

Jan 18 2013

Practice Area: Health Information Privacy and Security

The U.S. Department of Health and Human Services Office for Civil Rights ("OCR") issued a letter to health care providers clarifying the providers' ability under the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule to disclose necessary information about patients to avert threats to health or safety. OCR explained that providers may take action, consistent with ethical standards and other legal obligations, to disclose necessary information about a patient to law enforcement, family members of the patient, or other persons when providers believe the patient presents a serious danger to himself or other people.

OCR Secretary Leon Rodriguez issued the letter in response to recent mass shootings in Newtown, Connecticut and Aurora, Colorado. The letter does not introduce a new requirement or standard for providers. Rather, the letter serves as a reminder that when considering whether to disclose protected health information to avert threats, providers are required to balance safety with patient privacy and that in some instances, safety will be paramount to privacy. HIPAA is not a barrier to making disclosures under these circumstances.

OCR Guidance

In its letter, OCR explains that the Privacy Rule balances the privacy of patient protected health information with the need to ensure that information may be appropriately used or disclosed when necessary for the patient's treatment, to protect the nation's public health, and for other critical purposes. According to OCR, one such critical purpose is the disclosure of otherwise confidential information when providers warn law enforcement or others that individuals may be at risk of harm because of a patient. In such circumstances, providers are presumed to act in good faith based on the provider's interaction with the patient or based on a credible report from a person with apparent knowledge of the patient or other individual. Such provider warnings must be made consistent with other applicable law, including state law (see below for more on Wisconsin state law).

OCR's letter emphasizes that in order to avert threats to health or safety, information from mental health records may be disclosed, as necessary, to certain individuals who may reasonably be able to prevent or lessen the risk of harm. Consequently, if a patient makes a credible threat, a mental health provider may alert police, a parent or family member of a patient, school administrators, campus police and others who may be able to intervene without violating HIPAA. However, OCR cautions that providers should abide by state law in addition to federal law governing alcohol and drug abuse ("AODA") treatment records (42 C.F.R. Part 2).

Wisconsin Law

The OCR letter is generally consistent with Wisconsin law which has established that mental health professionals have a duty to exercise reasonable care in the treatment of their patients by warning others of threats of harm by the patient. In *Schuster v. Altenberg* (Wisconsin's version of the *Tarasoff* case), the Wisconsin Supreme Court held that the duty to warn extends to whatever steps are reasonably necessary under the circumstances, including contacting the police, recommending or requiring hospitalization, or notifying a family member or friend who can help ensure safety.

Despite a provider's duty to warn, Wisconsin's privacy statutes do not expressly permit the disclosure of mental health records for this purpose. As a result, Wisconsin providers may disclose otherwise confidential information to avert threats, but providers should limit the information to be disclosed to only that information which is essential to avert or lessen the threat.

We are aware that the legislature will make efforts during this legislative session to amend Section 51.30 of the Wisconsin Statutes, which protects the privacy of mental health records. A goal of the effort is to align the privacy provisions of Wisconsin law with HIPAA. This legislative effort may present an opportunity to amend Section 51.30 to expressly permit disclosure of mental health information and records to avert threats.

What Does This Mean For Wisconsin Providers – A Balancing Test

If a health care provider has reason to believe that a patient poses a threat to self or others, the provider may disclose otherwise confidential information about the patient in order to warn law enforcement, intended targets of the harm, or members of the patient's family. However, the provider should not disclose a patient's complete treatment record.

Providers must balance safety and patient privacy to assess what confidential information is reasonably necessary to provide notice to officials or individuals so that they may appropriately intervene to prevent or lessen a threat to health or safety. This balancing test takes into account the who, what, when, and how of disclosure – what individuals, officers, or organizations should receive the warning and disclosure; what confidential information should be disclosed; when should appropriate individuals be notified; and how should notice be provided?

For example, pursuant to a provider's duty to warn, if a patient has made credible threats, the provider could share the patient's name and contact information, the specific threats made by the patient, and a list of persons who may be at risk. However, it is unlikely that disclosure of the patient's treatment plan, complete list of prescriptions, and childhood history would be necessary to avert the threat. Law enforcement may be able to obtain a court order for more complete records, should they determine such disclosure is necessary. Providers are well advised to consult legal counsel when conducting this delicate balancing test.

Providers take on risk for over-disclosure of confidential patient information. OCR's letter and the provider's duty to warn do not provide providers with a blanket protection to disclose confidential patient information. Instead, providers should conduct the requisite balancing test and disclose only that confidential information reasonably necessary to avert or lessen a threat.

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