

HIPAA's Right of Access

Common Compliance Problems & Enforcement

CtHiMA

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- Privacy and healthcare attorney
- Significant experience representing healthcare providers on all aspects of HIPAA compliance and enforcement
- Served as General Counsel and Chief of Privacy at one of the largest federally qualified health centers in the country
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Right of Access

- OCR's focus on right of access began in 2016
 - 30+ pages of guidance on right of access in 2016
 - Right of Access campaign through YouTube videos in 2018
 - Enforcement began in 2019: 2
 - 2020 Enforcement actions: 11
 - 2021: 6 (so far!)



Right of Access



45 CFR 164.524 - HIPAA

- access to inspect or to obtain a copy of record
- form, time and manner of access
- fees

42 U.S. Code § 17935(e) - HITECH Act

- right to obtain copies of electronic medical records in electronic format and to direct the transmission to a third party

Right of Access

- By law, a patient is entitled to his or her records
 - No authorization needed but can require a form if patient is informed in advance
 - Personal representative must be treated as patient
 - Directives to disclose records to 3rd party: request in writing (signed) and identify to whom and where to send



Fees

Reasonable CostBase Fee

- Provider may not charge patients more than a “reasonable costbased fee” based on actual cost
 - Regardless of state law
 - Cost-based fee: labor, supplies and mailing
 - Electronic copy \$6.50 flat fee OK
 - Encourage providers to not charge patients

Right of Access – Proper Denial

May Only Deny Access for Specific Reasons

Unreviewable

- Psychotherapy notes
- ePHI is corrupt due to technical issue or is erroneous
- Correctional Inst., research, Privacy Act, obtained confidentially from another

Reviewable

- Likely to endanger life or physical safety
- Refers to another individual and likely to cause substantial harm to individual
- Personal rep requests, but concern of harm to patient
- Review: designated licensed professional not involved in the denial

Common Right of Access Issues



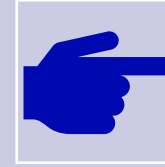
Cannot withhold records because of unpaid bill



Cannot require personal appearance to request records be sent



Cannot require records to be picked up when patient requests mail or email



Must be provided in the form and manner requested

Who is Requesting Records?

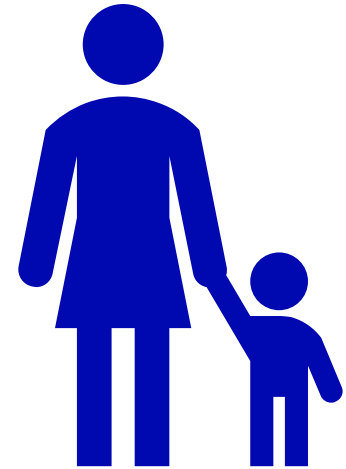
- **Patient**
 - For own use
 - To send to others
 - Treatment and Payment
 - Other Uses
- **Personal representative**
- **Other health care providers**
- **Insurers**
- **Others for public policy reasons**



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Personal Representatives

- Treat personal representative as the patient for purpose of consenting to or authorizing disclosure of records.
 - **Definition:** Person who under state law has the authority to act on behalf of the patient to make health related decisions.
 - E.g., parent of minor, legal guardian, health care representative, etc.
- Documentation and identity verification for release of records.



Enforcement

2019

- Enforcement initiative announced Spring 2019
- First Right of Access resolution - 9/9/2019
 - Fetal monitoring records
- Second Right of Access resolution - 12/12/2019
 - Small FL provider

2020

- Eleven enforcement action resolutions announced between Sept. and Dec.
- Large and small providers
- Total settlement amount: \$537,500
- Most announced enforcement resolutions were Right of Access matters (11 of 19)

Provider Location/Type	Amount	Facts
NYC Non-profit Provider	\$38,000	Failed to provide timely access; OCR provided technical assistance; second patient complaint filed
CA Family Medicine Clinic	\$15,000	Refused access to records
MA Mental Health Network of Providers	\$70,000	Court-appointed representative seeking access to deceased father's records
VA Psychiatric Provider	\$3,500	Failed to respond to request; OCR provided technical assistance; second patient complaint filed
CO Psychiatric Provider	\$10,000	Denied mother of a minor child access to records; OCR provided technical assistance; second patient complaint filed
AZ Hospital and Medical Ctr	\$160,000	Failed to give mother of minor child all records
NY/FL Neurology and Pain Management Provider	\$100,000	Failed to provide diagnostic films; ignored multiple mailings (including certified mail) and telephone messages from OCR over several months
CA Psychiatric Provider	\$25,000	Refused access to all records when only small subset was subject to denial (psychotherapy notes); OCR provided technical assistance; second patient complaint filed
NY ENT Provider	\$15,000	Failed to provide timely access and overcharged for copies; OCR provided technical assistance; second patient complaint filed
OH Large University Medical Ctr	\$65,000	Failed to respond to request to send records to patient's lawyer
GA Primary Care Provider	\$36,000	Failed to provide access to records; OCR provided technical assistance; second patient complaint filed

2020 Right of Access Enforcement Resolutions

2021 Right of Access Enforcement Resolutions (so far...)

Provider Location/Type	Settlement Amount	Facts
AZ – Non-profit Health System	\$200,000	Two complaints against affiliated covered entities for failing to timely provide requested records; one complaint came AFTER records provided.
NV – Non-profit Health System	\$75,000	Failed to timely respond to patient's request to send electronic copies of records, including billing records, to a third party.
CA – Medical Center	\$70,000	Failed to timely respond to patient's request to send electronic copies of records to a third party. OCR sent a technical assistance letter. Patient filed second complaint.
MA – Behavioral Health Provider	\$65,000	Failed to timely respond to patient's signed, written request to obtain access to records. OCR sent a technical assistance letter. Patient filed second complaint
NJ – Plastic Surgery Provider	\$30,000	Failed to timely respond to patient's request to obtain access to records.
W VA – Endocrinology Center	\$5,000	Failed to timely respond to request for copy of minor's records.
TOTAL	\$445,000	

2021 Right of Access Enforcement Resolutions

Banner Health – Largest Right Access Settlement \$200,000

- Two complaints by lawyers for patients against two affiliated covered entities
- One complaint filed after records received
 - Cannot “cure” by providing records late
- ACEs will be held accountable for all affiliated entities’ actions
 - Separate Phoenix-area entities



Enforcement

Common Enforcement Issues/Themes

- All triggered by patient complaints
- Technical Assistance Letters (6 of 11 in 2020, 2 of 6 in 2021)
 - Second complaint after TA letter caused investigation
- Lightning fast enforcement
 - 12 to 18 months



Enforcement

Common Enforcement Issues/Themes



- Smaller providers are not immune
 - Most received TA letters
- Personal representative
 - Minors
 - Court-appointed
- Psychotherapy notes
- Concerns about litigation

Best Practices to Avoid Enforcement

Right of Access Best Practices



Timely respond to all patient records requests and communicate with patients when there is a delay



Take seriously all communications from OCR



Treat personal representatives of patients appropriately



Don't overcharge for records



Review (and revise if necessary) Right of Access P&P



Train staff

Technical Assistance Letters

- **DO NOT ignore technical assistance letters!**
- Make sure they are sent to correct person in your organization.
- Document receipt.
- Review contents and make changes to policies, practices, as necessary.
- In nearly half of the enforcement actions under the OCR's Right to Access Initiative, the covered entity ignored technical assistance letters.



Questions?

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