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June 2012

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TRAINEES AND SUPERVISORS: PREPARE FOR CHANGES

Professional Record Keeping, Part II
Salvatore S. Cullari, Ph.D., Chairperson

In the previous article entitled Professional Record Keeping, Part I, we discussed some general requirements concerning record keeping. In this article, we will further consider the Health Insurance Portability and Accountability Act (HIPAA) requirements and the release of client records.

By now every licensed psychologist in the state has heard about HIPAA and is aware of its requirements. Briefly, HIPAA was signed into law in 1996, and its provisions became largely effective between the years of 2003 and 2005. The original goal of HIPAA was to protect people with preexisting conditions from losing health insurance when they changed jobs and to standardize electronic billing and filing. It applies to health care providers, including psychologists, insurance companies, health care clearing houses and other entities. Although there may be a very small minority of licensed psychologists who may be exempt from HIPAA, it is currently considered to be the standard of care, and thus its provisions should be followed.

HIPAA does not apply to correctional facilities, employment records, most educational records, life or disability insurance, Workers Compensation or Social Security Disability. In addition, state laws that are more restrictive of privacy for the client will supersede HIPAA. In Pennsylvania, these differences are mostly associated with the client records for minors and whether clients have access to their own records. These issues will be further addressed below.

Generally speaking, HIPAA includes the Electronic Transaction Standards (Transaction Rule), Standards for

Privacy of Individually Identifiable Health Information ("Privacy Rule"), Security Standards for the Protection of Electronic Protected Health Information (the Security Rule) and Business Associate contracts. The latter will not be addressed in this article. The Transaction Rule generally relates to electronic exchange of client information to other entities. It requires the use of standard formats whenever health care information such as an insurance claim is transmitted electronically. Many of these requirements are meant to streamline the process and to potentially reduce costs.

The Privacy Rule requires informing all clients about their privacy rights, potential uses and release of their health care information, creating practice privacy procedures, training employees, designating a privacy officer, and securing records. In a solo practice, the privacy officer and clinician are the same person, but this may not be the case in a larger practice and in fact this person does not need to be a licensed individual.

HIPAA's Privacy rule has the biggest impact for the practice of psychology. It covers the following basic types of information: 1) Health Information (HI), which is any information about the client in any form that is created or used by health care professionals or entities. 2) Individually Identifiable Health Information (IIHI). This is a subset of the above that either identifies or can be used to identify the client. 3) Protected Health Information (PHI). If or when Individually Identifiable Health Information is electronically transmitted or maintained in any form or medium, including written, electronic and oral by a HIPAA covered entity, it automatically becomes Protected Health Information. It includes information such as psychological conditions, payment records, and the treatment provided. Psychotherapy notes are PHI, but they are not stored together in the general client record. The same is true of the clinician's personal notes, and all of these have different requirements for release. The Privacy Rule

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does not apply to “De-Identified information” which cannot be used to identify the client. Information may be De-Identified by removing information such as phone numbers, email addresses, social security number, medical record numbers, etc. that can potentially identify the client.

HIPAA does allow clients access to their own PHI such as psychological reports, diagnosis and treatment summaries, but not necessarily to the actual psychotherapy notes themselves. This is true for insurance companies as well and they cannot deny coverage based on the release (or non-release) of these notes. However, in Pennsylvania, clients who are treated in any MH/MR or a licensed drug and alcohol facility can have access to their psychotherapy notes unless that access is contraindicated for therapeutic reasons.

HIPAA defines psychotherapy notes as:

Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date. 45 C.F.R. § 164.501.

HIPAA does not preclude psychologists from releasing their psychotherapy notes to others, but it does require prior special authorization from the client which includes the following requirements: a specific description of the information that will be released and to whom, the purpose of this disclosure, an expiration date, the right to revoke this permission, and the right not to authorize this disclosure. Clients do not have the right to read, copy or request amendments to psychotherapy notes in their medical records unless the record is involved in litigation by the client.

The HIPAA Security Rule largely pertains to safeguards that are taken to protect confidential information from unintended disclosure. These would include factors such as a computer virus, unintended release of information

through emails, faxes or other electronic transmission. It requires three types of safeguards: 1) administrative (e.g., office policies and procedures, staff training) 2) physical (for example, protecting access to electronic records stored in the psychologist's computer or elsewhere in the office), and 3) technical (e.g. computer or file passwords, virus and hacking protection, and so on). The Security Rule applies only to electronically transmitted or stored protected health information. Information saved on paper is not covered.

Although not entirely equivalent, HIPAA's Privacy Rule, confidentiality, privileged communication, and the release of client records is certainly intertwined and in some instances, indistinguishable from each other. All of these have a number of important legal and/or professional exceptions where prior authorization by the client is not required. These include professional or staff consultations, research (as long as certain client/subject identity precautions are followed or if the individual consents to release), emergency situations, or imminent danger to others (which in Pennsylvania is based on *Emerich v. Philadelphia Center for Human Development, Inc.* and not *Tarasoff v. Regents of University of California*, applied in many other states), mandated reporting of child abuse (elder abuse is not mandated reporting unless you are an employee of a domiciliary care home, home health care agency, long-term care nursing facility, an older adult daily living center or a personal care home), significant potential of client suicide, seriously impaired drivers, and in some cases of national security.

Of course, clients should be informed about all of these exceptions at the beginning of therapy, and clients have the legal right (with certain restrictions) to: be informed about the provider's privacy practices, inspect and copy their medical records, request amendments and corrections to their medical records, restrict disclosures of their PHI, obtain an accounting of all non-routine uses and disclosures of PHI, and complain to the office practice and HHS about any Privacy Rule violations.

Under HIPAA, the rights of parents to access the records of their children may be restricted in certain situations. Generally speaking, the ability to seek treatment independently implies the right to control PHI, and HIPAA defers to state laws the rights of minors to seek treatment without parental consent. In Pennsylvania, children can seek mental health treatment without the

consent of their parents at the age of 14. In the case where parents consent to treatment of children either under or over the age of 14, they would theoretically have the right to control PHI. However, even in situations where parents give consent for their children to seek treatment, professional entities may decide not to release any information if in their professional judgment there is a risk that the child may be harmed by doing so. HIPAA guidelines also state that parents or guardians will not have access to the records of their minor child if they assent "to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service." 45 C. F. R. 164.502(g)(3)(i)(C).

HIPAA aside, the release of client records is often a confusing and potentially stressful experience for licensed psychologists. In Pennsylvania, the release of client records requires the full disclosure and prior authorization of the client or the client's legal representative or the client's guardian in the case of incompetency proceedings. This is also true for releasing records to law enforcement officials except in cases where there is a duty to protect by warning. Psychologists can release such information without these requirements when there is a court order to do so. Under HIPAA, a covered health care provider may disclose protected health information required by a court order, including the order of an administrative tribunal. However, the provider may only disclose the information specifically described in the order. A subpoena is different from a court order as it is issued by someone other than a judge, for example, an attorney. Because it is not a court order, the provider may disclose information only if the notification requirements of the Privacy Rule are met. This means that the provider must receive evidence that reasonable efforts were made to notify the person who is the subject of the request so that person has a chance to object to the disclosure, or to seek a qualified protective order for the information from the court.

Another confusing aspect of releasing records concerns the confidentiality of information of clients who have died. Confidentiality is not waived or terminated by the death of a client, but the release of their records is much more complicated. A client's family, friends, law enforcement officials, or executor of the client's estate are considered to be outside third parties. As stated

above, release of client records to third parties cannot be done without the consent of the client, the client's legal representative or guardian. The client may consent to the release of his records after death while he or she is still alive, which of course must be properly documented. In this case, the executor of a deceased client's estate would not possess the authority to release any confidential information or records. Probably the best or, at least, safest solution to this ethical dilemma is to get a court order to specify what records or information may be legally released.

References

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html>

Rost v. State Board of Psychology, 659 A.2d 626 (Pa. Cmwlth. 1995); appeal denied 670 A.2d 145 (Pa. 1995).

Meet the Members of the State Board of Psychology

Salvatore S. Cullari, Ph.D., Chairperson

Dr. Salvatore Cullari received a Ph.D. in psychology from Western Michigan University in 1981. He was a Psychological Services Director/Coordinator at several large mental health institutions prior to becoming a professor at Lebanon Valley College (LVC) in 1985. He was promoted to full professor and chair of the department in 1993 and remained in this position until his retirement in 2003. He is currently professor emeritus at LVC, a consultant and maintains a small private practice. He has been on the State Board of Psychology since 2005.

Karen W. Edelstein, Psy.D., Vice Chairperson

Dr. Karen Edelstein has been a Pennsylvania licensed psychologist since 1994. Her clinical practice is located in Philadelphia and Bryn Mawr, Pa. and involves individual and family therapy and psychological assessments with a varied patient population. Dr. Edelstein joined the State Board of Psychology in 2003, after membership in the Ethics Committee of the Philadelphia Society of Clinical Psychologists. She has served as the board chair and is currently the vice chair. Dr. Edelstein's board work grows out of her interest in the intricacies of law, ethics, and clinical

practice. She especially appreciates the “team approach,” to problem solving, which characterizes the board process. Dr. Edelstein believes that a psychologist’s self-care is a critical aspect of practice, and she strives to maintain a reasonable balance between professional and personal life.

Joseph L. French, Ed.D.

Joseph L. French, ABPP (School) from the University of Missouri to Penn State in 1964 where he developed one of the first ten programs for school psychologists accredited by the American Psychological Association.

French was credentialed as a school psychologist in each jurisdiction where he worked: Illinois, Nebraska, Missouri, and Pennsylvania and held/holds a license in Missouri (#101) and Pennsylvania (#756). He is a Fellow in the American Psychological Association (APA), Pennsylvania Psychological Association (PPA), and the Association of State and Provincial Psychological Boards (ASPPB).

He has been in the presidential chairs of PPA, the School Division of APA, and The Association for the Gifted – a Division of the Council for Exceptional Children. Selected honors include having his “Summary of Research on High Ability Dropouts” read into the Congressional Record by Senator Jacob Javits (NY), awards from five universities and several professional organizations. He was an invited participant to the National Conferences on Graduate Education in Psychology twice (Salt Lake and Ann Arbor) and on Internship Centers (Gainesville).

Among his honors is The Award for Distinguished Contributions to the Science and Profession of Psychology from PPA and the 1998 Distinguished Alumnus award from Illinois State University at Normal, where he earned a bachelors and masters degree.

He is married to Peg, a professional actress who taught acting and script analysis at Penn State. They have four children and are devoted grandparents to six and to

eight great grandchildren .

Ennes Littrell, Secretary (Public Member)

Ms.Littrell graduated from Westtown School (1963), Mary Baldwin College with a BA in Religion and Philosophy (1967). Following the receipt of her master’s in social work from the University of North Carolina – Chapel Hill (1969), she worked in community mental health centers and private psychiatric hospitals, administering the area’s first drug treatment program and providing outpatient clinical services. In 1978, she relocated to Philadelphia, and continued both clinical and administrative work at Hall Mercer Community Health Center. Following several years of volunteer work for ActionAIDS, an HIV/AIDS service organization, she became its first executive director and remained its executive leader until 1996.

Following her retirement in 1996, she has served as a board member of several non-profit organizations including The Print Center, The Delaware Valley Legacy Fund, and The Friends of the Free Library. In addition to her role as a public member of the Psychology Board, she creates multimedia pieces of art using found objects and photographs she has taken.

She and her husband, Javier Arrastia, live in Philadelphia.

Todd B. Narvol, Esq. (Public Member)

Todd Narvol joined the State Board of Psychology in November of 2011, as a public member. Mr. Narvol is a licensed attorney in Pennsylvania and Maryland, and practices civil litigation in both states, from an office in Harrisburg. He previously was a Chief Deputy District Attorney in the Dauphin County District Attorney’s office. He has a bachelor of science degree with a dual major in mathematics and English writing from the University of Pittsburgh, and a juris doctor degree from the Dickinson School of Law.