

Confidentiality of SUD Information in Integrated Care Settings: NH SBIRT SUMMIT

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Legal Action Center



Who is the Legal Action Center?

- ❑ Non-profit law and policy organization
- ❑ Anti-discrimination and privacy work
 - Substance use disorders
 - HIV/AIDS
 - Criminal records
- ❑ Legal services, litigation, technical assistance, policy



Today's Presentation will Cover:



1. The Purpose of 42 C.F.R. Part 2
2. Overview of Federal Privacy Laws - HIPAA v. 42 C.F.R. Part 2
3. Why HIPAA is Insufficient to Protect Confidential Substance Use Disorder (“SUD”) Patient Information
4. SAMHSA’s 2016 Proposed Rule for 42 C.F.R. Part 2
5. Sharing SUD Information in Today’s Integrated Care Environment

1. The Purpose of 42 C.F.R. Part 2 ("Part 2")

Enacted in the 1970s:

- to protect the *privacy* of people receiving SUD care;
- to guard against the *negative consequences* of unauthorized release of drug/alcohol patient information:
 - arrest
 - prosecution
 - loss of child custody and parental rights
 - loss of jobs
 - denial of health care
 - exclusion or eviction from public housing
 - the inability to obtain health, life, or disability insurance

The Purpose of Part 2 (con't.)

Enacted:

- to encourage individuals to enter drug/alcohol treatment
- to guard against the *stigma and discrimination* associated with having a SUD and/or receiving treatment.



2. Overview of Laws - HIPAA:

Generally:

- Federal law
- Establishes a floor (minimum) of safeguards to protect privacy of “protected health information” (PHI)
- Applies to PHI no matter how it is shared (electronic, written, or oral form)
- Also establishes patient rights



Overview of Laws - 42 CFR Part 2:

Background: The Basics of 42 C.F.R. Part 2



Overview of Laws - **Basics of Part 2**

- **NOTE:** The law is currently undergoing revisions.
- **Rule: No disclosure** of protected SUD information -- even to other health care providers, insurers, or parents -- unless there is written consent or another exception applies.
- Prohibition on re-disclosure of protected SUD information.
- More protective of privacy than HIPAA.



Overview of Laws – Basics of Part 2

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Who is covered?

- Drug/alcohol prevention & treatment programs

that are

- Federally assisted

must follow 42 C.F.R. Part 2

Definitions

Overview of Laws – Basics of Part 2

Who is Covered? (con't.)

► What is a “**program?**” 3 definitions....



FIRST DEFINITION:

- Individual *or* entity
- *other than* a general medical facility
- that holds itself out as providing, and does provide,
- drug/alcohol diagnosis, treatment, or referral for treatment....

OR....

Con't....

Overview of Laws – Basics of Part 2

Who is Covered? (con't.)

- What is a “**program?**” 3 definitions (con't.)



SECOND DEFINITION:

- An identified unit
- *within* a general medical facility
- which holds itself out as providing, and does provide,
- Drug/alcohol diagnosis, treatment, or referral for treatment....

OR....

Con't....

Overview of Laws – Basics of Part 2

Who is Covered? (con't.)

► What is a “**program?**” - 3 definitions (con't.)

THIRD DEFINITION:

- Medical personnel or other staff
- *in* a general medical care facility
- whose primary function is
- the provision of drug/alcohol diagnosis, treatment, or referral for treatment, and
- who are identified as such.



Overview of Laws – Basics of Part 2

Who is covered? (con't.)

What is a “**program?**” (con't.)

► KEY POINT:

- When dealing with a general medical facility...
- it is the **unit** or **medical personnel**
- that is the “**program,**”
- *NOT* the whole general medical facility

Overview of Laws – Basics of Part 2

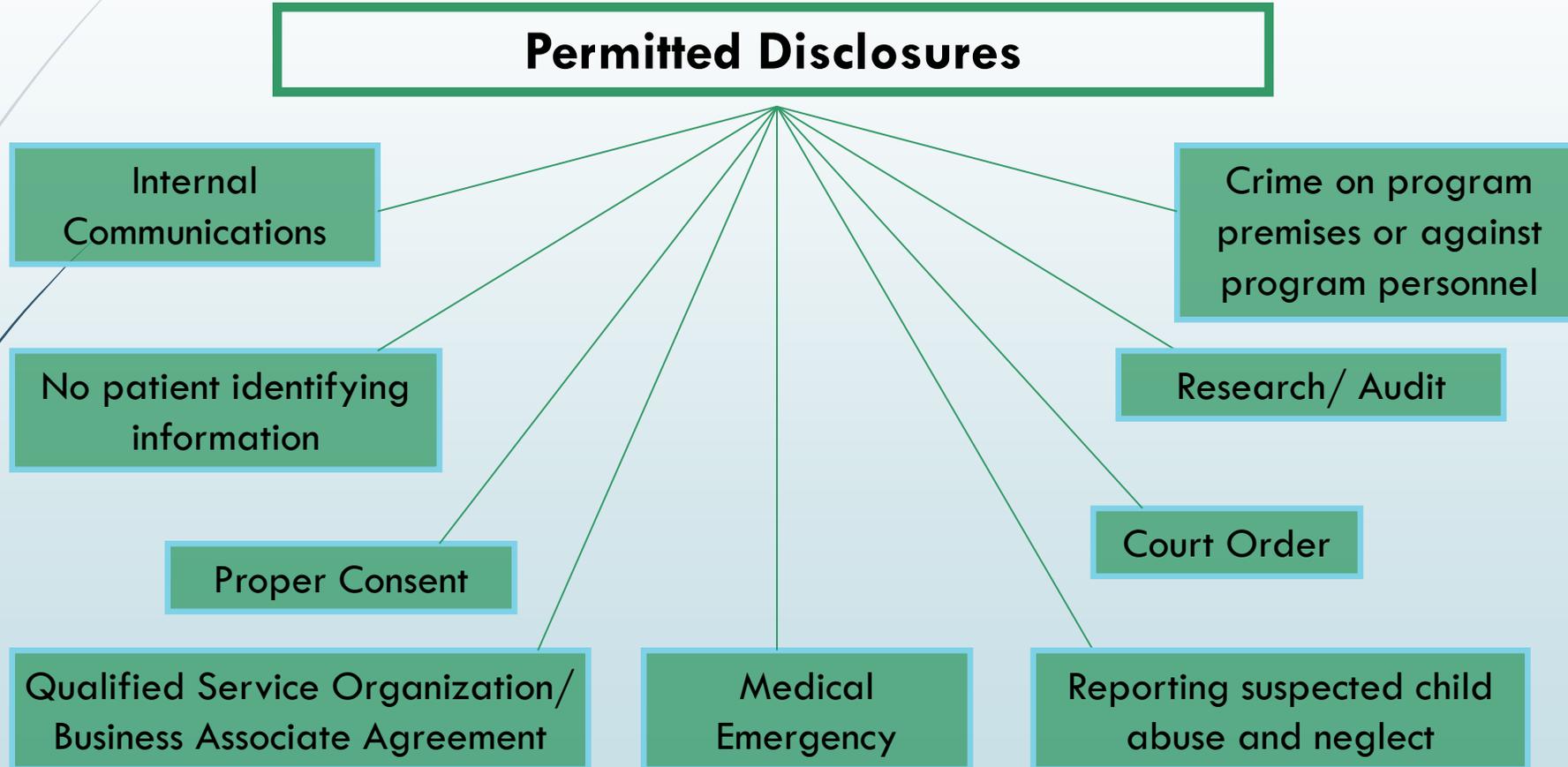
Who is covered? (con't.)

- Definition of a “**program**” (con't.) –
*What does “**holds itself out**” mean?*
 - Regulations do not specify, but SAMHSA includes:
 - State licensing procedures
 - Advertising or posting notices in office
 - Certifications in addiction medicine
 - Listings in registries
 - Internet statements
 - Consultation activities for non-“programs”
 - Info given to patients & families
 - Any activity that would reasonable lead one to conclude those services are provided



Basics of Part 2:

Exceptions to General Rule



3. Why HIPAA is Insufficient to Protect Confidential SUD Patient Information

Issues	HIPAA	42 CFR Part 2
Designed to guard against <u>SUD stigma and negative consequences of having a SUD</u> and/or getting treatment.	No	Yes
Gives patients the ability to <u>control the flow of confidential health information</u> through informed consent (for disclosures and re-disclosures).	No	Yes - patients <i>usually</i> must consent for disclosures/re-disclosures.
Helps to <u>prevent negative consequences from law enforcement entities and individuals/organizations in the health care system</u> (including payment and operations) by requiring safeguards for disclosures and re-disclosures of SUD information.	No	Yes - Includes additional protections against unauthorized disclosures/re-disclosures.

Why HIPAA is Insufficient to Protect Confidential SUD Patient Information (con't.)

Issues	HIPAA	42 CFR Part 2
Prevents <u>disclosures of confidential SUD information to law enforcement entities, and judicial and administrative bodies</u> (e.g., divorce and child custody proceedings) based on existing state law (e.g., when a health care provider receives a subpoena, judicial or administrative order, or a discovery request).	Some protection.	Yes - Part 2 does not permit these disclosures <u>unless</u> there is a <i>special</i> court order, with greater review standards.

Why HIPAA is Insufficient to Protect Confidential SUD Patient Information (con't)

Patients and providers want *greater* protection for confidential health information:

- 97% of the public believe that health care providers and insurers should not be able to share their health information without their consent. [Amer. Nat'l Standards Poll, 2012].
- 80% of outpatient mental health clinicians said (if they were a patient), they would not want health care providers to routinely access their mental health records [J. of Am. Med. Infomatics Assoc., 2010].



4. SAMHSA's Proposed Rule and Part 2

- SAMHSA issued Proposed Rule amending 42 C.F.R. Part 2 on Feb. 9, 2016.
- SAMHSA has not yet issued a *Final Rule*.



SAMHSA's Proposed Rule and Part 2: Key Points

Consent



- ❑ New option for general designation in “**to whom**” section of consent form
 - Limited to those who have “treating provider relationship” with patient
- ❑ Can include past, present, and/or future treating providers
- ❑ Example: Consent to disclose X to HIE & “all my treating providers” (who are members of the HIE).

SAMHSA's Proposed Rule and Part 2: Key Points

Consent (con't)

- Prohibition on re-disclosure remains.
- “From whom” section of consent form would now need to name specific individual/entity.
- New patient right: Can request & receive list of individuals/entities to whom their info has been disclosed pursuant to a general designation consent.

SAMHSA's Proposed Rule and Part 2: Key Points



Research

- Changes make it more consistent with HIPAA research requirements (e.g., Institutional Review Board).
- Maintains core protections of 42 C.F.R. Part 2 (including prohibition on re-disclosure).

SAMHSA's Proposed Rule and Part 2:

Key Points

Qualified Service Organizations (“QSOs”)

- ❑ Proposed Rule adds “population health management” to list of services Qualified Service Organizations can provide to SUD programs.
- ❑ Cannot use Qualified Service Organization Agreement (“QSOA”) for “care coordination” (patient treatment component – should use consent instead).
- ❑ Can use QSOA for “medical *staffing* services” but not “medical services” (should get consent to make disclosures for treatment purposes).

SAMHSA's Proposed Rule and Part 2:

Key Points

Medical Emergency

- ❑ A patient's SUD info can be disclosed w/o consent to medical personnel to meet a "*bona fide medical emergency*" in which the patient's prior consent cannot be obtained."
- ❑ Currently - SUD information could be disclosed w/o consent "for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention."



SAMHSA's Proposed Rule and Part 2: Key Points

Security of Records

- ❑ Updated - more in line with HIPAA.



5. Sharing SUD Information in Today's Integrated Care Environment



Sharing SUD Information in Today's Integrated Care Environment

Co-Located & Integrated Services: What are they?

- ❑ The integration & coordination of primary health care and behavioral health care (i.e., mental health care and substance use disorder care)
- ❑ Common models:
 - Behavioral health care provided in primary care setting
 - Primary health care provided in behavioral health care setting
 - Patient-Centered Medical Homes and “Health Homes”

Sharing SUD Information in Today's Integrated Care Environment

Co-Located & Integrated Services: How do privacy laws apply?

REMEMBER:

- ❑ Any provider that meets the definition of a “program” & is federally funded must also follow **Part 2**.
- ❑ This includes, for example:
 - Free-standing alcohol/drug treatment provider
 - Identified unit or medical personnel within a general medical facility
 - Remember that in a general medical facility, it's the unit or personnel that's the “program,” not the whole facility.

Sharing SUD Information in Today's Integrated Care Environment

How do privacy laws apply?

- Many **state laws** add extra privacy protections for certain medical information, such as:
 - ▣ Mental health
 - ▣ Reproductive health
 - ▣ HIV/AIDS
- Providers generally must follow whichever law gives *patients* the most privacy protection.

Sharing SUD Information in Today's Integrated Care Environment

How do privacy laws apply?

CASE STUDY

- Better Health, a federally qualified health center, provides various health services, including primary care and drug treatment. Providers in all of Better Health's units conduct "SBIRT" (Screening, Brief Intervention, and Referral to Treatment).
- Does this mean Better Health is covered by 42 C.F.R. Part 2?



Sharing SUD Information in Today's Integrated Care Environment

How do privacy laws apply?



CASE STUDY – ANSWER

- IT DEPENDS on which providers at Better Health are conducting the SBIRT.
- *When a unit/provider within Better Health that is a Part 2 “program” conducts SBIRT, then the SBIRT services and all corresponding patient records are covered by 42 C.F.R. Part 2.*
- When a unit/provider within Better Health that is *not* a “program conducts SBIRT, then the services and records are not covered by 42 C.F.R. Part 2.

Sharing SUD Information in Today's Integrated Care Environment

Privacy Laws: How can Part 2 Information be Included in EHRs?

- ❑ Remember the ways in which a 42 C.F.R. Part 2 “program” can share info with co-located providers:
 - Written patient consent
 - Internal communications exception
 - Medical emergency exception
 - QSO Agreements.
- ❑ EHR systems must be able to comply with these requirements.



Sharing SUD Information in Today's Integrated Care Environment

Privacy Laws: How can Part 2 Information be Included in EHRs?

Implementing patients' consent choices:

For alcohol/drug records, EHR system must be able to:

- Ensure records are disclosed:
 - Only pursuant to *proper written consent*
 - Only with *amount/type* of info listed on consent form
 - Only for *purpose* listed on consent form
- Implement patients' *revocation* of consent
- Ensure info ceases to flow when consent *expiration* is reached
- Provide a *Notice Prohibiting Redisclosure* with the disclosed info

For Additional Information:

- Go to our website: www.lac.org for more resources:
<https://lac.org/resources/substance-use-resources/confidentiality-resources/>
- Follow the Legal Action Center on social media:
 - @lac_news



Thank You