Hill Day 2016

Importance of 42 CFR Part 2 (the Federal Drug and Alcohol Confidentiality Law) in Today’s Health Care Settings

Legal Action Center
June 6, 2016
Who is the Legal Action Center ("LAC")?

• Non-profit law & policy organization

• Established in 1973:
  • Anti-discrimination & privacy work
    • Substance use disorders
    • HIV/AIDS
    • Criminal records

• Nearly 4 decades’ experience advising providers, patients, etc. on alcohol/drug confidentiality law (Part 2).
1. The Purpose of 42 CFR Part 2 ("Part 2")

Enacted in the 1970s:

- to protect the *privacy* of people receiving substance use disorder (SUD) care;
- to guard against the *negative consequences* of unauthorized release of drug/alcohol patient information:
  - arrest
  - prosecution
  - loss of child custody and parental rights,
  - loss of jobs,
  - denial of health care,
  - exclusion or eviction from public housing, and
  - the inability to obtain health, life, or disability insurance;
The Purpose of 42 CFR Part 2 (con’t.)

Enacted:

• to *encourage* individuals to enter drug/alcohol treatment without fear that entering treatment would make them *more vulnerable* to negative consequences

• to guard against the *stigma and discrimination* associated with having a SUD and/or receiving treatment.
2. Why HIPAA is Insufficient to Protect Confidential SUD Patient Information

<table>
<thead>
<tr>
<th>Issues</th>
<th>HIPAA</th>
<th>42 CFR Part 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Designed to guard against SUD stigma and negative consequences of having a SUD and/or getting treatment.</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Gives patients the ability to control the flow of confidential health information through informed consent (for disclosures and re-disclosures).</td>
<td>No</td>
<td>Yes - patients usually must consent for disclosures/re-disclosures.</td>
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<td>Safeguards against disclosures of confidential SUD information to law enforcement &amp; courts</td>
<td>Some protection.</td>
<td>Yes – Requires special court order, with greater review standards.</td>
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Why HIPAA is Insufficient to Protect Confidential SUD Patient Information (con’t.)

• While Part 2’s safeguards help protect patients from negative consequences, Part 2 does allow patient info to be disclosed:
  ➢ If patient consents;
  ➢ In a medical emergency;
  ➢ Among treatment program staff;
  ➢ If a special agreement is in place between treatment program & another entity (“QSOA”);
  ➢ And more….
Patients and providers want greater protection for confidential health information:

• 97% of the public believe that health care providers and insurers should not be able to share their health information without their consent. [Amer. Nat’l Standards Poll, 2012].

• 80% of outpatient mental health clinicians said (if they were a patient), they would not want health care providers to routinely access their mental health records [J. of Am. Med. Infomatics Assoc., 2010].
3. SAMHSA’s 2016 Proposed Rule Balances Confidentiality Rights of SUD Patients and Supports Sharing of Health Information Among Providers

Feb. 2016: SAMHSA proposed changes to Part 2:

- Easier for health providers to share patient SUD info when patient wants info shared
- Patient can consent to disclosures to:
  - All treating providers (don’t need specific name/title).
  - Past, present, & future (don’t need to get new consent when new providers join network).
- Patient can specify consent does not expire until her/his death.
SAMHSA’s 2016 Proposed Rule Strikes Appropriate Balance (con’t.)

- Proposed Rule continues to allow disclosures without consent in certain situations, when safeguards are in place:
  - Medical emergency
  - Research
  - Among staff of SUD treatment program
  - Between SUD treatment program & individual/entity providing services to program/patients, like lab (QSOA)
  - Pursuant to court order
  - Etc.
Additional Resources


Thank you!

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