

S·BI·RT: Federal Alcohol and Drug Confidentiality Overview

Key Points

42 C.F.R. Part 2 Valid Written Patient Consent Form Must Include:

1. Name/general designation of program making disclosure
2. Name of individual/entity receiving disclosure
3. Name of patient who is subject of disclosure
4. Purpose/need for disclosure
5. Description of how much and what type of information will be disclosed
6. Patient's right to revoke consent, and any exceptions
7. Date/event/condition on which consent expires
8. Patient's signature
9. Date signed

Integration and Confidentiality: How can Integrated Health Centers Comply with Alcohol and other Drug Confidentiality Regulations?¹

Sharing Information with Co-located/Integrated Behavioral Health Providers

A program can share information with co-located/integrated providers utilizing these four exceptions:

Exception One: Written patient consent

Patient can sign a written consent form, with all elements required by 42 C.F.R. Part 2, authorizing her alcohol/drug treatment providers (program) to communicate with her primary care (and/or other) providers. The program must provide the Notice Prohibiting Re-disclosure when it discloses patient's protected alcohol/drug information pursuant to consent.

Valid consent form

Most disclosures are allowed if a patient signed a valid consent form (called "authorization" under HIPAA) that has not expired or been revoked. The consent must adhere to proper format; otherwise, it is NOT sufficient. The proper format for consent to release information includes the following documentation: 1. Name/general designation of program making disclosure; 2. Name of individual/entity receiving disclosure; 3. Name of patient who is subject of disclosure; 4. Purpose/need for disclosure; 5. Description of how much and what type of information will be disclosed; 6. Patient's right to revoke consent and any exceptions; 7. Date/event/condition on which consent expires; 8. Patient's signature; 9. Date signed; and further, 10. HIPAA: program's ability to condition treatment, payment, enrollment, or eligibility on the consent.

¹ 42 C.F.R. confidentiality information included in this Appendix is the synthesis of the Legal Action Center's presentation and slides available on their website and used with their permission. (<https://lac.org>)

Minors and Consent

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. However, under 42 C.F.R. Part 2, the program must always obtain a minor's consent for disclosure, and must also obtain parental consent for disclosure **only** if State law requires parental consent to treatment. ***In NH, youth aged 12 and older can seek treatment for substance use disorders without parental consent.***

Prohibition on Re-disclosure

Any disclosure made pursuant to written patient consent must be accompanied by a written statement that the information disclosed is protected by Federal law and that the recipient may not disclose it further unless permitted by the regulations. This is true even for verbal disclosures. This language is dictated by regulations:

"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 patient." (42 CFR § 2.32)

Exception Two: Internal Communications

Programs covered by 42 C.F.R. Part 2 may disclose information without patient consent to an entity with administrative control over the program, to the extent the recipient needs the information in connection with providing alcohol/drug services. The "entity with administrative control" could include, for example, a records or billing department of a general medical facility. Information may also be disclosed to other program staff but only to the extent the recipient needs information in connection with provision of drug/alcohol services (purpose and amount).

Exception Three: Medical Emergency

Disclosure may be made to medical personnel to the extent necessary to meet a bona fide medical emergency of the patient or any other individual. A medical emergency meets two criteria: 1) it is an immediate threat to the health of the individual, AND 2) it requires immediate medical attention. The determination of a medical emergency can be made by personnel based on professional judgment.

Documentation of Medical Emergency

A disclosure made in connection with a medical emergency must include the following documentation in the patient's record: name and affiliation of recipient of information; name of person making disclosure; date and time of disclosure; and nature of emergency.

Exception Four: Qualified Service Organizations/Business Associates (QSO/BA) Agreement

Disclosure without patient consent to certain outside organizations that provide services to the program or its patients may be made with a QSO Agreement. These outside organizations are referred to as Qualified Service Organizations (QSOs) in 42 C.F.R. Part 2, and as Business Associates (BAs) by HIPAA. QSOs may

provide services such as medical services, data processing, dosage prep, lab analyses, vocational counseling, patient transport, legal or accounting services, electronic storage of patient records, etc.

Requirements of a QSO/BA Agreement

The program must enter into written agreement with the QSO, agreeing that the QSO:

- is fully bound by 42 C.F.R. Part 2; and
- will resist an effort to obtain access to patient information except as permitted by 42 C.F.R. Part 2

An organization serving as QSO that is also covered by HIPAA must also meet BA agreement requirements.

Incorporating alcohol/drug treatment records into EHR systems

Regardless of the EHR system in place, providers must be mindful of the requirements of 42 C.F.R. Part 2 when including alcohol/drug patient records. Records protected by 42 C.F.R. Part 2 can be integrated into EHR systems with providers not covered by 42 C.F.R. Part 2 in the same ways that a program can share information with co-located/integrated providers:

1. Written patient consent

The system must be able to implement patients' consent choices. For alcohol/drug records, the EHR system must be able to ensure records are disclosed only: 1) pursuant to proper written consent (Consent Form Must Be 42 C.F.R. Part 2 Compliant), 2) with the amount/type of information listed on the consent form, and 3) for the purpose listed on the consent form. The systems must be able to ensure information ceases to flow when consent expiration is reached, including providing notice prohibiting re-disclosure with information disclosed. The consent form must comply with 42 C.F.R. Part 2 requirements, and the system must be able to comply with medical emergency requirements, and be capable of implementing QSO/BA agreement limitations.

2. Internal communications exception

Programs covered by 42 C.F.R. Part 2 may disclose information without patient consent to an entity with administrative control over the program, to the extent the recipient needs the information in connection with providing alcohol/drug services.

3. Medical Emergency Exception

When information protected by 42 C.F.R. Part 2 is disclosed in connection with medical emergency, the program must document certain information and the EHR system must be able to:

- Notify the program when its patients' records are disclosed in medical emergency;
- Capture the information that the program is required to document in its records; and
- Include the information with the notification.

4. QSO/BA Agreement

A QSO/BA agreement is a two-party agreement between the program and the QSO/BA; the QSO/BA cannot re-disclose the information. When alcohol/drug patient information is included in an EHR system pursuant to a QSO/BA agreement, the EHR system must have the capability to ensure the information is not re-disclosed without proper patient consent.