# Sharing Behavioral Health Information for Treatment Purposes: Mental Health and Substance Use Disorder

NATIONAL ASSOCIATION OF Community Health Centers®

## BACKGROUND

Many health center patients benefit from behavioral health services, which may include mental health services and/or substance use disorder services. Integrated, coordinated health care including primary care and behavioral health services is a key component of large-scale health outcomes improvement initiatives including the Quadruple Aim, the Patient-Centered Medical Home, and Accountable Care Organizations. Increasingly, managed care requires integration of primary care and behavioral health services.

Integration of primary care and behavioral health services requires exchange of information regarding a patient's behavioral health services. Information that a behavioral health provider and primary care provider may wish to share includes: medication prescription and monitoring; treatment plans, including goals, interventions, team members and progress towards goal attainment; results of clinical tests; and progress notes. Patient information may be shared through health information exchanges (HIEs), electronic health records (EHRs), direct exchanges, secure email, faxes, or other less technological methods such as paper charts, warm hand-offs, and verbal referrals. Regardless of the how the health center delivers behavioral health services (e.g., hiring staff members to directly provide services, making referrals outside the center, bringing contractors on-site), it is important for the patient's primary care team members to be able to access the patient's behavioral health information and for the patient's behavioral health clinicians to be able to access primary care service information.

As health centers continue to integrate services to meet their patients' needs, they must be aware of their responsibility to comply with applicable federal, state, and community standard of care confidentiality requirements. This fact sheet is designed to clarify how behavioral health information may be shared for treatment purposes, whether or not primary care and behavioral health services have been fully integrated.

## KEY FEDERAL LAWS & REGULATIONS

Many behavioral health and primary care providers incorrectly assume that HIPAA and 42 CFR Part 2 restrict the sharing of ALL behavioral health information. Below is a summary of how these federal laws and regulations protect patient information and how patient information may be shared for treatment purposes. Note that many states have laws and regulations that also protect mental health and substance use disorder (SUD) records. Many states also have laws and regulations allowing minors to consent to certain medical and/or behavioral health care services and requiring the minor to consent to any disclosure of those records. When state laws and regulations provide greater confidentiality protections than HIPAA or 42 CFR Part 2, health centers must follow the more restrictive state laws or regulations. In addition, if the health center has a separately licensed mental health or SUD unit, additional state laws and regulations may apply.

1. **THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 ("HIPAA") PRIVACY RULE** provides patients with privacy rights and protections with respect to their health information, including controls over how their health information is used and disclosed by health care providers and agencies. The Privacy Rule generally permits a covered entity (such as a health center) to disclose protected health information (PHI), without a patient's consent, to another health care provider or agency for treatment or continuity of care purposes. As defined by HIPAA, treatment is the provision, coordination, or management of health care and related services for an individual by one or more health care providers, including consultation between providers regarding a patient and referral of a patient by one provider to another. **The Office for Civil Rights (OCR)**, which enforces the HIPAA Rules, has published several guidance documents that describe the circumstances in which a health care provider can disclose the PHI of a patient who is being treated for a mental health condition.

   The HIPAA Privacy Rule also permits covered entities to disclose PHI to their business associates through a formal Business Associate Agreement (BAA). A business associate is a person or entity that performs certain functions or activities that involve the use or disclosure of PHI on behalf of, or provides services to, a covered entity. A covered entity must execute a HIPAA-compliant BAA or other contract that establishes the permitted and required uses and disclosures of PHI by the business associate.

   ### HIPAA EXCEPTIONS AND CONSIDERATIONS

   **Psychotherapy Notes**: The HIPAA Privacy Rule provides additional protection to **psychotherapy notes**. The Privacy Rule defines psychotherapy notes as "notes recorded (in any medium) by a health care provider who is a mental health

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professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes exclude medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date." To disclose psychotherapy notes for treatment purposes, a covered entity generally must obtain the individual's written authorization.

An individual's authorization is not required to use or disclose psychotherapy notes for the following exceptions:

- The covered entity who originated the notes may use them for treatment.
- A covered entity may use or disclose, without an individual's authorization, the psychotherapy notes, for its own training, and to defend itself in legal proceedings brought by the individual, for HHS to investigate or determine the covered entity's compliance with the Privacy Rules, to avert a serious and imminent threat to public health or safety, to a health oversight agency for lawful oversight of the originator of the psychotherapy notes, for the lawful activities of a coroner or medical examiner or as required by law.

**2** **TITLE 42 OF THE CODE OF FEDERAL REGULATIONS (CFR) PART 2: CONFIDENTIALITY OF SUBSTANCE USE DISORDER PATIENT RECORDS ("PART 2")** protects the confidentiality of certain **SUD** records by restricting the circumstances under which Part 2 Programs or other lawful holders can disclose SUD records. The Part 2 regulations, which are promulgated and enforced by the **Substance Abuse and Mental Health Services Administration (SAMHSA)**, provide more stringent federal protections than HIPAA. For example, under Part 2, a patient must consent to the disclosure of their SUD records for purposes of treatment, unless one of a limited number of exceptions applies.

To determine whether compliance with Part 2 is required, health centers must determine whether they provide SUD services in such a way as to meet the definition of a federally-assisted Part 2 Program. If a health center has either: (1) an identified unit (or program) which "holds itself out" as providing and provides SUD diagnosis, treatment, or referral for treatment or (2) staff members whose primary function is the provision of SUD treatment or referral for treatment and who are identified as such providers, then Part 2 likely restricts the use and disclosure of those SUD records. Health centers must reevaluate whether Part 2 applies as they increase their SUD services and change their SUD service model. In addition, if a health center receives records from a Part 2 Program, the health center is considered a "lawful holder" and must comply with the Part 2 regulations for purposes or redisclosure of those SUD records. As with HIPAA, individual states may have additional regulation beyond the scope of Part 2.

To disclose records protected by Part 2 for treatment purposes, the patient must complete a Part 2-compliant consent that includes (among other requirements) an explicit description of the SUD information to be disclosed, as well as the specific name of the individual or entity to whom their records are to be released, except in limited situations involving intermediaries such as a health information exchange (HIE). The disclosure of Part 2 records must include notice to the recipient that the records are protected by Part 2. Additional consent and compliance requirements apply to redisclosure of SUD records protected by Part 2 to HIEs and to other entities that do not have a treating provider relationship with the patient.

Among the limited number of **exceptions** to the patient consent requirement are:

- Disclosures "between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of patients with substance use disorders if the communications are: (i) Within a part 2 program; or (ii) Between a part 2 program and an entity that has direct administrative control over the program." Depending upon how the Part 2 Program is structured, patient consent may still be necessary to share SUD records with the health center's other staff members through the EHR.
- Disclosures between a Part 2 Program and a qualified service organization (QSO). QSOs are similar to business associates under HIPAA; however, a QSO agreement (QSOA) must meet specific regulatory requirements. A QSOA may not be used to disclose Part 2 information for treatment or care coordination purposes.

### EXCEPTIONS AND CONSIDERATIONS

**Screening Brief Intervention And Referral To Treatment (SBIRT):** Patient records of SBIRT services are covered by Part 2 if they are provided by a Part 2 Program. A health center that does not otherwise meet the definition of a Part 2 Program does not become a Part 2 Program simply because they provide SBIRT within the context of general health care.

**Medication-Assisted Treatment (MAT) / Opioid Substitution Therapy (OST):** A primary care practice is not necessarily subject to Part 2 on the sole basis of employing a clinician with a DATA 2000 waiver, though it may meet Part 2 criteria through other services or by "holding itself out" as providing SUD care.

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**Payment:** The January 2018 revisions to Part 2 allow redisclosure of information to "contractors, subcontractors, or legal representatives to carry out payment and/or health care operations on their behalf."

SAMHSA's website provides additional information about Part 2, including the current regulations, FAQ documents and fact sheets.

The California Health Care Foundation hosts an excellent guide for primary care practices (updated 2018).

## METHODS FOR SHARING BEHAVIORAL HEALTH INFORMATION FOR TREATMENT PURPOSES

The methods for sharing patient information between behavioral health and primary care providers continue to evolve with the development of new technologies designed to connect and coordinate patient care. Below are several models used by health centers to share behavioral health information with other treating providers including patient consent requirements for HIPAA and Part 2 disclosures.

### DISCLOSING RECORDS TO/THROUGH A HEALTH INFORMATION EXCHANGE (HIE)

- **HIPAA:** A covered entity may use an HIE to facilitate the exchange of PHI for treatment purposes, provided it has executed a HIPAA-compliant business associate agreement (BAA) with the HIE. Although the **HIPAA Privacy Rule** generally allows a covered entity to disclose PHI for purposes of treatment without the patient's consent, a covered entity may develop a consent process for disclosures to/through an HIE. A covered entity must develop a consent process for HIEs that require patients to "opt-in" in order for their PHI to be stored and/or disclosed by the HIE. To facilitate openness and transparency, the OCR encourages all covered entities to provide individuals with notice of how their PHI will be used and disclosed to/through the HIE.

- **Part 2:** Part 2 requires patient consent to disclose SUD records to an HIE unless a QSOA is in place between the Part 2 Program and the HIE. To disclose the SUD records to other providers and entities participating in the HIE for treatment purposes, the patient must consent to the disclosure by either naming the specific individuals or entities or providing a general designation of individuals and entities that have a treating provider relationship with the patient. SAMHSA's 2017 Final Rule includes the consent requirements for disclosures to HIEs, as well as the compliance requirements for HIEs.

### DISCLOSING RECORDS THROUGH DIRECTED AND SECURE EXCHANGES (SUCH AS DIRECT SECURE MESSAGING IN THE EHR), ENCRYPTED EMAIL, TELEHEALTH, OR FAX

- **HIPAA:** The HIPAA Privacy Rule generally permits covered entities to electronically disclose behavioral health information to another provider for treatment purposes. Covered entities must have in place reasonable and appropriate administrative, technical, and physical safeguards to protect the privacy and security of the PHI that is disclosed.

- **Part 2:** Part 2 requires patient consent to disclose SUD records to another provider for treatment purposes, including disclosures via directed exchanges, email, telehealth, or fax. Part 2 Programs must have formal policies and procedures in place that address creating, receiving, maintaining, and transmitting electronic records.

- **Telehealth:** As remote care delivery through remote patient monitoring (RPM) and videoconferencing modalities expand, efforts should be made to maximize patient safety and ensure confidentiality of patient data. Resources include the National Institute of Standards and Technology and the National Cybersecurity Center of Excellence, The American Telemedicine Association, and the Center for Connected Health Policy.

### RELEASING RECORDS DIRECTLY TO THE PATIENT

- **HIPAA:** The HIPAA Privacy Rule generally requires covered entities to provide individuals with access to their PHI maintained in the covered entity's designated record sets. An individual's right to access their PHI includes the right to inspect or obtain a copy (or both) of the PHI. A covered entity may require individuals to request access in writing, provided the covered entity informs individuals of this requirement.

- **Part 2:** Part 2 permits patients to access their own SUD records. This includes providing a patient an opportunity to inspect and copy any records that the Part 2 Program maintains about the patient. Part 2 Programs are not required to obtain a patient's written consent to provide access to the patient.

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