

February 12, 2019

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

Andra Wicks  
Health Information Privacy Specialist  
Office of Civil Rights  
U.S. Department of Health and Human Services  
200 Independence Ave., SW  
Washington, DC 20201

Re: Request for Information on Modifying HIPAA Rules to Improve Coordinated Care, HHS, Office of Civil Rights, RIN 0945-AA00

Dear Ms. Wicks:

NASW is pleased to submit the following comments in response to the above-referenced Request for Information concerning modifications to the HIPAA rules. NASW is the largest membership organization of professional social workers in the United States, with approximately 120,000 members. The Association works to enhance the professional growth and development of its members, to create and maintain professional standards, and to advance sound social policies. Our members have a particular concern in ensuring that the HIPAA rules establish clear and enforceable privacy protections, while also minimizing both unnecessary barriers in sharing information to promote their clients' care and unnecessary burdens on their professional practice. The comments below focus on selected issues of particular importance to social workers.

***Requiring Timely Disclosure of PHI by Covered Entities for Treatment, Payment, and Health Care Operations Purposes***

NASW concurs with the Office of Civil Rights (OCR) that timely exchange of information among health care practitioners and settings promotes effective coordination of care. Timely communication among providers notwithstanding, promotion and protection of client confidentiality and privacy are of the utmost importance. Mandatory disclosure of protected health information (PHI) could result in the unnecessary sharing of extremely sensitive information, such as HIV status, mental health and substance use diagnoses, reproductive health information, history of abuse or trauma, and genetic information (such as susceptibility to Alzheimer's Disease). Thus, NASW urges OCR to retain the current "permissive rule," allowing

health care providers to rely on their own professional judgment in determining the extent to which PHI should be shared, with consideration of relevant professional and ethical standards. (For social workers, these include various NASW practice standards and guidelines<sup>1</sup> and the *NASW Code of Ethics*.<sup>2</sup>) Moreover, in no situation should psychotherapy notes be disclosed without the client's express authorization, given the very sensitive nature of this information and the individual's expectation of privacy.

**The current approach with regard to mandatory disclosure should be retained – disclosure should be mandatory if, but only if, the request is accompanied by a client authorization.** That is, if the provider requesting information has obtained client consent, then the Covered Entity must share the PHI. If no such consent accompanies the request, then the current permissive rules would continue to apply. In the case where the client has consented to disclosure, NASW agrees that a deadline for disclosure should apply. We suggest that seven business days be allowed for disclosure of treatment records, although when there is an urgent need for the record, it should be provided as soon as possible to reduce barriers to treatment. For other records (including those related to payment and health care operations), we suggest a deadline of 10 business days.

**NASW recommends that an individual receive their PHI from their health care provider rather than a health care clearinghouse, as proposed by OCR.** A clearinghouse is not properly prepared to answer questions about treatment from a patient. In addition, in the event information requires clarification to prevent misinterpretation or harm, a provider should be available to discuss it with the patient, not the clearinghouse. To safeguard confidentiality, mental health records should only be release by the provider, not a clearinghouse.

### **Eliminating the Minimum Necessary Requirement for Care Coordination and Case Management Disclosures**

**NASW opposes any change to the current minimum necessary standard.** That is, disclosures for purposes of treatment should continue to be exempt from the minimum necessary standard. This will help facilitate the prompt sharing of such information, because providers would not need to be concerned about omitting portions of records they share. However, the standard should continue to apply to disclosures for purposes of payment and health care operations. It is clear that individuals retain an expectation of privacy regarding such disclosures and assume that only the minimum amount of information necessary for such purposes will be shared. This is especially important for patients receiving mental health care, given

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<sup>1</sup> National Association of Social Workers. (2019). *NASW practice standards & guidelines*. Retrieved from <https://www.socialworkers.org/Practice/Practice-Standards-Guidelines>

<sup>2</sup> National Association of Social Workers. (2017). *Code of ethics of the National Association of Social Workers*. Retrieved from <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English>

the sensitivity of the information at issue and the likelihood they would be discouraged from seeking treatment otherwise. For example, it is rarely necessary to disclose treatment notes for health care operations purposes, and practitioners should continue to refrain from doing so.

Requirements for psychotherapy notes must not be changed; i.e., psychotherapy notes may be released only upon separate, express client authorization.

### **Disclosures of PHI to Social Services Agencies and Community-Based Programs**

NASW concurs with OCR that social service agencies and community-based support programs play important roles in coordination of care. A recent analysis of the RFI addresses relevant provisions of the existing HIPAA rules:

Currently, the HIPAA Privacy Rule permits Covered Entities to disclose PHI to social service agencies or community-based support programs (Agencies and Programs) for treatment purposes, which includes the coordination or management of health care by a health care provider with a third party. OCR recognizes, however, that Covered Entities are nonetheless currently hesitant to share PHI with these Agencies and Programs without a written authorization or Business Associate Agreement (BAA) because these recipients are not directly subject to HIPAA.<sup>3</sup>

NASW concurs with this perspective. Misperception of HIPAA rules sometimes delays transmission of information between health care providers and social service agencies or community-based support programs. **Rather than changing the HIPAA rule, however, NASW encourages OCR to provide information and training to clarify the rule**, thereby supporting covered entities in implementing the relevant provision.

### **Disclosure of PHI to Family Caregivers**

**NASW encourages OCR not to modify current standards.** The existing standards adequately balance client confidentiality with the need for disclosure to prevent harm, and the standards defer appropriately to state-level patient privacy requirements. The association believes both HIPAA and state-level privacy requirements suffice not only for minors, but also for adults with limited capacity.

However, NASW is aware that some providers lack clarity on the requirements governing PHI disclosure to family members, caregivers and other third parties and, consequently, may be reluctant to share information with such individuals, even when

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<sup>3</sup> McDermott Will & Emery. (2018, December 21). *OCR requests information from stakeholders on significant changes to the HIPAA rules*. Retrieved from <https://www.jdsupra.com/legalnews/ocr-requests-information-from-90589/>

such disclosure is permissible and could lessen risks to their clients and others. In this regard, the OCR guidance *How HIPAA Allows Doctors to Respond to the Opioid Crisis* notes:

HIPAA still requires that a disclosure to prevent or lessen a serious and imminent threat must be consistent with other applicable laws and ethical standards. For example, if a state's law is more restrictive regarding the communication of health information (such as the information can only be shared with treatment personnel in connection with treatment), then HIPAA compliance hinges on the requirements of the more restrictive state law.<sup>4</sup>

Providers frequently do not have ready access to information about relevant state law. Therefore, **it would be helpful to provide an authoritative resource—such as a clearinghouse of state privacy protection laws and guidance—regarding these state requirements.** Such a resource would be especially important for clinical social workers and other mental health providers, who frequently encounter clients who may pose a risk to themselves or others.

In addition, in regard to minors, there have been situations reported in which a caregiver who was not a parent, legal guardian or representative was unable to obtain information even though they were the primary caretaker. Describing circumstances in which the primary caretaker, in the absence of a parent or guardian, can receive information would be helpful in cases of a minor being treated, especially in urgent situations.

## **Notice of Privacy Practices**

**NASW supports the current requirement** that health care providers with a direct treatment relationship with an individual (1) obtain and retain a written acknowledgment from their clients of their receipt of the provider's notice of privacy practices (NPP) and (2) in cases in which such written acknowledgment of receipt cannot be obtained, retain documentation that the provider made a good-faith effort to obtain the acknowledgment. These requirements promote clients' informed consent regarding how health care providers may use and disclose PHI. Furthermore, the burdens involved are minimal and are clearly outweighed by the benefits of full disclosure.

## **Other Questions**

In response to other questions regarding the NPP, clinical social workers in independent practice bundle the NPP with other documents during the initial interview. The number of pages vary but include documents such as informed consent, fee schedule, and demographic information. The NPP is a standalone

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<sup>4</sup> U.S. Department of Health and Human Services. (n.d.). *How HIPAA allows doctors to respond to the opioid crisis*. Retrieved from <https://www.hhs.gov/sites/default/files/hipaa-opioid-crisis.pdf>

document and should not be printed with non-NPP materials. Non-NPP documents should be updated annually.

A required electronic signature for the patient may be burdensome for the provider and patient. Patients who lack experience in using a computer would require assistance in using an electronic signature. This would create a burden to providers who would need to provide the assistance.

NASW members have not reported an economic burden to maintain documentation of the NPP. However, OCR's recommended use of a standard NPP checklist is acceptable and would streamline the process in completing the form. In response to OCR's question about barriers in obtaining an NPP, clinical social workers may be unable to obtain an NPP from a patient during a life-threatening illness or injury.

The HIPAA sample forms developed by OCR are utilized by clinical social workers and serve as helpful templates for providers. The best way to help patients understand HIPAA is to have a verbal conversation with patients to help them understand what they have read and whether they have questions. The information included in the NPP is helpful; however, it would be important to specify a minimum number of days in which a patient should receive their records upon request. In addition, the first set of their records should be free, and the fee requirements should apply only to additional copies.

Thank you for the opportunity to provide comments on these important issues. Should you have questions or require additional information, please do not hesitate to contact me at [acamper.nasw@socialworkers.org](mailto:acamper.nasw@socialworkers.org), with a copy to Mirean Coleman, LICSW, Clinical Manager ([mcoleman.nasw@socialworkers.org](mailto:mcoleman.nasw@socialworkers.org)), and Gary Gross, Deputy General Counsel ([ggross.nasw@socialworkers.org](mailto:ggross.nasw@socialworkers.org)).

Sincerely,

A handwritten signature in black ink that reads "Anne B. Camper / MBF". The signature is written in a cursive style.

Anne B. Camper  
General Counsel