

Frequently Asked Questions About HIPAA

General Information

Question: Who is covered under HIPAA's Privacy Rule?

Answer: HIPAA's Privacy Rule covers health care insurers, hospitals and health care facilities and Health care clearinghouses; and Health care providers who transmit information electronically. HIPAA excludes correctional facilities, FERPA (educational) records, or employment records. Also, HIPAA does not cover life or disability insurance, Workers Compensation, or Social Security Disability.

Question: Are psychologists covered by HIPAA if they bill electronically only for some of their patients?

Answer: Psychologists will have to comply with HIPAA if they bill electronically for any one of their patients.

Question: Some physician groups, hospitals, and insurers have commented that HIPAA will greatly change the way in which they practice and will impose substantial burdens on them. Is this true?

Answer: It is true for many of them. However, the strict laws applying to mental health services do not usually apply to physical health and certainly not to insurance companies. Psychologists, who traditionally have given great weight to patient privacy, will not find HIPAA as burdensome as most other health care professionals.

Question: Does HIPAA require me to bill electronically?

Answer: No. HIPAA does not require psychologists to bill electronically.

Question: Does HIPAA forbid psychologists to fax patient information even in an emergency?

Answer: The Privacy Rule has no such restriction.

Question: Does the Privacy Rule create a government database with individuals health care information?

Answer: No. The Privacy Rule does not require transmission of information to the government.

Question: I am not a covered entity; however, I want to comply with some of HIPAA's provisions voluntarily. Do I have to comply with all of HIPAA's provisions?

Answer: No. If you are not a covered entity, you do not have to comply with any of HIPAA's Privacy Rule requirements, or you may comply with only those that you want to. However, you should be aware that some elements of HIPAA's Privacy Rule, such as the Privacy Notice, may become the "industry standard" for practice over the years. Consequently, there may be more reasons for you to comply.

Question: Can I be fined or imprisoned for failing to comply with any of HIPAA's Privacy Provisions?

Answer: The Office of Civil Rights (OCR), which is responsible for investigating reports of noncompliance

with HIPAA, is taking an educational approach. OCR recognizes that well meaning providers may not be informed properly about HIPAA and will seek voluntary corrections when investigating complaints. It is true that HIPAA does have provisions for penalties, but these will be reserved for especially egregious behaviors.

Question: What are sources that I can use for more information?

Answer: You can look at: www.hhs.gov/ocr/hipaa/privacy.html (This has very detailed information from Health and Human Services) and www.hhs.gov/ocr/hipaa (then click on questions). This is the official site of the Office of Civil Rights of Health and Human Services, which is responsible for interpreting HIPAA. It has a very good question and answer section. This is the first choice from the government for useful information about HIPAA.

Psychotherapy Notes and Patient Records

Question: What is a psychotherapy note?

Answer: They are 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.

The definition specifically excludes information pertaining to medication prescription and monitoring, 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. Any of this "excluded" information can be disclosed based solely on the initial general consent. The Psychotherapy Notes require a separate authorization form.

Question: When a psychologist writes a note in the medical chart found in the ward in a rehabilitation hospital, is that note considered a psychotherapy note?

Answer: No, psychotherapy notes must be separate from the medical record.

Question: What does it mean for a psychotherapy note to be separate from the rest of the medical record?

Answer: Health and Human Services is not clear about that. Until there is greater clarification, it would be prudent to take the position that the psychotherapy notes should be easily distinguishable from the rest of the medical record. They may be on a different color of paper or located in a different part of the patient's chart.

Question: If patients have to give authorizations to release protected health care information just the same as they have to do to release psychotherapy notes, why bother with making psychotherapy notes distinct from the rest of the medical records?

Answer: There are implications concerning access by third party payers and for utilization review activities. Third party payers may not condition payment upon receipt of psychotherapy notes (although they may request other information from the "excluded list" as indicated above). If psychotherapy notes are separated in your files, they will less accessible during utilization review.

Question: I treat the emotional and behavioral aspects of physical illnesses. Could my notes be considered psychotherapy notes even though I am not treating a mental illness?

Answer: Yes. If they are notes by a mental health professional they could be considered as psychotherapy notes.

Question: Does HIPAA require me to keep two sets of notes?

Answer: No. HIPAA has no such requirement.

Question: I know that patients have access to their medical records. May I require that patients pay for copying of those records?

Answer: Yes, you may charge reasonable fees for copying and postage costs if they are mailed. If a patient has agreed to receive a summary or an explanation, a psychologist may charge for the preparation of that summary or explanation.

Patient Authorizations

Question: What is an authorization?

Answer: It is a release of information form.

Question: What are some circumstances in which I do NOT need an authorization?

Answer: Psychologists do not need to obtain authorizations to share information in training programs in which students, trainees, or practitioners in mental health are under supervision to improve their skills in group, joint, family, or individual counseling. Also, psychologists do not need an authorization to release information as a result of a mandated reporting law, such as a report of suspected child abuse. Of course, psychologists still may have to release information in response to a court order.

Question: I am in a group practice in which we provide both individual and group psychotherapy. Do I need to get an authorization to share patient information with the therapist of the group she is in?

Answer: No. You do not need an authorization to share information for the delivery of service within the same facility or agency. If the group therapy were being offered by a different facility or agency, however, you would need a patient authorization.

Privacy Notices

Question: What should I do if a patient refuses to accept a Privacy Notice?

Answer: Psychologists should make “good faith” attempt to get the patient to sign that they received the Privacy Notice. There are no obligations to do anything more than attempt to get the signature. Psychologists should document their efforts to get the signature.

Question: When I schedule a patient over the phone, do I have to get a Privacy Notice to them before the first appointment?

Answer: Where a health care provider's initial contact with the patient is simply to schedule an appointment, the notice provision and acknowledgment requirements may be satisfied at the time the individual arrives at the provider's facility for his or her appointment.

Question: Do I have to give patients a Privacy Notice even in an emergency?

Answer: No. Psychologists can wait until the emergency is over before giving the patient the Privacy Notice.

Question: I work in a group practice with several mental health professionals. Do I have to give a separate Privacy Notice every time a patient talks to a different professional in the practice?

Answer: No. Only one Privacy Notice is required for each organized entity (e.g. group practice).

Question: Do patients have a right to amend their records?

Answer: No. Patients may request amendments to records, although providers do not have to agree with the amendments. However, the psychologist needs to document the request for an amendment and why the amendment was not adopted.

Question: Do I have to give a Privacy Notice to a minor patient?

Answer: Only if the minor has the legal authority to consent to treatment him- or herself. (In Ohio 14-18 year olds may receive treatment for 6 sessions or 30 days. After that time period, parents need to be notified.) In other situations, you should give the Privacy Notice to the parent or guardian. Of course you may give the Privacy Notice to the minor patient in addition to the parents if you believe it would be clinically indicated to do so.

Question: I am confused about Privacy Notices. At one place HIPAA says that I have to make a Privacy Notice available to anyone who asks and at another place it says that I have to give a Privacy Notice to every patient. Which standard do I follow?

Answer: You follow both. You have to give a Privacy Notice to every patient. However, any individual, even a non-patient, has the right to see your Privacy Notice.

Question: I know I am required to have the Privacy Notice posted in my office. What is the best way to do this?

Answer: Psychologists have the discretion to design the posted notice in a manner that works best for their facility. If you want, you can simply use a thumbtack and secure the Privacy Notice to a cork bulletin board.

Minors

Question: Under HIPAA, can minors seek treatment on their own?

Answer: HIPAA defers to state laws on when children can seek treatment without parental consent. In Ohio 14-18 year olds may receive treatment for 6 sessions or 30 days. After that time period, parents

need to be notified.

Question: Am I always obligated to share information about children with parents?

Answer: Assuming that the child is receiving treatment with the consent of the parents, the general rule is that the psychologists should share information about treatment with the parent. There are a few exceptions, however. First, the psychologist may have an agreement with the parents that they will not share information with the parent. Second, a court may have appointed another individual as the guardian of the minor. Third, psychologists are not obligated to share information with a parent if the child is a victim of abuse, neglect or domestic violence and sharing the information would be likely to harm the minor.

Question: Do I have to give a Privacy Notice to a minor patient?

Answer: Only if the minor has the legal authority to consent to treatment him- or herself. In other situations, you should give the Privacy Notice to the parent or guardian. As indicated above, in Ohio 14-18 year olds may receive treatment for 6 sessions or 30 days. After that time period, parents need to be notified.

Business Associates

Question: What is a business associate?

Answer: A business associate is an individual (other than an employee or member of your workforce) or group who has a legitimate reason to get protected health care information (billing services, attorneys, etc.), but it does not include other health care professionals.

Question: Are health care providers business associates?

Answer: Health care providers are business associates only if they also provide non-health care services. For example, a psychologist who is an independent contractor working in a group practice is not a business associate.

Question: Is a janitor a business associate? A bank? A landlord?

Answer: No.

Question: Sometimes I need to send my patients notices in the mail. Should I consider the Post Office as a business associate?

Answer: No, carriers like the Post Office are not business associates.

Question: Is my secretary a business associate?

Answer: No. Persons in your workforce are not business associates.

Question: I hired a company to shred my old records. Is that company a business associate?

Answer: They would likely be a business associate, unless they shredded the records in your office

under the direct supervision of you or someone in your office staff. In that case, they would be considered part of your workforce.

Question: I provide health care in a local nursing home. Am I a business associate of that nursing home?

Answer: No. You are not a business associate when you are providing health care.

Question: Does the Privacy Rule require psychologists to actively monitor the activities of their business associates?"

Answer: No. The Privacy Rule has no such requirement, although providers should take reasonable steps if violations are brought to their attention.

Minimum Necessary Rule

Question: What is the minimum necessary rule?

Answer: According to this rule, providers are required only to give the minimum amount of information to business associates necessary for them to fulfill the intended purposes.

Question: Does the minimum necessary rule apply to group therapy, family therapy, or communications with other health care professionals?

Answer: No. It does not apply to communications needed to deliver health care. For example, information given to the billing company should be restricted to information necessary to accomplish the billing. It does not apply to disclosures by one health care professional to another for treatment purposes.

Question: Does the minimum necessary requirement restrict the disclosure of information to trainees?

Answer: No. The Privacy Rule explicitly exempts "students, trainees, or practitioners of health care under supervision" from the minimum necessary rule

Question: Does the minimum necessary rule apply to disclosures that are authorized by a patient?

Answer: No. For example, if a patient authorizes a psychologist to send information to a life insurance company, the psychologist does not have to follow the minimum necessary rule.

Privacy Officers

Question: What are the duties of the Privacy Officer?

Answer: The Privacy Officer must train employees, oversee implementation of the Privacy Rule, and receive grievances.

Question: I am in a solo practice. Who should I name as the Privacy Officer?

Answer: You are the Privacy Officer.

Question: I am in a middle-size group practice. Does the Privacy Officer have to be a psychologist?

Answer: No. The educational background of Privacy Officers is not specified in the HIPAA regulations.

Question: What should be included in the training of employees?

Answer: The training of employees may vary according to their job responsibilities. You may rely upon What Your Employees Should Know About HIPAA, which may be obtained from Bobbie Celeste at OPA or from the OPA Webster (www.ohpsych.org)

Question: Will the training requirements established by HIPAA greatly change the way in which psychologists currently conduct their practices?

Answer: Probably not. Most psychologists already train their employees on confidentiality and are careful about the unauthorized release of information. The expected major changes are that the training will be more uniform, systematic, and documented.

Question: Is the Privacy Officer legally liable for any breaches of confidentiality among the staff?

Answer: The Privacy Officer will have the same degree of liability as any administrative supervisor. A very brief summary of the standards is that it is possible for a Privacy Officer to be considered negligent if the responsibilities were not performed adequately. It is possible for a Privacy Officer not to be considered negligent if, despite adequate training and safety precautions, an employee disobeyed clear privacy policies without the knowledge of the Privacy Officer or supervisor.

However, it is important to remember that the Office of Civil Rights enforcing HIPAA intends to take an educational approach to infractions as much as possible. Furthermore, patients have always had a private right of action when individuals or agencies engage in unauthorized disclosures of information. HIPAA does not alter this private right of action.

State Preemption

Question: What do I do if the Privacy Rule appears to conflict with a state law?

Answer: If the Privacy Rule appears to conflict with state law you should follow the law which is more protective of patient privacy from the standpoint of the patient.

Question: Does HIPAA prevent me from reporting child abuse, elder abuse, or warning if patients present an imminent danger of harming themselves or others?

Answer: The Privacy Rule has no such provision. The Privacy Rule defers to state laws on mandatory reporting requirements.

Question: Under HIPAA would I be required to turn over my notes to any police officer who requested them as part of a search for a suspect?

Answer: No. HIPAA defers to state laws, which are more protective of patient privacy from the standpoint of the patient. Our analysis of state laws, called the preemption analysis, shows that almost every state law dealing with the release of mental health information stays the same. Although our preemption analysis is not complete, there may be a few narrow cases in which HIPAA will provide for greater privacy in Pennsylvania. State law prohibits psychologists from turning over information to the police unless there is an authorization (release of information form) signed by the client/patient, the police have a court

order, or the psychologists are fulfilling their obligations under Tarasoff (“Duty to warn or protect”).

Question: Where can I find more information about preemption in Ohio?

Answer: Talk with Glenn Karr, J.D. at 888-527-7529 or in Cols. 843-3100 or at OPA, Bobbie L. Celeste, Ph.D. at 800-783-1983 on most Thursdays.

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