21st Century Cures Act Implications for Behavioral Health Professionals

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Learning Objectives:

- Describe the ONC's Cures Act Final Rule.
- Review Open Notes framework and literature/research supporting its use.
- Define the Information Blocking rule and associated exceptions.

Outline/Agenda:

- Introduction and Background – changing EHR data, 21st Century Cures Act
- Open Notes
- Exceptions
- Case Examples
- Audience Discussion / Frequently Asked Questions

What is the 21st Century Cures Act?

- Passed in 2016 – Broad-ranging bill, emphasis on technology and innovation in healthcare
- Final Rule took effect 04/05/2021
  - Planned for Nov 2020, delayed
- Developers vs Providers
  - Different requirements and deadlines
- Most salient area today – Section 4004, Information Blocking

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What is Information Blocking?

- A practice that: "...is likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information."
- For providers specifically: "...such provider knows that such practice is unreasonable and likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information."
- Data eventually required to be in standard formats (rules here are evolving)
- Overarching aim – Improve **interoperability** between systems

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Important Caveat

- Broad audience today
- State laws may be more granular/restrictive
- Ages of consent for information release
- Categories of information:
  - Behavioral Health
  - Substance Use
  - Sexual Health
- Be mindful of state-specific requirements!

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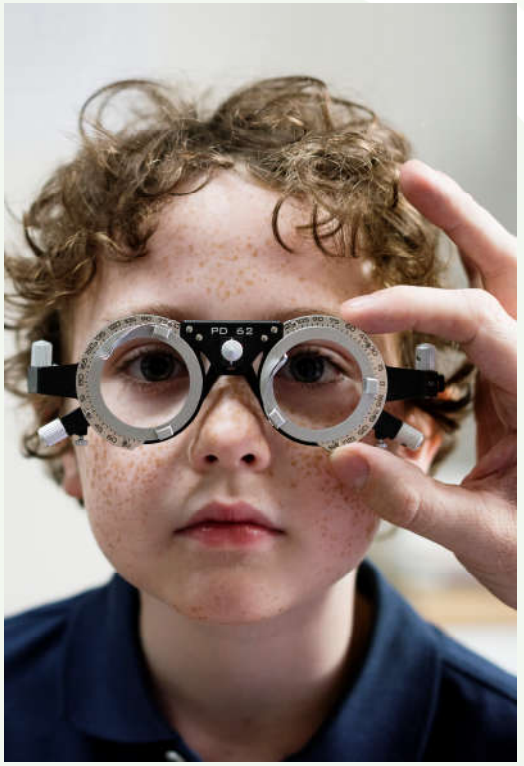
What do we have to share?

- USCDI – US Core Dataset for Interoperability
- Clinical Notes
  - All major categories
  - Clarified – Inclusive of all disciplines (MD, PhD, RN, LICSW, etc.)
- Goals
- Problems
- Note Provenance – Author Organization and Timestamp

Open Notes –
Before 21st Century Cures Act

Past experiences – patient access to notes

- Coordinated effort to share notes began in 2009 in three major healthcare systems (https://www.opennotes.org/)
  - Started in primary care
  - Expanded across outpatient practices
- Prior to 21st Century Cures Act – many organizations allowed patients access to notes in real-time
  - By 2019, "more than 40 million patients using secure online patient portals [could] access the notes written by their clinicians at 200 health systems across the U.S. and Canada"



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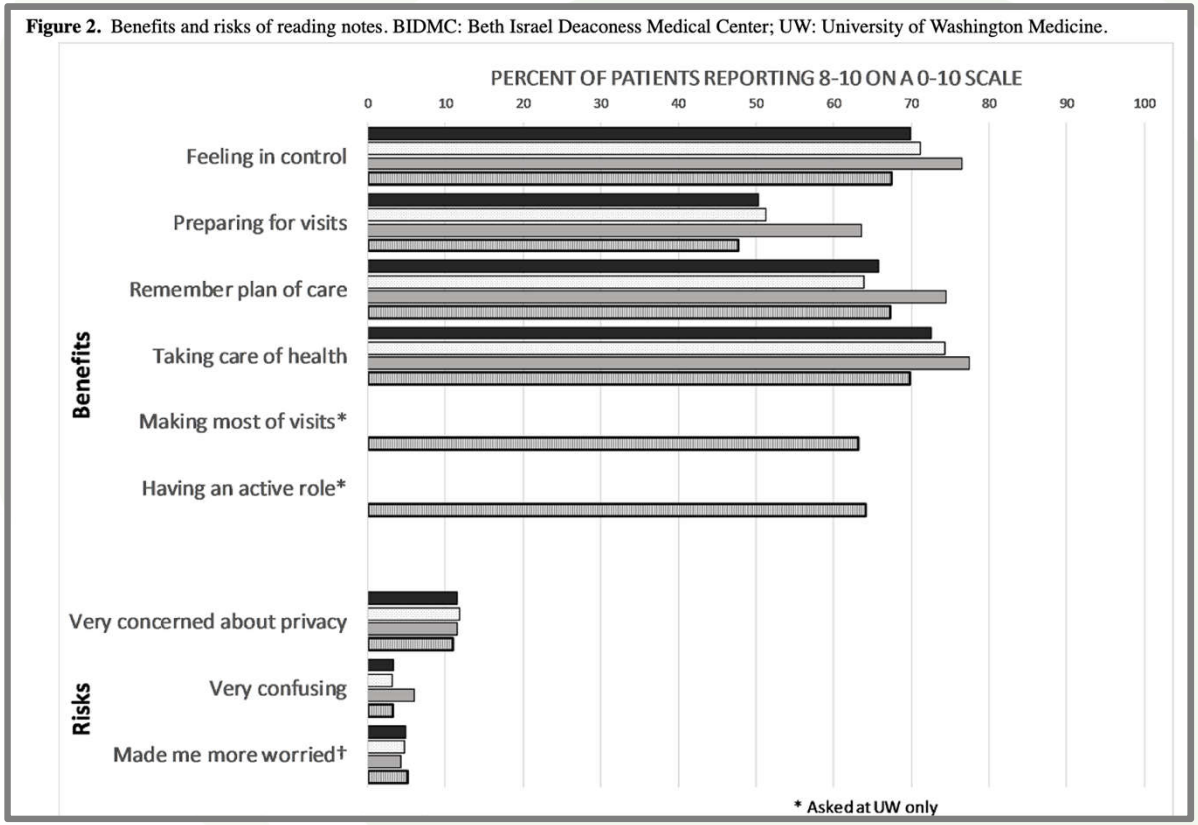
What happens when patients see their notes?

- Across multiple health care systems where patients had access to notes
  - 98.5% of patients who read notes thought making notes available was a good idea
  - 50%-73% reported reading notes beneficial across several areas



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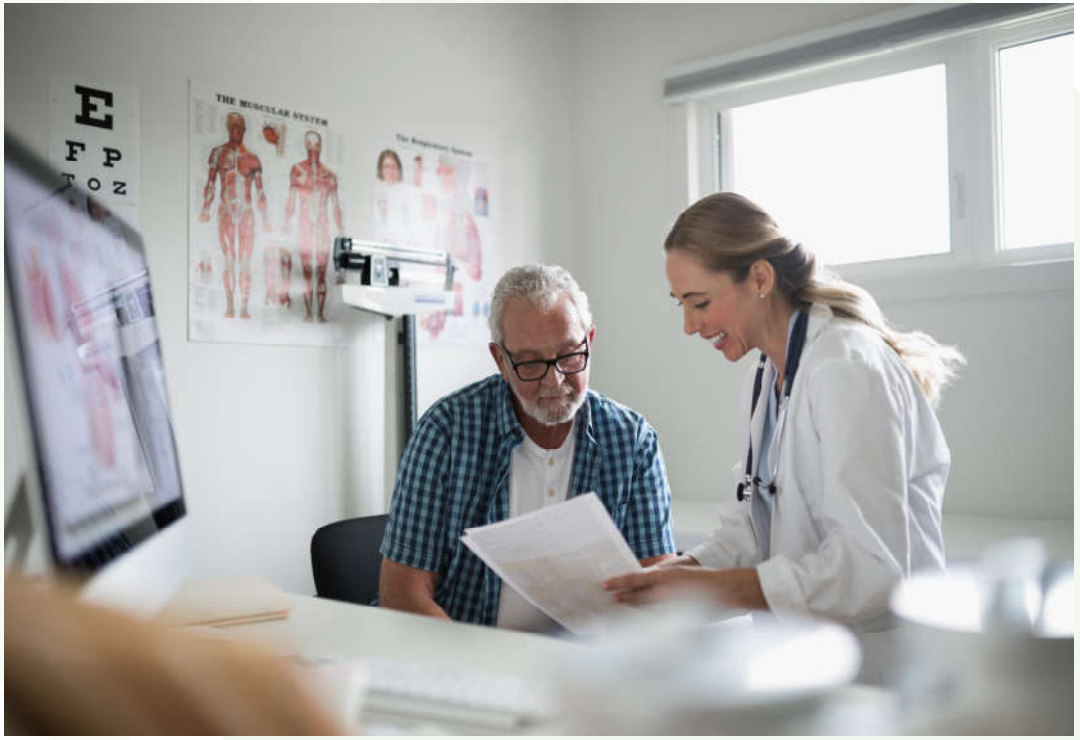
What happens when patients see their notes?

- Specific populations
  - Older patients and Black patients more likely to consider note reading important
  - Non-English speakers and patients with fewer years of education were more likely to use notes to make the most of visits, remember the plan of care, and prepare for visits
- Across multiple health care systems where patients had access to notes
  - 3% felt confused by notes
  - 5% felt more worried after reading notes
  - 11% were concerned about privacy

What about patients who choose not to read?

- Among patients who did not read their notes
  - 50% forgot / did not know visit notes were available
  - 10% did not know they had a right to look at notes
  - 9% were too busy
  - 7% did not think it would be useful
  - 6% could not find the notes
  - 89% agreed making notes available to patients is a good idea



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What about Mental Health Notes?

- Initially, mental health notes were not shared as openly
- Small studies suggest
  - Most patients report increased understanding of their mental health, better remembering their care plan, and better awareness about the potential side-effects of medications in an outpatient psychiatry clinic
  - After reading notes, many mental health patients describe feelings of validation, greater engagement, and enhanced trust in clinicians

Perceptions of the level of *transparency* and *respect* in notes contributes to feelings of trust for clinicians

  - Some patients describe feeling more worried or offended as a result of what they have read

What about Mental Health Notes?

- Adolescent and young adult patients on an inpatient unit
  - Majority reported understanding their notes
  - Majority were satisfied with note content and description of mental health issues
  - Trust in provider remained the same or increased
  - Some suggested edits to their notes
- Clinician response
  - In VA system, nearly 63% of clinician respondents reported being less detailed in their documentation
  - Similarly, in Sweden, 62% of clinical psychologists reported being less candid in mental health documentation after the implementation of note sharing

Strategy to help patients benefit from their mental health notes

The **U.S. Department of Veterans Affairs (VA)** was one of the first health systems to open all notes to all patients. The VA developed the R.E.A.D. Strategy to help patients get the most out of their mental health notes.

- Step 1 is to **REFLECT.** Think about what you hope to learn, and choose a reading environment that suits your learning or reading style.
- Step 2 is to **EXPLORE**. Take your time reading your notes because the contents or language may be unfamiliar and keep an open mind about what you are learning.
- Step 3 is to **ASK**. Let your clinician know if you want to discuss your notes or if you need follow up about something, like a test or appointment. And ask your clinician for reading material or trusted websites to learn more.
- Step 4 is to **DECIDE**. It's up to you to decide how you want to use your notes. Consider how often and how much of your notes you want to read.

https://www.opennotes.org/mental-health-patients/

Exceptions to Information Blocking

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More on the Privacy Exception

"It will not be information blocking if an actor does not fulfill a request to access, exchange, or use EHI in order to protect an individual's privacy, provided certain conditions are met."

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Key Conditions of the Privacy Exception

- **Precondition not satisfied:** If an actor is required by a state or federal law to satisfy a precondition (such as a patient consent or authorization) prior to providing access, exchange, or use of EHI, the actor may choose not to provide access, exchange, or use of such EHI if the precondition has not been satisfied under certain circumstances.
- **Health IT developer of certified health IT not covered by HIPAA:** If an actor is a health IT developer of certified health IT that is not required to comply with the HIPAA Privacy Rule, the actor may choose to interfere with the access, exchange, or use of EHI for a privacy-protective purpose.
- **Denial of an individual's request for their EHI consistent with 45 CFR 164.524(a) (1) and (2)** of the HIPAA Privacy Rule.
- **Respecting an individual's request not to share information:** An actor may choose not to provide access, exchange, or use of an individual's EHI if doing so fulfills the wishes of the individual, provided certain conditions are met.

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More on the Preventing Harm Exception

"It will not be information blocking for an actor to engage in practices that are reasonable and necessary to prevent (physical) harm to a patient or another person, provided certain conditions are met."

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Key Conditions of the Preventing Harm Exception

- The actor must hold a reasonable belief that the practice will substantially reduce a risk of harm.
- The actor's practice must be no broader than necessary.
- The actor's practice must satisfy at least one condition from each of the following categories: type of risk, type of harm, and implementation basis.
- The practice must satisfy the condition concerning a patient right to request review of an individualized determination of risk of harm.

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More on the Infeasibility Exception

"It will not be information blocking if an actor does not fulfill a request to access, exchange, or use EHI due to the infeasibility of the request, provided certain conditions are met."

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More on the Infeasibility Exception

- Uncontrollable events:
  - The actor cannot fulfill the request for access, exchange, or use of electronic health information due to a natural or human-made disaster, public health emergency, public safety incident, war, terrorist attack, civil insurrection, strike or other labor unrest, telecommunication or internet service interruption, or act of military, civil or regulatory authority.
- Segmentation: The actor cannot fulfill the request for access, exchange, or use of EHI because the actor cannot unambiguously segment the requested EHI.
- Infeasibility under the circumstances: The actor demonstrates through a contemporaneous written record or other documentation its consistent and non-discriminatory consideration of certain factors that led to its determination that complying with the request would be infeasible under the circumstances.
- The actor must provide a written response to the requestor within 10 business days of receipt of the request with the reason(s) why the request is infeasible.

What about the Psychotherapy Exception?

- Law was not written by behavioral health experts...
- Describes "Process Notes"
  - Process Notes may be withheld without fear of information blocking violation
- Notes for billing or communication are NOT covered by this exception
- APA Webinar link on https://www.psychiatry.org/psychiatrists/practice/practice-management/health-information-technology/interoperability-and-information-blocking: https://vimeo.com/489526056
- AACAP FAQ: https://www.aacap.org/App_Themes/AACAP/docs/clinical_practice_center/business_of_practice/emr/21st-Century-Open-Notes-Intro-FAQs.pdf

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Privacy Case Examples

- A patient and multiple family members of the patient participate in the interview. All share clinically-relevant, yet private information related to their own mental health.
- A young patient has been removed from the home by DCS (family services).
- A young patient has recently disclosed sexual abuse, and it is anticipated that this may lead to a criminal trial.
- During a session, a parent specifically requests that certain content not be shared with their child or with their child's other parent(s).

Preventing Harm Case Examples

- A patient has an eating disorder, and the clinician has a session/conversation with the parent about their weight, eating habits, and potential interventions to treat. There is concern for potential harm if the patient has access to some of the content discussed.
- A patient on the inpatient unit mentions that they will kill themselves if they lose their spouse. The spouse shares with their clinician that they are considering potential divorce. All parties are concerned about the possibility of substantial harm if the patient were to find out at this time.
- A young patient reports information that requires a report to protective services to be filed. They share that they are concerned about their safety due to sharing this information.

Infeasibility Case Examples

- A provider only has a single electronic/paper notebook with notes on a young patient and their family, with each interspersed in a living document, not separated out by session. It is impossible to separate out the private sections of one session from the permitted sections of another visit.
- Your system's EHR has been offline due to a ransomware attack. A patient is requesting records that are not currently accessible during negotiations.
- A provider was grandfathered out of the HITECH Act requirements for an EHR and has declined to have an EHR, continuing to use paper charts and paper prescriptions. A request for medical records requires the provider to obtain copies of the paper chart.
- A provider's medical records storage facility was found to have asbestos everywhere. A patient's request for his old chart records is impossible during fumigation and mitigation of the space.

Common Questions

- What about those of us who don't have an electronic medical record or a patient portal? Does the Cures Act apply to us?
- What are a noncustodial parent's rights to access their child's medical records?
- We may receive confidential or sensitive information related to a parent in the course of obtaining history about a young child (e.g., age 11). What should we do with this information, knowing that at some point, the child will have full access to their chart?
- Should we change what and how we write in a patient's record, knowing that they and others may read it more readily? How?

Open Discussion

Resources

https://www.psychiatry.org/psychiatrists/practice/practice-management/ health-information-technology/interoperability-and-information-blocking

https://www.ama-assn.org/system/files/2021-01/information-blocking- part-1.pdf

https://www.opennotes.org
https://www.opennotes.org/research/words-matter-what-do-patients-find-judgmental-or-offensive-in-outpatient-notes/
https://www.opennotes.org/mental-health-patients/

https://infoblockingcenter.org

https://www.healthit.gov/curesrule

https://www.healthit.gov/sites/default/files/cures/2020-03/InformationBlockingExceptions.pdf

https://www.psychiatry.org/psychiatrists/practice/practice-management/ health-information-technology/interoperability-and-information-blocking

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