Value-Based Payment Patient Confidentiality: Issues and Considerations

Meeting 2: Technical and Data Sharing Issues

November 8, 2016
Agenda

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Welcome & Introductions
Rules and Regulations
Federal-Health Insurance Portability and Accountability Act (HIPAA)

<table>
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<th>Data Covered</th>
<th>Individually identifiable health information transmitted to Covered Entities or Business Associates</th>
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<tr>
<td>Entities Covered</td>
<td>Health plans, health care clearing houses, and any health care provider</td>
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<tr>
<td>General Rule</td>
<td>No disclosure without consent or exception</td>
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<td>Consent Exception</td>
<td>Treatment, payment and health care operations</td>
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**Note One:** This is not a comprehensive overview of HIPAA. Rather this is a general summary of the relevant portions for our discussion. A comprehensive overview is located in the supplemental material provided prior to the workgroup. This is not legal advice.

**Note Two:** Other federal laws, such as 42 USC 290dd-2; 42 CFR Part 2; are potentially relevant in this area.

**Treatment:** Provision, coordination or management of healthcare and related services by one or more health care provider, including consultation.

**Payment:** Activities by health care providers to obtain reimbursement for provision of care to an individual; Activities of a plan to obtain premiums, determine/fulfill coverage/benefit responsibility; tender payment for health care delivery to an individual.

**Health Operations:** (a) quality assessment; (b) competency assurance; (c) conducting/arranging for audit/reviews/legal/FW&A, (d) insurance functions; (e) business planning tasks; (f) business management and administrative tasks.
New York State Laws-General Restrictions

### Public Health Law § 18: Written Patient Authorization

- Provider disclosed PHI requires written consent together with certain recording requirements.
- Implication: Can be violated in cases where an organization shares a patient’s information with a third party without the patient’s consent; Courts have not addressed whether provisions of Public Health Law § 18 are violated in cases where the disclosure is made for purposes of treatment, payment or health care operations. Therefore, it is unclear if § 18 maintains the same or more restrictive provisions than HIPAA.

### Education Law § 6530: Professional Misconduct related to revealing Protected Health Information (PHI)

- Applies to physicians, physician’s assistants, and specialist’s assistants,
- ...“revealing of personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient, except as authorized or required by law” constitutes professional misconduct.
- Implication: Education Law § 6530 has previously been cited by DOH legal broadly as potentially being interpreted to require broad consent beyond HIPAA.

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1 “Whenever a health care provider, as otherwise authorized by law, discloses patient information to a person or entity other than the subject of such information or to other qualified persons, either a copy of the subject’s written authorization shall be added to the patient information or the name and address of such third party and a notation of the purpose for the disclosure shall be indicated in the file or record of such subject’s patient information maintained by the provider…”

**Note:** This is not a comprehensive overview of any NYS law or regulation provided herein. Rather this is a general summary of the relevant portions for our discussion. A comprehensive overview of these laws are located in the supplemental material provided prior to the workgroup. This is not legal advice.
New York State Laws-Special Circumstance

**NYS Public Health Law § 2782: HIV related patient records**

- Health care providers and other persons who obtain HIV related patient information must meet specific requirements before disclosing HIV related information to third parties: **Relevant Exceptions:** When necessary for care or with patient consent.
- DOH takes a broad view of data transmission when necessary for care.
- **Implication:** Limited ability to release HIV/AIDS related medical information to third parties.

**NYS Mental Hygiene Law § 33.13: Office of Mental Health (OMH) and NYS Office for People with Developmental Disabilities (OPWDD) licensed providers**

- Data from clinical facilities licensed/operated by the NYS OMH and OPWDD kept confidential without consent with limited exception.
- **Implication:** General requirement of confidentiality is more restrictive than the corresponding Public Health Law provisions.

**NYS Mental Hygiene Law § 22.05: Office of Alcoholism and Substance Abuse Services (OASAS) licensed providers**

- Patient records pertaining to rehabilitation programs/treatments kept confidential in the same manner set forth in section 33.13.
- **Implication:** Patient records related to rehabilitation from a NYS OASAS licensed providers fall under strict confidentiality requirements.

**NYS Public Health Law § 17: Minors**

- Expressly forbids the release of medical records pertaining to a minor’s abortion or treatment for STIs to the minor’s parents without explicit consent from the minor.
- **Implication:** Narrowly restricts issues of minor consent beyond HIPAA

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**Note:** This is not a comprehensive overview of any NYS law or regulation provided herein. Rather this is a general summary of the relevant portions for our discussion. A comprehensive overview of these laws are located in the supplemental material provided prior to the workgroup. This is not legal advice.
Relevant Consent Forms
Medicaid Consent Form

Signed when enrolling in a Medicaid plan

Covers general medical information disclosure related to treatment, payment, and health care operations

Maintains broad inclusion of special circumstances (i.e. HIV, mental health, alcohol and/or substance abuse information)

On its face, the Medicaid Consent Form generally permits broad claims and clinical data exchange, including under most special circumstances, in line with HIPAA.

New York State provides a more narrow interpretation as it relates to treatment, payment, and health care operations.
Relevant Non-Medicaid Consent Forms

RHIO/SHIN-NY Consent (Opt-In):
- Permits specific providers and their organizations the ability to obtain access to a patient's medical records through the RHIO/SHIN-NY

Health Homes Consent (Opt-In):
- Allows specific health homes and their partners to access specific RHIOs to take receipt of a patient’s PHI

Medicaid Release of PHI:
- Authorization for the release of Medicaid protected information from the NYS department of health, office of health insurance programs to a third party other than a Medicaid enrollee/patient

Other
Issues Presented, Analysis and Conclusions
Issues Presented

• Medicaid Consent Form
  • Does the Medicaid Consent Form cover all necessary circumstances?
  • Is it possible to interpret the Medicaid Consent Form more broadly?

• Laws and Regulations
  • Is it possible to interpret relevant laws more broadly?
  • Can the restrictive NYS law be changed or eliminated?
  • Is it possible to enact new laws that may permit VBP specific data exchange?

• Can other consent forms be changed or created in a beneficial manner?
  • Can the substantive text of the forms be changed?
  • Can the non-substantive operation of the forms be changed?
  • Can a global or other consent forms be created?

General Issues: Member education, disenfranchisement, ability to tag and segregate data, solutions applicable to all providers, difficulty of securing consent.
Analysis: Policy Options - Two Main Buckets

- Comprehensive Application of Medicaid Consent Form
- Non-Comprehensive Medicaid Consent Form: Other Options

OR

Broad Interpretation?

Comprehensive Coverage?

New York State Laws
- New Laws?
- Amend Laws?
- Interpretation?

Non Medicaid Consent Forms
- Change Content?
- Change Operation?
- Global Consent?
Bucket One: Medicaid Consent Form

**Comprehensive Coverage:** Does the Medicaid Consent Form cover all necessary circumstances?

- HIV
- Mental Health
- Substance Abuse
- Minors
- Care Management

**Broad Interpretation:** Is it possible to interpret the Medicaid Consent Form more broadly to ensure that necessary data sharing is feasible?

- Yes/No/Other

**Issue**

- Whether DOH legal will reasonably take a broad interpretation of the Medicaid Consent Form (consistent with HIPAA)

**Solution/Potential Considerations**

- Purpose of receipt of information
- Difficulty obtaining consent
- Timing of consent (at enrolment/provider visit/other)
- Informed consent (patient's understanding of consent form)
- Patient education opportunities
- True HIPAA harmonization without a change in law
- Other

**Potential Alternatives**

- NYS Law
- Non Medicaid Consent Forms
- Other
Bucket Two: Other Options

Beyond the Medicaid Consent Form, what are the other options to disseminate data globally?

- New York State Laws
- Non Medicaid Consent Forms
New York State Laws

Is it possible to interpret these laws more broadly?

- DOH Legal Interpretation
- Regulatory Interpretation
- Legislative Action

Can the existing NYS law be changed?

Is it possible to enact new laws?

Is it possible to eliminate current laws?

Issue

Whether (a) interpretation or changes to laws can be effectuated, and/or (b) whether laws should be eliminated or enacted

Solution/Potential Considerations

Meeting Three: Which laws; What interpretations; What specific text should change; What specifically should be eliminated or enacted

Non Special Circumstances
- Public Health Law § 18: Written patient Authorization
- Education Law § 6530: Professional Misconduct related to revealing PHI

Special Circumstances
- Public Health Law § 2782: HIV related patient records
- Public Health Law § 17: Minors
- NYS Mental Hygiene § Law 33.13
- NYS Mental Hygiene § Law 22.05

Potential Alternatives
- Non Medicaid Consent Forms
- Other
Non-Medicaid Consent Forms

Can other consent forms be changed?

Can the text of the form be changed?

Can the operation of the form be changed?

Can the consent be made opt-in/out-out?

Can the time and place that consent is given be changed?

Can a global or other consent form be created?

Potential Considerations

Meeting Three: Which forms; What text; What operations; Global consent?

Medicaid Consent Forms

- RHIO/SHIN-NY (Opt-In)
- Health Homes Consent (Opt-In)
- DSRIP Opt-Out
- Medicaid Release of PHI
- Provider Releases
- Other

Non Medicaid Consent Forms

- Medicare ACO Data Consent (Opt-Out) (claims data only)
- Other

Care Management Implications

Difficult of Obtaining Consent

Purpose for Receipt of Consent

Reasonable Work Arounds

Limited Providers in SHIN-NY

Potential Alternatives

Other
Conclusions & Recommendations
Up Next: Meeting Three
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Appendix: Data Flow
Option One: Condition of Medicaid Enrolment

Member Enrolment Consent (claims/clinical/all providers) → NYS Department of Health (DOH) → Medicaid Data Warehouse → Regional Health Information Organization (RHIO)/Qualified Entity (QE)/Statewide Health Information Network for New York (SHIN-NY) → Managed Care Organizations → VBP Provider → VBP Downstream Providers → Non-VBP Provider → VBP Downstream Providers

Key:
- Consent Flow
- Encounter Flow
- Claims/Clinical Out
- Claims/Clinical in
- Clinical Out

Pro: All data consents required, for all networks, at one point of contact and time

Con: Privacy concerns

Unknown: Legality-violation of STCs with federal gov’t. Other?

Unknown: Informed consent?

Unknown: Special populations (HIV/AIDS, Minors, Other)

Unknown: Other?

Consent Agreement implications explained (see slide 19)
Option Two: At first provider visit

NYS Department of Health (DOH)
Medicaid Data Warehouse

Regional Health Information Organization (RHIO)/Qualified Entity (QE)/Statewide Health Information Network for New York (SHIN-NY)

Managed Care Organizations

Enrollment Consent (claims/clinical/all providers)
Non-VBP Provider

VBP Provider

VBP Downstream Providers

VBP Downstream Providers

VBP Downstream Providers

Unknown:
Special Populations (HIV/AIDS, Minors, Other)

Unknown:
Scope of consent-provider’s network or all Medicaid

Unknown:
Opt-In; Opt-Out?

Pro: Educational opportunity

Con: What to do with those who do not consent?

Consent Agreement implications explained (see slide 19)

Encounter Flow
Claims/Clinical Out
Claims/Clinical in
Clinical Out

Other?

Consent Agreement implications explained (see slide 19)