

Confidentiality of Substance Abuse Treatment Records in Integrated Care Setting

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What do Integrated Practices Need to Do about Privacy and Confidentiality?

- ❖ Brief overview of Existing Law Relating to Privacy and Confidentiality – 42 CFR Part 2
 - ❖ Who does it apply to?
 - ❖ When will proposed changes be final?
 - ❖ How do the rules apply to minors?
- ❖ Steps to take towards compliance for integrated practices

Confusion Due to Proposed Rule Changes

- ❖ First substantial update since 1987 to Confidentiality of Alcohol and Drug Abuse Patient Records regulations -designed to:
 - ❖ Encourage care integration and information exchange
 - ❖ Update consent form requirements
 - ❖ Address healthcare technology changes
 - ❖ Address re-disclosures and accounting of disclosures
 - ❖ Address research uses of data
 - ❖ Address security of records
- ❖ Comment period ended on April 9, 2016
- ❖ In effect 180 days after publishing final rule

Overview of Applicable Privacy and Confidentiality Law

Jurisdiction	Statute/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
New Hampshire	RSA 332-I: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.

HIPAA v. Part 2

HIPAA - Who's Covered?

1. Health care providers, both physical and behavioral health
2. Health plans
3. Health care clearinghouses
4. Business Associates

Part 2 – Who's Covered?

1. An individual or entity (or a unit in a general medical care facility) that holds itself out as providing and does provide alcohol/drug abuse diagnosis, treatment or referral for treatment services; *or*
2. Medical personnel or staff in a general medical care facility whose primary function is the provision of such services and who are identified as SUD providers; *and*
3. That are federally funded
4. [Providing SBIRT services does not make a provider Part 2!]

HIPAA v. Part 2

HIPAA Permitted Disclosures

- With a patient's valid verbal or written authorization.
- After a patient receives notice of the provider's privacy policy, a covered provider may disclose health information for the purposes of: Treatment; Payment; Health care operations; other purpose as consent authorizes.

Part 2 Permitted Disclosures

- **Express Consent**
- Internal communications
- Medical emergency
- Qualified service organization agreement
- De-identified information
- Crime on program premises
- Research
- Audit
- Court order
- Reporting child abuse/neglect

HIPAA What is Covered?

- All individually identifiable health information
- Psychotherapy notes documenting or analyzing a conversation during a private counseling session or group session must be maintained separately.

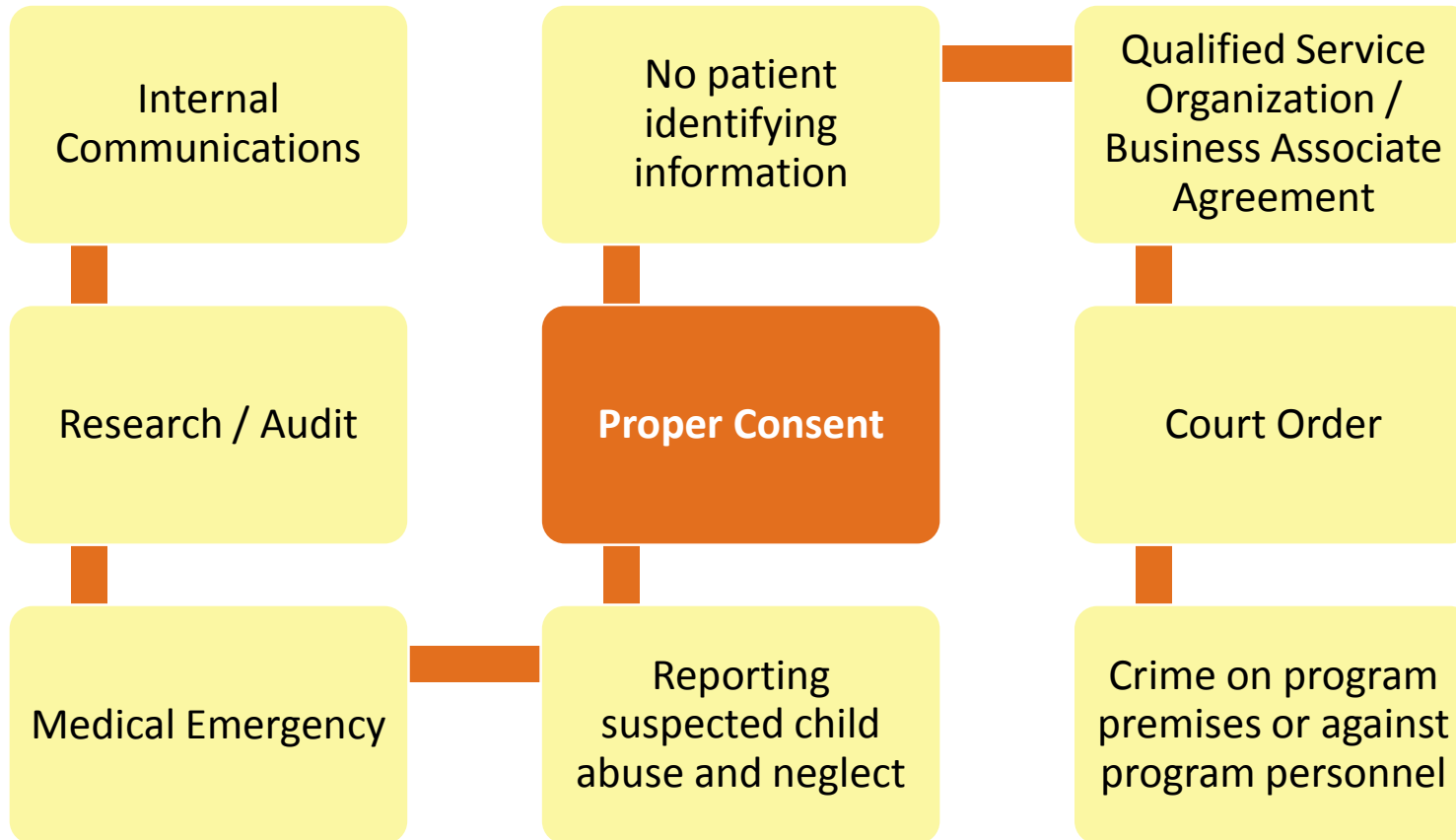
Part 2 What is Covered?

Information, whether or not recorded, which:

1. Would identify a patient as an alcohol or drug abuser
2. Is drug alcohol abuse information obtained by a federal program for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment or making a referral for that treatment.

42 C.F.R. Part 2:

Permitted Disclosures



Part 2 Consents/Disclosures/Notices

- ❖ Consent form must be in writing, include the Part 2 bells and whistles and must:
 - ❖ Clearly explain your integrated delivery model of practice
 - ❖ Identify your Part 2 providers as the entity making the disclosure
 - ❖ Describe how treatment records will be disclosed for the purpose of treatment and coordinated care in an integrated care setting
 - ❖ Clarify “to whom” the disclosure will be made including treating providers as part of the integrated delivery model of care
 - ❖ Let the patient know of his/her right to revoke
 - ❖ Identify a date the consent expires – can be longer than a year!
 - ❖ Be signed and dated by the patient
- ❖ Part 2 providers must also provide notice of federal confidentiality obligations
- ❖ Part 2 providers must also include appropriate “disclosure language” when Part 2 records are “disclosed”

Consents - Special Language:

- Authorization:
- “I understand that my alcohol and/or drug treatment records are protected under state law, the federal regulations governing Confidentiality and Drug Abuse Patient Records, 42 CFR Part 2 (“Part 2”), as amended, and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and cannot be disclosed without my written consent unless otherwise permitted by the regulations. I also understand that I may revoke this consent at any time except to the extent that action has been taken in reliance on it, and that in any event this consent expires automatically when.....”
- “I understand that I might be denied services if I refuse to consent to a disclosure for purposes of treatment, payment or health care operations.”

Disclosure - Special Language

“This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patients.”

Confidentiality and Minors

- ❖ Both HIPAA and 42 C.F.R. Part 2 leave the issue of who is a minor and whether a minor can obtain health care or alcohol/drug treatment without parental consent entirely to State law.
- ❖ *In New Hampshire* a minor 12 years old or older may seek and be treated for drug dependency or any problem related to the use of drugs without parental consent (RSA 318-B:12-a)

Specific Laws of Minor Consent

Providing Emergency Services	Minor Seeking Drug and Alcohol Abuse Treatment (CFR Part 2 Discussion)
Minor Seeking STD Treatment	Minor Seeking Abortion Services
Minor Seeking HIV Testing	Emancipated Minor (rare cases)

Other issues re minors in NH

- ❖ The age of majority in NH is 18 (RSA 21-B:1)
- ❖ NH law provides that a health care provider can only perform an HIV test with the consent of the individual being tested (RSA 141-F:5)
 - ❖ Example if a 15 year old is seeking an HIV test, that 15 year old must consent to the test even if the parent does not consent
 - ❖ Results of a test may only be given to the individual tested (RSA 141-F:7, II)
 - ❖ If the individual tested is under 18 or lacks the mental capacity to understand a *positive* HIV test, the provider **may** disclose to the parent or guardian (RSA 141-F:7, III)
- ❖ A provider is not liable for failing to obtain consent when treating a patient in an emergency no matter what age (RSA 153-A:18)
- ❖ A minor who is 14 years or older may seek and be treated for a sexually transmitted disease (STD) without the consent of a parent or guardian (RSA 141-C:18)

Compliance Steps

- Who are your Part 2 providers or “units” who create confidential records?
- Who are your Part 2 patients who must sign Part 2 consents?
- Assess your practice patterns in order to determine “to whom” “from whom” consent needs:
 - What entities/providers do Part 2 providers share information with?
 - What behavioral health care entities/providers do providers need information from?
- Review your policies and patient consent forms and adapt to integrated care model.
- Provide patients with appropriate Notice of federal confidentiality requirements at the time of treatment if possible (2.22)
- Assess your EMR capabilities

What are your BHI Practice Needs?

- System of Care: Large integrated practice setting with system wide EMR; General & Behavioral Health Care integration: Patient is co-served by physical and behavioral health providers and care is coordinated; information must be available along the treatment spectrum.
- Coordinated Care: Part 2 providers are coordinating care with outside practices and at patient transition points: Patient moves from one care provider to another and care teams conduct formal hand off needing information to flow in both directions.

Resources

- Proposed regulations for Part 2 –
<https://www.gpo.gov/fdsys/pkg/FR-2016-02-09/pdf/2016-01841.pdf>
- [http://lac.org/wp-content/uploads/2014/12/Video DVD Training Workbook 2014.pdf](http://lac.org/wp-content/uploads/2014/12/Video_DVD_Training_Workbook_2014.pdf)
- [https://www.oregon.gov/oha/amh/docs/Legal Action Center Questions and Answers 42 CFR Part 2.pdf](https://www.oregon.gov/oha/amh/docs/Legal_Action_Center_Questions_and_Answers_42_CFR_Part_2.pdf)
- <http://www.samhsa.gov/about-us/who-we-are/laws/confidentiality-regulations-faqs>
- <https://oasas.ny.gov/mis/forms/trs/index.cfm>

Questions?

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