

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



June 4, 2021

A Little HIPAA, FERPA

And a lot 42 CFR Part 2

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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

This webinar was created by Health Law and Policy Programs, UNH School of Law, UNH Institute for Health Policy and Practice. The content is intended for education and training and not intended to serve as legal advice. Thank you to Lauren LaRochelle, JD and Bridget Drake for their work on this presentation. We appreciate the support from our colleagues at the UNH Institute on Disability and the help from Chris Alibrandi from Region 6 IDN.

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 Today

- 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



- Grateful



Who are we?



Integrated Delivery Networks

Providers who support, screen, diagnose, treat and refer patients across the primary care, mental health, SUD continuum of care.



Integrated Behavioral Health

Patient centered models of care that integrated health services or the body and mind. to allow support integrated treatment



Creating Connections

Develop and implement a system of care for youth ages 12-25 SUD, mental health and co-occurring illness including screening and brief interventions.



Peer Supports

SUD, mental health, family and adolescent peer support integrates recovering peers and pro-social activities into evidenced based clinical practice.

Sharing Information while protecting privacy along the continuum of care



Peer Recovery Core Competencies

- **Who else should peer workers consider collaborating with?**

Peer workers who feel comfortable doing so should consider collaborating with other service systems such as hospitals, housing and homeless services, employment assistance, child welfare agencies, and the criminal justice system.

- **What is meant by a support network?**

A support network refers to the relationships one may have with family, friends and others that provide encouragement and support to help individuals achieve their recovery goals.

Questions about You and Your Clients

What clinical behavioral health or other recovery services **do you** provide?

What services does your **organization** provide?

Who are your clients? What do they need?

Who do you need to share information with about your “client” inside your organization?

Who do you need to share information with about your “client” outside of your organization?

How does your client benefit from your sharing information?

What Confidentiality Obligations Apply to Me and My Communications?



Potential Sources of Confidentiality/Privacy Restrictions

Grants/Contracts

Professional Responsibilities / Codes of Ethics

Employer Policies

Statutes and Regulations

Client Requests

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

Age of Consent - NH

Substance Use	STDs	Medicaid Family Planning	Seriously Mentally Ill
<p>Minor age 12 or older may consent to treatment for drug dependency or any problem related to the use of drugs without the consent of a parent or legal guardian. RSA 318-B:12-a</p>	<p>Minor age 14 or older may voluntarily consent for medical diagnosis and treatment for sexually transmitted diseases, and a licensed physician may diagnose, treat or prescribe for the treatment of sexually transmitted diseases in a minor age 14 or older without the knowledge or consent of the parent or guardian. RSA 141-C:18</p>	<p>Adolescent minors who are eligible for Medicaid may receive confidential family planning services funded by Medicaid</p>	<p>Treatment information regarding seriously or chronically mentally ill person receiving services from community mental health program or state facility may be disclosed to a family member who lives with the person or provides direct care after the facility has received the written consent of the patient or, if consent cannot be obtained, has notified the patient in writing as to what is being disclosed, the reason for its disclosure</p>

LDACs/MDLACs

330-C:26 Privileged Communications Between Licensees and Certificate Holders and Their Clients.

– A person licensed or certified under this chapter or an employee of such person, shall not disclose any confidential information that the licensee, certificate holder, or employee may have acquired while performing substance use counseling services for a patient unless in accordance with the federal regulation regarding the Confidentiality of Alcohol and Drug Abuse Patient Records pursuant to 42 C.F.R. section 2.1 et seq.

- Source. 2008, 189:1, eff. July 1, 2008.

Peer Recovery Support Specialists - Ethics

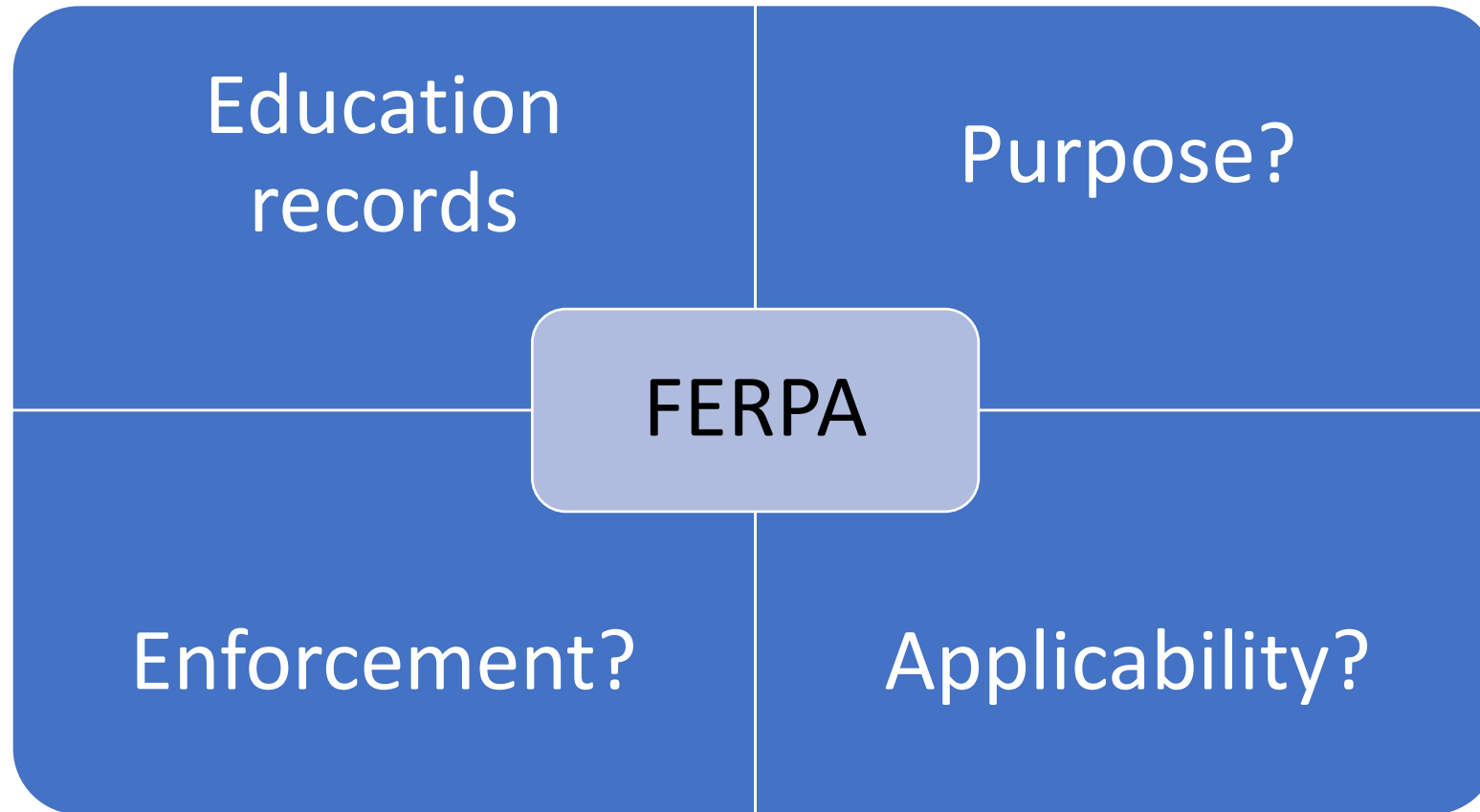
- National Certified Peer Recovery Support Specialist (NCPRSS) Code of Ethics [PDF of NCPRSS Code of Ethics](#)
- 10. Protect the privacy and confidentiality of persons served in adherence with Federal Confidentiality, HIPAA laws, local jurisdiction and state laws and regulations. This includes electronic privacy standards (Social Media, Texting, Video Conferencing etc.).

What Do You Want To Share About Your Client?

- This is a professional decision
- What does your client need you to share?
- Is someone telling you disclosures are obligated by law?
- Who do you ask for help?



Getting to know FERPA



What is an education record?

Education records are records that are directly related to a student and that are maintained by an educational agency or a party acting on its behalf. Records include, but are not limited to,

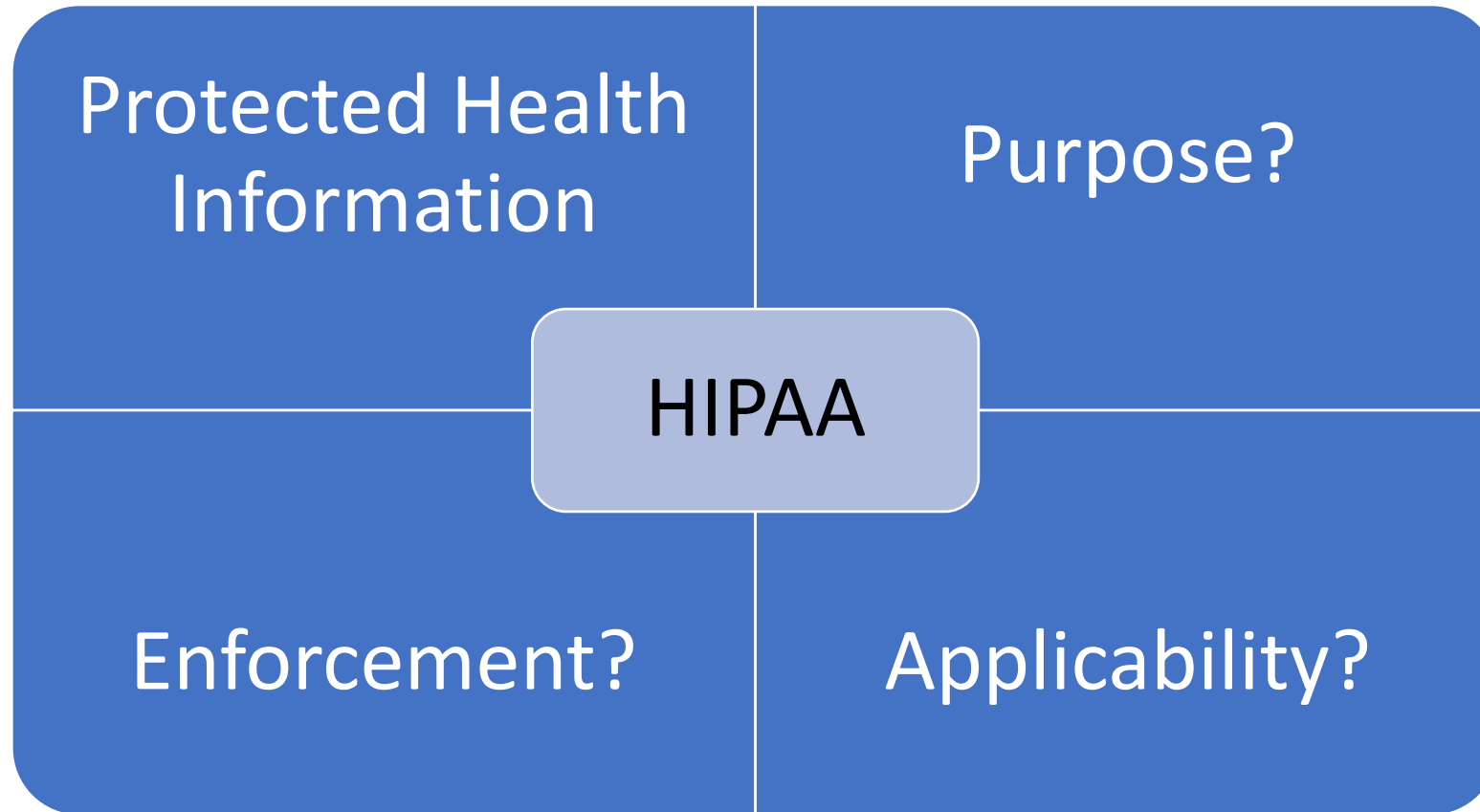
- Grades
- Transcripts
- Class lists
- Student course schedules
- **Health records (at the K-12 level),** and
- Student discipline files.

The information may be recorded in any way, including handwriting, print, computer media, videotape, audiotape, film, and email.

FERPA Umbrella

- K-12 school nurses and their records are typically protected by FERPA
- School nurses can receive information as treating providers from HIPAA covered entities and ask questions about diagnosis and treatment of their student
- However, unless there's an emergency, educators need consents to talk to outsiders about their students.

Getting to know HIPAA



Who is covered by HIPAA?

Covered entities and **business associates of covered entities**. A **covered entity** is:

1. A health care provider, both physical and behavioral health;
2. Health plan; and
3. Health care clearinghouse

The rule **also** applies to business associates of a covered entity.

Protected health information is individually identifiable health information held or transmitted by a covered entity or its business association.

Health care providers **may share protected health information** for treatment purposes without consent.

HIPAA Umbrella

- Health care providers who submit claims electronically can share medical information for treatment purposes without the patient's authorization
- This includes sharing information with other providers to refer a patient.
- This includes information about a patient's mental health.

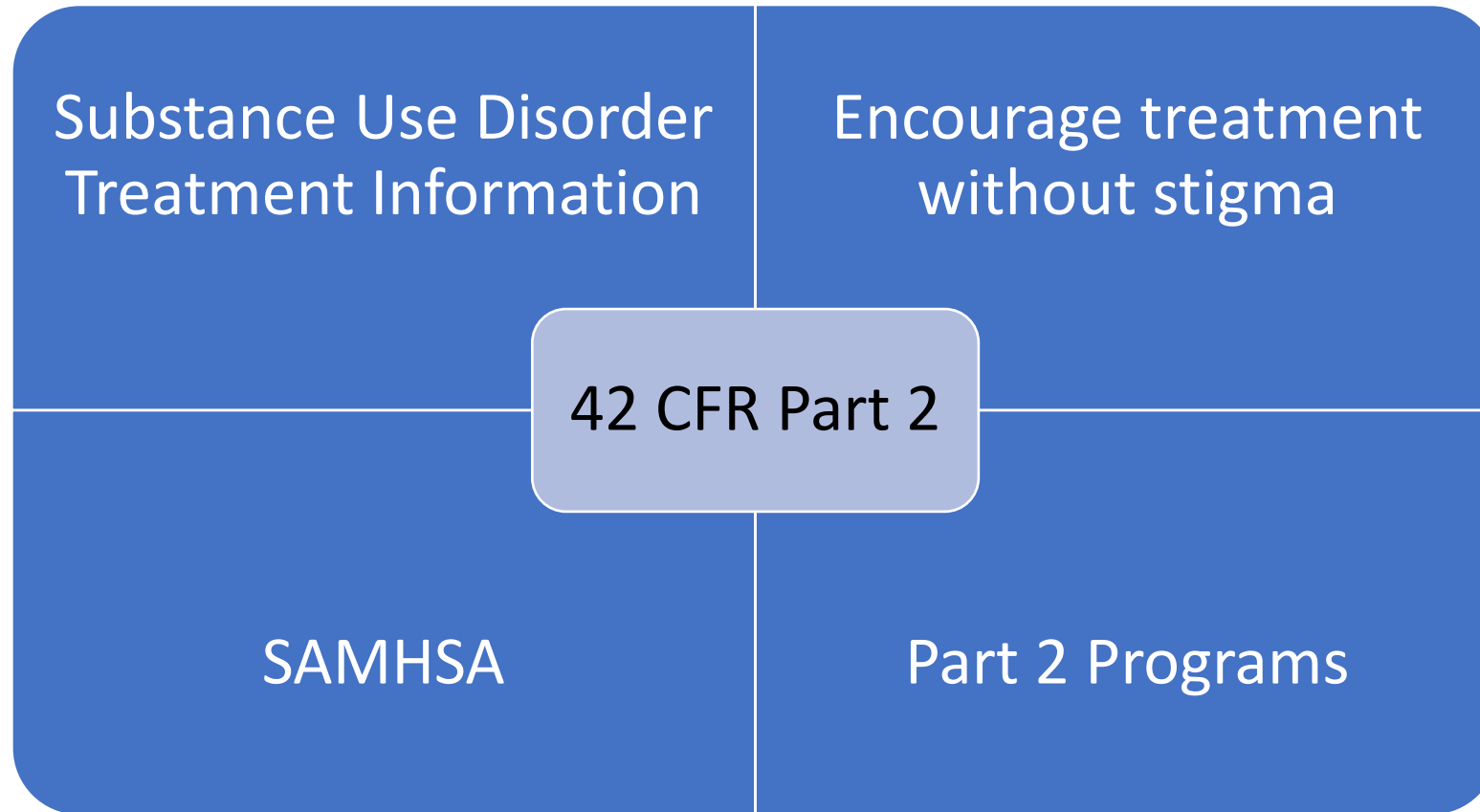
As a HIPAA Provider...

- Physicians may disclose Private Health Information (PHI) (whether orally, on paper, **by** fax or electronically) for treatment, payment and health care operations **without consent** or authorization.
- HIPAA treats **mental health** information the same as other information and health care providers may disclose to other health providers any protected health information (PHI) contained in the medical record about an individual for treatment, case management, and coordination of care.
 - *except that* covered entities must obtain individuals' authorization to disclose separately maintained **psychotherapy session notes** for such purposes

As a HIPAA Provider – Substance Use

- Physicians can share health information with family and close friends who are involved in care of the patient if the provider determines that doing so is in the best interests of an incapacitated or unconscious patient and the information shared is directly related to the family or friend's involvement in the patient's health care or payment of care.
- *For example, a provider may use professional judgment to talk to the parents of someone incapacitated by an opioid overdose about the overdose and related medical information, but generally could not share medical information unrelated to the overdose without permission.*

Getting to know 42 CFR Part 2



42 CFR Part 2 General Rule

42 CFR Part 2 regulations (Part 2) serve to protect patient records created by federally assisted programs for the treatment of substance use disorders (SUD)

With limited exceptions, 42 CFR Part 2 requires patient consent for disclosures of protected health information even for the purposes of treatment, payment, or health care operations.

Who is a Part 2 Provider or Program?

A Part 2 program is

1. An individual or entity (or a unit in a general medical care facility) that holds itself out as providing and does provide SUD treatment, diagnosis or referral; or
2. Medical personnel or staff in a general medical facility whose primary function is the provision of such services and who are identified as SUD providers; and
3. *That are federally “assisted”*

Who is a Part 2 Patient?

A **Part 2 patient** is any individual who has applied for or been given a diagnosis, treatment, or referral for treatment for a SUD at a Part 2 program

- “**Treatment**” means the care of a patient suffering from a SUD, a condition which is identified as having been caused by the SUD, or both, in order to reduce or eliminate the adverse effects on the patient

What's Protected?

A **Part 2 Program** is prohibited from disclosing any information that would identify a person as having or having had a SUD unless that person provides a written consent, or the disclosure meets another exception.

Remind Me – Is there a difference between HIPAA and Part 2?

HIPAA

HHS

Applies to covered entities (healthcare providers, health plans, healthcare clearinghouses) and Business Associates

Protects: privacy and security of general health information

Purpose: to protect health data integrity, confidentiality, and accessibility

Permits disclosures *without* patient consent for treatment, payment and healthcare operations and for public health purposes.

42 CFR Part 2

SAMHSA

Applies to SUD patient records from federally-assisted “Part 2 programs”

Protects: privacy and security of records identifying individual as seeking/receiving Substance Use Disorder (SUD) treatment

Purpose: to encourage people to seek Substance Use Disorder (SUD) treatment and reduce stigma through enhanced confidentiality

Prohibits disclosures except with a patient consent for treatment, payment, and healthcare operations, with limited exceptions

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?



Am I covered by 42 CFR Part 2?



Clarifying Steps - Does 42 CFR Part 2 apply?



Identify which providers or programs hold themselves out as providing and do provide SUD diagnosis, treatment or referral to treatment



Are any providers subject to 42 CFR Part 2 due to state regulation?

Who Is a Part 2 Programs

A Part 2 program is:

- An individual or entity (or a unit in a general medical care facility) that **holds itself out as** providing **and does provide** SUD treatment, diagnosis or referral for treatment; or
- Medical personnel or staff in a general medical facility **whose primary function is** the provision of SUD services and who are identified as SUD providers; and
- Is federally “assisted” (with the exception of some Veterans’ Administration services).



Holds herself
out as...

- An entity or person, or unit in a medical facility...
- Who holds itself out as providing **and** does provide SUD treatment, diagnosis or referral for treatment services

Entities

- A professional whose primary function as part of an entity is the provision of SUD services
- Who is/are identified as SUD provider/s

LDACs

- Licensees when licensure rules or ethics requires 42 CFR Part 2 compliance

Examples of “Programs”

- A freestanding drug/alcohol treatment program
- Primary care providers who provide drug/alcohol services as their principal practice
- A detox unit
- Outpatient or inpatient drug program within a general medical facility
- An addiction specialists working in a primary care practice
- A LDAC working in a peer support program in New Hampshire

Health Centers

Federally qualified health centers would generally be considered “general medical care” facilities.

Providers who work in a health center would only meet Part 2’s definition of a program if 1) they work in an identified unit within the health center that holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment, or 2) the primary function of the provider is alcohol or drug abuse diagnosis, treatment or referral for treatment and they are identified as providers of such services.

Not even primary care provider who prescribes controlled substances meets the definition of Part 2 “program”.

Question

A family practitioner screens a patient using Screening, Brief Intervention and Referral to Treatment (SBIRT) and refers the patient to a SUD provider for follow-up assessment.

Does conducting SBIRT mean the practitioner is a “Part 2” program?

Answer:

No....

Unless the family practitioner holds herself out as providing and does provide SUD services.

Question

A primary care provider conducting an annual visit on a patient, screens the patient for moderate depression and a reported increasing dependence on alcohol. Physician refers the patient to the clinic's LDAC to discuss options after the visit.

Is the patient a “Part 2” patient? Is the LDAC a Part 2 program?

Answer

No – the patient is a primary care patient and the PCP is subject to HIPAA privacy rules, allowing the PCP to share treatment information with the LDAC.

Treatment by LDAC: The LDAC, if licensed in NH, must comply with 42 CFR Part 2. His treatment records will be protected by 42 CFR Part 2 and can't be disclosed to except consistent with an exception.

Question

A school nurse refers a teen to an independent APG (Alternative Peer Group) program. The school nurse discusses the teen with the program coordinator and asks to be kept up on the student's progress.

Is the school nurse a Part 2 Program?

Can the APG coordinator call the school nurse with updates?

Answer

No!

The School Nurse is not a Part 2 Program. The school nurse's communications about a student are governed by FERPA. The school nurse would need a consent from the parent to disclose information to the APG coordinator

No!

Even if the APG is not a Part 2 Program, the APG coordinator can not call the school nurse with updates **unless** such a disclosure is consistent with its ethical obligations and understandings with the teen participant.

Question

A patient of an outpatient ambulatory surgical center discloses in his pre-operative visit for his knee arthroscopy that he had been treated 5 years previously at an inpatient facility for SUD.

Is the patient a “Part 2” patient?

Answer

No!

When a non-Part 2 provider asks a question to illicit information about a patient's substance use, the information exchange does not result in the creation of Part 2 protected information. If a HIPAA provider asks the question, the information is protected by HIPAA.

Question

A mother calls 211 seeking advice on where to take her son who she just revived with Narcan.

Is 211 a “Part 2” Program?

Answer

No!

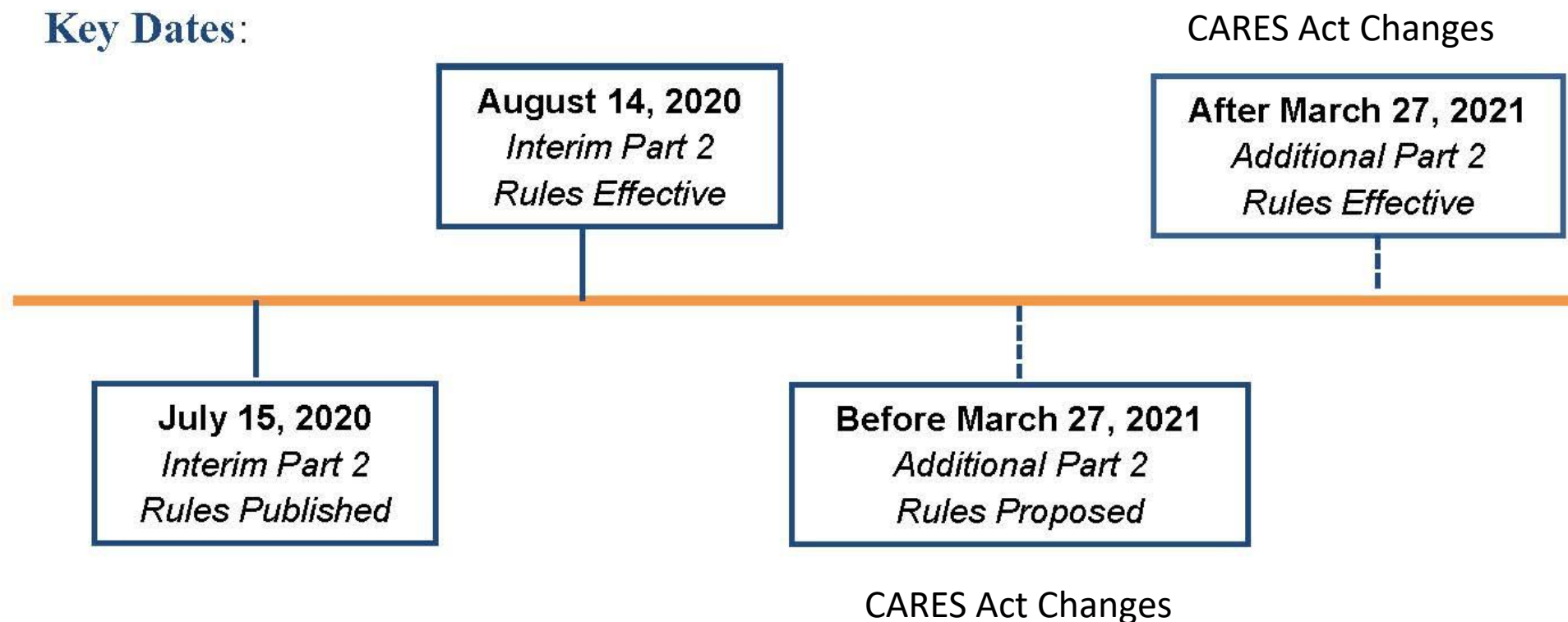
211 is not a Part 2 program. 211 is a call center and does not retain any patient identifying information. The mother is seeking help on behalf of her son.


42 CFR Part 2 Overview



42 CFR Part 2 Rules – CARES Act

Key Dates:



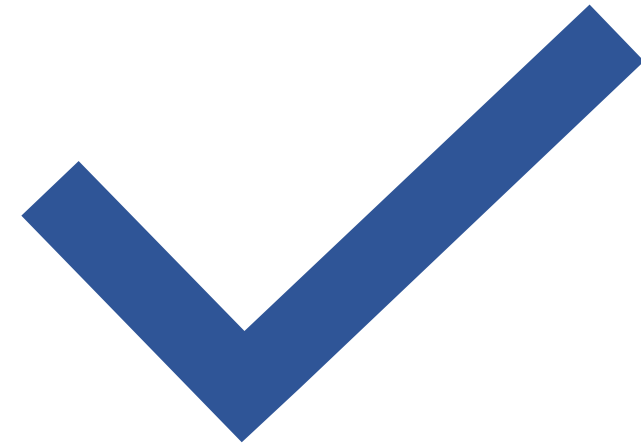


What happens
if I am covered
by 42 CFR Part
2? Or not?



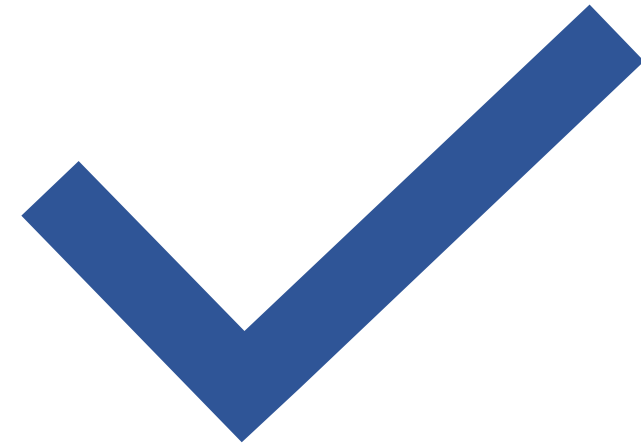
Part 2 Requirements – Check List

- 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



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**
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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

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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”

Part 2 Requirements – Details

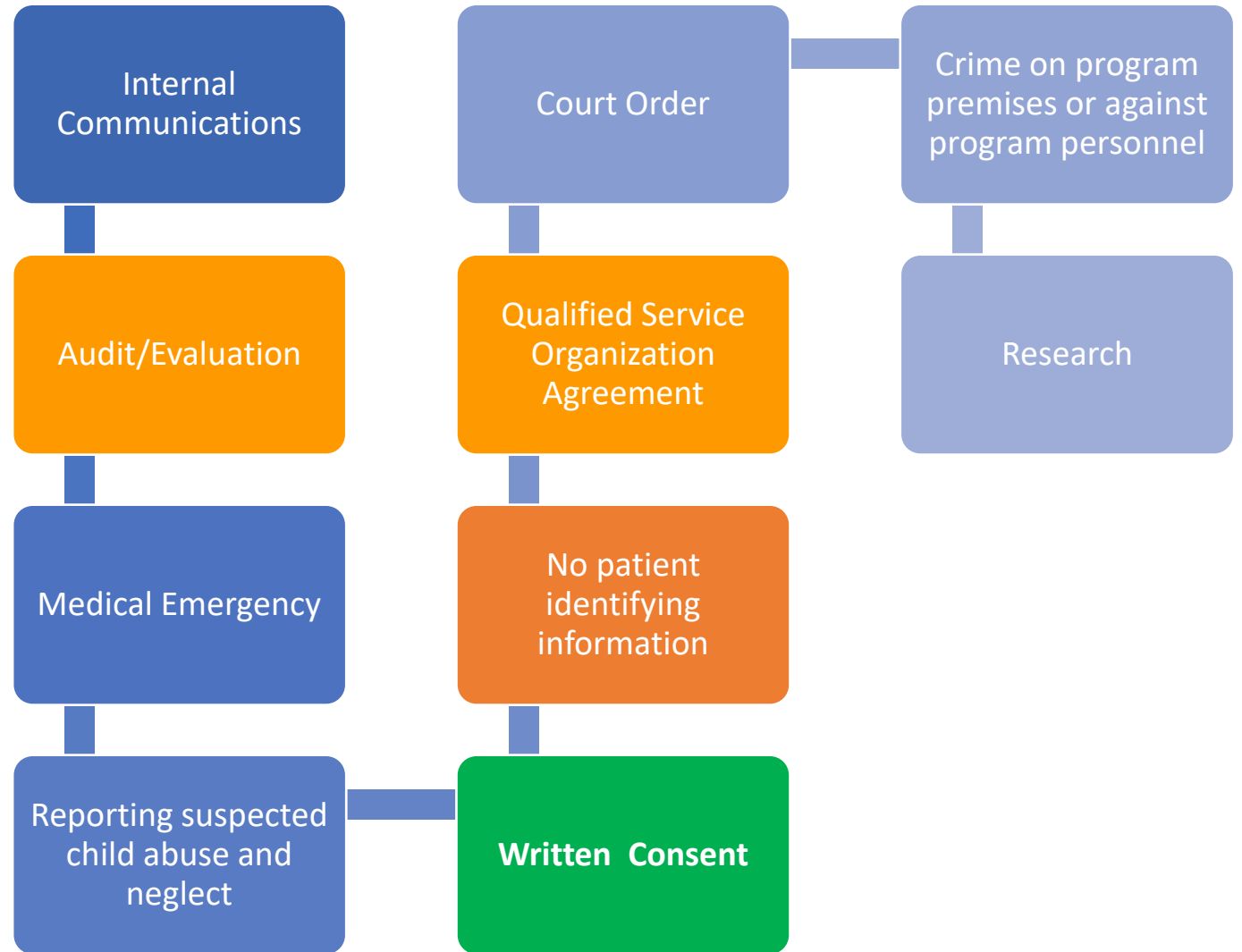
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Exceptions to 42 CFR Part 2's Prohibition on Disclosure of SUD Information



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.

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.

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)



Bona Fide Medical Emergency

- ❖ Determination made by any health care provider treating the patient for the medical emergency
 - ❖ Immediate threat to health of the individual
 - ❖ Requires immediate medical attention
- ❖ **Consent Cannot be Obtained**
- ❖ Patient must be incapable of consenting
- ❖ However, if patient *refuses consent*, then cannot share info under this exception

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?*

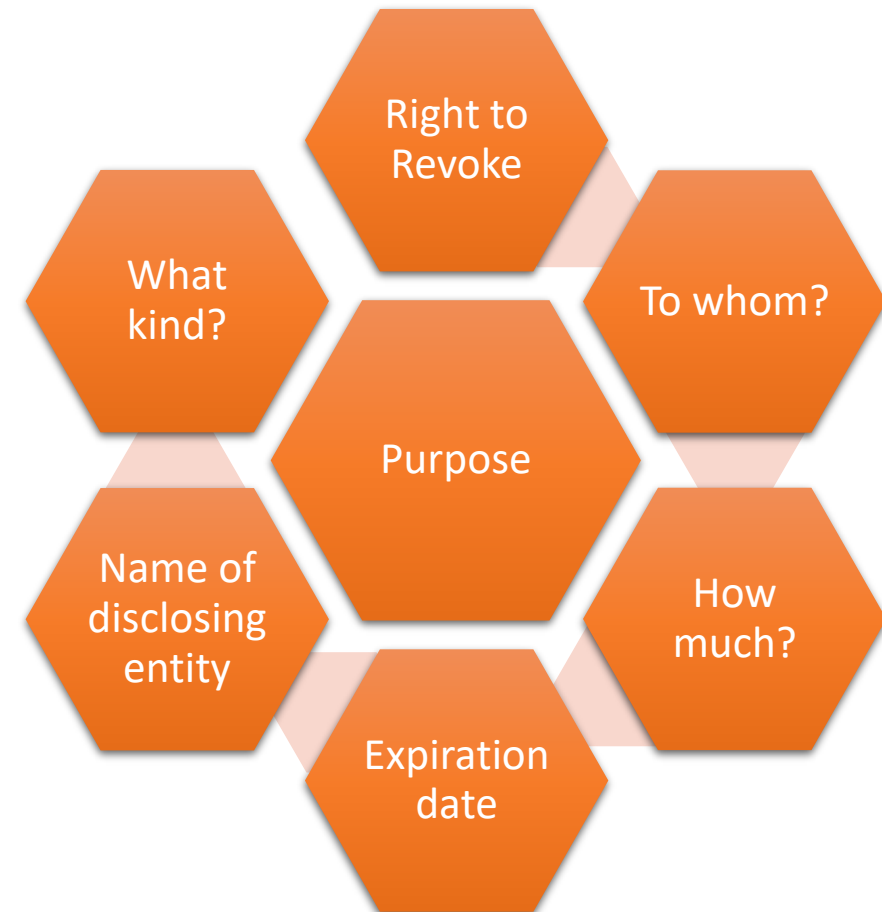
Answer

YES – a Part 2 provider can disclose information 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.

Patient Consent: Elements (2.31)

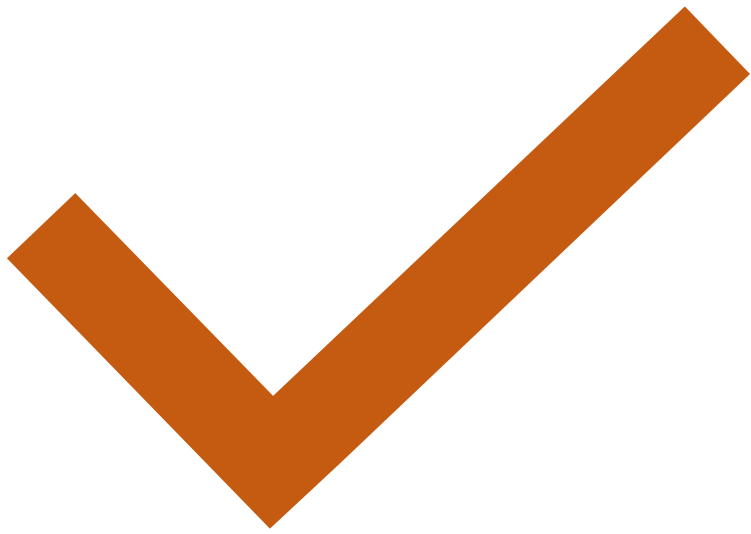
- 1) Name of the Patient
- 2) Names of Part 2 entities or providers making the disclosure
- 3) How much and what kind of information is to be disclosed including specific reference to SUD
- 4) “To Whom” is the disclosure being made?
- 5) The purpose of the disclosure
- 6) Right to revocation at any time going forward
- 7) The date, event or condition upon which the consent will expire.





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

- **Telephone call from SUD provider**
- A Substance Use Treatment provider treating a health center patient calls with patient consent to alert the health center PCP to the patient's discharge from the treatment program. Health center staff writes note in primary care 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

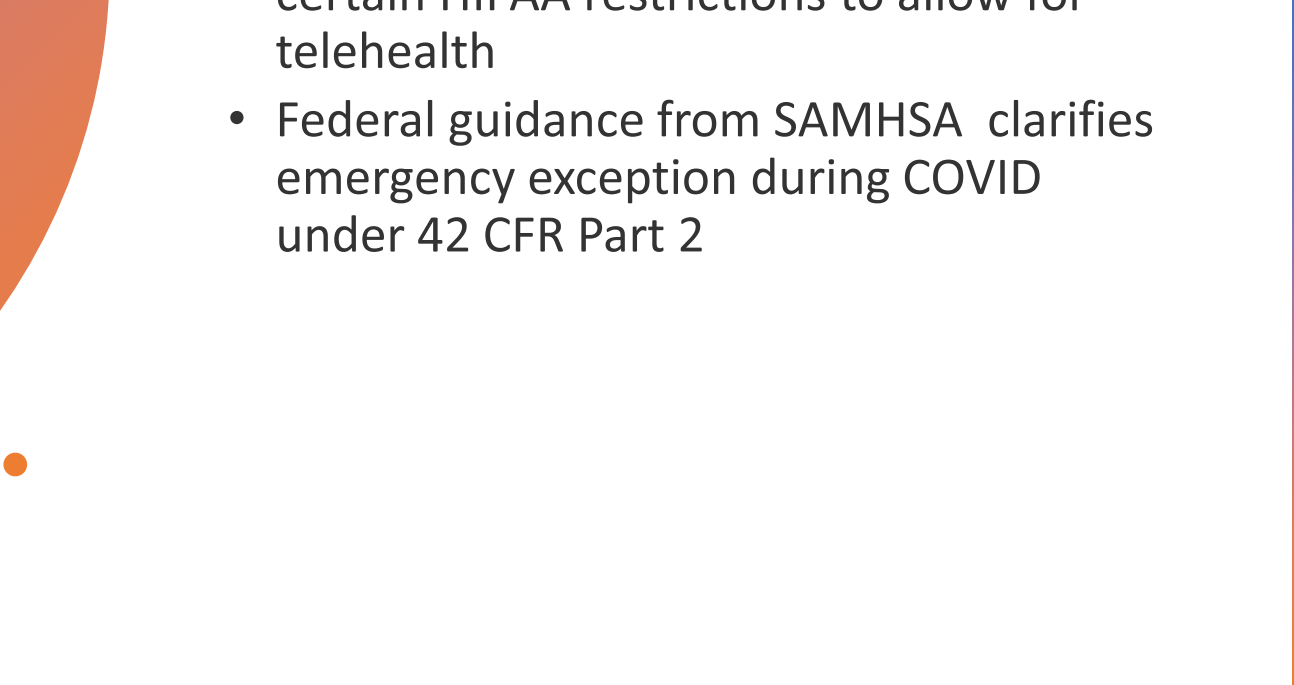
- What if I'm a non-Part 2 provider and I receive patient records from a Part 2 Program about the SUD treatment of one of my patients/clients? Can I include them in my records?

Answer

- 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.



COVID 19 – update on June 30

- Federal and state orders during emergency relieved privacy restrictions to allow for new care pathways during COVID.
 - 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
- 

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 June 30

1

Deeper Dive into Consents and Exceptions

2

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

3

Interactions between Part 2 and non-Part 2 Providers

4

Team Based Approach to Implementing Privacy Practices

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

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