Myths and Reality: The HIPAA Privacy Rule

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Disclaimer

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• Consent and exceptions.
• Disclosures to caregivers.
• Accessing and amending one’s own records.
• Communications with criminal justice systems and professionals.
• Privacy rights for students.
• HIPAA and employment
• Confidentiality of substance use disorder records (42 CFR Part 2)
Translating Acronyms!

- **HIPAA** – “The Health Insurance Portability and Accountability Act.”
- **PHI** - Protected Health Information.
A few overarching points

• Only information generated or disseminated by “covered entities” is subject to HIPAA
• “Covered entities” include:
  • Health care providers;
  • Health care plans;
  • Health care clearinghouses (convert non-standard data into standard form);
  • Business associates (e.g. claims processing, billing, quality assurance).
• HIPAA applies to “individually identifiable” health information.
• HIPAA establishes a floor, not a ceiling, for privacy protections.
• State laws that are “more protective of privacy” supersede HIPAA
Dr. Freud, a psychiatrist from Washington DC contacts Dr. Kildare, a primary care physician in Philadelphia. Dr. F. has begun treating Sally, a woman with schizophrenia, who is a long time patient of Dr. K. Dr. F. requests information from Dr. K. about her medical history.

Dr. F. does not include a signed consent form with this request.

May Dr. K. provide Dr. F. with the requested information?
Signed Consent is Optional

• Signed consent **not** required for:
  • Treatment;
  • Payment
  • Health Care operations (e.g. credentialing, quality assurance, medical audits).

• Notice of privacy practices **is** required.
  • Provided one time, generally at beginning of treatment relationship.
  • Provision of treatment can’t be conditioned upon person signing the notice of privacy practices.
Psychotherapy Notes Exception

- Disclosure of psychotherapy notes requires specific consent.
- Psychotherapy notes are notes separated from the rest of the medical record pertaining to the details of therapy/counseling sessions.
- Psychotherapy notes do not include information about medications, clinical test results, and summaries of diagnosis, functional status, treatment plan, symptoms, prognosis, and progress to date.
Charlie Jones, who has a long history of bipolar disorder, was hospitalized 10 days ago after a suicide attempt. Tomorrow, Charlie is being discharged from the hospital and will be moving in with his brother, Brian.

Although Brian knows about his brother’s history of bipolar disorder, he is not aware of the recent suicide attempt. The psychiatrist who has treated him at the hospital feels that he is ready for discharge, but knows that he is still struggling with symptoms.

Can the psychiatrist inform Brian about the suicide attempt and the need for follow-up care and monitoring?
Disclosure is permitted when:

- Person present, has capacity to make health decisions, and does not object;
  - May ask permission;
  - May give person opportunity to agree or object;
  - May infer from circumstances that person does not object.

Disclosure is permitted when:

- Person is not present or is incapacitated and:
  - Health provider determines, based on professional judgment, that doing so is in the best interests of his/her patient;

Disclosure is permitted when necessary to prevent or lessen a serious or imminent threat to the health or safety of the person or the public.

- What is a “serious or imminent” threat?
**What is “incapacity?”**

- Health provider believes, based on professional judgement, that patient does not have capacity to agree or object, sharing information is in his/her best interests;
- Formal determination of incapacity by a court is not required;
- Examples may include “circumstances in which a patient is suffering from temporary psychosis or is under the influence of drugs or alcohol.”
- Provider must believe that disclosure is in patient’s best interests.
  - In determining “best interests,” provider should consider patient’s prior expressed preferences regarding disclosures of their information.

Mary is in her final year of Nursing School and is planning to apply for licensure immediately upon graduation.

She is concerned that she may have to provide information about her past psychiatric hospitalizations to the State Board of Nursing. She is particularly worried that the records may contain inaccurate information about diagnosis and her capacity to work professionally.

Does Mary have the right to access and inspect her own records?
Individuals generally have the right under HIPAA to review and obtain a copy of their own records.

• Psychotherapy notes may be excepted, if maintained as a separate part of the record.

Individuals may be denied access if the provider believes that access could be harmful.

• But, provider must provide justification, and the individual who has requested the information can seek independent review.

An individual incarcerated in a correctional facility may be denied access if obtaining records would jeopardize the health, safety, security, custody or rehabilitation of the individual or of other inmates, or the safety of any officer.
When accessing her records, Mary discovers inaccurate information that she fears will have a negative impact on future employment prospects.

Does she have the right to request that her records be amended?
• HIPAA provides individuals with the right to request amendments to their records to correct inaccuracies.
• If a request is accepted, the covered entity must make “reasonable” efforts to provide the amended version requested by the individual.
• If a request is denied, the covered entity must provide a written explanation and the individual must be allowed to insert a statement of disagreement into the record.
Dr. Welby, a psychiatrist, receives a call from Mrs. Jones. She tells him that her son, a patient of Dr. Welby, has been arrested and is being held in the county jail. She is worried about her son’s deteriorating mental health and thinks that it is important that jail health staff are informed as quickly as possible about his need for treatment and medication.

Mrs. Jones asks Dr. Welby to contact the jail and to send them her son’s medical records. She says it will be very difficult to get in to see her soon anytime soon and besides, she fears he is too symptomatic at present to sign a release form.

Is Dr. Welby permitted to contact the jail and provide written or verbal information about his patient?
Consent required, except for:

• Provision of health care to the individual;
• The health or safety of inmate, other inmates, or correctional officers and staff;
• The health and safety of those providing transportation from one correctional setting to another;
• Law enforcement on the premises of the correctional facility;
• Administration and maintenance of the safety, security and good order of the facility.

Correctional facility can accept info from caregivers.
Generally, consent required, with same exceptions for treatment, payment and health care operations.

But, HIPAA consent requirements do not apply to disclosures by courts, court personnel, or law enforcement officers such as police or parole and probation officers because they are not covered entities.

- If states have stronger protections in place for these kinds of disclosures, than state law applies.

John Petrilla, “Dispelling the Myths About Information Sharing Between the Mental Health and Criminal Justice Systems,”
During her sophomore year in college, Jane begins to experience serious mental health symptoms. She is unable to sleep, maintain concentration on her studies, and begins to accuse her suite mates of conspiring against her.

Alarmed, her suite mates refer her to the student counseling center, and she is eventually hospitalized under an involuntary commitment order and diagnosed with bipolar disorder.

Is the college permitted to inform Jane’s her parents of her diagnosis, treatment, and need for follow up care?
Family Educational Rights and Privacy Act (FERPA)

- Applies to student education records including records kept in college counseling and health clinics.
- Prohibits colleges from sharing info in student records with parents, with following exceptions:
  - Health or safety emergency;
    - Is involuntary commitment a health emergency?
  - Parents document that student claimed as tax dependent;
  - Written authorization from student.
When is it HIPAA, when is it FERPA?

- FERPA: Educational records, health records generated and/or held by campus counseling center.
- HIPAA: Medical records from hospital, community mental health center, etc.

- What if the hospital is on campus (e.g. UVA hospital)?
- Is a college basketball coach who has medical information about his star player precluded from disclosing that information to the media or the public?
HIPAA does **not** apply to employment records.

HIPAA **does** apply to health information generated in the course of your employment, e.g.

- Your employer is a health provider from whom you receive care;
- Your employer provides a self-insured health plan and therefore has access to reports about health care utilization by the group;

ADA applies to health information as well.

- Prohibits employers from asking medical questions or requiring medical examinations unless related to the job and necessary for conducting employers business.
- All individually identifiable health information must be kept confidential, maintained in separate files.
Confidentiality of Substance Use Disorder Records (42 CFR Part 2)

- With limited exceptions, requires written consent for disclosures of PHI, even for purposes of treatment, payment or health care operations.

- Applies to any information disclosed by a covered program that identifies an individual as:
  - Having a current or past drug or alcohol problem;
  - As a participant in a covered program.

- Applies to any individual or entity that is federally assisted and provides alcohol or drug abuse diagnosis, treatment, or referral for treatment (most drug and alcohol programs).
Additional Resources


“I wish I had an answer to that because I’m tired of answering that question”

- Yogi Berra
Thank You!

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