

The Applicability of the Federal Drug and Alcohol Confidentiality Law and HIPAA to the Alcohol and Other Drug Prevention Field*

Who is required to comply with the Federal Drug and Alcohol Confidentiality Law and the Health Insurance Portability and Accountability Act (HIPAA)?

The Federal Drug and Alcohol Confidentiality Law (42 CFR Part 2)

42 CFR Part 2 applies to "federally-assisted" providers that meet the definition of a "program".

A "program" includes any individual or entity that provides, in whole or in part, alcohol or drug abuse diagnosis, treatment, referral for treatment or prevention. (42 USC §§ 290dd-2, 42 CFR 2.11)¹

A program is "federally-assisted" if it:

- (a) Receives federal funds in any form, whether or not the funds directly pay for alcohol or drug abuse services; or
- (b) Is being carried out under a license, certification, registration, or other authorization granted by the federal government (e.g. licensed to provide methadone, certified as a Medicare provider); or
- (c) Is assisted by the IRS through a grant of tax exempt status or allowance of tax deductions for contributions; or
- (d) Is conducted directly by the federal government or by a state or local government that receives federal funds which could be (but are not necessarily) spent for alcohol or drug abuse programs.

42 CFR § 2.12(b)

School-based "programs" are specifically covered under 42 CFR Part 2. 42 CFR § 2.12(e)(1).

HIPAA

HIPAA applies to "covered entities" that *transmit health information electronically in connection with a covered transaction*.

The definition of "covered entity" includes health care providers that furnish, bill, or are paid for health care in the normal course of business. "Health care" includes preventive, diagnostic, therapeutic, counseling, and assessment services with respect to the physical or mental condition of an individual.

¹ There has been some discussion as to whether prevention programs are covered by 42 CFR Part 2 due to the fact that the original regulations themselves did not specifically mention prevention programs. However, the current federal authorizing statute for the regulations (47 U.S.C. § 290dd-2) and the original authorizing statutes (42 U.S.C §§ 290dd-2 and 290ee-3), which are now incorporated into the regulations, explicitly state that prevention programs and activities are covered.

Covered transactions include: claims processing, payment and remittances, coordination of benefits, checking claim status, enrollment or disenrollment in a health plan, health plan eligibility, health plan premium payments, referral, certification and authorization, first report of injury, and health claim attachments). Only "covered entities" that electronically transmit information to carry out these financial or administrative duties are covered by HIPAA.

Therefore, drug and alcohol prevention programs are health care providers and as such, are required to comply with HIPAA if they transmit covered transactions electronically. General education classes would not be covered by HIPAA as they would not meet the definition of "health care" under HIPAA.

What if both HIPAA and 42 CFR Part 2 apply?

If a program is covered under both HIPAA and 42 CFR Part 2, the statute that is more protective of the patient's identifying information must be followed.

Although the reach of HIPAA is more expansive, the vast majority of drug and alcohol programs will be covered by both 42 CRF Part 2 and HIPAA.

What Information is Protected?

The Federal Drug and Alcohol Confidentiality Law – 42 CFR Part 2

Any information that would identify a patient as having an alcohol or drug problem, either directly or indirectly, is protected. 42 CFR § 2.12

Therefore, prevention efforts are covered under 42 CFR Part 2 if the information would disclose that an individual is an alcohol or drug user or is in an alcohol or drug program. This means that a general drug and alcohol education class for the entire sixth grade would not be covered but a class that targets a specific audience (e.g. kids who have been caught with drugs at school) would be covered.

HIPAA

HIPAA protects all health information that identifies an individual whether or not it identifies them as a patient of a particular program or as receiving services for a specific purpose.

ALL patient identifying information transmitted or maintained by the program in *any* medium (oral, written, or electronic) is protected under HIPAA once it is determined that the program is a covered entity that transmits health information electronically in connection with a covered transaction.

What Disclosures are Permissible?

The Federal Drug and Alcohol Confidentiality Law – 42 CFR Part 2

42 CFR Part 2's prohibition on disclosing patient-identifying information has very few exceptions. The following are the general categories of exceptions: written consent, internal program communications, removal of all patient-identifying information, medical emergency, court order, crime on program premises or against program personnel, research, audits and evaluations, child abuse, and in conjunction with a qualified service organization agreement.

HIPAA

HIPAA permits disclosures to be made when they are for the purpose of treatment, payment or the health operations of the covered entity that receives the information. Some of the other exceptions include: disclosures to health oversight agencies, disclosures regarding victims of abuse, neglect, or domestic violence, and disclosures for research purposes. There are parameters around what can be disclosed and how for each of the exceptions.

Permissible Communications

Consent/Authorization: The best way to ensure communications are permissible under 42 CFR Part 2 and HIPAA is to have the individual sign a consent/authorization form that complies with the requirements of both HIPAA and 42 CFR Part 2. A sample of a form that complies with both laws can be found at: www.lac.org/pubs/gratis/Consent-Basic.pdf. Be sure to include any elements of a consent/authorization form that are required by applicable state law as well.

Qualified Service Organizations/Business Associate Agreements: Pursuant to both 42 CFR Part 2 and HIPAA, programs can disclose information without consent to outside organizations that provide services to the program or its patients. These organizations are called Qualified Service Organizations (QSOs) and Business Associate Agreements (BAAs) under 42 CFR Part 2 and HIPAA, respectively. Only two parties may enter into these agreements and two alcohol and drug programs may not enter into a QSO or BAA with one another. Student Assistance Programs (SAPs) can enter into QSO/BAA agreements with the school's administrative office or principal's office.

Once these agreements have been entered into, the program and the outside agency can communicate freely as long as the information is limited to what is necessary for the BAA or QSO to provide services to the program.

A sample BAA/QSO, which includes requirements of both HIPAA and 42 CFR Part 2, can be found at: www.lac.org/pubs/gratis/QSO-BA%20Agreement%20Form.pdf.

Internal Program Communications: Both 42 CFR Part 2 and HIPAA allow communications to be made between individuals within a program and to an entity that has direct administrative control over the program, on a need to know basis. Most

student assistance programs (SAP) are under the direct administrative control of the principal's office. Since information can only be disclosed under this section on a need to know basis, a SAP can share information necessary to obtain permission for students to attend the program, for example, but not to a principal who is considering disciplinary action.

A program can be structured in a way that a school's SAP counselors, guidance counselor, school nurse, teacher representative and a representative of the principal's office are all considered to be part of the program as key individuals concerned with the students' overall social, health and educational functioning. The program must be defined and structured in a way that includes these individuals as part of the program. Students should be made aware that these individuals will receive information about them but that they are bound by HIPAA and 42 CFR Part 2.

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