



ASHA

American
Speech-Language-Hearing
Association

August 7, 2023

The Honorable Lina M. Khan, Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Commissioner Khan:

On behalf of the American Speech-Language-Hearing Association (ASHA), I write to provide comments regarding the notice of proposed rulemaking to amend the Commission's Health Breach Notification Rule (HBN Rule) to require vendors of personal health records (PHRs) and related entities that are not covered by the Health Insurance Portability and Accountability Act (HIPAA) to notify individuals, the Federal Trade Commission (FTC), and in some cases the media, of a breach of unsecured personally identifiable health data.

ASHA is the national professional, scientific, and credentialing association for 228,000 members and affiliates who are audiologists; speech-language pathologists; speech, language, and hearing scientists; audiology and speech-language pathology assistants; and students. Audiologists specialize in preventing and assessing hearing and balance disorders as well as providing audiologic treatment, including hearing aids. Speech-language pathologists (SLPs) identify, assess, and treat speech, language, swallowing, and cognitive-communication disorders. ASHA's vision is to make effective communication, a human right, accessible for all.

ASHA appreciates the Commission's commitment to and careful consideration of the current HBN Rule and proposed changes for improvement and clarification. **We urge the Commission to finalize this proposed rule in support of the work of our members and the privacy of the patients they serve.**

Many Americans seeking health care services think all health care providers are HIPAA-covered entities and assume all their protected health information (PHI) is secure under the HIPAA law.¹ While most individuals receive their health care through HIPAA-covered entities, many providers fall outside of HIPAA enforcement because of the way their practices are structured (e.g., providers who only take payments in cash and do not conduct covered electronic transactions). It is incredibly important that patients who receive care from individuals who are not covered entities receive the same or similar levels of protection of their PHI and PHRs as those receiving health care services through non-HIPAA-covered entities.

While all ASHA members are subject to rigorous standards for confidentiality in our ethical code, we strongly support greater protection and enforcement.² Specifically, we support expanding safety for PHRs that are held by non-HIPAA-covered entities because patients do not always understand the difference in protection when receiving services from them, and because protecting PHI is equally important when held by a non-HIPAA-covered entity.

Many of our members work in direct health care service delivery; however, we also have audiologist and speech-language pathologist (SLP) members who work for or as application ("app") developers. While some of these apps are indeed HIPAA-covered entities (e.g., some cochlear implant devices that require apps for functionality), some are not (e.g., certain over-the-counter hearing aid related applications). Additionally, members who may themselves be

HIPAA-covered entities may use apps that are not subject to HIPAA (or those who are not compelled to use a business associate agreement) while conducting their patients' treatment.

ASHA members work with patients of all ages who have communication disorders related to speech and hearing with varying support needs. For example, consider our members' patients who use apps for alternative and augmentative communication (AAC) on a tablet or certain discrete speech-generating devices. These may or may not be HIPAA-covered apps. Due to the nature of the communication difficulties that some patients face, their devices may contain even more information than the average person would need to upload into an application on their device. A person who uses an AAC device to speak would likely need to list their phone number and address in an application on their device because if it were lost, they might not be able to communicate that information effectively without the ability to speak.

ASHA takes patient health data privacy very seriously and has resources available to our members who are HIPAA-covered entities and those who are not.³ **We believe that all holders of PHI and PHRs should be held to the new standards that this rule proposes for reporting breaches with the ultimate goal of maximizing the safety of patient data.**

Thank you for the opportunity to provide these comments and lend our members' expertise to help further inform the Commission's deliberative process. If you or your staff have any questions, please contact Caroline Bergner, JD, ASHA's director, health care policy for Medicaid, at cbergner@asha.org.

Sincerely,



Robert M. Augustine, PhD, CCC-SLP
2023 ASHA President

¹ Centers for Medicare & Medicaid Services. (2022 May 26). *Are You a Covered Entity?* <https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/AreYouaCoveredEntity>.

² American Speech-Language-Hearing Association. (2018). *Issues in Ethics: Confidentiality*. <https://www.asha.org/practice/ethics/confidentiality/#sec1.5>.

³ Blackstone, S., Higginbotham, D., & Williams III, A. (2022 Nov 1). *Privacy in the Information Age: Unique Issues for AAC Users*. *The ASHA Leader*, Vol 7, No 20. <https://leader.pubs.asha.org/doi/10.1044/leader.FTR1.07202002.1>.