Ethical Decision-Making: A Public Health Emergency and Unprecedented Challenges

Theresa H. Rodgers, MA, CCC-SLP, ASHA Fellow, L-SLP, EdS (LD)
Louisiana Speech-Language-Hearing Association Virtual Convention
June 3, 2021

No portion of this presentation may be reproduced without permission (2021).

Practice Considerations and Constraints?
- Productivity demands (e.g., SLPs in SNF required to clock out for paperwork, expectation that clients will be maintained on caseload at same level of service even when no longer warranted, etc.)
- Pressure to bill on-going assessment provided within therapy sessions as "evaluation"
- Billing for services which do not match CPT code(s) including "upcoding"

Acknowledgements!
Special thanks to the following individuals who contributed significantly in the development of this presentation:
- Donna Euben, Esq.
- Glenn Waguespack, MS, CCC-A, L-AUD

Acknowledgements!
Practice Considerations and Constraints?

- Inappropriate delegation of tasks to graduate students (and/or assistants)
- Inadequate documentation of supervision
- Conflict of interest (e.g., solicitation of cases for part-time private practice from practitioner’s full-time employment entity)

ASHA Health Care Survey Report on SLPs: 2019

- 35.1% of respondents employed in SNFs, 14.5% in a rehab hospital setting, and 11.5% in home health indicated that they had felt pressured by an employer or supervisor to discharge inappropriately (i.e. early or delayed). Overall – 14%
- Provide evaluation and treatment that are not clinically appropriate
  - SNFs – 25.1%; Rehab hospital – 16.2%; Overall – 12%

Which of the following ethical issues have you faced during the last 3 years?

- 40.5% identified lack of time to ensure the delivery of quality services to my students as an issue.
- 19.6% selected complying with administrative and regulatory mandates.
- 13.5% selected dealing with impaired practitioners in our profession.
- 7.6% identified lack of confidentiality and privacy of student files and records as a challenge.
- 1.9% chose employer pressure to alter documentation for billing and/or reimbursement.

ASHA Health Care Survey Report on SLPs: 2019

- 23.2% of respondents employed in SNFs indicated that they felt pressured by an employer or supervisor to provide inappropriate frequency or intensity of services. Overall – 14%
- Alter documentation for reimbursement - SNFs – 6.2%; Overall – 4%

ASHA Schools Survey Report 2020: SLP Workforce and Work Conditions Report

SLPs were asked to identify which of five issues had presented them with significant ethical challenges during the last 3 years.

- 63% identified lack of time to ensure the delivery of quality services to my students as an issue.
- 29% selected complying with administrative and regulatory mandates.
- 13% selected dealing with impaired practitioners in our profession.
- 9% identified lack of confidentiality and privacy of student files and records as a challenge.
- 3% chose employer pressure to alter documentation for billing and/or reimbursement.

Which of the following ethical issues have you faced during the last 3 years?

- 40.5% identified lack of time to ensure the delivery of quality services to my students as an issue.
- 19.6% selected complying with administrative and regulatory mandates.
- 13.5% selected dealing with impaired practitioners in our profession.
- 7.6% identified lack of confidentiality and privacy of student files and records as a challenge.
- 1.9% chose employer pressure to alter documentation for billing and/or reimbursement.

ASHA Schools Survey Report on SLPs: 2016 and 2018

- In 2018, almost half (41%) of school-based SLPs identified compromising quality of services as an issue that presented them with the biggest ethical challenges—about the same as in 2016.
- In 2018, 21% found that adhering to administrative or regulatory mandates was an ethical challenge—compared to 25% in 2016.
- Another ethical challenge is completing Medicaid billing: 18% in 2018 and 14% in 2016.

ASHA Schools Survey Report on SLPs

• In 2018, the survey asked for the first time whether school-based SLPs felt “pressured by an employer, administrator, or supervisor to provide or deny a service, report scores, etc., that would be in violation of the ASHA Code of Ethics.”
• 18% responded YES!


Practice Considerations and Constraints

14

Questions concerning cultural competence in the administration and interpretation of diagnostic materials.

Cultural Sensitivity and Humility

Cultural competence issues in interacting with families and those whom we serve.

https://leader.pubs.asha.org/do/10.1044/leader.FM25082020.8/full/

The Practice Environment During COVID-19: Considerations And Constraints

• Mandated use of teletherapy in certain practice settings
• Virtual learning
• Lack of Personal Protective Equipment (PPE)
• Risks associated with Aerosol Generating Procedures

The Practice Environment During COVID-19: Considerations And Constraints

• Impact on research
• Tele-supervision
• Relaxation of HIPAA patient privacy enforcement

The Practice Environment During COVID-19: Considerations And Constraints

• Patient/client/student safety
• Billing and reimbursement considerations
• Lack of work-life balance; burnout

Federally Declared Public Health Emergency (PHE)

HHS Secretary Becerra on April 15, 2021 renewed the January 31, 2020 declaration by former Secretary Azar. The 90-day renewal extends the PHE through July 19, 2021.
Telehealth Discretion During Coronavirus

A covered health care provider that wants to use audio or video communication technology to provide telehealth to patients during the COVID-19 nationwide public health emergency can use any non-public facing remote communication product that is available to communicate with patients.

OCR is exercising its enforcement discretion to not impose penalties for noncompliance with the HIPAA Rules in connection with the good faith provision of telehealth using such non-public facing audio or video communication products during the COVID-19 nationwide public health emergency.

Some remote communications technologies, and the manner in which they are used by HIPAA-covered health care providers, may not fully comply with the requirements of the HIPAA Rules.

OCR will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency. This notification is effective immediately.

Covered health care providers may use popular applications that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype, to provide telehealth without risk that OCR might seek to impose a penalty for noncompliance with the HIPAA Rules related to the good faith provision of telehealth during the COVID-19 nationwide public health emergency. Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.

"Under this Notice, however, Facebook Live, Twitch, TikTok, and similar video communication applications are public facing, and should not be used in the provision of telehealth by covered health care providers."

https://www.asha.org/About/Coronavirus-Updates/
Covered Audiology Services Provided via Telehealth under Medicare Part B

Audiology CPT Codes
The following codes represent audiology services covered under the Medicare telehealth benefit.

- 92601: Diagnostic analysis of cochlear implant, patient younger than 7 years of age; with programming
- 92602: Diagnostic analysis of cochlear implant, patient younger than 7 years of age; with programming; subsequent programming
- 92603: Diagnostic analysis of cochlear implant, age 7 years or older; with programming
- 92604: Diagnostic analysis of cochlear implant, age 7 years or older; with programming; subsequent programming

Audiology Services Provided via Telehealth to Medicare Beneficiaries

- 92550, Tympanometry and reflex threshold measurements
- 92552, Pure tone audiometry (threshold); air only
- 92553, Pure tone audiometry (threshold); air and bone
- 92555, Speech audiometry threshold
- 92556, Speech audiometry threshold; air and bone
- 92557, Speech audiometry threshold; air and bone
- 92563, Tone decay test
- 92564, Stenger test, pure tone
- 92567, Tympanometry (impedance testing)

Approved Codes Added April 1, 2021 (can bill for services provided January-March, 2021 and afterwards during the PHE)

- 92568, Acoustic reflex testing, threshold
- 92570, Acoustic immittance testing, includes tympanometry (impedance testing), acoustic reflex threshold testing, and acoustic reflex decay testing
- 92587, Distortion product evoked otoacoustic emissions; limited evaluation (to confirm the presence or absence of hearing disorder, 3-6 frequencies) or transient evoked otoacoustic emissions, with interpretation and report
- 92625, Assessment of tinnitus (includes pitch, loudness matching, and masking)
- 92626, Evaluation of auditory function for surgically implanted device(s) candidacy or postoperative status of a surgically implanted device(s); first hour
- 92627, Evaluation of auditory function for surgically implanted device(s) candidacy or postoperative status of a surgically implanted device(s); each additional 15 minutes

Approved Codes Added April 1, 2021 (can bill for services provided January-March, 2021 and afterwards during the PHE)

- 92558, Examination of speech understanding
- 92625, Evaluation of auditory function for surgically implanted device(s) candidacy or postoperative status of a surgically implanted device(s); first hour
- 92626, Evaluation of auditory function for surgically implanted device(s) candidacy or postoperative status of a surgically implanted device(s); each additional 15 minutes
- 92628, Natural hearing for surgically implanted device(s) candidacy or postoperative status of a surgically implanted device(s); each additional 15 minutes

Approved Codes Added April 1, 2021 (can bill for services provided January-March, 2021 and afterwards during the PHE)

- 92526, Treatment of swallowing dysfunction and/or oral function for feeding
- 92607, Evaluation for prescription for speech-generating augmentative and alternative communication device, face-to-face with the patient; first hour
- 92608, Evaluation for prescription for speech-generating augmentative and alternative communication device, face-to-face with the patient; each additional 30 minutes
- 92609, Therapeutic services for the use of speech-generating device, including programming and modification
- 92610, Evaluation of oral and pharyngeal swallowing function

Speech-Language Pathology CPT Codes
The following codes represent speech-language pathology services covered under the Medicare telehealth benefit.

- 92507: Treatment of speech, language, voice, communication, and/or auditory processing disorder; individual
- 92508: Treatment of speech, language, voice, communication, and/or auditory processing disorder; group
- 92521: Evaluation of speech fluency (e.g., stuttering, cluttering)
- 92522: Evaluation of speech sound production (e.g., articulation, phonological process, apraxia, dyssynchrony), with evaluation of language comprehension and expression (e.g., receptive and expressive language)
- 92523: Evaluation of speech sound production (e.g., articulation, phonological process, apraxia, dyssynchrony), with evaluation of language comprehension and expression (e.g., receptive and expressive language)
- 92524: Behavioral and qualitative analysis of voice and resonance

Covered SLP Services Provided via Telehealth under Medicare Part B

Approved Codes Added April 1, 2021 (can bill for services provided January-March, 2021 and afterwards during the PHE)

- 92507: Treatment of speech, language, voice, communication, and/or auditory processing disorder; individual
- 92508: Treatment of speech, language, voice, communication, and/or auditory processing disorder; group
- 92521: Evaluation of speech fluency (e.g., stuttering, cluttering)
- 92522: Evaluation of speech sound production (e.g., articulation, phonological process, apraxia, dyssynchrony), with evaluation of language comprehension and expression (e.g., receptive and expressive language)
- 92523: Evaluation of speech sound production (e.g., articulation, phonological process, apraxia, dyssynchrony), with evaluation of language comprehension and expression (e.g., receptive and expressive language)
- 92524: Behavioral and qualitative analysis of voice and resonance

https://www.asha.org/Practice/reimbursement/medicare/Providing-Telehealth-Services-Under-Medicare-During-the-COVID-19-Pandemic/
Approved Codes Added April 1, 2021 (can bill for services provided January-March, 2021 and afterwards during the PHE)

SLP Services Provided via Telehealth to Medicare Beneficiaries

- 96105, Assessment of aphasia (includes assessment of expressive and receptive speech and language function, language comprehension, speech production ability, reading, spelling, writing, eg. by Boston Diagnostic Aphasia Examination) with interpretation and report, per hour
- 96125, Standardized cognitive performance testing (eg. Ross Information Processing Assessment) per hour of a qualified health care professional’s time, both face-to-face time administering tests to the patient and time interpreting these test results and preparing the report
- 97129, Therapeutic interventions that focus on cognitive function (eg. attention, memory, reasoning, executive function, problem solving, and/or pragmatic functioning) and compensatory strategies to manage the performance of an activity (eg. managing time or schedules, initiating, organizing, and sequencing tasks), direct (one-on-one) patient contact; initial 15 minutes
- 97130, Therapeutic interventions that focus on cognitive function (eg. attention, memory, reasoning, executive function, problem solving, and/or pragmatic functioning) and compensatory strategies to manage the performance of an activity (eg. managing time or schedules, initiating, organizing, and sequencing tasks), direct (one-on-one) patient contact; each additional 15 minutes


Making Changes to the IEP after the Annual IEP Team Meeting

OSER’s March 21, 2020 Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, states that “…in making changes to a child’s IEP after the annual IEP Team meeting, because of the COVID-19 pandemic, the parent of a child with a disability and the public agency may agree to not convene an IEP Team Meeting for the purpose of making those changes, and instead develop a written document to amend or modify the child’s current IEP.”

https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/qa/r/qa_r/qa_r_policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf

When conducting meetings using alternative means such as telephone or videoconferencing, LEAs (Local Education Agencies) should ensure parents are apprised of possible privacy considerations and consent to the use of the suggested method for the meeting. This includes documentation of the discussion of how special education documents will be shared with the parents.


- Parents’ electronic or digital signatures are acceptable as long as the LEA ensures appropriate safeguards are in place to protect the integrity of the process.
- Prior written notice can be provided through electronic mail.
- The public agency can provide a parent with an electronic copy of the procedural safeguards (e.g. through email) instead of a paper copy.
- Parents maintain the right to inspect and review the child’s education records while school buildings and other public facilities are closed due to the pandemic. The LEA may identify a mutually agreeable timeframe and method for providing access (e.g. email, secure on-line portal or postal mail).

Guidance for Academic Programs from CAA and CFCC

Telepractice with Telesupervision

Speech-language pathology and audiology programs are permitted to count clinical hours earned through telepractice as part of their required supervised clinical practicum hours, including those earned after January 1, 2020.

https://www.asha.org/certification/covid-19-guidance-from-cfcc/
The drafting of Code revisions began during the 2020 meetings of the ASHA Board of Ethics/Ethics Education Subcommittee. It is a multi-year process.

If found in violation of the ASHA Code of Ethics, one of the following sanctions will be applied:

- **PRIVATE** Reprimand
  - Between Complainant and Respondent

PUBLIC

- Censure
- Withholding – for Applicants or Dropped Members*
- Suspension – for months or years*
- Revocation – for months, years, or life*

* Interrupts Certification/Membership

### Potential Sanctions of the Board of Ethics

- **Reprimand** (private sanction)
- **Censure** (essentially a public reprimand)
- **Suspension** (individual remains member/certified, paying dues/keeping up with certification requirements, shorter duration of time than revocation, e.g., 6-12 months, no requirement to petition the BOE for reinstatement)

Continued on next slide

### Potential Sanctions of the Board of Ethics

- **Revocation** (individual’s membership/certification revoked; to rejoin, individual must petition the BOE for reinstatement which can be rejected; must then meet any new certification standards/requirements)
- **Withholding** (like revocation, but for applicants and former members/certified individuals)
- **Cease and Desist** (letter to immediately stop conduct that violates Code of Ethics)

Continued on next slide

### Sanctions – LBESPA

- **Reprimand** (Public)
- Probationary status (e.g., limit or prohibit certain area(s) of practice as prescribed by the board; completion of professional education approved by the board, etc.)
- Fine (for each violation)
- Suspension
- Revocation
- Other discipline (e.g., Open Book Examination)

Restitution of costs and expenses associated with disciplinary proceedings are also allowed.

*Retrieved April 1, 2019, from http://www.asha.org/uploadedFiles/ET2016-00342.pdf (included in handouts)*

*Retrieved May 14, 2021 from https://www.lbesa.org/index.cfm/licensee/disciplinary-action*
Layers of the Onion: Overlapping Regulations

The professional practice of SLPs is governed by a variety of sources, including but not limited to:

- ASHA's Code of Ethics (2016)
- State Licensing Board laws and regulations
- Collective Bargaining Agreements/Individual Employment Contracts
- Federal Law (FERPA, HIPAA, IDEA, ADA, etc.)
- Hospital/Home-Health/School District/University/Facility Policies and Procedures/Handbooks


Ethical Scenarios

Scenarios will be presented which represent a potential violation of the ASHA and/or LBESPA Code of Ethics. Determine if any ethical violation(s) has occurred and, if so, which principle(s) and/or rule(s) has/have been violated.

Discussion Questions

1. What is the major ethical issue or disagreement in this case?

2. a. Is this a violation of the ASHA Code of Ethics? If so, which principle(s) and/or rule(s) does it violate?
   b. Is this a violation of the LBESPA Code of Ethics? If so, which principle(s) and/or rule(s) does it violate?

3. What is the appropriate ethical action?