

**Testimony of the American Psychological Association Practice Organization:
A Proposed Solution for Defining Minimum Necessary in ACA Risk Adjustment Audits Involving
“Combined” Mental Health Records**

The American Psychological Association Practice Organization thanks the Subcommittee for soliciting our perspective on this important Privacy Rule issue.¹

The main challenge that we have encountered in recent years with the Privacy Rule’s minimum necessary standard stems from records requests by insurers conducting annual Risk Adjustment (RA) audits mandated under the Affordable Care Act (ACA). The problem arises when psychologists or other mental health professionals² are asked to produce an entire mental health record that combines clinical information with sensitive details from therapy that are unnecessary to the audit’s purpose.

We have worked collaboratively with certain insurers conducting RA audits to develop a solution to this dilemma – letting the professional extract the relevant clinical information from the record. To the extent that the subcommittee will be making recommendations, we propose that our solution (described in detail below) be adopted as the industry standard for this context.

Background on RA Audits

The RA program, overseen by another part of HHS, is designed to level the playing field between health plans with healthy, inexpensive patients and plans with unhealthy, costly-to-treat patients. The idea is to stabilize premiums and keep plans with unhealthy populations viable and affordable. The transfer of substantial dollar amounts between plans is based on data the plans provide on the health status of their insured populations. The RA audits essentially serve as a spot check of whether plans are accurately reporting the health status of their members.

The RA audits, which insurers are required to conduct annually, will have a broad impact on the health care world. They apply to individual and small group plans both within and outside of the health insurance exchanges. For further information

see: <https://www.cms.gov/CCIIO/Resources/Files/Downloads/fm-2a-fed-ra-ov-dv.pdf>

We have dealt with audits by insurers for many years, but the RA audits present a unique minimum necessary concern because of the very narrow focus of the audits—the health status of the subscriber as it relates to the likely cost of care.

¹ The American Psychological Association Practice Organization is an affiliate of the American Psychological Association, the largest scientific and professional organization representing psychology in the United States. APA's membership includes 117,500 researchers, educators, clinicians, consultants and students.

² For ease of reference, we will refer simply to psychologists.

Background on “Combined” Mental Health Records

Minimum necessary becomes a concern for those psychologists who choose not to keep sensitive details of therapy in separate psychotherapy notes.³ These professionals keep what we call a “combined record” that mixes the details of therapy with basic clinical information.

For example, say a psychologist has a 30-page combined record that includes extensive detail about what the patient said in therapy, the psychologist’s informal interpretations, as well as the patient’s deepest secrets and fears. If that record were requested for an RA audit, the psychologist could not rely on psychotherapy notes protection to withhold the details because he/she did not keep separate psychotherapy notes. All of that detail, however, would far exceed the basic information the insurer would need to verify the health status of the patient, raising concerns about compliance with the minimum necessary standard.

Proposed Solution

We first encountered this issue about 18 months ago when one of the nation’s largest insurers, Anthem/WellPoint (Anthem), began a “dry run” of RA audits. We were able to work collaboratively with Anthem to resolve the minimum necessary concern. We recommended to Anthem—and it accepted—the solution of allowing psychologists with combined records to extract and provide the following basic clinical information to auditors (the RA Solution). The following items are how we define minimum necessary for an RA audit disclosure:

- Modalities and frequencies of treatment furnished
- Results of clinical tests
- Summary of the following:
 - Diagnosis
 - Functional status
 - Treatment plan
 - Symptoms
 - Prognosis
- Progress to date
- Medication prescription and monitoring
- Clinical documentation (admission, discharge notes, or progress notes)

Most of these items are from the Privacy Rule’s list of items excluded from heightened protection as “psychotherapy notes.”⁴ The last item, added by Anthem, lists specific clinical documents that by their nature would likely contain relevant clinical information.

After Anthem agreed to the RA Solution, Blue Cross Blue Shield of Minnesota did as well. We subsequently recommended that our members take this approach with other companies conducting RA audits. We have not heard of pushback from other companies.

³ The Privacy Rule does not mandate that psychologists keep separate psychotherapy notes. Rather, it is optional.

⁴ These items are excluded from the “psychotherapy notes” definition at 46 CFR Section 164.501. Psychotherapy notes are protected from disclosure to insurance companies in all states.

We think that the RA Solution allows mental health providers and insurers to comply with the minimum necessary standard, while giving the latter the basic information they need to comply with their obligations under the ACA to conduct RA audits. The RA Solution also saves the insurers' RA auditors the time that would be wasted combing through extensive combined records to find relevant clinical information.

Accordingly, we recommend that the collaboratively developed RA Solution be adopted as the industry standard for RA audits of combined mental health records.

We look forward to questions from the Subcommittee and discussions among the panelists.

Respectfully Submitted,

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Attached: Appendix

Appendix:

Additional Information Regarding Psychologists' Recordkeeping and Other HIPAA/Privacy Issues with RA Audits

Recordkeeping

In response to the increased prevalence of RA and other audits, we recommend that members keep their records in one of several ways that create a separate, basic clinical record appropriate for producing in response to an audit. These methods allow members to easily provide what insurers need for RA audits, with minimal intrusion on their patients' privacy.

Psychologists' recordkeeping practices are varied. Despite our guidance, for a variety of reasons it will take time to shift a portion of our membership away from combined records. (In addition there are many mental health professionals keeping combined records who do not receive our guidance. For those mental health professionals, we believe that the RA Solution is the best way to ensure compliance with the minimum necessary standard.

Other HIPAA/Privacy Issues with the RA Audits

We understand that the ultimate purpose of the RA audits is to make health insurance more available and affordable. Thus, we have been encouraging our members to be responsive to RA audits provided that: 1) members with combined records can rely on the RA Solution; 2) the auditing company complies with consent/authorization/notice provisions in state mental health confidentiality laws; and 3) the patient does not object to the disclosure.

Points 2 and 3 raise HIPAA/privacy issues beyond the scope of the Subcommittee's focus on the minimum necessary standard. But we think it is important for HHS to be aware of them. RA audit letters typically tell psychologists that no patient consent is required because the audit falls within the "treatment, payment, health care operations" (TPH) exception in the Privacy Rule. While this is true for most health care, it is not true for mental health.

Every state has more stringent mental health confidentiality laws that are not preempted by the TPH exception. In most states, prior consent for such a release is required. A handful of states require a HIPAA-type contemporaneous authorization. In California, the auditing company is required to send a specific notice to the psychologist and the patient.⁵

In most states, these laws do not require the psychologist to give the patient notice before sending records in response to an RA audit (provided that the patient has signed a consent form from the psychologist or insurer that is broad enough to cover RA audits). But many psychologists choose to ask their patients out of respect for their privacy. At this point, we recommend that members honor a patient's objection, in part because we have heard from insurers that with the early rounds of RA audits, patient/subscriber participation is voluntary. But we have also heard that later in the process there may be repercussions if a subscriber refuses to release his/her records. We plan to request clear guidance on this privacy issue from the HHS office that oversees the RA audits.

⁵ California Civil Code Section 56.104.

