Northwest Regional Telehealth Resource Center and the Telehealth Alliance of Oregon

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Pacific Northwest University of Health Sciences  University of Utah Health Clinical Neuroscience
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Presentation slides are posted at https://nrtrc.org/sessions. Recordings will be posted after the conference.
• Moderator: Cathy Britain and Deb LaMarche
• Presenters:
  – Jeffrey Mitchell, JD, Counsel, Fletcher, Heald & Hildreth, PLC
  – Rene Quashie, JD, Vice President, Policy & Regulatory Affairs, Digital Health, Consumer Technology Association
  – Emily Wein, JD, Of Counsel, Foley & Lardner LLC
  – Mei Wa Kwong, JD, Executive Director, Center for Connected Health Policy
Agenda

• Introduction to OCR Bulletins, Guidance, and Enforcement Waivers for Telehealth

• HIPAA Privacy
  • OCR Waiver
  • FAQ Issues

• Part 2
INTRODUCTION

• From McDermott Will & Emery: HHS Office for Civil Rights (OCR) has issued the following bulletins and guidance (collectively, the OCR COVID-19 Guidance):

- OCR, COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities, March 25, 2020
- OCR, Notification of Enforcement Discretion for telehealth remote communications during the COVID-19 nationwide public health emergency, March 17, 2020
- OCR, Bulletin: HIPAA Privacy and Novel Coronavirus, February 3, 2020
- OCR, FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency, March 20, 2020
During PHE, OCR will not impose penalties for non-compliance with HIPAA involving:

- Covered entity healthcare provider in connection with “good faith” provision of telehealth

Covered entity healthcare provider can use any “non-public facing” remote communication products that are available to communicate with patients

- Video application examples- Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, WhatsApp video chat
- Text application examples- Signal, Jabber, Facebook Messenger, Google Hangouts, WhatsApp and iMessage.
“Public facing” communication products are not covered by the waiver and cannot be used

Examples of “public facing”:
- Facebook Live
- Twitch
- TikTok

These products are designed to be open to public or allow wide and indiscriminate access to the communication
OCR WAIVER (FAQ) – WHAT IS “BAD FAITH”?

• Criminal acts, fraud, identity theft

• Further uses or disclosures of patient data transmitted during a telehealth communication that are prohibited by the HIPAA Privacy Rule (e.g., sale of the data)

• Violations of state licensing laws or professional ethical standards that result in disciplinary actions

• Use of public-facing remote communication products, such as TikTok, Facebook Live, Twitch, or a public chat room
OCR WAIVER

Telehealth service does not need to be related to diagnosis/treatment of COVID-19

Enforcement waiver extends to failure to enter into BAAs with vendors of non-public facing remote communications and utilization of non-HIPAA compliant remote communication products

Enforcement waivers apply only to covered entity healthcare providers (not health plans or healthcare clearinghouses)
Informing Patients

OCR encourages notifying patients that remote communication potentially involves privacy risks and to enable all available encryption and privacy modes when using remote communication solutions.

Providers need to evaluate how to notify patients and consider the methods to implement (i.e. in writing or oral and timing of notification).
OCR WAIVER – OTHER ISSUES

- No expiration date included in OCR Notification 3/17/2020
- In 3/20/2020 FAQs, OCR says enforcement waiver terminates only after it issues a notice to the public indicating so
- FAQ: Providers should always use private locations and patients should not receive telehealth services in public or semi-public settings, absent patient consent or special circumstances
The Substance Abuse and Mental Health Services Administration (SAMHSA) issued guidance on March 19, 2020 addressing substance use disorder treatment.

SAMHSA states Part 2’s requirements to obtain written patient consent for disclosure of substance use disorder records would not apply to utilization of telehealth services if a medical emergency exists.

CARES Act allows patients to consent to the use and disclosure of their substance use disorder treatment services records in accordance with HIPAA (as opposed to the more restrictive 42 CFR Part 2).