



COMMISSIONER  
Jon Weizenbaum

December 9, 2016

To: Nursing Facilities (NFs)

Subject: Provider Letter No. 16-41 — Steward Litigation Hold Notice Related to Preadmission Screening and Resident Review (PASRR) Requirements

RE: *Eric Steward, et al. v. Charles Smith, Executive Commissioner, Texas Health and Human Services Commission (HHSC), et al.*

The Texas Department of Aging and Disability Services (DADS) is issuing this provider letter to remind nursing facility providers that, **as a Medicaid contracted party with DADS, you are required to keep and preserve certain records as described in this letter.**

On December 20, 2010, Plaintiffs, which included private individuals, disability rights advocates, and later, the U.S. Department of Justice, filed a class action lawsuit naming DADS, HHSC, the state's governor, HHSC executive commissioner, and DADS commissioner as Defendants. Plaintiffs allege that the state unnecessarily segregates Medicaid-eligible individuals with IDD, who either live in or are at risk of going into a NF, in violation of the ADA, the Nursing Home Reform Amendments to the Medicaid Act, and various other federal statutes. Plaintiffs specifically allege deficiencies in the PASRR process, including a failure to properly identify individuals with IDD and provide those individuals with community alternatives to institutionalization and, for those remaining in the NF, appropriate specialized services.

In light of a request for production of documents DADS/HHSC recently received in this ongoing litigation, and **until a subsequent provider letter is issued by DADS/HHSC containing further instructions, you must stop destruction of certain documents under your normal retention policies and preserve all documents and things related to PASRR** dated from December 21, 2010 and onward (details below). "Documents and things" include all formats in which information exists – whether electronic form, hard copy, or any other medium – that relate to the allegations made by the *Steward* plaintiffs or to the defense of those allegations, unless such documents or things are specifically excluded from this preservation notice as described below.

As a reminder, you are already under an obligation to keep and preserve certain records pursuant to the NF Provider Contract and 40 TAC §19.1910(b)(1)-(2).

**The NF Provider Contract contains the following specific preservation requirements:**

*B. To keep all records pertinent to the services for which the Provider submits a claim.*

- 1. The Provider must keep adult residents' medical records for a minimum of five years after medical services end.*
- 2. The Provider must keep minor residents' medical records for a minimum of three years after the resident reaches legal age under Texas law.*

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3. *The Provider must keep other records for a minimum of three years after the end of the federal fiscal year in which the services were provided.*

4. *If any litigation, claim, or audit involving the records begins before the expiration of the retention period, the Provider must keep the records until all litigation, claims or audit findings are resolved. A matter is considered resolved when a final order is issued in litigation or when the Department and Provider enter into a written agreement.*

C. *That if this agreement is terminated or the Provider terminates business operations, the Provider must ensure:*

1. *records are stored and accessible;*

2. *someone is responsible for adequately maintaining the records in accordance with the records retention requirements set forth in paragraph B above;*

3. *the Department is informed in writing of how and where the records will be maintained and who may be contacted in order to access the records;*  
*and*

4. *if any information in item 3 above changes, the Provider will notify the Department in writing within 10 business days of the date of the change.*

**40 TAC §19.1910(b)(1)-(2) requires:**

*(b) Clinical records must be retained for:*

*(1) five years after medical services end; or*

*(2) for a minor, three years after a resident reaches legal age under Texas law.*

This preservation notice applies to documents and things described in the NF Provider Contract and in 40 TAC §19.1910(b)(1)-(2) and supersedes the lengths of time required for preservation as set forth in the NF Provider Contract and in 40 TAC §19.1910(b)(1)-(2). Therefore, even if the minimum required length of time has passed, as required by the NF Provider Contract and 40 TAC §19.1910(b)(1)-(2), **you must continue to preserve the required documents and things until you receive additional instruction from DADS/HHSC.**

Carefully review the following list of documents and things affected by the litigation hold. This list is not exclusive. Rather, it is intended to offer general guidance as to the types of documents and things you may encounter on a daily basis and what must be preserved. **If you are in doubt, then preserve.** If you have questions about whether you should retain a specific document or thing, call DADS Legal Services, Special Projects Unit (contact information provided at the end of this document) or your own respective attorney or legal representative.

**A. The documents and information to be retained include, but are not limited to, all records related to PASRR screenings for persons suspected of intellectual or developmental disabilities or a related condition, all medical records pertaining to those individuals, all records of specialized services that the NF has initiated or provided to those individuals, and all records related to Interdisciplinary Team (IDT) meetings. These records may be in any of the following forms:**

1. Paper documents or things concerning the persons described above;
2. Electronic documents or information created or supported by applications, such as: Microsoft Word (or WordPerfect or other word processing software), Microsoft Excel (or other spreadsheet software, such as Quattro Pro), Microsoft Access (and other database management systems), PowerPoint, Adobe Acrobat and Reader, etc., concerning the subject matter of this litigation;
3. Draft paper and electronic documents and files concerning the subject matter of the litigation (*e.g.*, a preliminary version of a document that has been shared by the author with another person by email, print, or otherwise; or a document or file that the author no longer intends to finalize or to share with another person);
4. Red-lined or marked-up electronic documents concerning the subject matter of the litigation;
5. Electronic mail, calendar entries, or contact data concerning the subject matter of the litigation; and
6. Pictures, photographs, presentations, plans, drawings, or other documents concerning the subject matter of the litigation.

**B. All Health Insurance Portability and Accountability Act (HIPAA) rules will be observed to the extent that any information is ultimately collected from your facility. Furthermore, the parties to the litigation have entered into an agreed protective order under which all medical records containing protected health information that you provide, regardless of the form supplied, shall be deemed confidential and handled accordingly.**

**C. You do *not* need to retain the following types of documents and information beyond your normal retention periods:**

1. Voicemail or other voice recordings;
2. SMS messages (text messages), instant messages, photos, or videos stored on an employer-issued Personal Digital Assistant or iPhone;
3. Logs of calls made to or from telephones;
4. Temporary or cache files, including internet history, web browser cache, and cookie files, wherever located;
5. Server, system, or network logs;
6. Data stored within photocopiers or fax machines; and
7. Delivery or read receipts of electronic mail.

**D. This notice to preserve includes any medium that you have used in connection with the aforementioned litigation, including:**

1. Office computers;
2. Home computers;
3. Offline storage or removable media storage;
4. Information stored on laptops and other portable devices; and
5. Any health information that is stored electronically on network drives, the *Cloud*, or other shared storage media.

**E. Important Additional Information:**

1. If you use an office laptop, then ensure that it is backed up periodically.
2. Whenever a member of your staff leaves your employ (or is terminated), ensure that all relevant documents are preserved on the media.

A DADS/HHSC representative will contact your facility's administration in the event that items from your facility are requested and need to be collected. If you have any questions regarding document retention issues or types of documents to preserve, which are not questions amounting to legal advice, please contact HHSC Legal Services, Special Projects Unit at (512) 438-3545. If you have legal questions, however, then contact your respective attorney/legal representative.

If you are in need of technical assistance regarding PASRR, contact the PASRR Unit at 1-855-435-7180, local 512-438-3028, or email at [pasrr@dads.state.tx.us](mailto:pasrr@dads.state.tx.us).

If you have compliance-related questions concerning this letter, contact a policy specialist in the Policy, Rules and Curriculum Development section at (512) 438-3161.

Sincerely,

*[signature on file]*

Mary T. Henderson  
Associate Commissioner  
Regulatory Services

MTH:cg