Introduction to Information Sharing and Resources
State-Based COSSAP Grantees Working Group
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Legislative Analysis and Public Policy Association (LAPPA)
ABOUT LAPP A

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.


https://legislativeanalysis.org/
What does LAPPA do?

• Model Acts grant
  - Model laws (16 published)
  - 50-state Summary of Laws (17 published)
  - Fact sheets (36 published)
  - Case Law Monitor (six per year)
  - News Bites (six per year)
  - Knowledge Labs (six in 2023-2H)
  - Technical assistance (TA)

• COSSAP grant subaward
  - Information sharing scenarios (COSSAP website)
  - TA
What does LAPPAG do?

The Legislative Analysis and Public Policy Association (LAPPAG) is a 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.
Types of information sharing laws

Federal laws and regulations

State (specific) laws and regulations
Types of information sharing laws

Federal laws and regulations

State (specific) laws and regulations
Federal information sharing laws/regulations

- HIPAA Privacy Rule
- 42 C.F.R. Part 2
- 28 C.F.R. Part 23
- FERPA
- CAPTA
- Resources online
Federal 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
Federal 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?

• 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?
Federal information sharing laws/regulations

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
Federal 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 identifiers 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
Federal 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**
Federal 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**

**SERVICES**
- Legal; actuarial; accounting; consulting; data aggregation; management; administrative; accreditation; financial

**ACTIVITIES**
- Claims processing; data analysis, processing, or administration; utilization review; quality assurance; billing; benefit management; practice management
Federal information sharing laws/regulations

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
Federal 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)
Federal 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
Federal information sharing laws/regulations

HIPAA Privacy Rule – Patient authorization

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

<table>
<thead>
<tr>
<th>ELEMENTS</th>
<th>Description of information; who is authorized to disclose/receive; purpose; expiration date; signature</th>
</tr>
</thead>
<tbody>
<tr>
<td>STATEMENTS</td>
<td>Patient may revoke; potential for re-disclosure; ability/inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization</td>
</tr>
</tbody>
</table>
Federal 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
Federal 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**?
Federal information sharing laws/regulations

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
Federal information sharing laws/regulations

HIPAA Privacy Rule – Deflection initiatives

• Challenges vary depending type of initiative
• 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:

- 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
Federal information sharing laws/regsulations

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
Federal information sharing laws/regulations

HIPAA Privacy Rule - Resources

• Administrative Simplification Regulations (HHS; as of 2013)
• 45 CFR Part 164 - SECURITY AND PRIVACY (LII/Cornell Law School)
• Summary of HIPAA Privacy Rule (HHS; last reviewed Oct. 2022)
Federal information sharing laws/regulations

HIPAA Privacy Rule - Resources

- Administrative Simplification Regulations (HHS; as of 2013)
- 45 CFR Part 164 - SECURITY AND PRIVACY (LII/Cornell Law School)
- Summary of HIPAA Privacy Rule (HHS)
- HIPAA FAQs for Professionals (HHS)
Federal information sharing laws/regulations

### HIPAA Privacy Rule - Resources

- [Administrative Simplification Regulations](https://www.hhs.gov/; as of 2013)
- [45 CFR Part 164 - SECURITY AND PRIVACY](https://www.law.cornell.edu; LII/Cornell Law School)
- [Summary of HIPAA Privacy Rule](https://www.hhs.gov; HHS)
- [HIPAA FAQs for Professionals](https://www.hhs.gov; HHS)
- [Information Sharing Scenarios](https://www.cossap.org; COSSAP Resources)
- [Examples of Compliance Cases](https://www.hhs.gov; HHS)
- [ODMAP and PHI under HIPAA](https://www.lappa.org; LAPPLE)
- [Information Sharing in Criminal Justice – Mental Health Collaborations](https://www.bja.gov; BJA)
Federal 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
Federal 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?
Federal 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
Federal 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
Federal 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
Federal 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
Federal 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
Federal 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
Federal 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)
Federal information sharing laws/regulations

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
Federal information sharing laws/regulations

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

- 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/](https://ptaccollaborative.org/ptacc-suite/)
Federal information sharing laws/regulations

42 C.F.R. Part 2 - Resources

- 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)
Federal information sharing laws/regulations

42 C.F.R. Part 2 - Resources

• [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)
• [Information Sharing in Criminal Justice – Mental Health Collaborations](BJA)
Federal information sharing laws/regulations

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

• 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
Federal information sharing laws/regulations

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

• 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
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”
Federal 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.
Federal information sharing laws/regulations

28 C.F.R. Part 23 - Resources

- 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)
Federal information sharing laws/regulations

Family Educational Rights and Privacy Act (FERPA)

• Circumstances under which such records may be used and disclosed
• 20 U.S.C. § 1232g; 34 CFR Part 99
• Privacy rights of an “eligible student” lapse upon death
• Did the decedent’s privacy rights in the records expire upon death?
• If not, does any individual hold the privacy rights from whom consent to disclose can be obtained?
Federal information sharing laws/regulations

**Child Abuse Prevention and Treatment Act (CAPTA)**

- **42 U.S.C. §§ 5101 to 5116i**
- State may share child services records only to:
  - Individuals who are the subject of the report
  - Federal, state, or local governmental entities, that have a need for such information in order to carry out their responsibilities
  - Child abuse citizen review panels and child fatality review panels
  - Grand jury or court, upon a finding of necessity
  - Other entities or classes of individuals statutorily authorized by the state
  - Public disclosure of the findings or information about cases that resulted in a child fatality or near-fatality
State (specific) laws/regulations

Key issues

- Open meeting and open records laws
- PDMP information
- Criminal justice information
- Access to death certificates
- Educational records (institution-specific)
- Persons to approach for more information
State (specific) laws/regulations

Key issues – 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
State (specific) laws/regulations

Key issues – Deflection initiatives

• 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/
State (specific) laws/regulations

Key issues – Resources

- Open Government Guide (RCFP) – open records and open meetings
State (specific) laws/regulations

Key issues – Resources

- **Open Government Guide** (RCFP) – open records and open meetings
- **First Responder Deflection Resource Library** (COSSAP)
State (specific) laws/regulations

Key issues – Resources

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

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