Virtual Service Delivery During COVID-19
Guidance on Federal Privacy Laws for Behavioral Health Practitioners and Peer Support Specialists

CoE-PHI Presentation to the Mountain Plains ATTC (Region 8)
July 29th, 2020: 1:00 PM MT

Funded by Substance Abuse and Mental Health Services Administration
Center of Excellence for Protected Health Information

Funded by SAMHSA, the CoE-PHI develops and disseminates resources, training, and TA for states, healthcare providers, school administrators and individuals and families to improve understanding and application of federal privacy laws and regulations, including FERPA, HIPAA, and 42 CFR Part 2, when providing and receiving treatment for SUD and mental illness.

Resources, training, technical assistance, and any other information provided through the CoE-PHI do not constitute legal advice.
# Presenters

<table>
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<tr>
<th>Name</th>
<th>Title</th>
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Presentation Objectives

- Identify basic requirements of 42 CFR Part 2 and HIPAA
- Cite at least two ways privacy laws apply to telehealth in accordance with recently released SAMHSA and OCR guidance
- Explore recent changes to federal privacy laws outlined in the CARES Act and recent Part 2 amendments
- Describe how to access resources and TA provided by the CoE-PHI
OVERVIEW

FEDERAL PRIVACY LAWS
HIPAA

**Applies to** covered entities (healthcare providers, health plans, healthcare clearinghouses) and BAs
- 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

42 CFR Part 2

**Applies to** SUD patient records from federally-assisted “Part 2 programs”
- Protects privacy and security of records identifying individual as seeking/receiving SUD treatment

**Purpose:** to encourage people to enter and remain in SUD treatment by guaranteeing confidentiality

**Requires** patient consent for treatment, payment, and healthcare operations, with limited exceptions
Case Study #1

- Ana is a nurse in a federally qualified health center (FQHC).

- Her patient needs a referral to a specialist in another practice area of the FQHC.

Q: Does Ana need to obtain the patient’s written consent before making the referral?
Poll Question #1

Based on the previous case study example, does Ana need to obtain the patient’s written consent before making the referral?

- Yes
- No
- It depends…
Case Study #1 (Answer)

A: It depends on whether Ana works in an SUD treatment unit

– If Ana works in an SUD treatment unit that meets the definition of a Part 2 program, she needs patient consent to make the disclosure.

– If Ana does NOT work in an SUD treatment unit, she may make the referral without written consent because HIPAA* permits disclosures for “treatment”.

*Other privacy laws may also apply, in which case Ana should follow whichever law is most protective of privacy.
I Provide SUD Services in an FQHC: Does Part 2 Apply to Me?

Use the flowchart below to determine if Part 2 applies to you

NOTE: FQHCs will always be “federally assisted” due to certified status as Medicaid providers and/or federal funding

Are you “federally assisted”?

YES

Do you work in an identified SUD unit?

YES

Are the SUD services advertised or otherwise “held out” to the community?

NO

Are you an identified SUD provider?

YES

Is your primary function providing SUD services?

NO

YOU ARE NOT A PART 2 PROGRAM

YES

YOU ARE A PART 2 PROGRAM

For more information & resources, or to request technical assistance, please visit coephi.org.

Resources, training, technical assistance, and any other information provided through the Center of Excellence for Protected Health Information do not constitute legal advice. For legal advice, including legal advice on other applicable state and federal laws, please seek out local counsel.
Case Study #2

• Owen is a CASAC at a Part 2 program.
• He has a new patient joining a group session and wants to know more information about the patient’s diagnosis and treatment history.

Q: Can Owen look at the patient’s treatment record? Can he speak with his colleague about the patient?
Poll Question #2

Can Owen look at the patient’s treatment record? Can he speak with his colleague about the patient?

- Yes, because he needs the information in order to provide SUD treatment to the patient.
- Yes, because he has access to the EHR system and the colleague is also his friend.
- No, because he has not met the patient yet.
- He can speak with his colleague, but not look in the patient record.
Case Study #2 (Answer)

A: Yes, Owen can access the patient’s treatment record and speak with a colleague about the patient.

– Owen needs this information in order to provide SUD services to the patient.
Internal Communications

The “need to know” rule:

• You may share and receive patient information within your Part 2 program, *if necessary, to provide SUD services to the patient*

• Information should be limited to the *minimum necessary*
Internal Communications

For Part 2 programs within a larger entity – (like an FQHC or Community Health Center)

• The Part 2 program may share patient information for administrative purposes with the larger entity (e.g., billing)

• Disclosures for treatment purposes (e.g., with a primary care practitioner) - still need consent
Case Study #3

- Mario is a nurse at an opioid treatment program (OTP).
- One morning, a patient suddenly collapses to the floor and loses consciousness.
- Paramedics arrive and ask Mario a few questions about the pt.

Q: Can Mario share patient information with the paramedics?
Poll Question #3

Can Mario share patient information with the paramedics?

- Yes, because it is a medical emergency.
- Yes, but Mario can't share anything about the patient's substance use disorder.
- Yes, because HIPAA permits disclosures for "treatment" purposes.
- No, because Part 2 requires written patient consent.
Case Study #3 (Answer)

A: Yes, Mario can share patient information with the paramedics.

– If necessary, to help the paramedics address the medical emergency, Mario can share SUD information, as well as basic information like the patient’s name, age, date of birth, and emergency contacts.
Medical Emergency

• You may share information with medical personnel in order to meet a medical emergency in which patient’s prior consent could not be obtained
  – If patient has capacity to consent and chooses not to authorize the disclosure, you may not use the medical emergency exception
Medical Emergency

• The Part 2 program needs to document the disclosure in the patient’s record:
  – Name of the medical personnel and their affiliation with a healthcare facility
  – Name of individual making the disclosure
  – Date and time of disclosure
  – Nature of the emergency
Case Study #4

- Annabelle is a receptionist at a Part 2 program.
- Four police officers arrive at the program to investigate a series of burglaries in the area.
- The officers ask for a list of the patients, so they can run background checks.

Q: Can Annabelle give the officers the list of patient names?
Poll Question #4

Can Annabelle give the officers the list of patient names?

❑ Yes, because they are investigating an ongoing crime.
❑ Yes, because they are the police.
❑ No, because they don't have a warrant.
❑ No, because they don't have a court order signed by a judge.
Case Study #4 (Answer)

A: No, Annabelle cannot give the officers the list of patient names unless there is a court order authorizing the disclosure.

– Even a warrant is *not enough* to authorize disclosure of Part 2 records.
Law Enforcement

• Part 2 strictly protects the confidentiality of treatment records from law enforcement

• Disclosures only permissible if:
  – Court order authorizes the disclosure
  – Patient consents to disclosure
  – Program is reporting a crime on program premises, or against program personnel
Law Enforcement

- Even though Part 2 has strict confidentiality protections, *it does not require you to get arrested!*

- When responding to police inquiries, it can be helpful to:
  - Have a supervisor or colleague present
  - Show the officers a copy of the law and the [CoE-PHI resource on warrants](https://www.coe PHI.org/resources/warrants)
OVERVIEW

CHANGES TO PART 2
# Changes to the Law and Regulations

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<td>42 CFR Part 2</td>
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<tr>
<td><strong>March 27, 2020 –</strong> Congress amended statute, required new regulations</td>
<td><strong>July 15, 2020 –</strong> SAMHSA amended regulations – <em>transitional only</em></td>
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<tr>
<td><strong>Effective:</strong> March 27, 2021</td>
<td><strong>Effective:</strong> August 14, 2020</td>
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Aug. 2019: Proposed Rule (SAMHSA)

Fall 2019: Public Comments

March 2020: CARES Act (Congress)

July 2020: Final Rule (SAMHSA)

Before March 2021: New rulemaking implementing CARES Act (SAMHSA)
Changes to Part 2 (July 2020)

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<th>42 CFR §</th>
<th>Provision</th>
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<td>Definition of “records”</td>
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<td>Applicability and re-disclosure</td>
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<td>Notice of prohibition on re-disclosure</td>
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<td>Disclosures permitted with written consent (P/HCO)</td>
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<td>Court orders for undercover agents and informants</td>
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<td><strong>Guidance</strong></td>
<td>Disposition of records on employees’ personal devices, data segmentation</td>
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Review (Main Points)

- July 2020 Final Rule changed requirements for consent forms and made some changes to the ways information can be shared without patient consent
  - Effective date: August 14, 2020

- Overall framework didn’t change

- July 2020 Final Rule is *transitional* – CARES Act means more changes
Key Steps to Implement Changes

for August 14, 2020

• Update Prohibition on Re-Disclosure Notice
  – New language can be found here

• Optional: Consent forms – update “recipient”
  description to permit naming entity
Key Steps to Implement Changes (2)

for August 14, 2020

- For opioid treatment programs (OTPs):
  - Check state law requirements for Central Registry and PDMPs and **update consent forms as needed**

- Revise/develop policies and procedures for all other changes.
  - Resources available at [coephi.org](http://coephi.org)

- Train staff and educate clients about all changes.
Changes in the CARES Act

- Still requires initial patient consent to disclose protected SUD records
- After initial consent, some re-disclosures permitted:
  - For treatment/payment/healthcare operations ("TPO") by HIPAA covered entities, business associates, and Part 2 programs
  - Patient still has right to revoke initial consent
Poll Question #5

True or False: The CARES ACT repealed 42 CFR Part 2.

- True
- False
- Not Sure
Poll Question #5 Answer

False: The CARES Act makes some changes to the SUD privacy law, and will require future changes to the Part 2 regulations.

- The CARES Act goes into effect March 27, 2021.
- The CARES Act does not repeal the SUD privacy law or regulations.
PHI regulations protect patient privacy, give you flexibility to provide the best possible treatment, and help clarify the boundaries in protecting and sharing patient information.

COVID-19 AND TELEHEALTH
Poll Question #6

What methods are you currently (or considering) using to provide telehealth services? (please choose all that apply)

- HIPAA-compliant video communications (e.g.; Skype for Business, Updox, Zoom Health, WebEx, GoTo Meeting)
- Other video communications (e.g.; Apple FaceTime, Facebook Messenger video, Google Hangouts, Zoom, Skype)
- Encrypted text messaging
- Phone calls
- other
Privacy Considerations for Telehealth During COVID-19

• How do privacy laws apply?
• How to protect privacy and security at:
  – Provider’s location
  – Patient’s location
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<th><strong>HIPAA</strong></th>
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| **Applies to** covered entities (healthcare providers, health plans, healthcare clearinghouses) and BAs  
  • Protects privacy and security of general health information | **Applies to** SUD patient records from federally-assisted “Part 2 programs”  
  • Protects privacy and security of records identifying individual as seeking/receiving SUD treatment |
| **Purpose:** to protect health data integrity, confidentiality, and accessibility | **Purpose:** to encourage people to enter and remain in SUD treatment by guaranteeing confidentiality |
| **Permits** disclosures without patient consent for treatment, payment, and healthcare operations | **Requires** patient consent for treatment, payment, and healthcare operations, with limited exceptions |
OCR GUIDANCE AND HIPAA
OCR Bulletin: COVID-19

OCR announced it will waive potential penalties for HIPAA violations arising out of good-faith use of telehealth:

• Providers may use popular video chats, like FaceTime, Messenger, Google Hangouts, Zoom, or Skype
• Providers do not need to have a BAA in place
• Does not matter whether telehealth service is directly related to COVID-19

Still best practice to use secure, HIPAA compliant services and have BAA in place
OCR Bulletin: COVID-19

OCR’s enforcement discretion will end when there is no longer a *national emergency*

- OCR is not the only entity that *enforces* HIPAA violations
- **Check with your state’s Attorney General** to see if they have guidance about HIPAA compliance for telehealth during COVID-19
SAMHSA GUIDANCE AND PART 2
Quick Review: Medical Emergencies

42 CFR § 2.51

Part 2 permits disclosures w/o written consent to medical personnel in order to treat a bona fide medical emergency

- Information may be re-disclosed for treatment purposes
- Cannot use this provision to “override” patient’s objection to a disclosure
- Part 2 program must make note in patient file regarding disclosure
SAMHSA Guidance: COVID-19

SAMHSA’s COVID-19 Part 2 Guidance emphasizes that providers have discretion to determine whether *bona fide* medical emergency exists.
SAMHSA has **not** eliminated Part 2’s requirements for written consent to share information.

As before - no consent is required in a medical emergency, but SAMHSA has emphasized that providers may determine COVID-19 may meet the requirements.

E-signatures and photocopied signatures are okay!
CoE-PHI Telehealth Resources

Video - Tips to Keep Your Telehealth Visit Private
Questions and Discussion

Please share with us any questions that you have now.
Accessing the CoE-PHI

Request TA
coephi.org/technical-assistance

Resource Library
coephi.org/resource-center

Discussing privacy protections helps the care team to provide the best possible care.
Webinar Evaluation

Following the conclusion of this webinar, you will be sent a link to complete a brief evaluation.

We value your opinion- please take the time to complete our evaluation!
THANK YOU!