

Medical Records in the 21st Century
By: Samuel D. Hodge, Jr.

At the recent program on medical records, I discussed the fee limitations outlined in 45 CFR §164.524 (c)(4) and the ability of a patient to obtain an electronic copy of his or her medical records for the cost of copying which includes the expense of supplies, labor, copying, and postage. This has been calculated to be a fee not to exceed \$6.50 unless a specific formula was used to ascertain those costs. I also mentioned the ability of a patient to request the records be forwarded to a designated third party such as a lawyer.

In support of this position, I referenced *Moya v. Aurora Healthcare*, 2017 WL 1739828 (Wisc. 2017) which stated that an attorney is entitled to the exception on fees as a "person authorized by the patient" to obtain the records. A member of the audience correctly mentioned that there has been a more recent decision that has determined that the records cannot be sent to the attorney for the reduced price. He discussed the case in a little more detail since I was not aware of that ruling. I have reviewed that subsequent decision and wanted to provide you with an update.

The case is *Cox Health, LLC v. Azar*, 2020 WL 418454 and it was decided by a District Court Judge from the District of Columbia on January 27, 2020. The suit was filed by a copying service that contracts with healthcare providers nationwide to retrieve and produce a person's protected health information. The plaintiff challenged a guidance document, known as *Individuals' Rights under HIPAA to Access their Health Information*, issued by the Offices of Health and Human Services in 2016 which provided that the fee limitation also applied to sending the records to a third person as unreasonable and arbitrary. The judge agreed and found that the fee limitation did not apply to records supplied to a third party such as a lawyer. It was limited to records supplied to an individual in an electronic format.

On January 29, 2020, or two days after this ruling, the Office of Civil Rights, announced that it would no longer enforce the fee limitation for records sent to a third person. It was noted:

On January 23, 2020, a federal court vacated the "third-party directive" within the individual right of access "insofar as it expands the HITECH Act's third-party directive beyond requests for a copy of an electronic health record with respect to [protected health information] of an individual . . . in an electronic format." Additionally, the fee limitation set forth at 45 C.F.R. § 164.524(c)(4) will apply only to an

individual's request for access to their own records, and does not apply to an individual's request to transmit records to a third party.

The right of individuals to access their own records and the fee limitations that apply when exercising this right are undisturbed and remain in effect. OCR will continue to enforce the right of access provisions in 45 C.F.R. § 164.524 that are not restricted by the court order.¹

I also wish to direct your attention to two opinions filed after *Cox Health, LLC v. Azar* dealing with the fees charged by a copy service that exceeded the \$6.50 cap. In *Cross v. Cox Health, LLC*, 2020 WL 534289 (E.D. N.C.), the court granted the defendant's motion to dismiss for failure to state a claim and a similar result was rendered in *Cross v. Formativ Health Management, Inc.* 2020 WL 534912 (E.D. N.C.).

The ultimate resolution of this fee dispute remains to be seen. The government may be content to let its new interpretation remain in place unchallenged. On the other hand, *Cox Health, LLC v. Azar* was decided on narrow procedural grounds and the opinion does not bar HHS from trying to re-issue a directive to expand the rule to cover third parties.² For instance, if the agency can formulate a different legal reasoning for its previous position, it can reissue a policy interpretation that may survive a subsequent court challenge.³ State legislatures can also take measures to cap copying expenses that are more aligned with the \$6.50 mandate.⁴

¹ <https://www.hhs.gov/hipaa/court-order-right-of-access/index.html>

² Kurt Kastorf, *What is the Effect of Ciox Health v. Azar on HITECH Letters?* Kastorf Law, January 31, 2020, <https://kastorflaw.com/analysis/what-is-the-effect-of-ciox-health-v-azar-on-hitech-letters/>.

³ *Id.* at *2.

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