

Dilemma of Psychotherapy Notes and HIPAA

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by Ruby Nicholson, RHIT

For HIM professionals in behavioral health settings, the HIPAA privacy regulations pose a downright dilemma. Here's why.

The privacy rule defines psychotherapy notes as:

Notes recorded in any medium by a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session that are separate from the rest of the individual's medical record. Psychotherapy notes exclude 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.

The dilemma for many HIM professionals is determining what this means within the outpatient setting, particularly in free-standing outpatient behavioral health clinics.

Unlike an acute care hospital, where psychosocial documentation is maintained separately, records in behavioral health clinics are composed of screening assessments, psychosocial summaries, medication prescribing and monitoring, clinical tests, psychiatric evaluations, treatment planning, progress notes from multidisciplinary behavioral health teams, discharge summaries, and follow-up care. In a sense, the entire record could be considered a continuum of psychotherapy notes.

However, the privacy regulations are clear that only those psychotherapy notes kept *separate* from the rest of the individual's record are afforded additional protection. All psychotherapy notes maintained with other documentation lose any special protection for confidentiality and are not required to be treated differently. (Remember, however, that special provisions to some information apply in regulations such as those related to drug and alcohol abuse treatment and in state laws related to mental health disorders.) Because there was no further definition of psychotherapy notes in the guidance released in July 2001, organizations are left to further define how to handle psychotherapy notes on their own.

The Law and Definition of Psychotherapy Notes

Clinical tests, assessments, treatment plans, case management notes, and other documentation found in a behavioral health record are just as confidential as counseling or therapy notes, and they often contain even more sensitive material. As a result, HIPAA task forces within many organizations are currently engaging in discussions around their definitions of psychotherapy notes. It may be possible to define some, if not all, of the documents in a behavioral health record as psychotherapy notes.

Included in these discussions is a review of individual state laws dealing with the release of information for mental health records. Some states have adequate language within existing state law that provides the protection not available through federal privacy regulations. In states where laws involving release of mental health records are ambiguous, HIM professionals need to initiate language with their state legislators now.

Because the privacy regulations do not preempt 42 CFR Part II (the federal law relating to the confidentiality of alcohol and drug abuse patient records) substance abuse providers will not lose the existing additional protection, but they will need to ensure that other components of the privacy regulations are implemented. Behavioral health organizations that are federally assisted substance abuse providers and also provide mental health services may decide to cover the entire organization under 42 CFR Part II. This has both advantages and disadvantages depending on the structure of service delivery within the organizations, so professionals will want to review this closely before making any final decisions.

Regardless of the type of behavioral health services an organization delivers, it is imperative for HIM professionals to prepare well in advance of the April 2003 implementation date. Internal discussions, agency decisions, and passage of state laws all

take time. Individuals working in behavioral health must be proactive in planning privacy implementation strategies.

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Article citation:

Nicholson, Ruby. "The Dilemma of Psychotherapy Notes and HIPAA." *Journal of AHIMA* 73, no.2 (2002): 38-39.

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