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Nonprofits, HIPAA and Medical Records

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July 29, 2020

Mission of Pro Bono Partnership of Atlanta:

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals. We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

Pro Bono Partnership of Atlanta Eligibility & Other Information

- In order to be a client of Pro Bono Partnership of Atlanta, an organization must:
 - ✓ Be a 501(c)(3) nonprofit.
 - ✓ Be located in or serve the greater Atlanta area.
 - ✓ Serve low-income or disadvantaged individuals.
 - ✓ Be unable to afford legal services.
- *Visit us on the web at www.pbpatl.org*
- We host free monthly webinars on legal topics for nonprofits
 - ✓ To view upcoming webinars or workshops, visit the [Workshops Page](#) on our website
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Legal Information:

- ✓ This webinar presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.
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Presentation Overview

- I. HIPAA Introduction & Applicability
- II. HIPAA & COVID-19 Related Disclosures
- III. Substance Use Disorder Records
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 - Privileged Communications & Mental Health Professionals
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Introduction to HIPAA

- The Health Insurance Portability and Accountability Act of 1996 (“**HIPAA**”) is a federal law that was created to improve efficiency and effectiveness of the healthcare system while protecting patient privacy by establishing a set of standards and requirements for transmitting certain health information.
- Regulates:
 - ✓ (i) privacy of health information,
 - ✓ (ii) security of health information,
 - ✓ (iii) notification of breaches of confidentiality.
- HIPAA overseen by Department of Health & Human Services (“**HHS**”) and enforced by Office for Civil Rights (“**OCR**”).

What is Protected Health Information (PHI)?

- Protected Health Information (“**PHI**”) is any oral, electronic, or paper record that is created or received by Covered Entities and Business Associates that contains any individually identifiable information *and* any health information.
- **Examples:**
 - ✓ Patient name and prescription information,
 - ✓ Patient birth date and medical condition,
 - ✓ Patient phone number and medical diagnosis.
- PHI can also be in the form of electronic PHI (“**ePHI**”), which is PHI that is created, stored, transmitted, or received electronically.

Types of Data Protected by HIPAA

- Written documentation and all paper records,
- Spoken and verbal information including voicemail messages,
- Electronic databases and any electronic information, including research information, containing PHI stored on a computer, smart phone, memory card, USB drive, or other electronic device,
- Photographic images,
- Audio and Video recordings.

Who Must Comply with HIPAA?

- HIPAA portions that are important for our purposes are those that deal with protecting the privacy (confidentiality) and security (safeguarding) of health data.
- HIPAA Applicability:
 - ✓ **Covered Entities** – Healthcare Providers, Health Plans, and Healthcare Clearinghouses.
 - ✓ **Business Associates** – A person or entity that provides services to or on behalf of a Covered Entity that involves the use or disclosure of Protected Health Information.

Who Must Comply with HIPAA?

- HIPAA does ***not*** apply to all health care-related organizations that create, use, or disclose identifiable health information. An organization must be a “Covered Entity” or “Business Associate”.
- There are three types of Covered Entities:
 - ✓ Health plans (for example, Medicare, HMOs, a health insurance issuer, etc.),
 - ✓ Health care clearinghouses (entities that process and reformat certain health information such as billing companies),
 - ✓ **Health care providers.**

Who Must Comply with HIPAA?

- A health care provider is a Covered Entity subject to HIPAA if it:
 - ✓ Furnishes, bills, or receives payment for health care in the normal course of business, **AND**
 - ✓ Transmits any covered transactions electronically (i.e., claims, benefit eligibility inquiries, referral authorization requests, or other transactions for which Health and Human Services has established standards under the HIPAA Transactions Rule).
- **Both** parts of this statement must be true to be a Covered Entity.

Who Must Comply with HIPAA?

- To help make this determination, a nonprofit organization should ask two basic questions:
 1. Does the nonprofit organization furnish, bill, or receive payment for health care services on a patient encounter or claims basis? If no, the nonprofit organization is not a Covered Entity. If yes, go to Question 2.
 2. Does the nonprofit organization transmit (send) any transaction related to Question 1 electronically? If no, the nonprofit organization is not a Covered Entity. If yes, then the nonprofit organization is a Covered Entity.

Examples

- A health care provider that contracts with a billing service that submits claim information electronically, on the health care provider's behalf, **is a Covered Entity and subject to HIPAA.**
- A health care provider that transmits individually identifiable information electronically to Medicare, Medicaid or an insurance company to receive reimbursement for medical care provided to patients **is a Covered Entity and subject to HIPAA.**

Examples

- A health clinic that provides free services to patients and does not seek reimbursement for medical services from Medicare, Medicaid or an insurance company **is not a Covered Entity. Therefore, it is not subject to HIPAA.**
- A camp that collects health information via its website or emails from campers and their parents, such as annual physicals, **is not a Covered Entity. Therefore, it is not subject to HIPAA.**
- The following link to the U.S. Department of Health and Human Services, Civil Rights Office website includes an interactive tool to assist nonprofit organizations identify whether they qualify as Covered Entities: <https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/AreYouaCoveredEntity>.

Business Associates

- HIPAA regulations also apply to Business Associates of Covered Entities.
- HIPAA defines a Business Associate as an individual or entity that performs, on behalf of a Covered Entity, any function or activity involving the use or disclosure of PHI **AND** is not a member of the covered entity's workforce.
- Examples of Business Associates include:
 - ✓ Companies involved in claims processing (i.e., medical billing companies),
 - ✓ Health information exchanges, e-prescribing gateways,
 - ✓ Data conversion, de-identification and data analysis service providers,
 - ✓ Document storage or disposal (shredding) companies,
 - ✓ Patient safety or accreditation organizations,
 - ✓ Medical transcription companies.

If not a HIPAA Covered Entity, What Are My Obligations?

- Even if a particular nonprofit organization is not a Covered Entity, the nonprofit should still safeguard any identifiable health information it has for several reasons:
 - ✓ First, the nonprofit organization (or the health care practitioners on its staff) may be required to do so by Georgia law (i.e., mental health and developmental disability, HIV/AIDS and substance abuse records require strict privacy of individual information).
 - ✓ Second, voluntarily complying with certain HIPAA principles, such as limitation on uses and disclosures of identifiable health information, will meet clients' general expectations about the privacy of their identifiable health information.
 - ✓ Third, if a nonprofit organization does not safeguard such information, it will lose the trust of its clients.

HIPAA – COVID-19 Patients

- HIPAA generally *prohibits* health care providers from disclosing PHI about a patient (including their COVID-19 status) to a third-party without the patient's authorization or an applicable HIPAA exception being satisfied.
- HHS has identified several potentially relevant HIPAA exceptions related to the COVID-19 outbreak that, if satisfied, would allow a health care provider to disclose a patient's COVID-19 status to a third-party:
 - ✓ **Patient Authorization,**
 - ✓ **Disclosures to Prevent a Serious and Imminent Threat, or**
 - ✓ **Public Health Reporting Activities.**
- Absent a serious and imminent threat of substantial harm, nonprofit organizations should limit disclosure to reporting COVID-19 cases to the local health department and allow the local health department to contact the patient's employer or others who may have been infected.

HIPAA – COVID-19 Patients

- On April 2, 2020, OCR issued guidance extending the permissibility of HIPAA disclosures for public health reporting activities, indicated it will exercise enforcement discretion, and will not impose penalties for violations of certain provisions of HIPAA against health care providers, or their Business Associates, for the good faith uses and disclosures of PHI for public health oversight activities during the COVID-19 public health emergency.
 - Contact tracing falls under the definition of a public health activity.
- In issuing its April 2, 2020 guidance, OCR reminded Covered Entities that in making disclosures related to public health reporting activities, "a Covered Entity must make reasonable efforts to limit the information disclosed to that which is the “minimum necessary” to accomplish the purpose.“
- Therefore, nonprofit organizations should only disclose the PHI necessary to accomplish COVID-19 related contact tracing and other permissible public health reporting activities.

Confidentiality of Substance Use Disorder Records

- Records and information identifying an individual as having a substance use disorder are confidential, and cannot be disclosed without:
 - ✓ Written consent of the individual (or a person authorized to give consent), **OR**
 - ✓ Certain exceptions/exclusions described in 42 U.S.C. § 290dd-2.
- Substance use disorder records **CANNOT** be produced in response to a subpoena. Requires subpoena + court order authorizing disclosure.

Confidentiality of Substance Use Disorder Records

- Exceptions to consent requirement for disclosure of substance use disorder records:
 1. To medical personnel to meet a bona fide medical emergency,
 2. To law enforcement officials to report crime or imminent threat of crime,
 3. Child abuse and/or neglect, or
 4. If authorized by a court order showing good cause (e.g., need to avert a substantial risk of death or serious bodily harm).
- With limited exceptions, disclosure of substance use disorder records requires individual consent even for the purposes of treatment, payment, or health care operations.
 - ✓ Consent for disclosure must be in writing.

Georgia Confidentiality Laws – Mental Health and Developmental Disabilities Records

- Confidentiality of mental health and developmental disabilities records:
 - ✓ All information about individuals, whether oral or written and regardless of the form or location in which it is maintained, is confidential and may be disclosed only:
 1. When the individual (or another person authorized to do so) gives written consent, OR
 2. When Georgia statute specifically authorizes disclosure.

Georgia Confidentiality Laws – Mental Health and Developmental Disabilities Records

- Georgia statute authorizes disclosures of mental health and developmental disability records:
 - ✓ To physicians or psychologists for continuity of care,
 - ✓ To clinicians in a bona fide medical emergency,
 - ✓ To the guardian or health care agent of an individual, or parent / legal custodian of a minor,
 - ✓ To an individual's attorney, if authorized, AND if requested, at a hearing held under the Mental Health Code,
 - ✓ In response to a valid subpoena or order of any court of competent jurisdiction.

Georgia Confidentiality Laws – Privileged Communications & Mental Health Professionals

- Individuals have a privilege to keep confidential the communications they to their:
 - ✓ Psychiatrist
 - ✓ Licensed psychologist
 - ✓ LCSW
 - ✓ Clinical nurse specialist in psychiatric/mental health
 - ✓ Licensed marriage and family therapist
 - ✓ Licensed professional counselor
- Georgia mental health professionals have an affirmative duty to assert the privilege on behalf of a client and **have no authority to waive the privilege without patient consent.**

Intersection between Mental Health and Developmental Disabilities Records & Privileged Communications

- Although Georgia statute authorizes disclosure of mental health and developmental disability records in select scenarios, Georgia mental health professionals may not disclose privileged communications nor produce records containing privileged materials.
- Therefore, Georgia mental health professionals should not produce privileged materials except in response to a court order or the express written authorization of the patient, even in the absence of an objection from the patient.
- Remember, the privilege extends past an individual's death, and does not "die" with the individual.

Records Requests / Subpoenas

- Subpoenas are issued by courts or administrative tribunals to compel attendance or production.
 - ✓ Subpoena: attend trial, deposition or other proceeding
 - ✓ Subpoena duces tecum: bring or produce documents
- Subpoenas may be issued by:
 - ✓ Judge or magistrate
 - ✓ Prosecutor
 - ✓ Lawyer
 - ✓ Administrative officer
- Response will vary depending on who signs subpoena.

Subpoenas: Signed by Judge or Magistrate

- May disclose identifiable health information per subpoena signed by judge or magistrate.
- Judge, magistrate, or administrative judge = impartial, independent officer.
 - ✓ **NOT** prosecutor, attorney, or court clerk = not impartial or independent.
- The judge, magistrate, or administrative judge = the law.

Subpoenas: NOT Signed by Judge or Magistrate

- Do not ignore subpoena if court has jurisdiction.
- Do not disclose identifiable health information unless:
 - ✓ Receive written satisfactory assurances that individual notified of subpoena, given chance to object, and either objections have been denied or time has elapsed;
 - Subpoena itself may contain such assurances.
 - ✓ Qualified protective order requested or in place; or
 - ✓ Reasonable efforts have been made to contact individual to obtain consent for disclosure of identifiable health information.

Responding to Order or Subpoena

- Does it require disclosure of identifiable health information?
- Does the court that issued it have jurisdiction?
 - ✓ State court: originated from a court located in Georgia.
 - ✓ Fed court: check with attorney.
- Who signed it?
 - ✓ If judge or magistrate: comply with order or subpoena.
 - ✓ If NOT judge or magistrate: review carefully and respond appropriately.
- Comply with strict terms of subpoena or order.
 - ✓ Don't disclose more identifiable health information than is specified.

Questions?



For More Information:

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