

Key Privacy Provision Comparison

Federal privacy requirements designed to protect health-related information can be challenging to reconcile, resulting in misconceptions and confusion around their application. This is particularly true at the crucial intersection of behavioral health, criminal justice, homelessness, and other social determinants of health where ongoing, dynamic interactions are needed.

The CSG Justice Center called for new guidance that targets these systems, providing clearer direction on what information can be shared and in which circumstances. The goals of doing so are to strengthen cross-system collaboration, improve local capacity to collect and share information, reduce avoidable justice system contact, and strengthen community-based care and services.¹

This side by side comparison chart is one of several tools designed to do just that. Key similarities and critical differences between HIPAA and Part 2 are easier to identify in this format. No one agency or system can solve the public health challenges involving mental illness and addiction. We are proud to support these critical collaborations.

HIPAA Health	42 CFR Part 2 Substance Use Disorders
THE LAW	
The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, was enacted on August 21, 1996. HIPAA requires the Secretary of HHS to publicize standards for the electronic exchange, privacy, and security of health information. The	42 USC §290dd-2. Confidentiality of records (initial effective date July 1, 1944). 42 CFR Part 2 – The Secretary of HHS shall prescribe regulations to carry out the purposes of this section; SAMHSA.

¹ Alex Blandford, Thomas Coyne, Hadley Fitzgerald, et al., *Stepping Up Pennsylvania: Findings and Recommendations from the Behavioral Health-Criminal Justice State Policy Scan Project* (New York): The Council of State Governments Justice Center, 2021

<p>Administrative Simplification provisions are found in 45 CFR 160, 162 and 164².</p> <p>Office for Civil Rights (“OCR”) has responsibility for implementing and enforcing the Privacy Rule with respect to voluntary compliance activities and civil money penalties.</p>	<p>Together simply known as “Part 2,” they impose restrictions upon the disclosure and use of substance use disorder patient records which are maintained in connection with the performance of any part 2 program.</p>
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WHAT ENTITIES ARE COVERED

<p>Covered Entity³: Health plans, health care clearinghouses, and health care providers who transmit any health information in electronic form in connection with covered transactions.</p>	<p>Part 2 Program⁴: Entity or individual providing substance use disorder diagnosis, treatment, or referral for treatment⁵; must also receive federal assistance (defined broadly)⁶.</p> <p>Coverage includes, but is not limited to, those treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs, and private practitioners who hold themselves out as providing, and provide substance use disorder diagnosis, treatment, or referral for treatment.⁷</p>
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WHAT IS PROTECTED

<p>Protected Health Information (PHI)⁸: Individually identifiable health information that is transmitted by electronic media; maintained in electronic media; or transmitted or maintained in any other form or medium.</p>	<p>Patient Record: Records that would identify and contain any information about a patient as having or having had a substance use disorder for the purpose of treating, making a diagnosis for that treatment, or making a referral for that treatment.</p> <p>Patient¹⁰: Any individual who has applied for or been given diagnosis¹¹, treatment, or referral for treatment for a substance use disorder at a Part 2 Program, including any individual who, after arrest on a criminal charge, is identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a Part 2 Program. This definition includes both current and former patients.</p>
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² Administrative Rules: 45 CFR § 160 -164
³ Applicability: 45 CFR § 160.102; Definitions 45 CFR § 160.103
⁴ Part 2 Program: 42 CFR 2.11
⁵ SUD Services: 42 CFR § 2.11
⁶ Federal Assistance: 42 CFR § 2.12(b)
⁷ Coverage: 42 CFR 2.12(e)(1)
⁸ Protected Health Information: 45 CFR § 160.103
¹⁰ Patient: 42 CFR 2.11
¹¹ Diagnosis: 42 CFR 2.11

<p>Individually Identifiable⁹: Health information, including demographics,</p> <ul style="list-style-type: none"> • created or received by a health care provider, health plan, employer, or health care clearinghouse; and • 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 	<p>Record¹²: Any information,</p> <ul style="list-style-type: none"> • whether recorded or not, created by, received, or acquired by a part 2 program relating to a patient (<i>e.g.</i>, diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts) • information conveyed orally by a part 2 program to a non-part 2 provider for treatment purposes with the consent of the patient does not become a record subject to this Part in the possession of the non-part 2 provider merely because that information is reduced to writing by that non-part 2 provider. • Records otherwise transmitted by a part 2 program to a non-part 2 provider retain their characteristic as records in the hands of the non-part 2 provider, <i>but may be segregated by that provider.</i> • For the purpose of the regulations in this part, records include both paper and electronic records. <p>➤ To avoid the application of Part 2 requirements to non-Part 2 provider records, the Final Rule advises that the respective records should be “segregated.”</p> <p>Patient Identifying Information¹³: The name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient, as defined in this section, can be determined with reasonable accuracy either directly or by reference to other information.</p> <ul style="list-style-type: none"> • The term does not include a number assigned to a patient by a part 2 program, for internal use only by the part 2 program, if that number does not consist of or contain numbers (such as a social
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⁹ Individually Identifiable Information: 45 CFR § 160.103

¹² Records: 42 CFR 2.11

¹³ Patient Identifying Information: 42 CFR 2.11

<p>provision of health care to an individual; and</p> <ul style="list-style-type: none"> ○ That identifies the individual; or ○ With respect to which there is a reasonable basis to believe the information can be used to identify the individual. 	<p>security, or driver's license number) that could be used to identify a patient with reasonable accuracy from sources external to the part 2 program.</p>
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HOW INFORMATION IS SHARED

<p>Patient authorization¹⁴: A covered entity must obtain the individual’s written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations or otherwise permitted or required by the Privacy Rule. A valid authorization under this section must contain at least the following core elements⁵⁶:</p> <ul style="list-style-type: none"> • A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion. • The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure. • The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure. • A description of each purpose of the requested use or disclosure. The statement “at the request of the individual” is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose. • An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. 	<p>Consent¹⁵: A written consent to a disclosure may be paper or electronic and must include:</p> <ul style="list-style-type: none"> • The name of the patient; • The name(s) or general designation(s) of the disclosing individuals/entities; • How much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed; • The name(s) of the individual(s)/entities to which a disclosure is to be made. • The purpose of the disclosure, limited to that information which is necessary to carry out the stated purpose; • consent is subject to revocation at any time except to the extent that the part 2 program or other lawful holder of patient identifying information that is permitted to make the disclosure has already acted in reliance on it; • date, event, or condition upon which the consent will expire if not revoked before; no longer than reasonably necessary to serve the purpose for which it is provided; • signature of the patient authorized to give consent. <i>Electronic signatures are permitted to the extent that they are not prohibited by any applicable law;</i> • date on which the consent is signed. <p><i>Note: Special instructions exist for entities that facilitate the exchange of health information and research institutions¹⁶.</i></p>
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¹⁴ Authorization required: 45 CFR 164.508

¹⁵ Consent requirements: 42 CFR 2.31(a)

¹⁶ Special Consents: 42 CFR 2.31(a)(4)(ii)

<ul style="list-style-type: none"> Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided. <p><i>Note: Special instructions exist for entities that facilitate the exchange of health information and research institutions. The authorization must be written in plain language, a copy provided to the individual, and include required statements listed in the privacy rule.</i></p>	
<p>Minimum Necessary¹⁷: A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.</p> <p>Minimum Necessary Not Required¹⁸:</p> <ul style="list-style-type: none"> disclosure to or a request by a health care provider for treatment; disclosure to an individual/personal representative who is the subject of the information; use or disclosure made pursuant to an authorization; disclosure to HHS for complaint investigation, compliance review or enforcement; use or disclosure that is required by law; or use or disclosure required under HIPAA Transactions or other Administrative Simplification Rules. 	<p>Minimum Necessary¹⁹: Any disclosure made under the regulations in this part must be limited to that information which is necessary to carry out the purpose of the disclosure.</p> <p>Prohibition on Redislosures²⁰: Each disclosure made with the patient's written consent must be</p>

¹⁷ Minimum Necessary: 45 CFR 164.502(b), 45 CFR 164.514(d)

¹⁸ Min Necessary not required: 45 CFR 164.502(b)(2)

¹⁹ Minimum Necessary: 42 CFR 2.13(a)

²⁰ Prohibition on Redislosure: 42 CFR 2.32(a)

	<p>accompanied by one of the following written statements:</p> <ul style="list-style-type: none"> • This record which has been disclosed to you is protected by federal confidentiality rules (42 CFR part 2). The federal rules prohibit you from making any further disclosure of this record unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed in this record or, is otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose (see § 2.31). The federal rules restrict any use of the information to investigate or prosecute with regard to a crime any patient with a substance use disorder, except as provided at §§ 2.12(c)(5) and 2.65; or • 42 CFR part 2 prohibits unauthorized disclosure of these records. <p>Permissible further disclosures²¹:</p> <ul style="list-style-type: none"> • If a patient consents to a disclosure of their records for payment or health care operations activities, a lawful holder who receives such records under the terms of the written consent may further disclose those records as may be necessary for its contractors, subcontractors, or legal representatives to carry out payment and/or health care operations on behalf of such lawful holder. • Those disclosures must be limited to that information which is necessary to carry out the stated purpose of the disclosure. • Care coordination and/or case management services in support of payment or health care operations is one example of permissible payment or health care operations activities. • Lawful holders who wish to disclose patient identifying information under this scenario must have in place a written
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²¹ Payment and Health Care Operations Disclosures: 42 CFR 2.33(b)

	contract which provides that the recipient is fully bound by the provisions of part 2.
INFORMATION RECIPIENTS	
<p>Business Associate (BA)²²: A person or organization (other than a member of a covered entity’s workforce) using or disclosing individually identifiable health information to perform or provide functions, activities, or services for a covered entity. Requires a written agreement²³.</p> <p>Applicability: Where provided, the standards, requirements, and implementation specifications adopted under this part apply to a business associate.²⁴</p> <p>Business associates: Permitted uses and disclosures²⁵. A business associate may use or disclose protected health information only as permitted or required by its business associate contract, other permitted arrangement, or as required by law. Generally, the business associate may not use or disclose protected health information in a manner that would violate the requirements if done by the covered entity.</p> <p>Business associates: Required uses and disclosures²⁶. Generally, the same as a covered entity.</p>	<p>Qualified Service Organization (QSO)²⁷: Provides services to a Part 2 Program, such as data processing, bill collecting, dosage preparation, laboratory analyses, or legal, accounting, population health management, medical staffing, or other professional services, or services to prevent or treat child abuse or neglect. Requires a written agreement.</p> <p>QSO has entered into a written agreement with a Part 2 Program:</p> <ul style="list-style-type: none"> • Acknowledges that in receiving, storing, processing, or otherwise dealing with any patient records from the part 2 program, it is fully bound by the regulations in this part; and • If necessary, will resist in judicial proceedings any efforts to obtain access to patient identifying information related to substance use disorder diagnosis, treatment, or referral for treatment except as permitted by the regulations in this part.

²² Business Associate: 45 CFR § 160.103
²³ BA Agreement required: 45 CFR 164.502(e), 45 CFR 164.504(e)
²⁴ Applicability: 45 CFR § 164.500
²⁵ BA permitted use/disclosure: 45 CFR 164.502(a)(3)
²⁶ BA required use/disclosure: 45 CFR 164.502(a)(4)
²⁷ Qualified Service Organization: 42 CFR 2.11