HEALTH FOR A CHANGE

Data sharing, HIPAA, COVID-19: Legal Issues & Opportunities

May 4, 2021

Foundation for a Healthy Kentucky’s MISSION

To address the unmet health needs of Kentuckians

by . . .

- Developing and influencing policy
- Improving access to care
- Reducing health risks and disparities
- Promoting health equity

And VALUES . . .

✓ Integrity ✓ Leadership
✓ Respect ✓ Policy Equity
✓ Effectiveness ✓ Collaboration
Wednesday, **May 19** 12PM ET / 11AM CT
All things 2020 US Census: Review, new products, and Kentucky connections

Thursday, **June 10** 12PM ET / 11AM CT
Kentucky Health Coalitions and Public Health Transformation
https://www.healthy-ky.org/events/bost-health-policy-forum

Foundation RFP for Strategic Planning Consultant

Introduction
The Foundation for a Healthy Kentucky (Foundation) is seeking proposals from qualified consultants to facilitate and support a strategic planning process that will inform and assist the Board of Directors in reaching consensus on the focus, goals and objectives that will guide the next phase of investment and strategies beginning January 1, 2023 and beyond. The success of the Foundation depends on engaging with, listening to, and learning from the ideas and advice of others. We believe that solutions emerge when diverse groups of individuals and organizations come together to share their experiences and expertise. We value the advice of
About the Network for Public Health Law

At no cost, the Network provides legal support:

- **Technical assistance**
- **Training and resources**
- **Opportunities to build connections**
- [www.networkforphl.org](http://www.networkforphl.org)
- **Join the Network!**

This presentation is for informational purposes only. It is not intended as a legal position or advice from the presenters or their employers. For legal advice, attendees should consult with their own counsel.
Equip you with HIPAA basics, terminology, and strategies to maximize the exchange of health information during COVID-19 and beyond.

HIPAA basics

» What is it?
» What does it do?
» To whom does it apply?
» What does it cover?
» What does it require?
» What does it allow?
“HIPPA” stands for the “Health Information Privacy Protection Act.”

True  False

“HIPPA” stands for the “Health Information Privacy Protection Act.”

False
What is HIPAA?

Health Insurance Portability & Accountability Act

It’s more than privacy . . .

» Electronic transactions
» Privacy
» Security
» Breach notification

What does HIPAA do? (privacy)

» Requires appropriate safeguards for the privacy of protected health information (PHI)
» Sets limits and conditions on uses and disclosures without patient authorization
» Gives patients rights over their health information
### What does HIPAA do? (privacy)

- **Gives patients rights over their health information**
  - Right to access
  - Right to request amendment of PHI
  - Right to request confidential communications
  - Right to an accounting of disclosures
  - Notice of privacy practices

### What does HIPAA do? (security)

- Requires appropriate administrative, physical and technical safeguards to ensure the confidentiality, integrity, and security of PHI
- ePHI = transmitted by electronic media or maintained in electronic form

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What does HIPAA do?

> Includes provisions regarding compliance, and investigations, imposition of civil money penalties for violations of HIPAA and procedures for hearing

HIPAA applies to most health care providers.

True False
HIPAA applies to most health care providers.

✅ True

To whom does HIPAA apply?

» Health care providers
» Health plans
» Health care clearinghouses

» Called “covered entities” (CE)
» Office for Civil Rights “Am I a covered entity?” tool
» Business Associates of a covered entity
Certain health care providers

» Broad definition includes doctors, clinics, psychologists, dentists, nurses, pharmacies, etc.
» But only if they transmit information in electronic form in connection with an HHS adopted electronic standard transaction
  - E.g. request for payment, eligibility check, prior authorization, etc.

Health plans

» Health insurance companies
» HMOs
» Company health plans
» Government programs that pay for health care
  e.g. Medicare, Medicaid, SCIP

» But does not include government grants to fund health care
Business Associates

» A person or organization that is not a member of CE’s workforce

» Performs functions on behalf of CE or provides services to CE where access to PHI is involved

» Examples: billing services; document destruction services; outside attorneys and accountants; computer service technicians; software vendors; cloud computing vendors

» Must have written agreement known as a Business Associate Agreement (BAA)

Not all public health departments are required to comply with HIPAA.

True

False
Not all public health departments are required to comply with HIPAA.

True

3 possibilities: Completely covered, hybrid, or completely non-covered

Hybrid entity means a single legal entity:

» That is a covered entity
» Whose business activities include both covered and non-covered functions; and
» That designates health care components by separating them from its other components and documenting the designation.
My agency or organization is not covered by HIPAA. This means that I don’t need to know what HIPAA says.

True False
Importance of understanding HIPAA

» Health care providers are a crucial source of PHI needed by many agencies or organizations to protect and improve the public’s health

» Most health care providers are covered by HIPAA

» Providers may question or deny access to information even when the law allows sharing

HIPAA covers all health information.

True False
HIPAA covers all health information.

False

What the HIPAA Privacy Rule covers

» Use and disclosure of protected health information (PHI)

Use – The sharing, application, utilization, examination, or analysis of PHI within the entity that maintains the PHI

Disclose – The release, transfer, provision of access to, or divulging in any manner of PHI outside the entity holding the PHI
Protected health information (PHI)

» Information, including demographic information:
  - In any form: written, electronic or oral
  - Relating to past, present or future
    - Physical or mental health status or condition
    - Provision of health care
    - Payment for provision of health care
  » That identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual

PHI does not include:

» Student records
» Research records held by non-covered entities
» Employment records that may contain health information
» De-identified information
» Health information held by non-covered entities, including governmental entities
Aggregate data does not identify individuals. This means that I can release the data below with no HIPAA concerns.

### July 2020 pediatric COVID-19 cases by county

<table>
<thead>
<tr>
<th></th>
<th>&lt; 1year</th>
<th>1-5years</th>
<th>6-10yrs</th>
<th>11-17yrs</th>
</tr>
</thead>
<tbody>
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<td>1</td>
<td>3</td>
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<tr>
<td>Beacon</td>
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<td>18</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Calhoun</td>
<td>0</td>
<td>4</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Davis</td>
<td>4</td>
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**True**  
**False**

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**False**
Is aggregate data PHI?

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<td>Fulton</td>
<td>0</td>
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Protected health information (PHI)

- That identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual
- Beyond the basics: HIPAA has rules regarding aggregate data and deidentification risk at 45 CFR § 164.514.
- Network Tool: HIPAA Expert Determination De-Identification Method
  
HIPAA prohibits my local school district from providing to my local health department with COVID-19 vaccination information about individual students, absent the parent’s consent.

**True**

HIPAA prohibits my local school district from providing to my local health department with COVID-19 vaccination information about individual students, absent the parent’s consent.

**False**
What does HIPAA cover?

PHI does not include education records that are covered by the Family Educational Rights Privacy Act (FERPA)

Records that are

- Directly related to a student; and
- Maintained by a school or a party acting for the school, (includes a nurse employee and a nurse contractor)

» Includes transcripts, disciplinary records, and similar records.

» Includes immunization and other medical or health related records

HIPAA vs. FERPA

» HIPAA Privacy Rule – applies to:
  
  - Health plans and health care providers that transmit information electronically regarding covered transactions (related to payment for health care)
  - “Protected health information” – individually identifiable information related to patient health status, condition, care, or payment

» Protected health information
  
  - Excludes individually identifiable health information in education records covered by FERPA

» Bottom line: If FERPA applies, HIPAA does not
What does HIPAA require? Privacy: Basic rules

» Covered entities are prohibited from using or disclosing PHI unless required or allowed by HIPAA privacy rule

» Rule provides numerous exceptions that permit disclosure

» If another law provides greater privacy protection or greater rights to individual concerning his/her health information, must comply with the other law

Minimum necessary rule

» Except for treatment purposes, must limit uses and disclosures of PHI to the minimum amount necessary to accomplish the intended purpose
  - Do not disclose more information than required
  - Do not access information you don't need
Permissible disclosures

Basic Rule: Covered entities are prohibited from using or disclosing PHI unless required or allowed by HIPAA privacy rule

To patient (or legal representative, e.g. generally parent access to child’s info)

TPO
- Treatment: provision, coordination, management of care/related services including consults and referrals
- Payment for health care – reimbursement for health care, coverage, all related activities
- Health care operations – next slide
Exception – health care operations

» Activities directly related to treatment and payment
  (e.g. utilization review, quality assessment, training)

» Supporting activities
  (e.g. computer systems support, in-house legal counsel)

» Administrative and managerial activities
  (e.g. business planning, resolving complaints, complying with HIPAA)

Exception – Family & Friends

» May disclose PHI to family, relatives, friends involved in individual’s care / payment for care

» If individual present, opportunity to agree or disagree to disclosure (can be inferred)

» Can use professional judgment

» Give individuals ability to designate someone / revoke designation
  - See OCR guidance on “family & friends”

» Generally, personal representative can exercise all right of individuals
HIPAA prohibits Community Hospital from reporting a case of COVID-19 to my health department, absent the patient’s authorization.

**True**

False
HIPAA exceptions that allow disclosure to public health departments

» “Required by law” – mandate contained in law that is enforceable in a court of law
- Law includes statutes, administrative rules, executive orders (such as under Emergency Management Law), court-ordered subpoenas, etc.

» “Public health” – to public health authorities and their authorized agents for public health purposes, including but not limited to public health surveillance, investigations, and interventions

Sharing Medicaid data example

» Flint Registry
- Grant of public health authority from CDC
- Sought Medicaid data from Michigan Department of Health and Human Services
- Challenges
- Potential legal pathways
- Final outcome
HIPAA and public health emergency preparedness and response

» To identify, locate, and notify family members
» To disaster relief agency
» To avert a serious and imminent threat to health and safety of a person or the public
» To protect national security
» To law enforcement under certain circumstances
» For judicial or administrative proceedings

Covered entities do not have to comply with HIPAA rules and requirements during a federally declared public health emergency.

True  False
 Covered entities do not have to comply with HIPAA rules and requirements during a federally declared public health emergency.

**False**

**HIPAA and COVID-19**

» HIPAA compliance always applies, even during an emergency.

» Secretary of HHS has authority to waive sanctions and penalties when President declares an emergency and the HHS Secretary declares a public health emergency.

» Limited Waiver of HIPAA Sanctions and Penalties issues in March 2020 and still in effect.
Thank you!

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I ♥ LAWYERS