



Court throws out fee policies for medical record sharing; watch for new rules

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HIPAA

A court ruling has obliterated the HHS guidance that requires your practice to charge third parties the same low price as patients for medical records. You currently don't have much recourse if the patient just claims the records are for him or her -- but you should prepare yourself for regulation or sub-regulation that may provide it soon.

Ciox Health, a health care data management company, brought suit against HHS in 2018, claiming that 2016 HIPAA guidance had wrongly caused them harm by requiring that, when they handled medical records requests as part of their client work for covered entities under HIPAA, they had to charge for third-party medical records requests at the same low rate as requests made by the patient.

Third-party requests have to be authorized by patients under HIPAA, but can be sent on that authorization to any of a number of entities for any of a variety of reasons -- to law firms, for example, in furtherance of a legal action, or to insurers, hospitals or other parties.

HHS has in the past cited a "\$6.50" flat fee for records requested by patients -- known as the "Patient Rate" -- which it later withdrew, clarifying that for patients, covered entities and their business associates should "calculate the allowable fees for providing individuals with copies" of their protected health information (PHI) by one of two means: by "calculating actual allowable costs to fulfill each request" or by "using a schedule of costs based on average allowable labor costs to fulfill standard requests" ([PBN 9/5/19](#)).

But this was not thought to apply to third-party requests before 2016. A "third-party directive" found on the HITECH Act passed in 2009 merely stipulated that patients had a right to have their records sent to third parties, and the Omnibus Rule of 2013 said patients and third parties could get these records in whatever form they liked "if it is readily producible in such form and format." But neither said the fees had to be the same.

Court stops rule, rate

In 2016, HHS released official Privacy Rule Guidance that addressed the issue ([see resources, below](#)). That guidance included a Q&A response to the question, "When do the HIPAA Privacy Rule limitations on fees that can be charged for individuals to access copies of their PHI apply to disclosures of the individual's PHI to a third party?"

HHS declared that the Patient Rate also applies "when an individual directs a covered entity to send the PHI to a third party" and "applies regardless of whether the individual has requested that the copy of PHI be sent to herself or has directed that the covered entity send the copy directly to a third party designated by the individual." Critically, HHS added that "it doesn't matter who the third party is."

In its decision on *Ciox Health, LLC v. Alex Azar et alia*, the U.S. District Court for the District of Columbia noted that HHS had warned CHI Health St. Francis, a client of Ciox, "that it had received a complaint from a patient, alleging that Ciox had charged an excessive fee for forwarding her electronic medical records to a law firm," then warned Ciox itself. Ciox brought suit the following year, claiming it had lost millions of dollars observing the directive, which it claimed had been applied "capriciously" -- in part because, though it had the force of regulation, it had not been submitted to a notice and comment period as is required for regulation under the U.S. Administrative Procedure Act (APA).

While rejecting some of Ciox's charges, the court found for the company substantially and overturned both the 2013 Omnibus Rule on formats and the 2016 guidance of the appliance of the Patient Rate to third-party requests.

"I think HHS' heart was in the right place [in issuing its 2016 guidance]," says Eric Fader, a partner with the Rivkin Radler law firm in New York City. "It was in furtherance of improved access. In recent years, there's been a lot of focus on how to improve access to and sharing of patient records for legitimate purposes, particularly care coordination."

HHS' Office for Civil Rights (OCR) has in fact aggressively investigated and pursued cases in which patients complained that they weren't getting their records timely or in the format they requested or the cost they expected. In December 2019, for example, OCR settled with the Florida chain Korunda Medical for \$85,000. "Not only did Korunda fail to timely provide the records to the third party," OCR announced at the time, "but Korunda also failed to provide them in the requested electronic format and charged more than the reasonably cost-based fees allowed under HIPAA."

For companies like Ciox, whose “whole business is [healthcare data management], there are potentially tens of millions of records at issue,” Fader says. But for most practices, he thinks, the savings from the decision will be minor.

Nonetheless, there will be savings, unless patients simply decide to say the requests they mean to be for third parties are for themselves, and then just carry them over to the lawyers or insurers or whomever, Fader says. And there’s not much you can do.

As guidance looms, 4 tips for now

But Lucie F. Huger, attorney with the Greensfelder, Hemker & Gale P.C. law firm in St. Louis, expects that “future guidance will be issued, and new rules could come out on this relatively soon.”

Also, Jennifer Searfoss, Esq., founder of Ashburn, Va.-based SCG Health, reminds that CMS and ONC are working on finalizing their interoperability rules, and the “information blocking” components of those rules may directly affect the issue of patient records access brought up by this ruling.

Therefore, providers should be vigilant for federal action, and in the meantime prepare their HIPAA policies and procedures to reflect the new reality:

- **Establish non-patient rates.** “They’ll have to make changes to their fee schedules [based on the decision],” Huger says. “The policies won’t change if it’s for [the patients’] own records but if, as frequently happens, they direct them to a third party, your policy should address that.” Part of this would be a separate, specific rate for non-patient requests and a clear description of who qualifies.
- **Brief your staff.** “Providers also need to educate staff, especially those who address records requests,” Huger says. “A practice has been established and will need to be reconsidered. Often, offices have record request forms they use routinely that mirrors HIPAA language; now [in light of Ciox] they have to be revised. And apply it universally – if you have a policy, don’t make exceptions.”
- **Know your rights.** If you want to, you can be hardcore about insisting on the separate third-party rate. You could conceivably refuse delivery to a third party if those rates aren’t paid, “as long as the requested rates are reasonable and cost-based,” Fader says.
- **But be sensible.** On the other hand, your practice still has a duty to provide rather than hinder care, and in some cases to delay third-party delivery over a billing dispute would be inappropriate. **Example:** “For coordination of care of a critically ill patient, the additional time in having records first sent to the patient and then forwarded to the other care provider, as opposed to having them sent directly from one care provider to the other, could make a difference in the patient’s care,” Fader offers. “Hopefully no one will die trying to save a few dollars on copying fees, or because one provider takes longer than 30 days in responding to another provider’s request for records that wasn’t a valid third-party directive.” – Roy Edroso (redroso@decisionhealth.com)

Resources:

- Ruling, *Ciox Health, LLC, v. Alex Azar et alia*: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv0040-51
- HIPAA third party 2016: www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html
- “Is \$6.50 the maximum amount that can be charged to provide individuals with a copy of their PHI?” HHS: www.hhs.gov/hipaa/for-professionals/faq/2030/is-650-the-maximum-amount-that-can-be-charged/index.html
- “OCR Settles Second Case in HIPAA Right of Access Initiative,” HHS Office for Civil Rights: www.hhs.gov/about/news/2019/12/12/ocr-settles-second-case-in-hipaa-right-of-access-initiative.html