



March 2020

TECH UPDATE

1. M.I.T. is contemplating a \$1 million settlement of a website accessibility class action lawsuit brought by the National Association of the Deaf because the MIT website did not have appropriately close-captioned videos. This is just a few months after Harvard settled a similar suit for \$1.575 million. These are private lawsuits under Title III of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

This means our websites are still liabilities if not accessible. While OCR may have slowed down their enforcement, we are still targets.

2. While schools are typically not HIPAA medical providers, those lines are becoming more blurred with interagency service agreements and MediCal billing programs. We are hearing that schools may become HIPAA agencies if they engage in billing for various services. A reminder as to the risks of being a HIPAA provider is warranted.

There is a rule known as the “HIPAA Security Rule Section 164.308(a)(1).” Under this rule, failing to run a risk analysis is a violation. The rule requires all healthcare providers to “conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information held by the covered entity.”

This is only one of many administrative and technical requirements under the Security Rule. Do you know them all? One provider was recently fined \$100,000 for one violation. Given the increased activity, the application of HIPAA to schools that bill for services should be taken seriously and required expertise obtained.

3. The Office for Civil Rights in the Department of Health and Human Services has given notice there will temporarily be a “telehealth” relaxation of rules during the COVID-19 pandemic.

Under this notice, healthcare providers will be allowed to use some popular video chat apps, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video or Skype to

provide telehealth. OCR indicates it will not seek to impose a penalty for noncompliance with the HIPAA rules related to the good faith provision of telehealth during the COVID-19 nationwide emergency. Providers should notify patients that these third party applications potentially introduce privacy risks and providers should enable all available encryption and privacy modes when using such apps.

OCR also warns that some apps, such as Facebook Live, Twitch, TikTok and similar video communication apps, are “public facing” and should not be used. While OCR is not endorsing their use, a list follows of vendors that OCR says “represent” themselves as providing HIPAA-compliant video communication products with a HIPAA BAA:

- Skype for Business / Microsoft Teams
- Updox
- VSee
- Zoom for Healthcare
- Doxy.me
- Google G Suite Hangouts Meet

OCR’s notice can be accessed at:

<https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>

OCR has also published a bulletin on additional further flexibilities, as well as reminders of obligations that remain in effect under HIPAA, which can be accessed at:

<https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>

We have initiated contact with the Privacy Technical Assistance Center on the question of FERPA-compliant video/audio conferencing programs and are awaiting a response.

4. The FCC has relaxed certain E-rate rules to permit vendors and agencies to work together to solve tech issues with telehealth and distance learning. Contact me if you want specific information, but the highlights of the official notice follow [emphasis added for effect]:

This waiver will enable service providers to offer, and RHC and E-Rate program participants *to solicit and accept, improved broadband connections or equipment for telehealth or remote learning* during the COVID-19 outbreak without running afoul of commission rules.

Accordingly, under RHC and E-Rate rules, *applicants are not permitted to solicit or accept a gift or thing of value over \$20 from a service provider* and service providers are not permitted to offer applicants a gift or thing of value over \$20.17.

Today, we waive the RHC and E-Rate program gift rules to *permit service providers to offer, and eligible RHC and E-Rate entities to solicit and accept, improved capacity Wi-Fi hotspots, networking gear, or other things of value to assist healthcare providers, schools and libraries, as well as doctors and patients, teachers, students, school administrators, librarians and patrons during the coronavirus outbreak. These gifts could include, but are not limited to, free upgrades to connections, connected devices, equipment and other services for RHC program participants who provide care via telemedicine and free broadband connections, devices or other services that support remote learning* for students and teachers who will be taking classes at and providing instruction from home as a result of COVID-19.

This waiver of RHC program rules will remain in effect through September 30, 2020.

As the number of school closures continues to grow due to COVID-19, schools are increasingly planning for, and turning to, remote learning to continue instruction for students who will be home for an extended period of time. *In response, some service providers are partnering with schools and libraries to provide mobile hotspots and other wireless broadband-enabled devices to students without broadband access at home. Others are offering free broadband services* directly to students that need them. We waive the E-Rate program gift rules to enable service providers to offer and E-Rate eligible schools and libraries to solicit or accept broadband connections, devices, networking equipment or other things of value that could help students, teachers and patrons affected by school and library closures during the coronavirus pandemic.

To that end, this waiver of E-Rate program rules will remain in effect through September 30, 2020, to provide flexibility to schools and libraries as they deal with COVID-19-related closures.

More information is coming in faster and faster with everyone looking to deploy devices for home use during the coronavirus event. We will endeavor to keep up with it and share our legal point of view.

- William A. Hornback

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