



# North Carolina Board of Licensed Professional Counselors

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## NCBLPC Professional Brief

**Content Area:** HIPAA (Privacy Rule) - Records

### **Brief Overview/Description:**

The Health Insurance Portability and Accountability Act (HIPAA) was enacted by the U.S. Congress in 1996. Title II of HIPAA, known as the Administrative Simplification, requires the establishment of national standards for electronic health care transactions and national identifiers for providers, health insurance plans, and employers. The Act is massive in scope with five separate Titles:

- The Unique Identifiers Rule (National Provider Identifier);
- The HIPAA Privacy Rule;
- The Transactions and Code Sets Rule;
- The HIPAA Security Rule; and
- The Enforcement Rule.

The standards are meant to improve the efficiency and effectiveness of the nation's health care system by encouraging the widespread use of electronic data interchange. The purpose of this document is to describe the Privacy Rule and related topics.

In addition, HIPAA practitioners need to be familiar with the Health Information Technology for Economic and Clinical Health (HITECH) Act passed as part of American Recovery and Reinvestment Act of 2009 (ARRA). HITECH requires health care providers and other HIPAA-covered entities to promptly notify affected individuals of a breach of information, as well as HHS and the media, in cases where a breach affects more than 500 individuals. Breaches affecting fewer than 500 individuals will be reported to HHS annually (OCR, 2011). The regulations also require business associates of covered entities to notify the covered entity of breaches at or by the business associate.

Although HIPAA and HITECH are laws that come with consequences such as fines, they are also important benchmarks for maintaining the ethical standards related to confidentiality and overall competence to be a practicing clinician.

### **Resources:**

American Counseling Association (2005) Code of Ethics. Alexandria, VA: Author  
Leyva, C., & Leyva, D. (2011). HIPAA Survival Guide. Retrieved from <http://www.hipaasurvivalguide.com/hitech-act-text.php>

HHS (2011). Fast Facts <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/cefastfacts.html>  
OCR (2011). Understanding Health Information Privacy. Retrieved from <http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html>

### **Key Legal Factors:**

#### ***Definitions***

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*Covered Entities* must abide by HIPAA and HITECH. So who are Covered Entities under these statutes? The following are covered entities:

- 1) A health plan,
- 2) A health care clearinghouse, and
- 3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by one of the statutes.

The Department of Health and Human Services (OCR, 2011) notes that every health care provider, regardless of size, who electronically transmits health information in connection with certain transactions, is a covered entity.

A *health care provider* is any person or organization “that furnishes, bills, or is paid for health care” (OCR, 2011).

Transactions include claims, benefit eligibility inquiries, referral authorization requests, or other transactions for which HHS has established standards under the HIPAA Transactions Rule. For help in determining whether you are covered, use the HHS Covered Entity Chart.

The HIPAA definition of *electronic media* is broadly defined and includes both (a) electronic storage and (b) electronic transmission media (Leyva & Leyva, 2011). There are some exclusions, such as transmissions of paper sent via fax, voice, and telephone, which are not considered to be electronic media, because the information being exchanged did not exist in electronic form before the transmission.

HIPAA defines *disclosure* as the release, transfer, provision of, access to, or divulging in any other manner (oral or written), of information outside the covered entity holding the information. Protected Health Information (PHI) means individually identifiable health information which includes information:

- 1) Created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
- 2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual (Leyva & Leyva, 2011).

HIPAA also distinguishes *individually identifiable health information* as a subset of PHI that identifies the individual or could be used to identify the individual. A covered entity is permitted, but not required, to use and disclose PHI, without an individual’s authorization, for the following purposes or situations:

- a) to the individual (unless required for access or accounting of disclosures);
- b) treatment, payment, and health care operations;
- c) opportunity to agree or object;
- d) incident to an otherwise permitted use and disclosure;
- e) public interest and benefit activities; and
- f) limited data set for the purposes of research, public health or health care operations.

### ***Psychotherapy Notes***

HIPAA provides special guidelines specific to psychotherapy notes. A covered entity must obtain an authorization for any use or disclosure of psychotherapy notes, except:

- a) to carry out the treatment, payment, or health care operations;
- b) use or disclosure by the covered entity for its own training programs;
- c) use or disclosure by the covered entity to defend itself in a legal action or other proceeding brought by the individual;
- d) for HHS to investigate or determine the covered entity’s compliance with the Privacy Rules;
- e) to avert a serious and imminent threat to public health or safety,
- f) to a health oversight agency for lawful oversight of the originator of the psychotherapy notes, or
- g) for the lawful activities of a coroner or medical examiner or as required by law (Leyva & Leyva, 2011; OCR, 2011).

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### ***Minimum Necessary***

A central aspect of the Privacy Rule is the principle of *minimum necessary* use and disclosure. 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. This is in line with ACA's principle of minimal disclosure which states, "To the extent possible, clients are informed before confidential information is disclosed and are involved in the disclosure decision-making process. When circumstances require the disclosure of confidential information, only essential information is revealed" (ACA, 2005, B.2.d.).

Therefore, all covered entities must develop and implement policies and procedures to *reasonably* limit uses and disclosures to the minimum necessary. When the minimum necessary standard applies to a use or disclosure, a covered entity may not use, disclose, or request the entire medical record for a particular purpose, unless it can specifically justify the whole record as the amount reasonably needed for the purpose (OCR, 2011).

### ***Business Associates***

Another important concept is a *Business Associate*. According to HHS, a business associate is a person or organization, other than a member of a covered entity's workforce, that performs certain functions or activities on behalf of, or provides certain services to, a covered entity that involve the use or disclosure of individually identifiable health information (OCR, 2011). Examples of a business associates are legal consultants, accountants, consultants, data managers, administrators that may involve the disclosure of individually identifiable health information. For more information on Business Associates guidelines, please visit [HHS' Business Associate page](#). In addition, HHS provides a [sample Business Associate contract](#).

### ***Notice of Privacy***

According to the OCR (2011), the Privacy Rule provides that an individual has a right to adequate *notice* of how a covered entity may use and disclose protected health information about the individual, as well as his or her rights and the covered entity's obligations with respect to that information. Covered entities are required to provide a notice in plain language no later than the date of first service delivery except in an emergency treatment situation, which describes:

- How the covered entity may use and disclose protected health information about an individual.
- The individual's rights with respect to the information and how the individual may exercise these rights, including how the individual may complain to the covered entity.
- The covered entity's legal duties with respect to the information, including a statement that the covered entity is required by law to maintain the privacy of protected health information.
- Whom individuals can contact for further information about the covered entity's privacy policies.

The notice must include an effective date. See 45 CFR 164.520(b) for the specific requirements for developing the content of the notice. A covered entity is required to promptly revise and distribute its notice whenever it makes material changes to any of its privacy practices. See 45 CFR 164.520(c)(2)(iv) for covered health care providers with direct treatment relationships with individuals.

A Covered Entity that maintains a website must make the notice prominently available on its website. A covered entity must document compliance with the notice requirements, as required by 45 CFR 164.530(j), by retaining copies of the notices issued by the covered entity and, if applicable, any written acknowledgments of receipt of the notice or documentation of good faith efforts to obtain such written acknowledgment, in accordance with paragraph (c)(2)(ii) of this section. The notice may be delivered via email if the individual agrees to receive an electronic notice. Organizations may develop specific notices for different types of covered functions or may develop a joint notice as long as the joint notice describes the covered entities and the service delivery sites to which it applies.

Covered entities must rely on professional ethics and best judgments in deciding which permissive uses and disclosures to make. If state law is contrary to HIPAA, then the latter preempts and is controlling, but if state law is more stringent than HIPAA, then in essence the federal and state laws are complementary and both apply (Leyva & Leyva, 2011). Civil penalties for non-compliance can vary from \$100 to \$25,000 per calendar year (OCR, 2011).

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## **Real Issues to Consider**

HIPAA and HITECH are complicated statutes and most health care providers are working in good faith to be HIPAA compliant. However, with the recent enactment of The American Recovery and Reinvestment Act of 2009 (ARRA) and the Health Information Technology for Economic and Clinical Health Act (HITECH Act 2009), counselors need to be HIPAA compliant and understand there are substantial costs, financial and professionally, for failing to take the necessary precautions to secure protected health information. In addition, the HITECH Act focuses on the establishment of a national health infrastructure and on providing incentives for the adoption of electronic health records (EHRs).

Every Business Associate that may have access to protected health information must have signed a Business Associate Contract that is maintained by the Covered Entity. If the Covered Entity becomes aware of a breach of the contract then the Covered Entity is required to take steps to remedy the issue or terminate the contract. As always the Covered Entity may report the Business Associate to HHS for further investigation. A failure to address and, if necessary, report a Business Associate may result in the Covered Entity being held accountable for breaches in protected health information.

When a disclosure is warranted under HIPAA, the Covered Entity must apply the principle of minimum necessary and only disclose the minimal amount of information requested. Covered entities must have written policies outlining when disclosure will occur, the timeline for disclosure (30 to 60 days, see regulations for specific guidance on time frame), and reasons a disclosure request may be denied. The Covered entity must have a process for documenting any disclosures and a person needs to be designated as responsible for handling all disclosure requests.

In addition, the Covered Entity must designate a privacy officer who is responsible for implementing and monitoring HIPAA policies and procedures. All employees must be trained within a reasonable time and documentation of the training must be maintained.

There may be a range of interpretations of what constitutes reasonableness, with regard to the safeguards put into place to protect PHI, as well as the amount or type of information disclosed when an appropriate disclosure is made. Therefore, LPCs would do best to maintain the highest possible standards of privacy for electronic transmissions for billing purposes and maintenance of records.

Layve and Layve (2011) explain that a Covered Entity must provide a process for individuals to make complaints and complaints must be documented. Covered Entity must apply appropriate sanctions against employees who do not follow the entity's policies and document the response. A Covered Entity must mitigate, to the extent practicable, any harmful effects caused by the inappropriate disclosure of PHI. In addition, a covered entity must retain the documentation for **six years**.

In addition, a client may file a complaint with HHS as long as the complaint is in writing. If a client files a complaint, HHS has the right to conduct compliance audits and covered entities must: (a) provide records and compliance reports; (b) cooperate with complaint investigations and compliance reviews; and (c) permit access to information. In addition, the client may not face any retaliation or intimidation in response to the complaint.

It is important that providers take measures to stay up to date about new regulations (Layve & Layve, 2001).

## **Catch 22**

HIPAA and HITECH are incredibly complex statutes and can be interpreted in many ways. Layve and Layve (2011) probably provide the best advice when they noted with respect to the HIPAA Privacy Rule as "Do the right thing." Practitioners may need to seek outside consultation to ensure their policies and procedures are HIPAA compliant. At minimum, practitioners need to seek ongoing training regarding HIPAA and HITECH and should view the HHS website at least annually for updates.

## **Summary Statement:**

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HHS (2011) provides the following Fast Facts to help guide practitioners trying to navigate these complex laws:

- 1) **The Privacy Rule does not require you to obtain a signed consent form before sharing information for treatment purposes.** Health care providers can freely share information for treatment purposes without a signed patient authorization.
- 2) **The Privacy Rule does not require you to eliminate all incidental disclosures.** The Privacy Rule recognizes that it is not practicable to eliminate all risk of incidental disclosures and incidental disclosures do not violate the Privacy Rule when you have policies which reasonably safeguard and appropriately limit how protected health information is used and disclosed.
- 3) **The Privacy Rule does not cut off all communications between you and the families and friends of patients.** As long as the patient does not object, the Privacy Rule permits you to share needed information with family, friends, or anyone else a patient identifies as involved in his or her care; disclose information when needed to notify a family member or anyone responsible for the patient's care about the patient's location or general condition; and share the appropriate information for these purposes even when the patient is incapacitated if doing so is in the best interest of the patient.
- 4) **The Privacy Rule does not stop calls or visits to hospitals by family, friends, clergy or anyone else.** Unless the patient objects, basic information such as phone number, room number and general condition can be listed in the hospital directory; be given to people who call or visit and ask for the patient; and be given to clergy along with religious affiliation--when provided by the patient--even if the patient is not asked for by name.
- 5) **The Privacy Rule does not prevent child abuse reporting.** You may continue to report child abuse or neglect to appropriate government authorities.
- 6) **The Privacy Rule is not anti-electronic.** You can communicate with patients, providers, and others by e-mail, telephone, or facsimile, with the implementation of appropriate safeguards to protect patient privacy.

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