



Confidentiality

As it applies to 42 CFR Part 2 & HIPAA



Introduction

The purpose of this training is to provide basic information and overview of the complex and important area involving drug and alcohol abuse treatment records.

The Federal Statutes 42 CFR Part 2 will be discussed with emphasis on confidentiality and consent to disclosure information, and sanctions and penalties for unauthorized disclosure.

The Federal Statutes of HIPAA will also be discussed as to the role they play in Substance Abuse Treatment Records and how they apply to the statutes of 42 CFR Part 2.



What is HIPAA?

- HIPAA is the Health Insurance Portability and Accountability Act of 1996 also known as Public Law 104-191
- It is An act to amend the Internal Revenue Code of 1986 to improve portability and continuity of health insurance coverage in the group and individual markets, combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and other purposes”
- Administrative Simplification Provisions - national standards to facilitate the electronic exchange of health information and to protect the privacy of patient identifying health information



Who is a Client

- Client means any individual who has applied for or been given diagnosis or treatment for alcohol or drug abuse at a federally assisted program and includes any individual who, after arrest on a criminal charge, is identified as an alcohol or drug abuser in order to determine that individual's eligibility to participate in program.



Who is a Client

- The person who is the subject of the protected health information
- The individuals and organizations who are subject to HIPAA regulations as a Covered Entity or Business Associate.



Client Rights

Clients must be given written summary of confidentiality provisions and notice that Federal law and regulations protect the confidentiality of alcohol and drug abuse patient records.



Client Rights

- Receive notice of covered entity's privacy practices
- Access own information
- Request corrections of erroneous/incomplete information
- Request restriction of uses and disclosures
- Request transmittal of communications in an alternative manner
- Obtain an accounting of disclosures



Client Identifying Information

Client identifying information means the name, address, social security number, fingerprints, photographs, or other similar information by which the identity of a client can be determined with reasonable accuracy and speed, either directly or by reference to other publicly available information.

Neither written or unrecorded client information, such as verbal statements, may be disclosed.



Protected Health Information

PHI is individually identifiable health information that is transmitted by, or maintained in, electronic media or any other form or medium. This information must relate to 1) the past, present, or future physical or mental health, or condition of an individual; 2) provision of health care to an individual; or 3) payment for the provision of health care to an individual. If the information identifies or provides a reasonable basis to believe it can be used to identify an individual, it is considered individually identifiable health information. See Part II, 45 CFR 164.501.



The General Rule Prohibiting Disclosure

Except under certain specified conditions, the regulations prohibit the disclosure of records or other information concerning any client in a federally assisted alcohol or drug program § § 2.13 (b), 2.20.

This prohibition on unauthorized disclosure applies whether or not the person seeking information already has the information, has other means of obtaining it, enjoys official status, has obtained a subpoena or warrant, or is authorized by state law. § § 2.13 (b), 2.20.

If a program receives a request for a disclosure of an individual's records that is not permitted by the regulations, it must refuse to make the disclosure, and must be sure to do so in a way that does not reveal that the individual has ever been diagnosed or treated for an alcohol or drug problem.

The General Rule Prohibiting Disclosure

A “Covered Entity” may not use or disclose Protected Health Information (“PHI”) except as authorized by the individual, by:

- verbal agreement – (directories, release to family involved in treatment, etc.)
- consent – (for treatment, payment, or healthcare operations (required for providers only))
- authorization – (for other purposes for governmental or other specified purposes as required by HIPAA)

Proper Format for ROI's

A proper consent form must be in writing and must contain each of the items specified in § 2.31:

1. The name or general designation of the program(s) making the disclosure;
2. The name of the individual or organization that will receive the disclosure;
3. The name of the client who is the subject of the disclosure;
4. The purpose or need for the disclosure
5. How much and what kind of information will be disclosed
6. A statement that the client may revoke the consent at any time, except to the extent that the program has already acted in reliance on it;
7. The date, event or condition upon which the consent expires if not previously revoked;
8. The signature of the client (and/or other authorized person)
9. The date on which the consent is signed.

A general medical release form, or any consent form that does not contain all of the elements listed above, is not acceptable!



Proper Format for ROI's

- Be written in plain language and signed and dated
- Clearly describe the information to be used
- Name the recipients of the information
- Name the disclosers of the information
- Have an expiration date
- Tell the individual how to revoke it
- Tell the individual the information may not be protected once it is released
- Identify the purpose(s) of disclosure
- State what, if any, conditions are placed on the individual in exchange for signing the authorization
- State whether the discloser of information will receive compensation in exchange for disclosure
- State that individual can receive a copy of the authorization



Revoking Consent

Most disclosures are permissible if a client has signed a valid consent form which has not been expired or revoked by the client. §2.13* if authorized by the client's valid consent, a disclosure is permitted even if it may not be in the clients best interests. The regulations set up the client as the final arbiter of disclosures in most situations.

If a client puts in writing or verbalizes that he or she wants to revoke consent you must do the following two things:

1. Log the revocation in the progress notes of the chart;
2. Make a notation on the consent and place in the clients chart.



Revoking Consent

Must be in writing and state a Client's wish to prevent further PHI disclosures for any reason



Criminal Justice System Referrals

As for the revocability of the consent, the regulations provide that the consent form can state that it cannot be revoked until a certain specified date or condition occurs. The regulations permit the CJS consent form to be irrevocable so that an individual who has agreed to enter treatment in lieu of prosecution or punishment cannot then prevent the court or probation, parole or other agency from monitoring his or her progress.

Note that although a CJS consent may be made irrevocable for a specified period of time, its irrevocability must end no later than the final disposition of the criminal proceeding. Thereafter, the client may freely revoke consent. § 2.35(c).



Prohibition on Redisclosure

- Can only disclose pursuant to a consent or other permitted purpose
- Prohibition against redisclosure of information to another - can only disclose to those named in consent
- Must include a written prohibition statement to accompany the consent
- Any recipient of information is subject to the rule and may not disclose the information except as permitted by the rule.



Prohibition on Redisclosure

- No specific prohibition against redisclosure
- However, if the entity is a covered entity or a business associate, privacy protections continue to apply



Minimum Necessary

Client identifying information may only be used or disclosed as permitted by the regulations and must be limited to that information which is necessary to carry out the purpose of the disclosure.

In addition, disclosures made pursuant to a court order must be limited to the criminal or non-criminal purposes stated in the court order and the regulations.



Minimum Necessary

The Privacy Rule requires a covered entity to make reasonable efforts to limit use, disclosure of, and requests for PHI to the minimum necessary to accomplish the intended purpose. To allow covered entities the flexibility to address their unique circumstances, the rule requires covered entities to make their own assessment of what PHI is reasonably necessary for a particular purpose, given the characteristics of their business and workforce, and to implement policies and procedures accordingly. This is not a strict standard and covered entities need not limit information uses or disclosures to those that are absolutely needed to serve the purpose. Rather, this is a reasonableness standard that calls for an approach consistent with the best practices and guidelines already used by many providers today to limit the unnecessary sharing of medical information.



Internal Communications

Program staff may share information about a client with other staff when necessary to provide a treatment related service.

This information should be given to other staff members on a “need to know basis”.

For example: A client informs his counselor that he has a liver disease. The counselor can inform the supervisor, the nurse and the social worker but not the receptionist or janitor.

A client informs her counselor that she has had suicidal thoughts, the counselor can then relate this information to the supervisor, social worker, nurse and even the janitor and receptionist, so that all staff can properly monitor the client.



Patient Access to Records

- No consent nor authorization required
- Also subject to restriction on use 2.23(b)



Patient Access to Records

- Patient has right to access own records
- Exceptions:
 - Psychotherapy notes
 - Information compiled in anticipation of civil, criminal or administrative proceeding
 - Info subject to CLIA or exempt from CLIA (Clinical Laboratory Improvement Amendments of 1988)



Subpoenas/Court Orders

- A subpoena alone is not sufficient to release information - a court order is also required - must be issued by judge in accordance with specific procedures and criteria



Subpoenas/Court Orders

- Can disclose in response to a court (or administrative tribunal) order only, or a subpoena and court order, or by discovery request or lawful process alone



Requirements of Court Orders

The requirements under the federal regulations for a court order are as follows:

1. Notice to client and program.
2. Opportunity to be heard.
3. Fictitious name.
4. Confidential proceedings; and
5. Good cause

Search & Arrest Warrants

Neither a search warrant or an arrest warrant without a court order obtained in accordance with 42 CFR Part 2 is sufficient to authorize an alcohol or drug program to disclose any client identifying information.

When a police officer or other law enforcement officer arrives at the program with a search warrant or arrest warrant program personnel should:

1. Produce a copy of the federal regulations
2. Explain that the program may not cooperate without a valid court order obtained in accordance with 42 CFR Part 2.
3. If at all possible seek an attorney's assistance in the matter.
4. Contact the commanding officer and prosecuting attorney and explain the federal regulations.
5. Do not forcibly resist a police officers attempt to enter the program



Disclosure to Law Enforcement

- Can disclose to law enforcement and jails without consent/authorization:
- As required by law
- With a subpoena
- With a warrant
- To locate missing persons
- Victim of crime
- Crime on program premises

Medical Emergencies

- (1) An alcohol or drug program may disclose any necessary information:
 - (a) To medical personnel only (not family members)
 - (b) Who need the information in order to treat a condition which poses an immediate threat
 - (c) To the health of any individual, and
 - (d) Which requires immediate medical intervention.
- (2) No consent is required
- (3) Medical personnel may re-disclose patient identifying information to family members and others without patient consent.
- (4) Programs must document every disclosure made in a medical emergency by recording.
 - (a) Name of individual who made the disclosure
 - (b) Name and affiliation of the recipient of the disclosure
 - (c) Date and time of the disclosure, and
 - (d) Nature of the emergency.



Child Abuse/Neglect Reporting

- Specific exception allows reporting of child abuse/neglect
- Restrictions on disclosure and use continue to apply to the original alcohol and drug abuse patient records maintained by the program including their disclosure or use for criminal or civil proceedings which may arise out of the report



Child Abuse/Neglect Reporting

- Allows a report to appropriate authorities of abuse, including child abuse .



Public Health Authorities/Disease Reporting

- No specific exemption for reporting - need consent, court order, or can report if done anonymously
- Can disclose to FDA if error in manufacturing e.g., labeling or sale of drug used in treatment - exclusive purpose notifying clients and their physicians of potential dangers.



Public Health Authorities/Disease Reporting

- Authority to disclose to public health authorities for a variety of circumstances without patient authorization



Crimes on Premises

Alcohol and drug programs may disclose client identifying information to the police or other law enforcement agencies when a client commits or threatens to commit a crime on program premises (against anyone) or against program personnel anywhere.

The program can make this disclosure of patient identifying information to police or other law enforcement officers but not to anyone else.

The police report must be limited to the:

1. Particulars of the crime
2. Clients name
3. Clients address; and
4. Clients last known whereabouts

Research

Programs may disclose patient identifying information to qualified researchers if they follow the protocols required by the federal regulations.

These protocols include pledging not to re-disclose patient identifying information except back to the program.

For more information on disclosures to researchers see § 2.52 of the regulations.

Research

- De-identified health information, as described in the Privacy Rule, is not PHI, and thus is not protected by the Privacy Rule.
- PHI may be used and disclosed for research with an individual's written permission in the form of an Authorization.
- PHI may be used and disclosed for research without an Authorization in limited circumstances: Under a waiver of the Authorization requirement, as a limited data set with a data use agreement, preparatory to research, and for research on decedents' information.
- The Privacy Rule describes the ways in which covered entities can use or disclose PHI, including for research purposes. In general, the Rule allows covered entities to use and disclose PHI for research if authorized to do so by the subject in accordance with the Privacy Rule. In addition, in certain circumstances, the Rule permits covered entities to use and disclose PHI without Authorization for certain types of research activities. For example, PHI can be used or disclosed for research if a covered entity obtains documentation that an Institutional Review Board (IRB) or Privacy Board has waived the requirement for Authorization or allowed an alteration. The Rule also allows a covered entity to enter into a data use agreement for sharing a limited data set. There are also separate provisions for how PHI can be used or disclosed for activities preparatory to research and for research on decedents' information.

Enforcement, Compliance and Penalties

- **Enforcement - United States Attorney for judicial district in which the violation occurs**
- **Criminal penalties - not more than \$500 for 1st offense; no more than \$5,000 for each subsequent offense**