



42 CFR Part 2 Substance Use Disorder Confidentiality Regulations – Implications for Care Integration in Medicaid

Themes from Expert Roundtable

Medicaid and CHIP Payment and Access Commission

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Introduction

Commission previously noted:

- Need to improve behavioral and physical health care integration
- 42 CFR Part 2 as a barrier

Presentation today:

- Background on 42 CFR Part 2 regulations (Part 2) and expert roundtable
- Roundtable themes
- Next steps

HIPAA vs. 42 CFR Part 2

HIPAA, generally:

- Governs disclosure of protected health information
- Permitted without patient consent for payment, treatment, and health care operations

Part 2:

- Governs disclosure of SUD treatment and prevention records
- Intended to encourage individuals to seek treatment, who otherwise may fear negative consequences
- No law enforcement access, absent court order

Part 2 Summary

Consent required when:

- Treatment providers subject to Part 2 want to share SUD information (“disclosure”)
 - Recipient of information may not share further (“re-disclosure”) without new consent

Few exceptions when consent not required include:

- Medical emergencies
- Communications with qualified service organization (QSO)
- Re-disclosure to contractors and subcontractors for payment and health care operations, if patient consented to initial disclosure

Part 2 Summary (cont.)

Provider subject to Part 2, if “federally assisted” and meets definition of a “program”

- Federally assisted – includes: receiving any federal funds, even for non-SUD care; registered w/DEA for medication-assisted treatment
- Program:
 - Individual/entity, other than general medical facility, or
 - Identified unit within a general medical facility, if it “holds itself” out as providing and does provide SUD care; or
 - Staff in general medical care facility whose primary function is SUD care and who are identified as such

“Holds itself out”

- Activity leading to reasonable conclusion that provider delivers SUD care

Expert Roundtable – November 2017

- Sought input on:
 - Why protections are needed
 - How Part 2 affects Medicaid care delivery and information exchange
 - Any needed changes to support care integration, while protecting from discrimination
- Participants represented:
 - Federal and state Medicaid and behavioral health agencies
 - Legal and behavioral health experts
 - Medicaid health plans
 - Health care providers
 - Patient advocates

Part 2 Protects from Significant Harms

Disclosure of diagnosis or treatment can expose patients to harm; deterrent to seeking care

- Particular concern when outside of health care system
 - E.g.: criminal prosecution, employment or child custody loss
- Discrimination in health care system also possible
 - Cases where physician “fires” patient when SUD is disclosed

Limitations on Sharing May Cause Harm

Agreement that sharing information within health system important to integrated, whole-person care

- But, disagreement to what extent consent should be required
- Providers describe challenges when privy only to portion of health record
 - Some patients can't accurately report on medical history
 - Prescribing could lead to dangerous drug interactions
 - Difficulty coordinating care, managing care transitions, and following up on patient referrals
- Reinforces stigma

Confusion Over Part 2's Application

Widespread uncertainty about when and to whom Part 2 applies

- When is a provider subject to Part 2?
- Which patients are covered?
- What part of patient's health care record?
- When can information be shared with clinicians in same program or health system, or with payers?

Confusion Over Part 2's Application (cont.)

- Results in:
 - Inconsistent and arbitrary application of Part 2, even in same health system
 - Unnecessary barriers to information sharing
- Agreement that regulation is complex and not enough federal guidance

Technological Barriers to Information Sharing

Even with patient consent, electronic information sharing difficult

- Limited electronic health record (EHR) adoption by SUD treatment providers
 - Most not eligible for EHR meaningful use incentive payments

Technological Barriers to Information Sharing (cont.)

- EHRs and Health Information Exchanges (HIEs) generally can't segment out Part 2 data
 - If not segmented and contains Part 2 data, anyone accessing record (even if only for non-SUD information) must have permission through disclosure from patient's Part 2 program
- As a result, SUD treatment providers and information often excluded entirely from EHR records and HIE participation

Negative Effects on Medicaid Delivery Systems

Limits on data sharing

- Make assuming financial risk difficult
- Complicate proactive management of high-risk, high-cost patients
- Providers held accountable for overall health outcomes despite missing patient SUD information

Addressing Part 2 Challenges

Agreement that additional guidance needed to improve understanding and implementation

- Which providers are Part 2 programs
- What information in a medical record must be protected
- What information needs to be included in a Part 2-compliant consent form

Addressing Part 2 Challenges (cont.)

Agreement that more stakeholder education needed about Part 2 and importance of obtaining consent to promote care integration

- Stakeholders include:
 - providers and health systems
 - payers
 - health care attorneys, and
 - patients and families
- Relevant messengers needed to disseminate information

Addressing Part 2 Challenges (cont.)

Some discussion about more alignment of Part 2 with HIPAA

- Allow disclosure without patient consent for purposes of treatment, payment, and health care operations
- But maintain or strengthen protections against unauthorized disclosure outside of health care system
- Unclear how much can be done through regulation vs. requiring statutory change

Next Steps

- Is Commission interested in potentially making recommendations to address the identified challenges?
- What types of additional information would be needed to develop recommendations and evaluate their merits?



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