42 CFR Part 2 and Prescription Drug Monitoring Programs

Presentation at the Harold Rogers PDMP 2022 National Meeting

December 6, 2022

Funded by Substance Abuse and Mental Health Services Administration
Center of Excellence for Protected Health Information

Funded by SAMHSA, the CoE-PHI develops and disseminates resources, training, and TA for states, healthcare providers, school administrators and individuals and families to improve understanding and application of federal privacy laws and regulations, including FERPA, HIPAA, and 42 CFR Part 2, when providing and receiving treatment for SUD and mental illness.

Resources, training, technical assistance, and any other information provided through the CoE-PHI do not constitute legal advice.
CoE-PHI Team and Presenters

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
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<tr>
<td>Amber Black, JD</td>
<td>CoE-PHI Health Privacy Associate</td>
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<tr>
<td>Christine Khaikin, JD</td>
<td>CoE-PHI Senior Health Privacy Associate</td>
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Presentation Objectives

- Explain the basics of 42 CFR Part 2 (including who is covered by Part 2)
- Identify recent changes to Part 2 that apply to PDMPs
- Recognize how to access resources and technical assistance through the CoE-PHI
Fear, shame and stigma are some of the biggest obstacles to substance use disorder treatment. Privacy protections help overcome these obstacles to care.

Understanding the Federal SUD Privacy Law
INTRO TO PART 2
**HIPAA**

**Applies to** covered entities (healthcare providers, health plans, healthcare clearinghouses) and BAs
- Protects privacy and security of general health information

**Purpose:** to protect health data integrity, confidentiality, and accessibility

**Permits** disclosures without patient consent for treatment, payment, and healthcare operations

**42 CFR Part 2**

**Applies to** SUD patient records from federally-assisted “Part 2 programs”
- Protects privacy and security of records identifying individual as seeking/receiving SUD treatment

**Purpose:** to encourage people to enter and remain in SUD treatment by guaranteeing confidentiality

**Requires** patient consent for treatment, payment, and healthcare operations, with limited exceptions
42 CFR Part 2

- “Part 2” protects the confidentiality of patient records at federally assisted SUD treatment programs
  - These programs are called “Part 2 programs”
  - Not all SUD treatment providers are Part 2 programs

- Part 2 establishes privacy and security requirements
  - Part 2 is just one privacy law – other laws may also apply (e.g., HIPAA, state law)
True or False: Only Part 2 programs must follow Part 2.
Poll Question #1  
Answer

FALSE: Part 2’s privacy protections generally follow the information even once it leaves a Part 2 program

- The *recipient* of the information must also follow Part 2’s privacy protections
- A recipient is known as a “lawful holder”
- See 42 CFR §§ 2.12, 2.13.
General Rule

Part 2 generally requires *written* patient consent before making a disclosure of Part 2-protected records

- Limited exceptions apply
Questions?

Please share with us any questions that you have now
How does this sit with you?
Amendments to 42 CFR Part 2

WHAT CHANGED IN 2020

FOR PDMPS
Timeline

Aug. 2019: Proposed Rule (SAMHSA)

Fall 2019: Public Comments

March 2020: CARES Act (Congress)

July 2020: Final Rule (SAMHSA), effective 08/14/20, *transitional only*

TBD: New rulemaking implementing CARES Act (HHS)
What did NOT change?

- **Confidentiality framework**
  - Definition of a Part 2-covered program
    - Federally assisted SUD program, § 2.11
  - General rule: patients must authorize disclosures of their Part 2-records, unless an **exception** applies

- **Enforcement**
## Changes to Part 2 (2020)

<table>
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<td>Requirements for written consent forms</td>
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Background: PDMPs and Part 2

- In 2011 SAMHSA issued guidance stating that OTPs should not make disclosures to PDMPs
  - Clark HW. Dear Colleague letter. Sept. 27, 2011

- Since that time, PDMPs have not received Part 2-protected records from OTPs
*New § 2.36

Disclosures to PDMPs

“A part 2 program or other lawful holder is permitted to report any SUD medication prescribed or dispensed by the part 2 program to the applicable state prescription drug monitoring program if required by applicable state law. A part 2 program or other lawful holder must obtain patient consent to a disclosure of records to a prescription drug monitoring program under §2.31 prior to reporting of such information.”
Disclosures to PDMPs

- A Part 2 program or lawful holder may now report SUD medication it prescribes or dispenses to the state PDMP
  - *Only as required by applicable state law*
  - *And only with written patient consent*
Disclosures to PDMPs

Receiving Part 2 records from a Part 2 program or lawful holder makes the PDMP a “lawful holder,” 42 CFR §§ 2.12, 2.13.

- PDMP must protect Part 2 records according to Part 2:
  - Comply with Part 2’s restrictions on re-disclosure, 42 CFR § 2.13.
  - Protect security of records, 42 CFR § 2.16.
  - Only release records to law enforcement with Part 2 compliant court order, 42 CFR § 2.65.
Questions?

Please share with us any questions that you have now
How is this sitting with you?
Practical Steps and Case Studies

APPLICATION

Funded by Substance Abuse and Mental Health Services Administration
Practical Steps Toward Application

Step 1:
Review Your State Law

Step 2:
Review your PDMP’s privacy and security measures for Part 2 compliance
Step 1

Review Your State Law
Case Study #1
State Law

- State A permits, but does not require, opioid treatment programs (OTPs) to report information to the PDMP.
- A local OTP asks patients to sign a consent form authorizing disclosure to the PDMP.
- Patients have the right to refuse to sign the consent form.
Case Study #1

State Law

Does it violate Part 2 for the OTP to share the patient records with the PDMP if they have signed patient consent?

a) Yes, this violates Part 2 because state law does not require OTPs to report information.

b) No, this does not violate Part 2 because state law permits OTPs to report information.

c) No, because the patient consent form is optional.

d) No, because SAMHSA has said that PDMPs can be useful in addressing high overdose rates.
Does it violate Part 2 for the OTP to share the patient records with the PDMP if they have signed patient consent?

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<td>✗</td>
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Case Study #1
State Law
Answer

a) Yes, this violates Part 2 because the state law does not require OTPs to report SUD medications to the PDMP, 42 CFR § 2.36.

- **Remember** to check your state law to see whether it requires OTPs to report any SUD medication prescribed or dispensed to the PDMP.
Case Study #2
State Law (v2)

- State B’s law requires anyone who prescribes or dispenses SUD medication to report the information to the state PDMP.
- State B’s law does not require patients to consent to disclosures to the PDMP.
- State B’s Department of Behavioral Health instructs all the OTPs in the state to submit the last six months of SUD medication data to the PDMP, even if patient consent cannot be obtained.
Case Study #2

State Law (v2)

Does it violate Part 2 for the OTPs to share ALL patient records with the PDMP, including records of patients who did not consent?

a) Yes, this violates Part 2 because State B’s PDMP reporting law does not specifically refer to OTPs.

b) Yes, because the OTPs must have patient consent.

c) No, this does not violate Part 2 because state law requires the report, and state law does not require patient consent.

d) No, because the Department of Behavioral Health funds and regulates the OTPs.
Does it violate Part 2 for the OTPs to share ALL patient records with the PDMP, including records of patients who did not consent?
b) Yes, this violates Part 2 because the OTPs must have written patient consent before sharing records with the PDMP, 42 CFR § 2.36.

- Even though state law does not require written patient consent, Part 2 (federal law) does.
  - **Remember**: if state law requires a disclosure prohibited by Part 2, Part 2 controls, 42 CFR § 2.20.
- OTPs may share SUD medication records for those patients who sign written consent.
Step 2

Review your PDMP’s privacy and security measures for Part 2 compliance
Case Study #3
Security

- State C’s PDMP is collecting SUD medication information from OTPs, pursuant to the new provisions in Part 2.

- The PDMP follows the HIPAA privacy and security rule for all its records.
Case Study #3

Security

Does the PDMP need to adjust any of its security protocols for the Part 2 data?

a) No, because Part 2 does not apply to the PDMP’s data.

b) No, because HIPAA is the applicable security standard.

c) Yes, the PDMP needs to adjust its security protocols for all its data.

d) Yes, the PDMP needs to adjust its security protocols - but only for the Part 2 records it receives from OTPs.
Does the PDMP need to adjust any of its security protocols for the Part 2 data?

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<td>No</td>
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Case Study #3

Security

Answer

d) Yes, the PDMP needs to adjust its security protocols – but only for the Part 2 records it receives from the OTPs, 42 CFR § 2.12.

- The PDMP is now a lawful holder, 42 CFR § 2.13.
- Part 2 requires lawful holders to follow the security protocols in Section 2.16 for the protected Part 2 records only.
Key Points: Security

Lawful holders must have formal policies and procedures to reasonably protect against:

- Unauthorized uses and disclosures of Part 2 records (paper and electronic), and
- Reasonably anticipated security threats, 42 CFR § 2.16(a).

HIPAA security compliance is a good first step – but not sufficient.
Case Study #4

Law Enforcement

• Casey signs a consent form authorizing their OTP to share SUD medication records with the PDMP, as required by state law.

• The local DA is conducting an investigation into alleged criminal activity by Casey.

• State D requires law enforcement to have a warrant in order to obtain PDMP records.
Case Study #4

Law Enforcement

How may the PDMP release Casey’s records to the DA?

a) With a warrant, because that meets the state law requirements.

b) With a warrant and a certification that the DA is conducting an active investigation against Casey.

c) With a Part 2-compliant court order, finding that the alleged crime is extremely serious and that the public interest outweighs the harm to patient confidentiality.

d) The PDMP cannot share any records, because the OTP violated Part 2 by sharing the records in the first place.
### How may the PDMP release Casey’s records to the DA?

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Case Study #4

Law Enforcement

Answer

c) With a Part 2-compliant court order.

- The PDMP is a “lawful holder” of Part 2 records, 42 CFR §§ 2.12(d)(2), 2.13.
- Part 2 records may only be used to criminally investigate or prosecute a patient after a judge issues a special court order, 42 CFR §§ 2.12(b), 2.13.
**Key points: Law Enforcement**

- A warrant, subpoena, or certificate of open investigation is not sufficient to authorize disclosure of Part 2-protected records, 42 CFR §§ 2.12(b), 2.13.

- PDMPs may only disclose records if law enforcement produces a court order that meets the requirements of Section 2.65.
Part 2 Court Orders

Procedural requirements:

- Adequate notice to record holder (i.e., PDMP)
- Opportunity to appear and be heard
- PDMP represented by counsel independent of applicant
- Hearing held in judge’s chambers
- Order issued by judge (see next slide)
Part 2 Court Orders

Substantive Requirements:
- Court order must make all the following findings:
  - Crime alleged is "extremely serious"
  - Reasonable likelihood records will be substantially valuable
  - Other ways of obtaining the information not available
  - Potential injury outweighed by public interest

- Disclosure and use limited to minimum necessary, and limited to serious crime specified in application
Looking Ahead

WHAT ADDITIONAL CHANGES ARE COMING
CARES Act

- Coronavirus Aid, Relief, and Economic Security Act (March 2020) amended SUD privacy law, 42 USC § 290dd-2
  - Effective date: When new regulations are finalized
  - Requires HHS to amend 42 CFR Part 2

- Future rulemaking will define practical impact of the CARES Act changes (date TBD)
# Summary of CARES Act Provisions

<table>
<thead>
<tr>
<th>42 USC § 290dd-2</th>
<th>Change</th>
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<tbody>
<tr>
<td>(b)(1)</td>
<td>Disclosures for treatment, payment, and healthcare operations</td>
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<tr>
<td>(b)(2)(D)</td>
<td>De-identified records shared with public health authorities</td>
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<tr>
<td>(c)</td>
<td>Prohibition on use or disclosure of records in criminal, civil, or administrative contexts</td>
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<td>(f)</td>
<td>Penalties and enforcement</td>
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<td>(i)</td>
<td>Antidiscrimination provisions</td>
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<td>(j)</td>
<td>Notification in case of breach</td>
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<tr>
<td>(k)</td>
<td>Definitions cross-referencing HIPAA</td>
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</tbody>
</table>
Poll Question #2

True or False?

The CARES Act amended the SUD privacy law to be the same as HIPAA.

☐ True
☐ False
☐ I’m not sure…
True or False? The CARES Act amended the SUD privacy law to be the same as HIPAA.
Poll Question #2

Answer

FALSE. The CARES Act amended the SUD privacy law to permit certain redisclosures of information for treatment, payment, and healthcare operations (after a patient’s initial written consent).

- The impact of the CARES Act changes will depend largely on a future rulemaking to amend Part 2.
Questions?

Please share with us any questions that you have now.
ACCESSING The CoE-PHI
Accessing the CoE-PHI

Technical Assistance
Technical assistance (TA) provided by the Center of Excellence for Protected Health Information (CoE-PHI) aims to support implementation of relevant federal confidentiality and privacy laws for providing mental health and substance use disorder services to clients in practice.

TA is designed to clarify confidentiality regulations and laws, link professionals to helpful resources, and identify strategies to support practical implementation of confidentiality and privacy regulations in practice.

Before requesting Technical Assistance, consider visiting our Resource Library, as answers to many frequently asked questions regarding federal health privacy laws are contained within our resources.

REQUEST TECHNICAL ASSISTANCE →

Request TA
coephi.org/technical-assistance

Resource Library
coephi.org/resource-library/

Confidentiality is a cornerstone of recovery.
Protecting patient privacy opens doors to communication, understanding, and trust.
Training Evaluation

We value your opinion!

Please take the time to complete our evaluation by scanning this QR Code.
Training Evaluation

You can also access the evaluation by clicking the link below!

Evaluation Link
THANK YOU!

Fear, shame and stigma are some of the biggest obstacles to SUD and mental health treatment.

Privacy protections help overcome these obstacles to care.