

## HIPAA AND LANGUAGE SERVICES IN HEALTH CARE<sup>1</sup>

In 1996, the Health Insurance Portability and Accountability Act (HIPAA) became law and began to reshape how patients and healthcare providers think about the privacy of patient information. For interpreters who work in health care settings, it is important to understand how the patient privacy requirements of HIPAA affect their work and conduct.

In April, 2003, the regulations outlining health privacy protections became fully operational. The “privacy rule” provides a set of minimum national standards that limit the ways that health plans, pharmacies, hospitals, clinicians, and others (called “covered entities”) can use patients’ personal medical information. As stated by the Department of Health and Human Services, “A major goal of the Privacy Rule is to assure that individuals’ health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public’s health and well being.”<sup>2</sup>

The regulations protect medical records and other individually identifiable health information, whether it is on paper, in computers or communicated orally. The responsibility to abide by HIPAA binds the covered entity not only to ensure that its own staff protect patient privacy but also that anyone who it “controls” (such as volunteers) and with whom it contracts (called “business associates”) follows these regulations. Thus interpreters who work in health care settings – whether as an employee, independent contractor or volunteer – are generally required to uphold the HIPAA privacy regulations.

The purpose of this memo is to explain HIPAA and its application to interpretation provided in health care settings.

### 1. Who is covered by the HIPAA privacy rule?

HIPAA regulates the conduct of covered entities. The nature and extent of an individual’s obligations under HIPAA depend on the person’s relationship to the covered entity. An interpreter in a health care setting may be:

- § a “member of the workforce” of a covered entity;
- § a “business associate” of a covered entity; or
- § a person approved by the patient – neither of the above but approved by the patient to interpret.

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As different situations arise, the nature of the interpreter's relationship to a covered entity becomes increasingly important. While some overlap exists, different HIPAA expectations attach to members of the covered entity's workforce, business associates, and a "person approved by the patient." It is likely that an interpreter may be subject to different rules at different times, varying as the interpreter provides services for a variety of health care providers.

**Member of the workforce.** The HIPAA privacy rule applies directly only to "covered entities".<sup>3</sup> Covered entities include health plans,<sup>4</sup> health care clearinghouses,<sup>5</sup> and certain health care providers.<sup>6</sup> All members of a covered entity's "workforce" are required to abide by the HIPAA privacy rule. Being a member of the "workforce" is not limited to employees but also includes volunteers and trainees. Basically, any person whose conduct, when performing work for a covered entity, is under the direct control of the entity is subject to the privacy rule. It does not matter whether a person is actually paid by the covered entity.<sup>7</sup> This would include, for example, interpreters employed (full or part-time) by a hospital or other health care provider, volunteer interpreters coordinated through a covered entity's volunteer program, and other interpreters who are under the "control" of the covered entity.

**Business Associates.** In general, a "business associate" is a person or organization that performs functions for, or provides services to, a covered entity that involve the use or disclosure of individually identifiable health information.<sup>8</sup> The privacy rule requires that the covered entity ensure that its contract or other arrangement<sup>9</sup> with the business associate include specified written safeguards to protect individually identifiable health information used by, or disclosed to, its business associates. In addition, a covered entity may not authorize its business associates to make any use or disclosure of protected health information that would violate the privacy rule. Business associates were recently specifically subjected to the same limitations and penalties regarding use and disclosure of protected health information.<sup>10</sup>

The business associate must ensure that all of its agents, including subcontractors who have access to protected information, agree to implement reasonable and appropriate safeguards to protect it.<sup>11</sup> A business associate would include, for example, both a language agency and an individual interpreter who contracts directly with a covered entity. For the language agency, each of its agents – the interpreters themselves – would be bound to uphold the privacy rule through their relationship with the business associate.

**Person approved by the patient.** The privacy rule allows other individuals to have access to a patient's health information *with the patient's consent*. This includes a family member, other relative, or a close personal friend of the individual, or any other person identified by the individual. To these "persons approved by the patient," the covered entity may disclose protected health information directly relevant to the person's involvement with the patient's care or payment related to the patient's health care if the covered entity: obtains the individual's agreement; **or** provides the individual with the opportunity to object to the disclosure and the individual does not express an objection; **or** reasonably infers from the circumstances, based on the exercise of professional judgment, that the individual does not

object to the disclosure.

Thus an interpreter brought by a patient to a clinical visit would be allowed to interpret and have access to a patient's protected health information even if not a member of a covered entity's workforce or acting as a business associate. The "person approved by the patient" category could also include, but only if the patient consents, an *ad hoc* interpreter such as another patient or person in the facility (who is not a member of the workforce or a business associate). Because in this situation the patient has consented and the interpreter is neither a member of the covered entity's workforce nor a business associate, the interpreter is not bound by the privacy rule. But if the patient is concerned about disclosing certain information to an ad hoc interpreter, the patient has the right not to consent. If the patient does not object, the covered entity may reasonably believe consent has been given and disclose the patient's information. The patient may ask the covered entity to provide an interpreter who would be subject to the protections of the HIPAA privacy rule.

**2. How do I know if the "member of the workforce" or "business associate" rules apply to me?**

It depends on the situation and it can be difficult to determine whether someone is a member of a covered entity's workforce or a business associate. In practical terms, the HIPAA rules must be observed by both members of the workforce (since the rules must be enforced by the covered entity) and business associates (through their contract with the covered entity). The only practical difference relates to HIPAA-required training – a covered entity is responsible for training all members of its workforce about HIPAA requirements. A business associate does not have the same responsibility (unless required by the contract between the covered entity and business associate).

Since payment is not the deciding factor (see definition of "member of the workforce" in Q.1 above), determining whether someone is a member of the workforce depends in part on the nature of the interpreter's work at the covered entity. If the interpreter is under the regular control of the covered entity, then she is a member of the workforce. For example, if a language agency sends the same interpreter to the same covered entity on a regular basis (for example, the same two days each week for the same hours) and the covered entity controls the interpreter's work conditions (e.g. assigning where the interpreter works, when breaks are taken, etc.), the interpreter is more likely to be considered a member of the workforce than if the interpreter worked at a different covered entity each day with hours and responsibilities more closely controlled by the business associate.

It is likely that only a retrospective review would determine that an interpreter should be considered a member of the workforce. This might occur, for example, pursuant to a complaint investigation by HHS' Office for Civil Rights. If OCR determined the interpreter was a member of the workforce, the interpreter should have received training from the covered entity. If no training was provided, the interpreter would not be subject to any penalties but the covered entity might be found in violation of HIPAA.

### 3. What patient information is protected under HIPAA?

An interpreter who is a member of a covered entity's workforce or a business associate must abide by the privacy rule and not disclose certain protected information about a patient. Generally, the privacy rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate. It does not matter what format the information is in – electronic, paper, or oral. "Individually identifiable health information" is information created or received by a covered entity, including demographic data, which identifies the individual (or could reasonably be thought to identify the individual) and relates to:

- § the individual's past, present or future physical or mental health or condition;
- § the provision of health care to the individual; or
- § the past, present, or future payment for the provision of health care to the individual.<sup>12</sup>

Individually identifiable health information includes many common identifiers such as name, address, birth date, and Social Security Number. This information is protected and may only be disclosed in certain circumstances (see Q. 4 below).

There are no restrictions on the use or disclosure of "de-identified" health information. De-identified health information neither identifies nor provides a reasonable basis for believing it could identify an individual.

In certain circumstances, a person's primary language may constitute individually identifiable health information and be prohibited from disclosure. For example, if there are a relatively small number of foreign language speakers in a community, disclosing a person's language and one other characteristic (such as age) might be sufficient to identify that person and thus disclosure would be prohibited.

### 4. When can an interpreter disclose protected patient information?

A major purpose of the privacy rule is to define and limit the circumstances in which an individual's protected health information may be used or disclosed.

**Member of the workforce.** Interpreters who are members of a covered entity's workforce may not use or disclose protected health information, except:

- § as the privacy rule permits or requires; or
- § as the individual who is the subject of the information (or the individual's personal representative) authorizes in writing.