

**Illinois Health Information Exchange
Legal Task Force
Behavioral Health Workgroup Meeting
January 28, 2011
Meeting Notes**

In Person Attendees

Mark Chudzinski, Office of Health Information Technology

Attended by Phone

Rob Connor, Illinois Department of Human Services

Laurel Fleming, Northwestern Medical Faculty Foundation

Bruce Jefferson, Thresholds

Randy Malan, Illinois Department of Human Services

Wendy Rubas, Central DuPage Hospital

Laurel Fleming, co-chair of the workgroup, opened the meeting at 10:00 AM. The meeting was hosted by OHIT at the J.R. Thompson Center, Downtown Chicago, with a telephone conference call in number. Roll was taken, and the ability of those attending by telephone to hear and participate was confirmed.

Laurel thanked her co-chair, Wendy Rubas, for her leadership in arranging today's meeting. The meeting was convened to discuss the Illinois Mental Health and Developmental Disabilities Confidentiality Act ("Act") (740 ILCS 110/).

The group was advised that the Jan. 19th draft of the "Behavioral Health Legal Work Group Analysis Worksheet" ("Worksheet") had been disseminated and that the document could serve as a starting point for structuring the workgroup's review of relevant law. The Worksheet divides the initial analysis of PHI exchange under a particular statute by the purpose to be served by such exchange: "treatment", "payment", and health care "operations" ("T-P-O"), all as defined within HIPAA.

Treatment

It was noted that the Act seeks to protect the confidentiality of "communications" to a "therapist" in connection with the provision of "mental health or developmental disability services". "Therapist" is defined broadly to encompass nearly any healthcare professional, without reference to psychiatry or other licensed treatment specialty, and subject "services" are defined broadly to include any and all treatment activities, without reference to the treatment of psychosis or mental or behavioral health issues. Arguably, a broad scope of healthcare providers and treatment operations result in the creation of "communications" which should be treated confidentially in accordance with the Act, even if such treatment is primarily related to a condition unrelated to mental or behavioral health. Case law has somewhat narrowed the interpretation of the Act, so that it "only applies to situations in which the patient is seeking treatment for a mental health condition". (House v. Swedish American Hospital). However, the broad scope of the Act

does present challenges to multi-disciplinary integrated hospitals whose healthcare professionals other than mental health therapists diagnose and treat behavioral health conditions, prescribe drugs customarily prescribed to treat behavioral health conditions, and generate entries in patient records that may fall within the broad scope of the Act. Such entries in the patient record present sequestration challenges, both with regard to record access from within the healthcare enterprise, and for delivery of the patient record to third parties outside the enterprise; creation and storage of patient records in digital format (electronic health records) increases the challenge. Patient health information with health aspects and with respect to which special confidentiality treatment might be appropriate is increasingly “leaking” into the general patient record. The way in which EHR systems can address the privacy and security of such data varies by EHR vendor, and is evolving.

The protection of patient mental health data under Federal law (e.g. 42 CFR Part 2), by contrast to Illinois law, is directed at mental health treatment facilities which receive Federal financial support, many of which are not integrated multi-disciplinary healthcare providers. All patient records at such special-purpose facilities customarily are considered as falling within the scope of the privacy and security requirements of 42 CFR Part 2, requiring patient prior consent for disclosure of PHI for treatment purposes (with narrow exception for emergency treatment), and permitting patient withdrawal of previously granted consent. Such providers customarily then treat all patient records in accordance with the more stringent privacy and security requirements of the Act. By contrast, it was suggested that most, perhaps up to 90%, of Illinois general hospitals not operating as special-purpose providers specifically addressed by 42 CFR Part 2, apply the privacy and security requirements of HIPAA to their patient data, and are challenged with determining to what extent the more stringent privacy and security requirements of the Act may apply to their patient data.

It was noted during the discussion that an analysis of the Act had been conducted in connection with the preparation of a HIPAA pre-emption analysis (2003), and in connection with the HISPC-IL 2 and 3 initiatives (2006-07), and such available work product, though dated, should be made available to the members of the workgroup. OHIT also offered to provide the workgroup the assistance of a Legal Intern for conducting necessary legal research beyond analysis of the relevant Illinois statutes being performed by workgroup members, such as for identifying relevant precedents and best practices in other States. With regard to information from other States, the co-chairs would reach out to the Task Force’s Interstate Issues workgroup and to relevant national stakeholder associations (e.g. Mental Health America of Illinois).

Payment

The co-chairs would reach out to workgroup member Jill Wolowitz of Health Care Service Corporation to comment on the Act from a payer perspective. The involvement of additional workgroup members in such an analysis is welcome.

Operations

It was proposed that an analysis of the Act from the perspective of PHI exchange in relation to “healthcare operations” not be specifically assigned at present. Rather, several specific aspects of the Act should be examined in further depth, including the following:

- The extent to which the definition in the Act of “confidential communication” precludes any mental health facility sharing with the HIE record locator service (RLS) the existence of a patient record at such facility; Laurel Fleming and Rob Connor offered to explore the PHI scope of the Act (definitions of “record”, “therapist” and “confidential communication”), potentially with workgroup member Mark Heyrman of the University of Chicago;
- The extent to which useful EHR vendor solutions exist for sequestering data (e.g. EPIC), which could help inform the deliberations of the workgroup; Wendy Rubas offered to explore further;
- The extent to which the HIE would be involved in consent management, from the perspective of validating that a recipient of PHI is an authorized recipient, that the recipient is obtaining the data in furtherance of a treatment relationship, that the correct data is being supplied with respect to a particular patient, and the existence of validly collected patient authorizations/consents when required; Rob Connor offered to explore further;
- The extent to which “re-disclosure” is restricted under the Act (Worksheet section C.j), its consistency with corresponding Federal law, and its potential implications for the development of continuing care teams with licensed and unlicensed treatment providers and coordinators; Laurel Fleming offered to explore further;
- The extent to which payers will enjoy access to patient records through the HIE;
- The extent to which law enforcement authorities would enjoy access to patient records through the HIE; and its consistency with corresponding Federal law (45 CFR 164.512(f)); and
- The extent to which the Act should be revised in respect of “de-identification”, “limited data sets” and the use of “business associates” (Worksheet sections C.f-h); Laurel Fleming offered to explore further.

The co-chairs will circulate to the workgroup the specific assignments that members have agreed to undertake. The group discussed meeting in three (3) weeks, in mid-February. Those preparing any documents regarding their analysis of relevant Illinois law are encouraged to circulate such documents to the remaining members of the workgroup in advance of the meeting to permit more meaningful discussion of such analysis at the meeting.

There was no public comment offered.

The meeting was adjourned at 10:54 AM.