

Informed consent
Separate notes
Record of releases
Use versus disclosure

HIPAA and Its Implications for Counselors

Health care privacy was once entrusted to family doctors, who maintained their own record keeping system. Increasing technology has not only impacted the way individuals communicate, but also the way they store information. Technology affects the way health care is provided, documented, and paid for (Health and Human Services, 1997). Health care information is disclosed to health care providers, insurers, and third parties (Health and Human Services, 1997). Disclosure of health information requires legislation to protect the privacy of patients.

Here are some interesting statistics according to the U.S. Department of Health and Human Services: 24 percent of Healthcare leaders polled knew of specific violations of patient confidentiality; 1 out of 5 Americans believe that they are victims of improper disclosure of health information; 2 out of 3 Americans do not trust health plans and government programs to maintain confidentiality all or part of the time (Health and Human Services, 2003).

HISTORY

The Health Insurance Portability and Accountability Act of 1996 was designed to amend the Internal Revenue Code of 1986. Its goal was, “to improve portability and continuity of health insurance coverage in the group and the individual market, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, and

to standardize and simplify the administration of health insurance.” (PUBLIC LAW 104-191).

The following chart serves as a visual illustration for the organization of the Health Insurance Portability and Accountability Act of 1996. Using the chart it is easy to decipher the various aspects that are incorporated into this Act.

HIPAA of 1996					
Title I	Title II	Title II	Title III	Title IV	Title V
Insurance Portability	Fraud and Abuse -medical liability reform	Administration Simplification -Privacy -Security -EDI -transactions -code sets -identifiers	Tax Related	Group Health Plan	Revenue Offsets

Congress was unable to decide upon legislation for privacy, so the Clinton Administration’s Department of Health and Human Services took over and published privacy regulations in December of 2000 (American Counseling Association, 2003). The Bush Administration brought privacy regulations that removed the provisions requiring patient consent for routine use of health information (ACA, 2003). This meant that day-to-day disclosures for purposes of health care treatment, payment for services, and/or health care operations (related to business) did not require an individual’s consent (ACA, 2003). The final rule took effect on April 14, 2001 and stated that “covered entities” had until April 14, 2003 to comply with the regulations.

The law applies to three groups of covered entities as defined by The Centers for Medicare and Medicaid Services (CMS):

- Health Care Providers: Any provider of medical or other health services, or supplies who transmits any health information in electronic form in connection with a transaction for which standard requirements have been adopted.
- Health Plans: Any individual or group plan that provides or pays the cost of health care. Must include over 50 enrolled persons.
- Health Care Clearinghouses: A public or private entity that transforms health care transactions from one form to another.
(CMS, 2003)

Covered entities require administrative, physical, and technical safeguards. These safeguards ensure confidentiality, integrity, and availability of healthcare information and protect against any unreasonably anticipated threats or hazards to the security or integrity of information. (CMS, 2003, p.93)

Privacy Standards

“The Standards for Privacy of Individually Identifiable Health Information (Privacy Final Rule) establishes, for the first time, a set of national standards for the protection of medical records and other health information.” (CMS, 2003, p.94) The Department of Health and Human Services (DHHS) issued the Privacy Final Rule to implement HIPAA; they are also responsible for enforcing the rule. The privacy standards define the limits to use and disclosure of individual health information (called “protected health information” or PHI) to covered entities.

Privacy regulations do not override state laws or regulations, which normally are stricter towards privacy. The privacy regulations provide a “floor” rather than a “ceiling” of protection (ACA, 2003). HIPAA preempts contrary state laws, except when:

- The Secretary of HHS determines that the state law is necessary for certain specified purposes (e.g., prevent fraud or abuse) or is principally focused on controlled substances

- The state law relates to health information privacy and is more stringent than HIPAA (e.g., greater restrictions on use or disclosure, provides greater rights of access or amendment, narrows scope or duration of authorizations)
- The state law provides for the reporting of disease or injury, child abuse, birth or death, or for the conduct of public health surveillance, investigation or intervention
- The state law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals
(CMS, 2003)

Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical 372 N.J. Super.105, 855 A.2d 608

This case serves as an example of how state law regarding patient privacy is not preempted unless it is contrary to federal objectives contained in the Health Insurance and Portability Accountability Act. If a state law is more stringent and protective then it is not preempted. This case held that “HIPAA did not preempt New Jersey law protecting disclosure of mental health information, HIPAA did not preempt informal discovery in the form of ex parte interviews with medical providers, but HIPAA did preempt New Jersey law regarding content of patient disclosure authorizations”

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What information is protected?

Under the Privacy Final Rule protection is guaranteed to all “individually identifiable health information”, also called PHI, kept or transmitted by a covered entity or business associate. Individually identifiable health information includes information related to personal identifiers and demographic data. Personal identifiers include name, address, telephone numbers, birth date, and Social Security Number. Demographic data pertains to the following areas: the individual’s past, present, or future physical or mental health; the provision of health care to the individual; the past, present, or future payment

for the provision of health care to the individual. (CMS, 2003, p.95) Exceptions include federally protected education records, which are covered under the Family Educational Rights and Privacy Act, as well as employment records that a covered entity holds as an employer. (CMS, 2003, p.96)

De-identified Health Information

De-identified health information is information that does not identify or provide a basis to identify an individual. (CMS, 2003, p.95) Information that is considered de-identified health information faces no restrictions on use or disclosure. “There are two ways to de-identify information: use a formal determination by a qualified statistician; or remove specified identifiers of the individual and of the individual’s relatives, household members, and employers.”(CMS, 2003, p.95)

In order to provide clarity it is imperative to know how “use” and “disclosure” are defined under HIPAA. Use is defined as “the sharing, employment, application, utilization, examination, or analysis of PHI within an entity that maintains such information” (CMS, 2003). Disclosure means “the release, transfer, provision of access to, or divulging any other manner of PHI outside the entity holding the information” (CMS, 2003).

Minimal Use and Disclosure

Another key aspect of the Privacy Final Rule is limiting use and disclosure to the minimum necessary. “A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.” (CMS, 2003, p.97) However, there are a few circumstances when the minimum necessary requirement is not

imposed. These situations apply to necessary treatment of an individual, complaint investigations, and/or disclosure that is required by law.

Jafee v. Redmond (95-266), 518 U.S. 1(1996)

Jafee v. Redmond was the first case in which the Court recognized a psychotherapist privilege. Officer Redmond responded to a call about a fight at an apartment complex. Redmond shot and killed Allen after he failed to drop his weapon. Redmond received counseling after the incident. “The court ordered notes made by Beyer, a licensed clinical social worker, during counseling sessions with Redmond, rejecting their argument that a psychotherapist patient privilege protected the contents of the conversations. At the trial, the jury awarded petitioner damages after being instructed that the refusal to turn over the notes was legally unjustified and the jury could presume that the notes would have been unfavorable to respondents. The Court of Appeals reversed and remanded, finding that "reason and experience," the touchstones for acceptance of a privilege under Federal Rule of Evidence 501, compelled recognition of a psychotherapist patient privilege. However, it found that the privilege would not apply if in the interests of justice, the evidentiary need for disclosure outweighed the patient's privacy interests” (*Jafee v. Redmond*, 518 U.S. 1 (1996)). The court concluded that Beyer's notes should have been protected.

Implications for Counselors

Many question whether counselors fall in the category of “covered entities”? By asking two simple questions, “Do I provide health care?” and “Do I or my agency/clinic conduct standard transactions in electronic form?” an individual can determine if they are a covered entity and need to comply with HIPAA regulations. The privacy regulation

will influence and impact counselors and their practices (ACA, 2003). The American Counseling Association states that counselors should be aware of the set of client expectations that the privacy regulations will establish.

Psychotherapy Notes

Psychotherapy notes have strict requirements more so than other health care information under HIPAA. Psychotherapy notes should be excluded from an individual's regular medical records. Psychotherapy notes are defined by the following regulations:

“Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes exclude medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.” (ACA, 2003)

Many mental health professionals feel that this is an improvement in confidentiality; however this means that counselors will need to keep separate records (ACA, 2003).

Psychotherapy notes will have to be separated from basic treatment information (ACA, 2003). Counselors can share their psychotherapy notes with their clients, but are not to be compelled to do so under the privacy regulation (ACA, 2003). Clients do have the right to access the rest of their medical record; they can inspect, obtain a copy, and request amendments (ACA, 2003). Clients have the right to request a record of the disclosures (except routine disclosures) that are made regarding their protected health information (ACA, 2003).

Consent

Informed consent refers to the client's right to agree to participate in counseling and other provided services. Informed consent outlines what the client can expect from the counseling process. Clients must be provided with a notice policies and procedures, including their client rights. It is important that these policies be discussed and the client understands and agrees to abide by them if they wish to participate. Having the client sign informed consent provides documentation, which is important to keep on file, especially if confidentiality must be broken. The following list contains situations where disclosure is permitted without an individual's consent:

Disclosures to Personal Representatives

- A health plan must treat a personal representative (e.g., parent of a minor, executor, guardian) as the individual, with the same rights of access to the individual's PHI, unless it determines, in the exercise of professional judgement, that doing so is not in the best interests of the individual
- While a parent is normally the personal representative of an unemancipated minor, that is not the case for the PHI when the minor may lawfully obtain the health care service without the consent of the parent or the parent assents to an agreement of confidentiality between the minor and a provider

Disclosures Required by Law

- A health plan may use or disclose PHI without consent of authorization to the extent that such use or disclosure is required by law and is limited to the relevant requirements of such law
- Disclosures about victims of abuse, neglect or domestic violence, disclosures for judicial and administrative proceedings, disclosures for law enforcement purposes -If a disclosure is made about an individual's victim status, it must promptly be reported to the individual that such a report has been made, except if it would endanger the individual

Disclosures for Public Health Activities

- To a public health authority authorized by law to collect or receive information for the purpose of preventing or controlling disease, injury, or disability
- To a public health authority or other appropriate government authority authorized by law to receive reports or child abuse or neglect
- A person subject to the jurisdiction of FDA with respect to an FDA-regulated product or activity, for the purpose of activities related to the quality, safety or effectiveness of such FDA-regulated to the quality, safety or effectiveness of such FDA-regulated product or activity

- To 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 intervention or investigation (CMS, 2003)

Electronic Record Keeping

Electronic transactions refer to the transfer of electronic information for specific purposes. There are several types of electronic data that is moved electronically. Electronic Data Interchange (EDI) where data is moved between two entities (CMS, 2003). Web-based applications involve using the Internet to transmit information (including e-mail). Direct Data Entry (DDE) allows providers to key data directly into a certain form and send it to the health plan's computer. Additional sources of electronic media include sending a diskette/tape, using a credit card swipe machine, and using a "faxback" telephone voice response. (CMS, 2003)

Counselors who potentially could be conducting marketing involving clients or looking for client participation in research should further examine the HIPAA provisions for these areas.

Enforcement

Civil and criminal penalties for violations of regulations exist. They can begin anywhere from a \$100 civil penalty to a maximum penalty of \$25,000 per year for each standard violation. Criminal penalties are imposed for wrongful disclosures of health information for up to a maximum of \$250,000. Complaints and violations should be filed to the U.S. Department of Health and Human Services Office for Civil Rights (ACA, 2003).

Conclusion

The Health Insurance Portability and Accountability Act of 1996 inevitably changed the way health information is handled and disclosed. HIPAA stands as a law that promotes security, privacy, standardization and efficiency in the health care industry. HIPAA affects every individual in the United States in some shape or form and especially counselors. As counselors there are implications for everyone to incorporate into their own practice. The primary goal of a counselor is to ensure confidentiality. HIPAA provides a standard for how an individuals' health information should be treated and it is our ethical obligation to follow through with it.

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