

Training on the Privacy of Health and SUD Records: Improving Communications for Clients



June 30, 2021 – Session 2

: Sharing Information while protecting privacy as we communicate along the continuum of care

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She has practiced law for over 30 years, most recently serving as Legal Counsel to New Hampshire Governor Maggie Hassan and her senior health care policy advisor, working with the Governor on initiatives to expand access to health, mental health and substance use disorder services for New Hampshire citizens. Previously a shareholder in the firm of Rath, Young and Pignatelli, P.C., and Chair of the firm's Healthcare Practice Group, Lucy assisted providers and businesses navigate the changing health care environment. Prior to private practice, Lucy served as an Assistant Attorney General in the New Hampshire Department of Justice and began her practice in the San Francisco offices of Brobeck, Phleger and Harrison.

Acknowledgment

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Three Part Series

Session 1: Confidentiality of Substance Use Disorder Patient Records: 42 CFR Part 2 Highlights – What do you need to know?

June 4

Session 3: Important Changes on the Federal and State Level Coming to HIPAA/Part 2 that are Important to Substance Use Privacy

September 7

30 June

Session 2: Sharing Information while protecting privacy as we communicate along the continuum of care

Goals for Session 1 (June 7)

- 1 Reminder about basics of 42 CFR Part 2
- 2 Differences between HIPAA, FERPA and 42 CFR Part 2
- 3 How do you know if you are subject to 42 CFR Part 2 confidentiality? What if you are not?
- 4 Hypotheticals and Questions

Goals for Today: June 30

1

Deeper Dive into Consents and Exceptions

2

Part 2 and non-Part 2 Providers - Communications

3

The Impact of COVID on Best Practices – Telehealth and more..

4

Team Based Approach to Implementing Privacy Practices

Sharing Information while protecting privacy along the continuum of care



Question about Confidentiality

What is the source of your privacy obligations to your client?

Why does it matter?

What do you need to disclose? To whom?



Question

What's the best way to ask for help with one of my clients as an APG peer sponsor?

Answer

You can ask ANYONE for help if the information you share is “de-identified”. If you do not provide key identifying information, you can seek guidance and share details about your questions and needs. Always seek support and guidance from qualified individuals.

Part 2 is Just Part of the Many Privacy and Confidentiality Laws

Jurisdiction	Statute or Regulation	Scope
Federal	HIPAA Privacy Rules	Protects individually identifiable health information maintained by providers, payers and their contractors from disclosure. Heightened protections for psychotherapy notes.
	42 CFR Part 2	Protects the confidentiality of substance abuse patient records from disclosure without express patient consent.
	FERPA	Protects education records
New Hampshire	RSA 332-1:1	Medical information in the medical records in the possession of any health care provider shall be deemed to be the property of the patient
	RSA 318-B:12-a	Protects reports and records of treatment of minors for drug dependency as confidential
	RSA 330-A:32	Protects communications between mental health practitioners and patients as privileged
	RSA 330-C:26	Protects information held by a licensed alcohol or other drug use professional performing substance use counseling services unless permitted by 42 CFR Part 2
	RSA 135-C:19-a	Requires and/or permits disclosure of certain information by treating providers and community mental health centers to designated receiving facilities (DRFs) re: patients with SMI

42 CFR Part 2 Overview



A collection of 20 abstract geometric shapes and patterns arranged in a circular composition. The shapes include circles, squares, triangles, rectangles, and various patterns like dots, lines, and wavy lines. Some shapes are solid black, some are white with black outlines, and others are filled with a light blue color. The entire composition is enclosed within a large, faint circular border.

Remember Who You Are - What if?

If I am covered? Check List

1. Patient Records Security policies that meet the new Part 2 standards
2. Notice of privacy rights that meet Part 2 requirements
3. Non re-disclosure notices when Part 2 information disclosed with consent
4. Qualified Service Organization Agreements when necessary
5. Compliant consent forms and disclosures pursuant to a valid exception

If I'm not covered?

1. What privacy rules apply to information about my clients/patients?
2. Am I sharing information with a Part 2 Program?
3. Am I receiving information from a Part 2 Program?

Part 2 Requirements – Details

- I. Patient Records Security policies that meet the new Part 2 standards
- II. Notice of privacy rights that meet Part 2 requirements**
- III. Non re-disclosure notices when Part 2 information disclosed with consent
- IV. Qualified Service Organization Agreements when necessary
- V. Compliant consent forms and disclosures pursuant to a valid exception



Notice to Patients at time of admission to the Part 2 Program (2.22)

Federal law protects the confidentiality of SUD patient records!

A general description of the limited circumstances under which a Part 2 program may acknowledge an individual is present or disclose outside the program information identifying a patient as having or having had a SUD.

Violation of Part 2 is a crime and suspected violations may be reported.

Information related to patient's commission of a crime on the premises or against personnel is not protected.

Reports of suspected child abuse and neglect are not protected.

A citation to the federal law and regulations and where a .

May include summary of state law and additional consistent policies.

Part 2 Requirements – Details

- I. Patient Records Security policies that meet the new Part 2 standards
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Non-Disclosure Notice – **NEW**

Each disclosure with consent must be accompanied by a non-disclosure notice

OPTION 1 – long version

Is there a disclosure of part 2 information with a consent? If YES –

“This record which has been disclosed to you is protected by federal confidentiality rules (42 CFR Part 2). The federal rules prohibit you from making any further disclosures of this record unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed in this record or, is otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose (see 2.31). The federal rules restrict any use of the information to investigate or prosecute with regard to a crime any patient with substance use disorder, except as provided at 2.12(c)(5) and 2.65.”

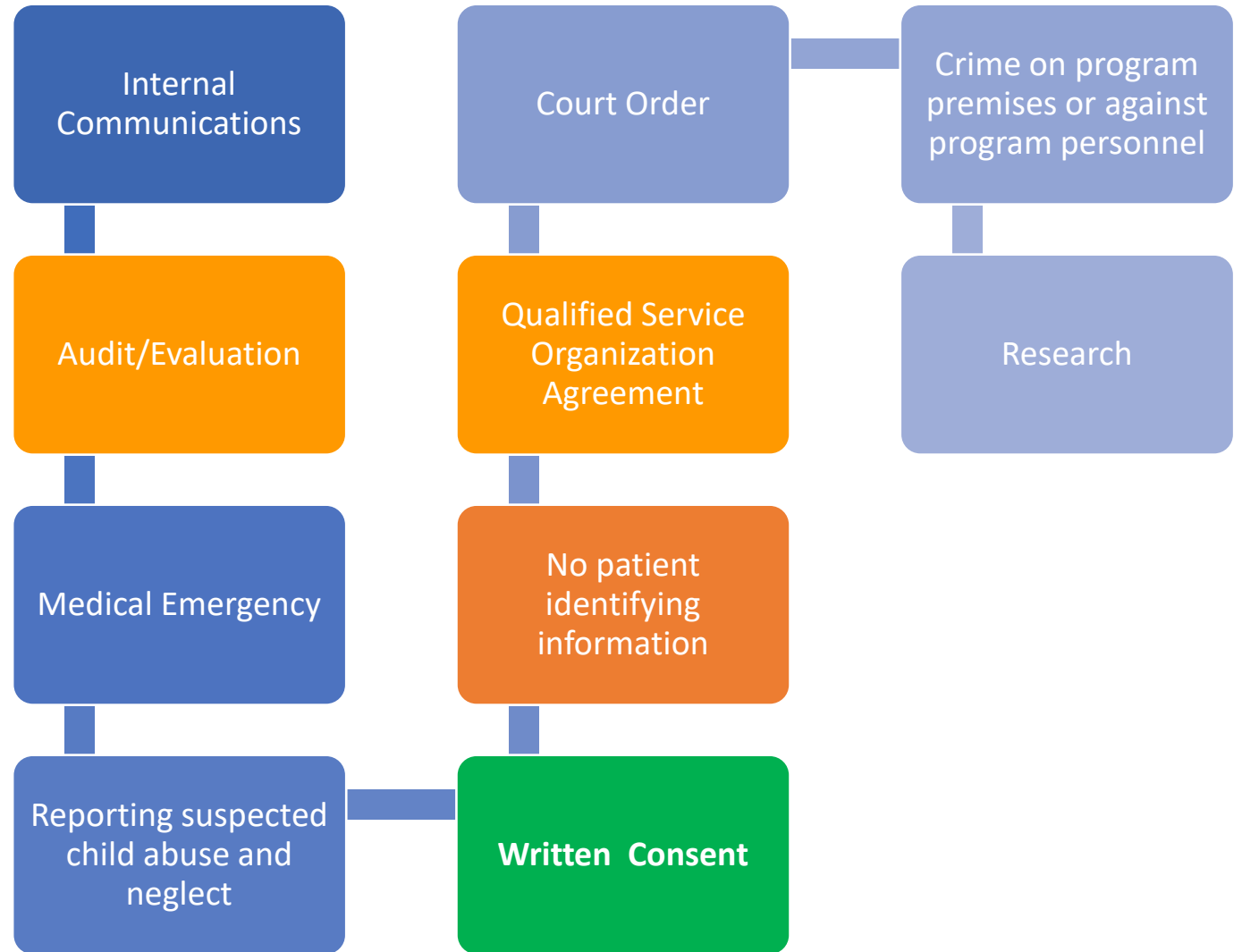
OPTION 2 – short version

“42 CFR part 2 prohibits unauthorized disclosure of these records”

Exceptions to 42 CFR Part 2's Prohibition on Disclosure of SUD Information



When Can Part 2 Records be Shared?



Internal communications

- It's OK to share information with other program staff
- It's OK to share information with the entity that has administrative control over the program (for example the records department or billing staff)
- *But only to the extent the recipient needs information in connection with the provision of drug/alcohol services*

Question

- *I'm a case manager with the MAT program at Recovery Center. Can I call my patient's peer sponsor about my concerns regarding our patient's recent missed appointments?*
- *Can I talk to the primary care provider on the SUD team about the test results that came back for our patient?*

Answer

- No: As a provider in a Part 2 Program, you can not call the peer sponsor unless your client has signed a consent that complies with 42 CFR Part 2.
- Yes: You can talk to other providers at your organization about your patient in connection with your patient's treatment.

Medical Emergency (2.51)



SUD treatment information may be disclosed by a Part 2 program to medical personnel to the extent necessary to meet a bona fide medical emergency in which the patient's prior consent cannot be obtained.

Medical Emergency (2.51)

- Immediately following disclosure, the Part 2 program must document in the patient's record:
 - The name of the medical personnel to whom disclosure was made and their affiliation with any health care facility
 - The name and individual making the disclosure
 - The date and time of the disclosure
 - The nature of the emergency



Question

- *A certified peer support worker who works for a Part 2 Program finds his peer overdosing. Can the recovery worker call for help?*
- *Can a mental health center providing SUD services to a patient inform an ER physician at the hospital whether an ER patient, who is apparently overdosing, is on Suboxone?*

Answer

YES – anyone can call for help in an emergency. In addition, a Part 2 provider can disclose information to a treating provider in an emergency when the patient is not able to consent. The provider should document the time and date in the record to whom the disclosure has been made, the nature of the disclosure, and the emergency at issue.

YES – the provider prescribing MAT may inform the emergency room of the treatment if the patient is not able to provide a consent.

Part 2 Requirements – Details

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Consent Elements – General

Name of Patient/Student

To Whom

From Whom

Why? What Purpose?

What information?

What authority?

Signature

Date/Duration/Revocation

42 CFR Part 2 Patient Consent (2.31)

Name of the Patient

Names of Part 2 entities or providers making the disclosure

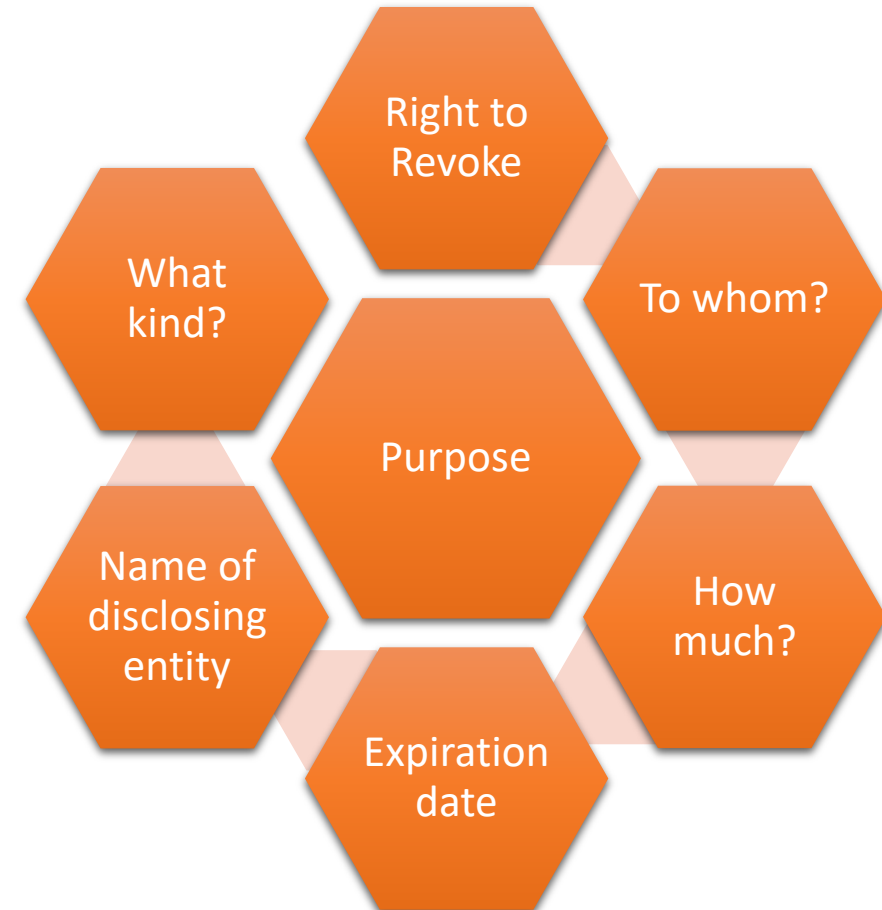
How much and what kind of information is to be disclosed including specific reference to SUD

“To Whom” is the disclosure being made?

The purpose of the disclosure

Right to revocation at any time going forward

The date, event or condition upon which the consent will expire.

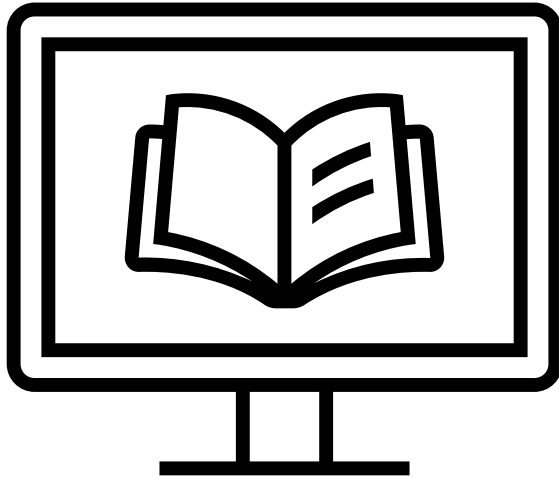


Payment and Health Care Operations by Consent

Patients can now consent to sharing Part 2 information for purposes of “**payment and health care operations**”

With consent, lawful holders can disclose necessary information with **their agents** for such purposes.

Magic Part 2 Language



Acknowledgement of Rights

- I understand that my substance use disorder treatment records are protected under the federal regulations governing Confidentiality and Drug Abuse Patient Records, 42 C.F.R. Part 2, and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 45 C.F.R. pts 160 & 164, and cannot be disclosed without my written consent unless otherwise provided for by the regulations. I understand that if my treating providers disclose my substance use disorder treatment records pursuant to this consent, the recipient will be provided a notice of non-disclosure.

Part 2 Consent - the details matter...NEW

To
Whom

2021

- The name of the individual(s) or
- The name of the entity(ies)
...to whom disclosure will be made.

Consent “To Whom” “From Whom”

I hereby authorize the disclosure of [my identity] and [substance use treatment] information both *orally and in writing* for the *purposes* of my ongoing treatment, care coordination and access to needed services/support (“my information”) as follows:

Disclosure by: (Part 2 Program) _____

My information may be *disclosed to* and *from* the following:

Entity: _____

Contact Info:

Entity: _____

Contact Info:

My health insurance or other third-party payer for payment and health care operations:

What? Purpose? E.g.,

Section III	
Reason for Disclosure* [To support my ongoing treatment and coordinated care]	Health information to be disclosed*: [My identity and information about my treatment and supports]

Health Care Payment and Operations....

I authorize [my treatment team] to use, disclose and communicate both verbally and in writing my health information including substance use and mental health information to and from my health insurance company or other entity responsible for my medical bills for the purpose of eligibility, payment, audit and health care operations. *[Either insert the name of the payer or refer to your program's policy regarding notification of payment]:*

Entity:

ID No.

Group No.:

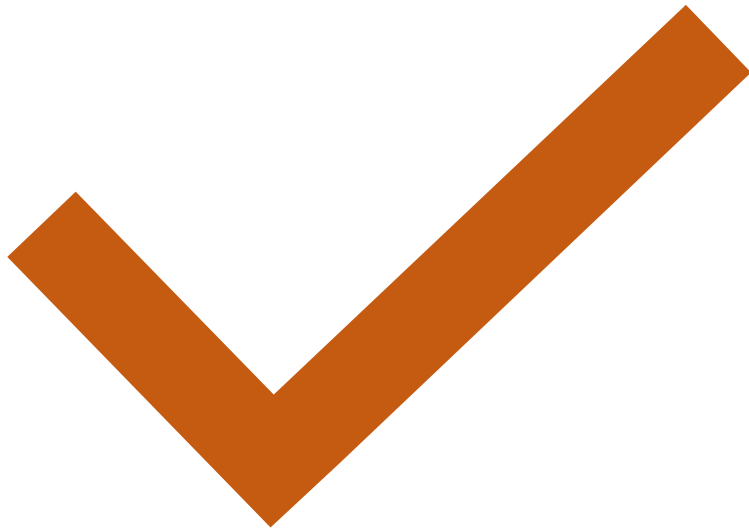
Expiration Revocation Signature

Section IV	
This authorization will remain in effect until revoked or shall expire on date or event specified below. I understand that I may revoke this authorization at any time by submitting written revocation in the manner specified by the disclosing entity, except to the extent that action has been taken in reliance on this authorization. If this authorization has not been revoked, it will expire on the date or completion of the event stated below. If no date or event is specified below, this authorization will expire in one year.	
Expiration Date or Event _____ (mm/dd/yyyy)	
• I understand that my substance use disorder records disclosed pursuant to this Consent are protected under federal law including 42 CFR Part 2 and cannot be redisclosed without my written consent unless otherwise provided for in the regulations. Any information disclosed pursuant to this Consent other than substance use disorder records or records protected under another state law may be subject to re-disclosure by the recipient. • If I have authorized disclosure to a generally described group or class of participants in an entity which is not my treatment provider, upon my written request, I must be provided a list of entities to which my information has been disclosed pursuant to that general designation.	
Signature of Individual*	Date* (mm/dd/yyyy)
Signature of Personal Representative (if applicable)* (identify relationship to individual below)	Date* (mm/dd/yyyy)
Relationship of Personal Representative to Individual (Personal representative shall submit proof of authority to the disclosing entity) ☐ Parent ☐ Legal Guardian ☐ Healthcare Power of Attorney ☐ Executor/Administrator ☐ Other ☐ N/A	



What if I'm not a Part 2 Provider and I Receive Part 2 information by phone?

- **Telephone call from SUD provider**
- A Substance Use Treatment provider treating a health center patient calls with patient consent to alert the primary care provider about the patient's discharge from the treatment program. The primary care provider staff writes the information down in the patient's chart.
- **Are patient notes now Part 2 records?**



New Definition of “Record” – oral communications

- **NO! The record of the oral communication with consent does not become ‘Part 2-protected’ record merely because it’s written down.**
- Records otherwise transmitted by a Part 2 program to health center PCP are still protected by Part 2 but may be segregated to prevent the entire medical record from special protections.
- Rule change facilitates necessary communication about treatment between treating providers.

Question – Non-Part 2 Program

What if I'm a non-Part 2 provider and I receive patient records from a Part 2 Program about the SUD treatment of one of my patients/clients? The patient has provided the Part 2 Program with consent to share with me. Can I include the information I receive in my records?

Answer

- Yes - If the patient consented to disclosing records to you, you can review the records. The records should have been provided with a non-disclosure notice clarifying that 42 CFR Part 2 protects the confidentiality of the records and they can't be redisclosed.
- These records remain protected by 42 CFR Part 2 even when in your possession.
- Best practice is for you to segment 42 CFR Part 2 protected records from your other records so your entire record is not subject to heightened confidentiality rules.

Question – Care Coordinator

- I'm a nurse coordinator at a primary care office where a patient is being treated with MAT by one of our family practitioners. The MD does not hold herself out as a SUD provider and we provide services as part of a general medical facility. I want to speak to the care manager at the IOD about one of our patients who has been referred there and needs an updated Rx for MAT. Do I need a Part 2 consent to do so from the patient?

Answer

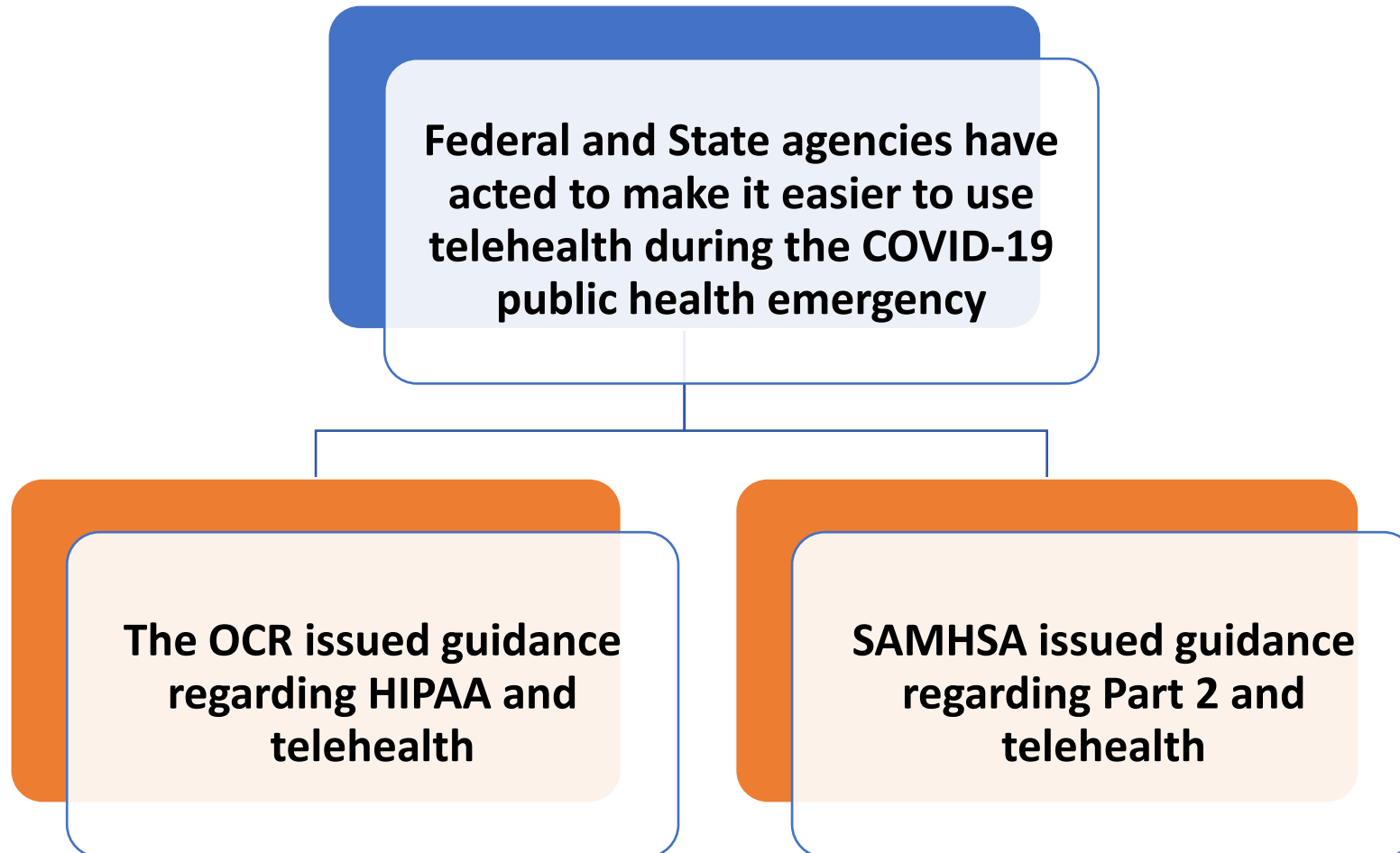
- *No:* The nurse manager is speaking to a treating provider, the care coordinator at the IOD about a patient. The nurse manager is not a Part 2 Program. No authorization is needed under HIPAA.
- *However!* The care manager at the IOD likely part of a Part 2 Program and a patient consent would be required to share the identity of the patient and any further information with the nurse manager at the primary care practice. The consent would name the primary care practice in the “to whom” section of the consent. Best practice for any primary care office offering MAT would be to seek valid consents to share information with other service and care providers.



COVID 19

- Federal and state orders during emergency relieved privacy restrictions to allow for new care pathways during COVID.
 - Federal Public Health Emergency is “likely” to last through 2021
 - Federal guidance from HHS waives certain HIPAA restrictions to allow for telehealth
 - Federal guidance from SAMHSA clarifies emergency exception during COVID under 42 CFR Part 2
- 

Telehealth During COVID-19



HIPAA Exceptions During Emergency

OCR Bulletin

Covered health care providers **will not be subject to penalties for** violations of the HIPAA Privacy, Security, and Breach Notification Rules that occur in **the good faith provision of telehealth** during the COVID-19 nationwide public health emergency.

Providers may use audio or video communication technology.

Telehealth may be provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19.

Providers can use any **non-public facing** remote communication products, including:

- Popular applications like Apple FaceTime, Facebook Messenger video chat, Zoom, and Skype;
- HIPAA-compliant vendors such as Skype for Business/Microsoft Teams, Updox, VSee, Zoom for Healthcare, etc.

Providers may NOT use public facing communication applications (Facebook Live, Twitch, TikTok, etc.)

OCR will not impose penalties against providers for the lack of a BAA with video communication vendors

Part 2 Exceptions During Emergency

Under Part 2, patient identifying information may be disclosed by a part 2 program or other lawful holder to medical personnel, without patient consent, to the extent necessary to meet a **bona fide medical emergency** in which the patient's prior informed consent cannot be obtained.

SAMHSA issued guidance “to ensure that substance use disorder treatment services are uninterrupted” during COVID-19

42 CFR Part 2 prohibitions on use and disclosure of patient identifying information would not apply to the extent the provider determines **that a medical emergency exists.**

Consent and Telehealth

Consents are still needed to for Part 2 programs to disclose Part 2 information even via telehealth

Part 2 allows e-signatures on consent forms

Consents are not needed to communicate with a patient.

Disclosures of patient-identifying information must be accompanied by a [Notice Prohibiting Redislosure](#)

Providers should obtain consent to disclose to the telehealth service if it will have access to patient information.

Bob Faghan, Live Free Recovery

Bob is a master licensed drug and alcohol counselor who obtained both his B.A. in Psychology and M.A. in Clinical Psychology from Bridgewater State University. He has 26-years of personal recovery and has spent the last 22-years as a clinician working with adolescents and adults who have substance use and mental health disorders. He founded Live Free Recovery in 2013 and developed a program of clinically supported peer recovery. Live Free Recovery became the pilot program for Anthem/Blue Cross in NH. In 2017 his book "Clinically Supported Peer Recovery- A comprehensive approach to treating those with substance use disorders" was published. He adapted this form of treatment to meet the needs of adolescents and developed an Intensive Outpatient Program that includes same age peer support into the group experience. He has provided substance abuse counseling for multiple school districts in New Hampshire including Farmington, Windham, and Dover. He has worked with the Rockingham County Commissioner to help develop a plan to implement transitional housing for people served by the county and consults for the University of New Hampshire Center for Disabilities which is working to implement a youth peer support program state-wide.

Questions

- What programs do you provide at Live Free Recovery?
- Why do you consider yourself a Part 2 Program?
- When do you first engage your staff in a discussion about confidentiality? Why?
- When do you first engage your patients in a discussion about confidentiality? Why?
- How do you work with your staff to manage questions about communications or confidentiality?
- You provide a lot of services to youth and in schools - What issues have come up and how have you dealt with them?
- What do you think your clients gain from the way you approach confidentiality practices?

Resources

<https://www.samhsa.gov/sites/default/files/does-part2-apply.pdf>

<https://www.samhsa.gov/sites/default/files/how-do-i-exchange-part2.pdf>

[Notice Prohibiting Redisclosure](#)

https://nahic.ucsf.edu/wp-content/uploads/2019/01/New-Hampshire-AYAH-Confidentiality-Guide_Final.pdf

Goals for September 7: 12-1

1

Review

2

Managing the Unwind Process

3

Federal Developments in HIPAA and Part 2

4

Q & A

Appendix

**Summary of 42 CFR Part 2 Rule Changes Effective
July 2020**



Franklin Pierce School of Law
Institute for Health Policy & Practice
Health Law & Policy

	HIPAA (health information) 45 CFR 164.508 “Authorization”	42 CFR Part 2 (substance use disorders), 42 CFR 2.31, 2.32 “Consent”	Family Education Rights Privacy Act (FERPA), 34 CFR 99.30, 99.33 “Consent”
Required Core Elements			
Whose information?	Name of Patient	Name of Patient	Name of student
What information – describe?	Must describe information in “specific and meaningful” way Remuneration: If purpose involves remuneration (e.g. marketing, sale of data), must state that disclosure will result in remuneration to covered entity	Must describe how much and what kind of information may be disclosed, including an explicit description of what substance use disorder information may be disclosed; must be limited to that information necessary to carry out the purpose of the disclosure	Must specify the records that may be disclosed
Who is disclosing the information?	Must include the name or other specific identification of person(s) or classes of persons authorized to make the disclosure	Must include the specific name(s) or general designation(s) of Part 2 program(s), entity(ies), or individual(s)	Must state the educational agency or institution disclosing the information

	HIPAA (health information) 45 CFR 164.508 “Authorization”	42 CFR Part 2 (substance use disorders), 42 CFR 2.31, 2.32 “Consent”	Family Education Rights Privacy Act (FERPA), 34 CFR 99.30, 99.33 “Consent”
Required Core Elements			
“TO WHOM” may the disclosure be made?	Authorization can be made without written consent to other covered entities for purposes of treatment, payment and health care operations. Written authorizations must identify the persons or class of person to whom disclosure it to be made	Must include the names of the individual(s) to receive the information, or for the following types of recipients: • Name of person or entity • Entities that facilitate health information exchange: the name of the entity or the name of the entity’s participant(s) that has a treating provider relationship with the patient	Must identify the party or class of parties to whom the disclosure may be made

	HIPAA (health information) 45 CFR 164.508 “Authorization”	42 CFR Part 2 (substance use disorders), 42 CFR 2.31, 2.32 “Consent”	Family Education Rights Privacy Act (FERPA), 34 CFR 99.30, 99.33 “Consent”
Required Core Elements			
Purpose(s) for which the information may be disclosed	Must describe each purpose of disclosure When initiated by individual, “at the request of the individual” is sufficient	Must describe each purpose of disclosure, as specific as possible	Must state the purpose of the disclosure
Signature of Individual	Must include signature of patient or authorized representative; if representative signs, must also include description of authority to act	Must include signature of patient or authorized representative	Must include signature of signature of parent or individual with authority to consent; a signature in electronic form must identify and authenticate a particular person as the source of the electronic consent and indicates such person’s approval of the information contained in the electronic consent
Signature of witness	None required	None required	None required
Date Signed	Must include date signed	Must include date signed	Must include date signed

Summary of Final Rule Changes

Definitions - Excludes certain oral communications and non-part 2 treatment records from the definition of “records.” To facilitate coordination of care activities between Part 2 programs and non-Part 2 providers.

Applicability - Information about an SUD recorded by a non-part 2 is not automatically rendered a medical record subject to Part 2

Segregated or Segmented records - Non-Part 2 providers may record and segment or segregate information from paper or electronic Part 2 records received from Part 2 providers without its record becoming subject to Part 2. The segregated or segmented records remain subject to Part 2.

Prohibition on redisclosure - Non-Part 2 providers do not need to redact information in non-Part 2 records and may redisclose with express consent

Disclosures Permitted with Written Consent - Disclosures for “payment and health care operations” are permitted with written consent; lists 18 qualifying activities, including care coordination and case management

Consent Requirements - A patient may consent to the disclosure of their information for operations purposes to certain entities without naming a specific individual

Summary of Final Rule Changes, cont.

Disclosures to Prevent Multiple Enrollments - Revises disclosure requirements to allow non-opioid treatment providers with a treating provider relationship to access central registries

Disclosures to Central Registries and PDMPs - Opioid treatment programs may disclose dispensing and prescribing data to prescription drug monitoring programs (PDMPs), subject to patient consent and State law.

Medical Emergencies - Authorizes disclosure of information to another Part 2 program or SUD treatment provider during State or Federally-declared natural and major disasters

Research - Disclosures for research under Part-2 are permitted by a HIPAA-covered entity of business associated to those who are neither HIPAA covered entities, nor subject to the Common Rule

Audit and Evaluation - Clarifies what activities are covered by the broad audit and evaluation exceptions

Undercover Agents and Informants - Extends court-ordered placement of undercover agents to 12-months

Disposition of Records - When an SUD patient sends an incidental message to the personal device of an employee of a Part 2 program, the employee may “sanitize” the device by deleting the message

Summary of Payment and Health Care Operations

Examples of permissible payment or health care operations activities under this section include:

- Billing, claims management, collections activities, ...related health care data processing;
- Clinical professional support services;
- Patient safety activities;
- Activities pertaining to: (i) The training of student trainees and health care professionals; (ii) The assessment of practitioner competencies; (iii) The assessment of provider or health plan performance; and/or (iv) Training of non-health care professionals;
- Accreditation, certification, licensing, or credentialing activities;
- Underwriting, enrollment, premium rating, and other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits...;
- Third-party liability coverage;
- Activities related to addressing fraud, waste and/or abuse;
- Conducting or arranging for medical review, legal services, and/or auditing functions;
- Business planning and development;
- Business management and general administrative activities;
- Customer services, including the provision of data analyses for policy holders, plan sponsors, or other customers;
- Resolution of internal grievances;
- The sale, transfer, merger, consolidation, or dissolution of an organization;
- Determinations of eligibility or coverage and adjudication or subrogation of health benefit claims;
- Risk adjusting amounts due based on enrollee health status and demographic characteristics;
- Review of health care services with respect to medical necessity, coverage under a health plan, appropriateness of care, or justification of charges;
- **Care coordination and/or case management services in support of payment or health care operations; and/or**
- **Other payment/health care operations activities not expressly prohibited in this provision.**