) The individual agrees to the disclosure; or

(ii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:

(A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;

(B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

(C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) Permitted disclosure: Decedents. A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

(5) Permitted disclosure: Crime on premises. A covered entity may disclose to a law enforcement official protected health information that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

(6) Permitted disclosure: Reporting crime in emergencies. (i) A covered health care provider providing emergency health care in response to a medical emergency, other than such emergency

on the premises of the covered health care provider, may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to:

- (A) The commission and nature of a crime;
- (B) The location of such crime or of the victim(s) of such crime; and
- (C) The identity, description, and location of the perpetrator of such crime.

(ii) If a covered health care provider believes that the medical emergency described in paragraph (f)(6)(i) of this section is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care, paragraph (f)(6)(i) of this section does not apply and any disclosure to a law enforcement official for law enforcement purposes is subject to paragraph (c) of this section.

(g) Standard: Uses and disclosures about decedents. (1) Coroners and medical examiners. A covered entity may disclose protected health information to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. A covered entity that also performs the duties of a coroner or medical examiner may use protected health information for the purposes described in this paragraph.

(2) Funeral directors. A covered entity may disclose protected health information to funeral directors, consistent with applicable law, as necessary to carry out their duties with respect to the decedent. If necessary for funeral directors to carry out their duties, the covered entity may disclose the protected health information prior to, and in reasonable anticipation of, the individual's death.

(h) Standard: Uses and disclosures for cadaveric organ, eye or tissue donation purposes. A covered entity may use or disclose protected health information to organ procurement organizations or other entities engaged in the procurement, banking, or transplantation of cadaveric organs, eyes, or tissue for the purpose of facilitating organ, eye or tissue donation and transplantation.

(i) Standard: Uses and disclosures for research purposes. (1) Permitted uses and disclosures. A covered entity may use or disclose protected health information for research, regardless of the source of funding of the research, provided that:

(i) Board approval of a waiver of authorization. The covered entity obtains documentation that an alteration to or waiver, in whole or in part, of the individual authorization required by § 164.508 for use or disclosure of protected health information has been approved by either:

(A) An Institutional Review Board (IRB), established in accordance with 7 CFR 1c.107, 10 CFR 745.107, 14 CFR 1230.107, 15 CFR 27.107, 16 CFR 1028.107, 21 CFR 56.107, 22 CFR 225.107, 24 CFR 60.107, 28 CFR 46.107, 32 CFR 219.107, 34 CFR 97.107, 38 CFR 16.107, 40 CFR 26.107, 45 CFR 46.107, 45 CFR 690.107, or 49 CFR 11.107; or

(B) A privacy board that:

(1) Has members with varying backgrounds and appropriate professional competency as necessary to review the effect of the research protocol on the individual's privacy rights and related interests;

(2) Includes at least one member who is not affiliated with the covered entity, not affiliated with any entity conducting or sponsoring the research, and not related to any person who is affiliated with any of such entities; and

(3) Does not have any member participating in a review of any project in which the member has a conflict of interest.

(ii) Reviews preparatory to research. The covered entity obtains from the researcher representations that:

(A) Use or disclosure is sought solely to review protected health information as necessary to prepare a research protocol or for similar purposes preparatory to research;

(B) No protected health information is to be removed from the covered entity by the researcher in the course of the review; and

(C) The protected health information for which use or access is sought is necessary for the research purposes.

(iii) Research on decedent's information. The covered entity obtains from the researcher:

(A) Representation that the use or disclosure sought is solely for research on the protected health information of decedents;

(B) Documentation, at the request of the covered entity, of the death of such individuals; and

(C) Representation that the protected health information for which use or disclosure is sought is necessary for the research purposes.

(2) Documentation of waiver approval. For a use or disclosure to be permitted based on documentation of approval of an alteration or waiver, under paragraph (i)(1)(i) of this section, the documentation must include all of the following:

(i) Identification and date of action. A statement identifying the IRB or privacy board and the date on which the alteration or waiver of authorization was approved;

(ii) Waiver criteria. A statement that the IRB or privacy board has determined that the alteration or waiver, in whole or in part, of authorization satisfies the following criteria:

(A) The use or disclosure of protected health information involves no more than a minimal risk to the privacy of individuals, based on, at least, the presence of the following elements;

(1) An adequate plan to protect the identifiers from improper use and disclosure;

(2) An adequate plan to destroy the identifiers at the earliest opportunity consistent with conduct of the research, unless there is a health or research justification for retaining the identifiers or such retention is otherwise required by law; and

(3) Adequate written assurances that the protected health information will not be reused or disclosed to any other person or entity, except as required by law, for authorized oversight of the research study, or for other research for which the use or disclosure of protected health information would be permitted by this subpart;

(B) The research could not practicably be conducted without the waiver or alteration; and

(C) The research could not practicably be conducted without access to and use of the protected health information.

(iii) Protected health information needed. A brief description of the protected health information for which use or access has been determined to be necessary by the IRB or privacy board has determined, pursuant to paragraph (i)(2)(ii)(C) of this section;

(iv) Review and approval procedures. A statement that the alteration or waiver of authorization has been reviewed and approved under either normal or expedited review procedures, as follows:

(A) An IRB must follow the requirements of the Common Rule, including the normal review procedures (7 CFR 1c.108(b), 10 CFR 745.108(b), 14 CFR 1230.108(b), 15 CFR 27.108(b), 16 CFR 1028.108(b), 21 CFR 56.108(b), 22 CFR 225.108(b), 24 CFR 60.108(b), 28 CFR 46.108(b), 32 CFR 219.108(b), 34 CFR 97.108(b), 38 CFR 16.108(b), 40 CFR 26.108(b), 45 CFR 46.108(b), 45 CFR 690.108(b), or 49 CFR 11.108(b)) or the expedited review procedures (7 CFR 1c.110, 10 CFR 745.110, 14 CFR 1230.110, 15 CFR 27.110, 16 CFR 1028.110, 21 CFR 56.110, 22 CFR 225.110, 24 CFR 60.110, 28 CFR 46.110, 32 CFR 219.110, 34 CFR 97.110, 38 CFR 16.110, 40 CFR 26.110, 45 CFR 46.110, 45 CFR 690.110, or 49 CFR 11.110);

(B) A privacy board must review the proposed research at convened meetings at which a majority of the privacy board members are present, including at least one member who satisfies the criterion stated in paragraph (i)(1)(i)(B)(2) of this section, and the alteration or waiver of authorization must be approved by the majority of the privacy board members present at the meeting, unless the privacy board elects to use an expedited review procedure in accordance with paragraph (i)(2)(iv)(C) of this section;

(C) A privacy board may use an expedited review procedure if the research involves no more than minimal risk to the privacy of the individuals who are the subject of the protected health information for which use or disclosure is being sought. If the privacy board elects to use an expedited review procedure, the review and approval of the alteration or waiver of authorization may be carried out by the chair of the privacy board, or by one or more members of the privacy board as designated by the chair; and

(v) Required signature. The documentation of the alteration or waiver of authorization must be signed by the chair or other member, as designated by the chair, of the IRB or the privacy board, as applicable.

(j) Standard. Uses and disclosures to avert a serious threat to health or safety. (1) Permitted disclosures. A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

(i)(A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

(B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat; or

(ii) Is necessary for law enforcement authorities to identify or apprehend an individual.

(A) Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or

(B) Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody, as those terms are defined in § 164.501.

(2) Use or disclosure not permitted. A use or disclosure pursuant to paragraph (j)(1)(ii)(A) of this section may not be made if the information described in paragraph (j)(1)(ii)(A) of this section is learned by the covered entity:

(i) In the course of treatment to affect the propensity to commit the criminal conduct that is the basis for the disclosure under paragraph (j)(1)(ii)(A) of this section, or counseling or therapy; or

(ii) Through a request by the individual to initiate or to be referred for the treatment, counseling, or therapy described in paragraph (j)(2)(i) of this section.

(3) Limit on information that may be disclosed. A disclosure made pursuant to paragraph (j)(1)(ii)(A) of this section shall contain only the statement described in paragraph (j)(1)(ii)(A) of this section and the protected health information described in paragraph (f)(2)(i) of this section.

(4) Presumption of good faith belief. A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) or (ii) of this section, if the belief is based upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

(k) Standard: Uses and disclosures for specialized government functions. (1) Military and veterans activities. (i) Armed Forces personnel. A covered entity may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission, if the appropriate military authority has published by notice in the Federal Register the following information:

(A) Appropriate military command authorities; and

(B) The purposes for which the protected health information may be used or disclosed.

(ii) Separation or discharge from military service. A covered entity that is a component of the Departments of Defense or Transportation may disclose to the Department of Veterans Affairs (DVA) the protected health information of an individual who is a member of the Armed Forces upon the separation or discharge of the individual from military service for the purpose of a determination by DVA of the individual's eligibility for or entitlement to benefits under laws administered by the Secretary of Veterans Affairs.

(iii) Veterans. A covered entity that is a component of the Department of Veterans Affairs may use and disclose protected health information to components of the Department that determine eligibility for or entitlement to, or that provide, benefits under the laws administered by the Secretary of Veterans Affairs.

(iv) Foreign military personnel. A covered entity may use and disclose the protected health information of individuals who are foreign military personnel to their appropriate foreign military authority for the same purposes for which uses and disclosures are permitted for Armed Forces personnel under the notice published in the Federal Register pursuant to paragraph (k)(1)(i) of this section.

(2) National security and intelligence activities. A covered entity may disclose protected health information to authorized federal officials for the conduct of lawful intelligence, counter-

intelligence, and other national security activities authorized by the National Security Act (50 U.S.C. 401, et seq.) and implementing authority (e.g., Executive Order 12333).

(3) Protective services for the President and others. A covered entity may disclose protected health information to authorized federal officials for the provision of protective services to the President or other persons authorized by 18 U.S.C. 3056, or to foreign heads of state or other persons authorized by 22 U.S.C. 2709(a)(3), or to for the conduct of investigations authorized by 18 U.S.C. 871 and 879.

(4) Medical suitability determinations. A covered entity that is a component of the Department of State may use protected health information to make medical suitability determinations and may disclose whether or not the individual was determined to be medically suitable to the officials in the Department of State who need access to such information for the following purposes:

(i) For the purpose of a required security clearance conducted pursuant to Executive Orders 10450 and 12698;

(ii) As necessary to determine worldwide availability or availability for mandatory service abroad under sections 101(a)(4) and 504 of the Foreign Service Act; or

(iii) For a family to accompany a Foreign Service member abroad, consistent with section 101(b)(5) and 904 of the Foreign Service Act.

(5) Correctional institutions and other law enforcement custodial situations. (i) Permitted disclosures. A covered entity may disclose to a correctional institution or a law enforcement official having lawful custody of an inmate or other individual protected health information about such inmate or individual, if the correctional institution or such law enforcement official represents that such protected health information is necessary for:

(A) The provision of health care to such individuals;

(B) The health and safety of such individual or other inmates;

(C) The health and safety of the officers or employees of or others at the correctional institution;

(D) The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another;

(E) Law enforcement on the premises of the correctional institution; and

(F) The administration and maintenance of the safety, security, and good order of the correctional institution.

(ii) Permitted uses. A covered entity that is a correctional institution may use protected health information of individuals who are inmates for any purpose for which such protected health information may be disclosed.

(iii) No application after release. For the purposes of this provision, an individual is no longer an inmate when released on parole, probation, supervised release, or otherwise is no longer in lawful custody.

(6) Covered entities that are government programs providing public benefits. (i) A health plan that is a government program providing public benefits may disclose protected health

information relating to eligibility for or enrollment in the health plan to another agency administering a government program providing public benefits if the sharing of eligibility or enrollment information among such government agencies or the maintenance of such information in a single or combined data system accessible to all such government agencies is required or expressly authorized by statute or regulation.

(ii) A covered entity that is a government agency administering a government program providing public benefits may disclose protected health information relating to the program to another covered entity that is a government agency administering a government program providing public benefits if the programs serve the same or similar populations and the disclosure of protected health information is necessary to coordinate the covered functions of such programs or to improve administration and management relating to the covered functions of such programs.

(l) Standard: Disclosures for workers' compensation. A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

**HISTORY:** [65 FR 82462, 82813, Dec. 28, 2000; 66 FR 12434, Feb. 26, 2001; 67 FR 53182, 53270, Aug. 14, 2002]