HIPAA and YOU

Covered Entities— Do you even have to bother?

Many state prison systems and most jails have widely diverging opinions as to whether they are "covered entities" under the new federal HIPAA regulations. This article attempts to clarify the legislation, give guidance on "covered entities," and create a template to follow so that correctional administrators do not run afoul of its provisions.

The Legislation

The Health Insurance Portability and Accountability Act (HIPAA) is designed to protect you as a patient; however, in so doing it may directly affect you in your life as a correctional professional. The broad general protection afforded to you was in an effort to make an employee be insurable through his employer's insurance. HIPAA specifically addressed portability of insurance between employers and preexisting conditions. In so doing, the law addressed the issues of privacy of medical information. It is that area that may cause you heartburn as a part of the correctional fraternity.

The Health Insurance Portability and Accountability Act was passed in 1996 and signed into law on August 21 of that year. It was a congressional amendment and refinement to three previous sections: the Employee Retirement Income Security Act of 1974 (ERISA); the Internal Revenue Code; and the Public Health Service Act. HIPAA includes changes that

1. limit exclusions for preexisting conditions,
2. prohibit discrimination against employees and their dependents based on their health status,
3. guarantee renewability and availability of health coverage to certain employees and individuals, and
4. protect many workers who lose health coverage by providing better access to individual health insurance coverage.

The good parts of this legislation for the individual employee are the limitations on exclusions for preexisting conditions. Some employers have health plans that limit or totally exclude coverage for preexisting health care conditions. For instance, if you had a heart attack while working for employer A and are hired by employer B, employer B's health plan may have excluded you permanently from any cardiac-related health care claim. Under the authority of HIPAA, health plans now have strict limits on how long exclusions for preexisting conditions can be in effect. Generally employees who change jobs and have health problems will have those preexisting conditions covered in 12 months or less. HIPAA also clarifies that a preexisting condition must have been affecting your health within the last six months for it to be excluded for the one-year period. HIPAA also makes clear that pregnancy is not to be considered a preexisting condition.

Another part that affects correction is the exclusion for passing a physical examination. When HIPAA is totally in effect, employers may not exclude persons from coverage because of any particular illness a prospective or existing employee may have, nor may they require a physical examination prior to coverage. This exclusion on physical examinations prior to employment is strictly for the purpose of health insurance coverage. Of course, jobs requiring physical examinations for performance of duties may still have a physical examination, and any data discovered during that evaluation, however, are specifically excluded from decisions on health care coverage.

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Privacy Under HIPAA

The second major area that HIPAA addresses is health care information. The intent of the legislation is clear: no health care information pertaining to an individual should be shared except as it pertains to those providers specifically involved with the provision of care for that individual and those third parties who need specific narrow information for billing and payment.

Currently, because of the varying nature of state health information laws, personal health information can be distributed without consent for reasons that are totally unrelated to treatment. This can and has led to abuses of information. For instance, under the current loose patchwork of state laws, information held by an insurer can be passed on to a lender who can then deny that patient's application for a home mortgage or a credit card, or to an employer who uses it in personnel decisions.

Personal health information may be disclosed for insurance underwriting purposes, without the knowledge or consent of the insured. This is a totally different situation than volunteering and consenting to a physical examination prior to the inception of the policy. Personal health care information has been used without the knowledge or consent of the individual for market research or any other reason without any safeguards to protect it against misuse.

While there is and has been this tremendous exchange of personal, identifiable health care information without consent of the patient, patients themselves have been in the awkward position of attempting to discover their own records without success. If the patients can surmount the access to their records issue, they are often unable to obtain their own medical records. In addition, patients wishing to access or control the release of such records may be unable to do so because of overwhelming barriers established by their insurance company, health care provider, hospital, state agency, federal provider, or anyone else who holds their records.

The intent of the PRIVACY section of HIPAA is to give control of the medical information and the medical records to the individual patient. Often cited are the appropriate areas that all of us would want. For instance HIPAA permits the patients to have the ability to know how their health information is being used. Health plans and providers must inform patients on the use of their personal health care information, to whom it is being disclosed, and why the information is being disclosed. Prospective consent is needed for each of the disclosures. Each patient is also entitled to a disclosure history listing the entities that received information unrelated to direct treatment or payment. This information must be supplied within 60 days of request.

The PRIVACY regulations of HIPAA specifically require doctors and hospitals to get the written consent of their patients to use their health information. While this provision will not alter the way most large entities and systems have operated, smaller individual providers—such as the doctor dropping by the jail once a week—may have to gain written consent from the detainees and inmates prospectively BOTH for treatment AND use of the medical information that the doctor gathers.

Even large entities will have to change the way they approach the medical information of their patients. First, nonroutine disclosures—that is, disclosures to someone other than the treatment team or billing services—would require a separate, specific written consent prospectively. Second, patients would have access to their own files. Not only would access to files be granted and copies when requested, but patients have the right to request corrections or amendments to their medical records.

While the intent of the legislation is part of an emerging understanding of the protection of privacy, it is possible under the HIPAA regulations for the patient to challenge diagnoses and other aspects of materials that have traditionally been considered the province of the medical professional. Neither the law nor the rule as described (in the *Federal Register,* vol. 65, No. 250/ Thursday, December 28, 2000), determines how accuracy of the challenges to the information is determined. For instance, in the White House press release on this subject, the specific language permitting "amendments and corrections" referred to a patient with "…an improper diagnosis in his or her medical file could be denied health insurance and left no redress." Nowhere are there guidelines on how to maintain the accuracy and integrity of the professional expert opinions.

In a further effort to protect individual patient health care information HIPAA attempts to set boundaries on medical record use and release. Those boundaries allude to the "minimum necessary" information to be used and disclosed. Currently, many state laws permit the disclosure of an entire record even if an employer, billing service, or other entity only requires specific limited information. HIPAA specifically restricts information that is used and disclosed to the minimum amount necessary to perform a specific function.

Another requirement of the PRIVACY section is to address all standard practice involving medical care documentation with regard to privacy considerations. Indeed, this is where there is an advocate for a HIPAA compliance officer. The regulation requires the establishment of internal procedures to protect the privacy of health records and other documents. These procedures include, but are not limited to, the training of employees about privacy considerations in the workplace, receiving complaints from patients about privacy issues, the designation of a privacy officer (HIPAA Compliance Officer) to assist patients with their complaints, and ensuring appropriate safeguards are in place for the protection of health information. With the exception of the designation of a single person as a compliance officer, many responsible physicians, hospitals, and other health care entities were assuring compliance. The new regulation enforcement will require documentation of the above items, such as specific training of employees on privacy of medical information. HIPAA makes this a national standard.

The law is entitled the "Health Insurance Portability and Accountability Act" because there are very strong

accountability provisions. There is an equally strong federal investigative authority granted to look into infringements of HIPAA. New civil and criminal penalties were created by this act for improper use or disclosure of information. These penalties like these which are divided between disclosure and disclosure for sale allude to the fact that accidental or sloppy disclosure is punishable in a draconian fashion. Civil penalties permit administrative actions for up to $100 PER DISCLOSURE (maximum of $25,000 per year) and create a tort action for the aggrieved party. Therefore it is possible to be civilly and criminally sanctioned by the federal government and then have a civil suit from the patient whose records were disclosed. Although the courts will have to make a determination on this aspect, it appears the law allows an aggrieved patient the right to sue because there was a disclosure and a second suit because the patient had harm as a result of the failure of the HIPAA compliance system.

Although the initial intent of Congress was to address electronically transmitted information, HIPAA's final form clearly indicated that the law extended its provisions to cover medical record information in all forms, specifically citing written and oral communications. The final regulation provides protection for paper and oral in addition to electronic information, creating a privacy system that covers all personal health information created or held by covered entities.

This provision means that there will be one standard for health care information rather than separate ones for paper, oral, and electronic. While a single standard will make compliance easier, it should be noted that this one single standard is fairly restrictive.

Are Jails and Prisons Excluded from HIPAA?

Having now gained some insight into the provisions and the extent of the law, the crucial question for the correctional administrator is: ARE WE A COVERED ENTITY? Throughout the legislation there is reference to "covered entities." The definition of a covered entity seems at first blush fairly simple; however, there is wide room for interpretation as noted by the response of various correctional facilities around the country.

Several state correctional systems have declared themselves a "covered entity" under the provisions of HIPAA (e.g., Florida). Other states have determined that their correctional systems are not covered entities (e.g., Washington), but have ongoing efforts to assure reasonable compliance. Other states and many local jails are unaware of the provisions of the act and have not determined whether or not they are covered entities.

Because of the confusion surrounding the law, extensions from compliance were readily obtainable through 2002. Many systems took advantage of the extension provisions, but for those that have not, compliance is expected within the first half of 2003.

Many correctional administrators cite broad exclusions from HIPAA compliance because of the unique nature of the correctional system. There are exclusions from HIPAA compliance in the *Federal Register* for corrections, but these exclusions are narrow, rather than broad. Certainly, as initially discussed in congressional committees there were to be broad exclusions for law enforcement, corrections, and other public safety units. HOWEVER, as the bill reached its final form most broad exclusions were removed and narrowly tailored specific language was inserted.

For instance, public health initially enjoyed a near exemption from the provisions because of the critical safety nature of its mission. These proposed broad exclusions were replaced with a rather narrow definition. Information for public health and research purposes is now specifically addressed. The regulation recognizes that threats to public health, such as life threatening and easily transmitted infectious diseases, will require appropriate monitoring by public health authorities. The regulation encourages health professionals to use de-identified records whenever possible. While HIPAA advocates feel the law strikes the proper balance between protecting privacy and meeting the needs of public health, public safety, and law enforcement others profoundly disagree.

Many jails and prisons look to the exclusions hopefully or try to define themselves as excluded from the provisions of "covered entities." Remember the exclusions are narrowly tailored and quite specific. The *Federal Register* and the act itself describe them with specificity.

First and most important for jails—the act clarifies that reference is to "…individuals that are incarcerated in correctional facilities that are part of the criminal justice system or in the lawful custody of a law enforcement official—*and not for individuals who are detained for noncriminal reasons…*" (Emphasis mine—*Federal Register,* Vol. 65 No. 250/Thursday, December 28, 2000. Pg. 82541). Specifically cited are people who are detained for mental health reasons which is a problem in every major jail in the country.

With the exception of this one confusing area concerning the mentally ill detainees, HIPAA clarifies and permits disclosure of personal medical information for inmates and detainees under the following circumstances:

(1) The provision of health care to such individuals
(2) The health and safety of such individual or other inmates
(3) The health and safety of officers [of][sic-or] employees or others at the correctional institution
(4) The health and safety of such individuals and officers or other persons responsible for the transportation of inmates or their transfer from one institution or facility to another
(5) Law enforcement on the premises of a correctional institution; and
(6) The administration and maintenance of the safety, security, and good order of the correctional institution (*Federal Register*/Vol. 65/No.250/Thursday, December 28, 2000/pg. 82541 and section 164.51(k) and (h) of the law).

The *Federal Register* goes on to site a specific example: "This section is intended to allow, for example, a prison doctor to disclose to a van driver transporting a criminal that the individual is a diabetic and frequently has seizures, as well as information about appropriate action to take if

the individual has a seizure while he or she is being transported." (Ibid.)

The provisions of HIPAA in the example provided above may permit more disclosure than state law. For example, currently in Florida, without the patient's consent we would advise the van driver that the inmate may become acutely ill in transport and if that occurred what he could do to assist the inmate. We would be prohibited from disclosure of the specific diagnosis of diabetes. In situations like this where HIPAA permits more disclosure than state law, the more restrictive legislation is controlling. In other words, although HIPAA would allow the sharing of the diagnosis of diabetes without the patient's consent, because Florida law does not, providers in Florida would have to decline sharing the specific diagnosis.

Covered Entities—Do You Even Have to Bother?

It should be clear that while there are specific exclusions for correctional facilities, because the law addresses them in such detail, the intent of the legislation is that corrections would be a "covered entity." Some states and local jails have indicated that because they do no electronic billing or transfer of protected information that they are not a "covered entity." Although a final determination will only come about by a trial case, it is wise for correctional administrators to begin to move into compliance with HIPAA.

There are a variety of reasons to assume this posture. First, eventually, all of corrections will be dependent on electronic transmission of information. Indeed it is routine and commonplace now. Second, the act clearly addresses the nonelectronic transfer of information and references written and oral documentation. From the comments released by the White House, a previous administration was certainly going to point executive branch enforcement agencies in that direction. Third, the penalties apply to all persons releasing or receiving protected information, not just medical professionals. Therefore, assuming that you are not a covered entity only to find out later that you were may cause judicial action against a correctional administrator for something his/her staff did in a routine fashion. Fourth, although at first it seems hugely cumbersome, complying with the privacy setting in corrections is not all that difficult.

While not exhaustive, compliance with the intent of HIPAA can be accomplished with few changes in most correctional settings. Establishing a HIPAA compliance officer, staff training on confidentiality of protected information, receiving grievances from patients concerning their medical information, having a system in place for inmates/detainees to evaluate and challenge their medical information, and giving copies of the record upon request comply with most of the privacy regulations. The Health Insurance Portability and Accountability Act continues specifically some of the legislation protecting mental health records and therefore those are not disclosable. There are still federal statutes regarding privacy of substance abuse, mental health, and some other physical conditions that are not affected (and therefore either not disclosable to the patient (mental health) or not disclosable to others without the patient's direct consent (e.g., substance abuse and HIV information except as provided in other laws).

One other aspect needs to be reviewed prior to concluding and that is medical information as it involves the prosecution of criminal activity. Although medical records are often important to the investigation and prosecution of serious criminal activity, it was clear in the comments of the White House at the signing ceremony of this law, the overarching philosophy of protection of personal medical information would be the goal. The specific comment was "…[although criminal prosecutors may desire personal medical information, that must be balanced by the fact that]… Americans must not be discouraged from seeking health care because of concerns about having their information inappropriately given to others."

Eventually, HIPAA will impact the way all of us in corrections do our job. We would be well advised to begin now to come into compliance with this legislation.

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LETTERS TO THE EDITOR

Dear Editor:

In the last issue there was an article by Dr. David Thomas and Ms. Jacqueline Thomas, *HIPAA and You,* concerning HIPAA and HIPAA compliance. The article seemed to advocate for small and medium sized jails to declare themselves as "covered entities" under the act.

Recently, the National Commission on Correctional Health Care organized a telephone conference call with the compliance division of the Department of Health and Human Services. It is apparent that the compliance division feels that any jail or prison system that does not involve itself in electronic billing does not have to consider itself a "covered entity" and therefore the privacy section of HIPAA is not required.

Frequently, federal legislation has a tendency over time to become more encompassing. Correctional facilities and systems would be wise to note the provisions of HIPAA. Those provisions concerning privacy and access to medical information by inmates and detainees may eventually impact all of us in corrections.

At this point in time, if a facility or system is not in any way involved in electronic billing, it need not consider itself a "covered entity." Hopefully, this letter to the editor will allay some of the concerns expressed by facilities not involved in electronic billing.

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