Behavioral Health Record-Sharing Changes

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Definitions

"Data segmentation" is the term often used to describe the electronic labeling or tagging of a patient's health information in a way that allows patients or providers to electronically share parts, but not all, of a patient record.

Data segmentation helps providers comply with specific state and federal laws, helping to keep the "sensitive" portions of a patient's electronic record private. For example, mental health counseling, Human Immunodeficiency Virus (HIV) status, substance abuse treatment, and other types of sensitive topics may need to be treated differently than other parts of a patient's record depending on the applicable laws.

Granular consent = patient consent process

Data segmentation = technical requirements to enable granular consent

Source: https://archive.healthit.gov/providers-professionals/data-segmentation-overview

Original Mental Health Law Language

40.1-5-26 Disclosure of confidential information and records.

(a) The fact of admission or certification, and all information and records compiled, obtained, or maintained in the course of providing services to persons under this chapter, shall be confidential.

(b) Information and records may be disclosed only:

(1) To any person, with the written consent of the patient, or his or her guardian.

(2) In communication among qualified medical or mental health professionals in the provision of services, or to make appropriate referrals or in the course of court proceedings. The consent of the patient, or his or her guardian, must be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the medical responsibility for the patient's care.

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Inconsistent Interpretations

- The highlighted language is unclear and therefore many mental health providers are not certain how to maintain compliance with the consent requirements
- This has led to extremely conservative record-sharing practices for care coordination, even when the patient wishes for records to be shared
- The end result is that patients with mental health conditions can receive lower quality care coordination, especially after psychiatric hospitalization – which has real impacts on their health and wellness
    - This has major implications for implementation of the CCBHC initiative
- In addition, this is an old law that does not specifically address any form of electronic record-sharing, which is a complicated landscape that state law needs to align with

Alignment with Federal Law

- HIPAA and 42 CFR Part 2 supersede state law and have been in effect alongside this law for many years
- These provisions will remain in effect no matter what language is used in state law
- However, it can cause confusion and, again, inconsistent interpretations if federal law is directly referenced in state law; it is generally preferable that federal law not be referenced in state law

S179 / H5687 Language

- Removes unclear and confusing sentence
- Explicitly defines allowable purposes for sharing records, in response to important feedback from community partners
- Language around “responsibility for the patient’s care” considered and removed due to conflict with the need for safety assessments in involuntary commitments

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(1) To any person, with the written consent of the patient, or his or her guardian.

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(14) To any vendor, agent, contractor, or designee who operates an electronic health record, health information exchange, or clinical management system to fulfill one of the purposes specified in subsection (b) of this section.

HIT Clause

- Does not introduce new or additional allowable purposes for record-sharing
- In response to community feedback, the purposes identified in § 40.1-5-26(b) (defined on Slide 6) are limited and specifically do not include advertising or commercial interests.
- Explicitly addresses electronic record-sharing using commonly utilized means and ensures it is treated the same as paper-based faxing
- Health IT is heavily regulated at the federal level and language here is kept simplified to ensure conflicts do not arise with federal law in the future

Affirmative Consent

- Based on input from community partners, this section expressly states that no purposes other than those listed and described are allowable purposes for disclosure without written consent from patient or guardian
- Revised and clarified policy around psychotherapy notes at suggestion from community partners
- Does not otherwise limit record elements to be shared in deference to clinical judgment and the changing nature of practices over time

(c) Written consent must be obtained from the patient, or the patient's guardian, before disclosures for purposes other than those allowed in subsection (b) of this section and for disclosure of psychotherapy notes that are otherwise excluded from a patient's record;

(d) In accordance with applicable federal and state laws, psychotherapy notes related to the treatment of a patient may be disclosed without the written consent of the patient or the patient's guardian in the course of court proceedings consistent with subsection (b)(7) of this section.

(e) The penalties pursuant to § 5-37.3-9 shall apply to any violation of the confidentiality provisions of this section.

Record of Disclosures

- Ensures patients have the right to know who has accessed their records regardless of the disclosure means (electronic or otherwise)
- Community partners supported this section – and the state strengthened the language with their feedback

(b) When any disclosure of information or records is made through automated electronic exchanges such as those facilitated by electronic health records or health information exchanges, the appropriate system operator shall promptly record the date and circumstances under which the disclosure was made, the names and relationships to the patient, if any, of the person or agencies to whom the disclosure was made, and the information disclosed.

(c) Documentation related to disclosure of information or records, including the content thereof, as required under subsections (a) and/or (b) of this section, shall be made available to the patient upon the patient's or the patient's guardian's request.

Substance Use (Federal)

42 CFR Part 2 was first promulgated in 1975 to protect patients seeking treatment for substance use disorder (SUD) from criminal proceedings and repercussions for seeking treatment. That remains the primary purpose at the federal level for these protections.

What is Covered by Part 2?

- Clinical programs covered by Part 2 protections are defined as:
  - Federally assisted (receipt of any federal funding, tax exempt status, or dispensing controlled SUD treatment medications such as methadone)

    and

  - Organization is primarily "held out us" SUD treatment provider

    or

  - Within a mixed-use facility, an identified unit or identified individual medical personnel/staff whose primary function is provision of SUD treatment
- Note that Part 2 occurs at the clinical program/provider level, **not the patient level**

Key Differences

- Disclosures for the purpose of “payment and health care operations” are permitted **with written consent.**
  - **Part 2 requires a named recipient (organization or individual) on the consent.**
  - Differing from HIPAA, Part 2 also requires that recipients of the patient’s SUD treatment records be notified that they are **prohibited from re-disclosing the records** without written consent from the patient.

Notice of Proposed Rule-Making 01/2023

- Section 3221 of the CARES Act requires HHS to bring Part 2 into greater alignment with certain aspects of HIPAA

- In 2019, the National Association of Attorneys General (NAAG) urged Congress to update the 40-year-old Part 2 regulation that was created in a time of “intense stigma” surrounding SUD treatment because it now serves to “perpetuate that stigma, as the principle underlying these rules is that [SUD] treatment is shameful and records of it should be withheld from other treatment providers in ways that we do not withhold records of treatment of other chronic diseases.”

https://www.federalregister.gov/documents/2022/12/02/2022-25784/confidentiality-of-substance-use-disorder-sud-patient-records

The Headline of the Proposed Rule

- **Permit use and disclosure of Part 2 records based on a single patient consent given once for all future uses and disclosures for treatment, payment, and health care operations (TPO)**
- Permit the redisclosure of Part 2 records as permitted by the HIPAA Privacy Rule by recipients that are Part 2 programs, HIPAA covered entities, and business associates, with certain exceptions.

TPO recipients may be a Part 2 program, covered entity, business associate, or intermediary:

- *For a single consent for all future uses and disclosures for TPO, the recipient may be described as "my treating providers, health plans, third-party payers, and people helping to operate this program" or a similar statement.*
- *To the extent that a requesting entity is itself a Part 2 program, covered entity, or business associate that has received Part 2 records pursuant to a consent that includes disclosures for health care operations, it would then be permitted to redisclose the records for other purposes as permitted by the Privacy Rule.*

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Other Proposed Changes

- Expand prohibitions on the use and disclosure of Part 2 records in civil, criminal, administrative, or legislative proceedings conducted by a federal, state, or local authority against a patient, absent a court order or the consent of the patient.
- Create two patient rights under Part 2 that align with individual rights under the HIPAA Privacy Rule:
  - Right to an accounting of disclosures in the past 3 years, including from intermediaries.
  - Right to request restrictions on disclosures for treatment, payment, and health care operations.
- Amend the enforcement provision of Part 2 to mirror the enforcement measures under HIPAA, giving HHS the authority to issue civil monetary penalties.

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Requirements for Intermediaries

Examples of an intermediary include, but are not limited to, a **health information exchange**, a research institution that is providing treatment, an **accountable care organization**, or a care management organization. In contrast, a research institution that is not providing treatment or a health app that is providing individual patients with access to their records would not be considered an intermediary.

If the recipient entity is an intermediary, a written consent must include the name(s) of the intermediary(ies) and

- (A) The name(s) of the member participants of the intermediary; or
- (B) A general designation of a participant(s) or class of participants, which must be limited to a participant(s) who has a treating provider relationship with the patient whose information is being used or disclosed; and
- (C) The statement that the patient's record may be redisclosed in accordance with the permissions contained in the HIPAA Privacy Rule, except for uses and disclosures for civil, criminal, administrative, and legislative proceedings against the patient.

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Implications

- **Allows** but does not **require** this approach
- Allows for Part 2 programs to condition treatment on consent to disclosure for TPO
- General consent can be taken at registration/intake with no expiration date
- Consent language and Notice of Privacy Practices (NPPs) must be updated to reflect these changes
- Must meet other Part 2 consent requirements, including listing the persons authorized to make the disclosure, description of information to be used or disclosed, and patient's written or electronic signature
- Patients may revoke consent in writing

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