To Share or Not to Share:
Considerations on information exchange to address the opioid epidemic

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Legislative Analysis and Public Policy Association (LAPPA)
ABOUT LAPPA

501(c)(3) nonprofit organization whose mission is to conduct legal and legislative research and analysis and draft legislation on effective law and policy in the areas of public safety and health, substance use disorders, and the criminal justice system.

ONDCP’s Model Acts Program Grant recipient for 2019-21 and 2021-23.

https://legislativeanalysis.org/
Webinar overview

Part 1 – Information sharing laws/regulations

Part 2 – Examples showing application of laws/regulations

Part 3 – Resource review

Part 4 – Q & A
Part 1 – Information sharing laws/regulations

- HIPAA Privacy Rule
- 42 C.F.R. Part 2
- 28 C.F.R. Part 23
- State-specific topics
Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule

42 C.F.R. Part 2

28 C.F.R. Part 23

State-specific topics

Remember to disable the hospital spy before discussing sensitive information.

Please remember not to discuss patient information (PHI) unless the Amazon Echo is muted.

Thank you.
Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule

- Title II to the Health Insurance Portability and Accountability Act (Section 264)
- Privacy Rule regulations ➔ 45 C.F.R. Parts 160 and 164 (A and E)
- **Covered entity** or **business associate** may not use or disclose protected health information (PHI), except as permitted or required
- Patient **authorization** is necessary for uses and disclosures of PHI not otherwise allowed
- More avenues for sharing under Privacy Rule than 42 C.F.R. Part 2
Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule – Scenario analysis

Do I even need to bother with the Privacy Rule?
• Is the information at issue PHI? and
• Is the info. holder a covered entity or business associate?

Does state or local law pose a hurdle?

Is only the minimum necessary information disclosed?

Does the Privacy Rule permit disclosure without patient authorization?

Is it practical to get patient authorization?
Part 1 – Information sharing laws/regulations

**HIPAA Privacy Rule – Individ. identifiable health info. (IIHI)**

- **IIHI** = subset of health information that is
  - Created or received by a health care provider, health plan, employer, or health care clearinghouse
  - Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual and
  - Either
    - Identifies the individual or
    - For which there is reasonable basis to believe could be used to identify individual
HIPAA Privacy Rule – Protected health information (PHI) 

- **PHI** = individually identifiable health information (IIHI) that is 
  - Transmitted by or maintained in any form or medium and 
  - Not one of the following: 
    - In records covered by FERPA 
    - Certain physician, psychiatrist, psychologist records pertaining to student over 18 
    - In employment records held by **covered entity** employer 
    - Regarding person who died 50+ years ago
Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule – Protected health information (PHI)

• De-identified health information is not PHI

• How can information be de-identified?
  ❖ Remove 18 items listed in 45 C.F.R. § 164.514(b)(2)(i)(A)-(R) or
  ❖ Have a person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods conclude info is de-identified
Part 1 – Information sharing laws/regulations

**HIPAA Privacy Rule – Covered entity**

- **Covered entity** = one of the following
  - Health plan
  - Health care clearinghouse or
  - Health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA

- Hybrid **covered entity**
### Part 1 – Information sharing laws/regulations

**HIPAA Privacy Rule – Business associate**

- **Business associate** = Person or entity that performs certain activities or services involving the use or disclosure of PHI either on behalf of, or to, a **covered entity** (but not the covered entity’s employees).

- **Covered entity** can be business associate of another **covered entity**

<table>
<thead>
<tr>
<th>SERVICES</th>
<th>ACTIVITIES</th>
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<tbody>
<tr>
<td>Legal; actuarial; accounting; consulting; data aggregation; management; administrative; accreditation; financial</td>
<td>Claims processing; data analysis, processing, or administration; utilization review; quality assurance; billing; benefit management; practice management</td>
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HIPAA Privacy Rule – Business associate

- **Covered entity** must include certain protections for the information in a **business associate** agreement (BAA).
- BAA must impose specified written safeguards on **PHI** used or disclosed by its **business associates**.
- **Covered entity** cannot use BAA to authorize a **business associate** to make disclosures not allowed under Privacy Rule.
Part 1 – Information sharing laws/regulations

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Does the Privacy Rule permit disclosure without patient authorization?
Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule – Disclosures w/o authorization

- Six (6) permitted (but not required) disclosures
  - To the individual who is subject of the PHI
  - For treatment, payment, or healthcare operations
  - Where individual given opportunity to agree or object
  - Incident to an otherwise permitted use and disclosure
  - Limited data set for research, public health, or health care purposes
  - “Public interest and benefit activities” (12)
Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule – Disclosures w/o authorization

- **Public interest and benefit activities** (“Uses and disclosures for which an authorization or opportunity to agree or object is not required”)
  - Required by law
  - Public health activities
  - About victims of abuse, neglect, or domestic violence
  - Health oversight activities
  - Judicial and administrative proceedings
  - Certain law enforcement purposes

- Decedent information
- Cadaveric organ, eye or tissue donation purposes
- Research purposes
- Avert a serious threat to health or safety
- Specialized government functions
- Workers compensation compliance
Part 1 – Information sharing laws/regulations

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Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule – Scenario analysis

Do I even need to bother with the Privacy Rule?
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Does the Privacy Rule permit disclosure without patient authorization?

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### HIPAA Privacy Rule – Patient authorization

- **Valid authorization** requires:
  - Six core elements
  - Three statements
  - Plain language
  - Copy to individual

#### ELEMENTS
- Description of information; who is authorized to disclose/receive; purpose; expiration date; signature

#### STATEMENTS
- Patient may revoke; potential for re-disclosure; ability/inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization
Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule – Decedents’ records

- **Covered entity** must treat **personal representative** the same as the individual with respect to uses and disclosures of **PHI**

- **Personal representative** = person with legal authority (based on state law) to act on behalf of the decedent or the decedent’s estate
Part 1 – Information sharing laws/regulations

HIPAA Privacy Rule – Scenario analysis

- Do I even need to bother with the Privacy Rule?
  - Is the information at issue PHI? and
  - Is the info. holder a covered entity or business associate?

- Does state or local law pose a hurdle?

- Is only the minimum necessary information disclosed?

- Is it practical to get patient authorization?

- Does the Privacy Rule permit disclosure without patient authorization?

- Do I even need to bother with the Privacy Rule?
  - Is the information at issue PHI? and
  - Is the info. holder a covered entity or business associate?
Part 2 – Examples

HIPAA Privacy Rule – ODMAP

- Does ODMAP contain PHI?
- Can a covered entity report to ODMAP?
- Use of geolocation data

https://odmap.org:4443/
Part 2 – Examples

HIPAA Privacy Rule – Overdose fatality review (OFR)

• How can an OFR team obtain medical records?
• Sharing information learned from family
• Non-member observers

https://www.cossapresources.org/Tools/OFR/Resources
Part 2 – Examples

HIPAA Privacy Rule – Deflection initiatives

- Challenges vary depending on the type of initiative
- York County (Pa.) example → post-overdose outreach program; mental health co-responder and a CRS
  - Is OD victim info covered by HIPAA or can it be shared with/between response team members?
  - Does it make a difference if referral is LE or EMS?
  - What if outreach team wants to share information with family members?
  - Do they need to obtain permission from the OD victim beforehand?

https://ptaccollaborative.org/ptacc-suite/
Part 2 – Examples

HIPAA Privacy Rule – Deflection initiatives

- Challenges vary depending on the type of initiative.

York County (Pa.) example

- Post-overdose outreach program; mental health co-responder and a CRS

- Is OD victim info covered by HIPAA or can it be shared with/between response team members?

- Does it make a difference if referral is LE or EMS?

- What if outreach team wants to share information with family members?

- Do they need to obtain permission from the OD victim beforehand?

Source: HIPAA Privacy and Security Agreement for Huntington (W.V.) Quick Response Team Project Members
Part 2 – Examples

HIPAA Privacy Rule – Use of public health data

• Using data sources designed and intended for routine public health surveillance to aid in law enforcement drug distribution investigations

Part 1 – Information sharing laws/regulations

42 C.F.R. Part 2 (42 C.F.R. §§ 2.1 to 2.67)

- Confidentiality of substance use disorder (SUD) treatment records
- Authority from 42 U.S.C. § 290dd-2
- Regulations first adopted in 1975 (prior to electronic records)
- Restricts the disclosure and use of SUD patient records which are maintained in connection with the performance of any part 2 program
- More straightforward and direct than HIPAA Privacy Rule
- Changes forthcoming in 2023
Part 1 – Information sharing laws/regulations

42 C.F.R. Part 2 – Scenario analysis

Do I even need to bother with Part 2?

- Does the record identify a patient as having or having had SUD either directly or by reference to other info. or person? and
- Does the record contain info. obtained by a part 2 program for purposes of SUD treatment, diagnosis, or referral?

Does Part 2 permit disclosure w/o consent?

Generally, no

Is it practical to get patient consent?

Does state or local law pose a hurdle?

Generally, no
Part 1 – Information sharing laws/regulations


- **Patient** = individual who applies for or receives diagnosis, treatment, or referral for treatment for SUD at a **part 2 program**
- **Record** = any information, whether recorded or not, created by, received, or acquired by a **part 2 program** relating to a **patient** (e.g., diagnosis, treatment, and referral for treatment information, billing information, emails, voice mails, and texts)
- **Patient identifying information (PII)** = name, address, SSN, fingerprints, photo, or other information by which the identity of **patient** can be determined with reasonable accuracy
Part 1 – Information sharing laws/regulations

42 C.F.R. Part 2 – Part 2 program

- **Part 2 program** = [federally assisted] [program]
- Federally assisted = defined in 45 C.F.R. § 2.12(b)
- Program = one of the following:
  - Individual or entity holding itself out as providing SUD diagnosis, treatment, or referral for treatment
  - Identified unit within a general medical facility doing the above
  - Medical personnel /other staff in a general medical facility whose primary function is providing SUD diagnosis, treatment, or referral for treatment and who are identified as providers
Part 1 – Information sharing laws/regulations

42 C.F.R. Part 2 – Types of disclosures

- Disclosure without patient consent
- Disclosure with patient consent
- Court orders authorizing disclosure and use
Part 1 – Information sharing laws/regulations

**42 C.F.R. Part 2 – Disclosure without patient consent**

- Disclosure of PII may occur in three (3) situations:
  - **By medical personnel**, during bona fide medical emergency
  - **Scientific research**, if researcher meets specific requirements
  - During the course of an **audit or evaluation** of the **Part 2 program** that provided the treatment
Part 1 – Information sharing laws/regulations

42 C.F.R. Part 2 – Disclosure with patient consent

• Nine (9) required elements for consent, including:
  ❖ How much, what kind, and explicit description of info.
  ❖ Names/entities to which disclosure will be made
  ❖ Purpose of disclosure
  ❖ Patient’s right to revoke
  ❖ Date, event, or condition upon which consent expires

• Disclosure itself must be accompanied by notice to recipient that re-disclosure is prohibited, absent further consent by patient
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Part 1 – Information sharing laws/regulations

42 C.F.R. Part 2 – Changes forthcoming (2023?)

- Required by Section 3221 of CARES Act (2020)
- NPRM published 11/28/2022; comments due 1/31/2023
- More closely aligns Part 2 with Privacy Rule
  - Permits use and disclosure of patient records based on a single patient consent given once for all future uses and disclosures
  - Permits re-disclosure of patient records in any manner permitted by the HIPAA Privacy Rule, with certain exceptions
  - Expands prohibitions on the use and disclosure of patient records in civil, criminal, administrative, and legislative proceedings
  - New HHS enforcement authority
Part 1 – Information sharing laws/regulations

42 C.F.R. Part 2 – Decedents’ records

- No expiration on protection of decedents’ PII (unlike Privacy Rule)
- PII disclosable in two (2) circumstances:
  - PII related to patient’s cause of death under laws: (1) requiring the collection of death or other vital statistics or (2) permitting inquiry into the cause of death
  - After consent by personal representative
- Personal rep. =
  - (1) executor, administrator, or other personal representative
  - (2) spouse, if no (1);
  - (3) any responsible member of the patient’s family, if no (1) or (2)
Part 2 – Examples

42 C.F.R. Part 2– Overdose fatality review (OFR)

• How can an OFR team obtain behavioral health records?

https://www.cossapresources.org/Tools/OFR/Resources
Part 2 – Examples

42 C.F.R. Part 2 – Deflection initiatives

- York County (Pa.) example ➔ post-overdose outreach program; mental health co-responder and a CRS
  - Are there any challenges to sharing the OD victim info with regards to 42 CFR Part 2?

https://ptaccollaborative.org/ptacc-suite/
Part 1 – Information sharing laws/regulations

28 C.F.R. Part 23

- Assures all law enforcement agencies operating federally funded multijurisdictional or interjurisdictional **criminal intelligence systems** do so while conforming with the privacy and constitutional rights of individuals
- Adopted in 1980 with minor revisions in 1993
- Covers submission, entry, security, inquiry, dissemination, review, and purge of criminal intelligence information
Part 1 – Information sharing laws/regulations

28 C.F.R. Part 23

• Applies to agencies:
  ❖ Receiving funding from Omnibus Crime Control and Safe Streets Act of 1968, as amended
  ❖ Required to comply by grant special condition (e.g., HIDTAs, homeland security grant) or
  ❖ Required by state law

• Sets forth minimum operating principles and funding guidelines that a project must incorporate into its operating policies and procedures
Part 1 – Information sharing laws/regulations

28 C.F.R. Part 23

Agency operating a **criminal intelligence system** must develop its own operating policies and procedures, which should include:

- Access to criminal intelligence (participation standards)
- Participation agreements and other forms, as required
- Submission/entry requirements
- Types of criminal activity eligible to be maintained in the system
- Inquiry, dissemination, review and purge or validation procedures
- Audit and inspection, security requirements
- Definitions of key terms, including “need to know” and “right to know”
Part 1 – Information sharing laws/regulations

28 C.F.R. Part 23 – Criminal intelligence information

• Analyzed information related to an identified criminal subject and the definable criminal activity in which the subject is reasonably suspected of being involved.
Part 1 – Information sharing laws/regulations

State-specific topics

- Open meeting and open records laws
- Criminal justice information
- Access to death certificates
- PDMP information
- Persons to approach for more information
Part 2 – Examples

State-specific topics– OFRs

• Are OFR team records (meetings) subject to state open records (meeting) laws?
• Can OFRs obtain PDMP information?

https://www.cossapresources.org/Tools/OFR/Resources
Part 2 – Examples

State-specific topics – Deflection initiatives

- York County (Pa.) example → post-overdose outreach program; mental health co-responder and a CRS
  - Should OD victim info be considered criminal history information? If so, with whom can it be shared?
  - What agreements or background checks need to be in place?

https://ptaccollaborative.org/ptacc-suite/
Part 3 – Resource review

HIPAA Privacy Rule

- **Administrative Simplification Regulations** (HHS; as of 2013)
- **45 CFR Part 164 - SECURITY AND PRIVACY** (LII/Cornell Law School)
- **Summary of HIPPA Privacy Rule** (HHS; last reviewed Oct. 2022)
Part 3 – Resource review

HIPAA Privacy Rule

- Administrative Simplification Regulations (HHS; as of 2013)
- 45 CFR Part 164 - SECURITY AND PRIVACY (LII/Cornell Law School)
- Summary of HIPPA Privacy Rule (HHS)
- HIPAA FAQs for Professionals (HHS)
**Part 3 – Resource review**

**HIPAA Privacy Rule**

- [Administrative Simplification Regulations](HHS; as of 2013)
- [45 CFR Part 164 - SECURITY AND PRIVACY](LII/Cornell Law School)
- [Summary of HIPPA Privacy Rule](HHS)
- [HIPAA FAQs for Professionals](HHS)
- [Information Sharing Scenarios](COSSAP Resources)
- [Examples of Compliance Cases](HHS)
- [ODMAP and PHI under HIPAA](LAPPA)
- [Information Sharing in Criminal Justice – Mental Health Collaborations](BJA)
Part 3 – Resource review

42 C.F.R. Part 2

- 42 C.F.R. Part 2 (LII/Cornell Law School)
- Proposed changes to 42 C.F.R. Part 2 (Federal Register)
- Information Sharing Scenarios (COSSAP Resources)
Part 3 – Resource review

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Part 3 – Resource review

28 C.F.R. Part 23

- **28 C.F.R. Part 23** (LII/Cornell Law School)
- **Online Training Resources** (BJA)
- **Online Training FAQs: Regulation Questions** (BJA)
- **Guide to Criminal Intelligence Policies** (BJA)
Part 3 – Resource review

State-specific issues

• *Open Government Guide* (RCFP) – open records and open meetings

G. Addressing government suits against disclosure

Open Meetings

I. Statute - basic application

A. Who may attend?

All meetings shall be open to the public as provided in Va. Code Ann. § 2.2-3707.A., unless the topic of discussion at such meetings falls within one of the enumerated exemptions in Va. Code Ann. § 2.2-3711.A. (listing grounds for closed meetings) or Va. Code Ann. § 2.2-3707.01 (concerning meetings of the General Assembly and its committees). No closed meeting shall be held unless the public body proposing to convene such meeting has followed the procedures for closing a meeting, Va. Code Ann. § 2.2-3712.
Part 3 – Resource review

State-specific issues

- **Open Government Guide** (RCFP) – open records and open meetings
- **First Responder Deflection Resource Library** (COSSAP)
Part 3 – Resource review

State-specific issues

- **Open Government Guide** (RCFP) – open records and open meetings
- **First Responder Deflection Resource Library** (COSSAP)
- **OFR Resources** (COSSAP)
QUESTIONS?

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