Tool #2

SBIRT AND THE FEDERAL ALCOHOL & DRUG CONFIDENTIALITY RULES – THE BASIC REQUIREMENTS

Second in a series about SBIRT and confidentiality

Introduction

This tool gives Screening, Brief Intervention and Referral to Treatment ("SBIRT") providers an overview of the basic requirements of the federal law governing the confidentiality of substance use disorder ("SUD") records (42 C.F.R. Part 2 or "Part 2"). The tool is for providers who have determined they are covered by Part 2 as well as those who are not covered, but communicate with programs which are. If you do not know whether you are required to follow Part 2, you can use Tool #1 to find out.

Amendments to Part 2 went into effect in 2017 and early 2018. This tool reflects these changes. For additional guidance on the amendments, visit the Legal Action Center's resources.

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What information does Part 2 protect?

Part 2 prohibits SBIRT providers who are covered by Part 2 ("covered SBIRT providers") from identifying individuals as patients in the program or as having a substance use disorder (current or past), unless one of the law's exceptions applies. These exceptions, summarized below, seek to strike a balance that enables necessary communication while protecting privacy.

Part 2's privacy protections apply to both written and oral communications and tend to be stricter than those in the Health Insurance Portability and Accountability Act ("HIPAA"). Part 2 prohibits disclosure of protected information even to persons who –

- already have the information,
- have official status, or
- have a subpoena or warrant.

Part 2 also overrides conflicting state laws that are less protective of patients' confidentiality. For example, if a state law requires SBIRT providers to disclose information, but Part 2 prohibits the disclosure, the information may not be disclosed.

How can SBIRT programs disclose Part 2-protected information?

Part 2 prohibits covered SBIRT providers from disclosing protected SUD information unless one of the "exceptions" to the general non-disclosure rule applies. The ten main exceptions are as follows:

1. Proper Written Consent

Programs may disclose protected SUD information with the patient's written consent containing all of these components:

(i) name or general designation of Part 2 program, entity or individual making the disclosure;
(ii) name of individual/entity receiving the disclosure (note: there are limitations regarding the types of entities that may be listed; for more information, visit LAC's resources; if in doubt, name the individual(s) authorized to receive the information);
(iii) patient's name;
(iv) purpose of disclosure;
(v) description of how much and what kind of information to be disclosed, including an explicit description of the SUD information to be disclosed;
(vi) patient's right to revoke consent except to the extent it has already been relied upon;
(vii) for programs covered by HIPAA, the ability to condition treatment, payment,

enrollment, or eligibility of benefits on patient agreeing to the consent;

(viii) date, event or condition upon which consent expires if not previously revoked;

(ix) signature of patient and/or other authorized person; and

(x) date signed.

For more information about consent forms, including sample consent forms that comply with Part 2's requirements, visit LAC's confidentiality resources for guidance and sample forms.

EXAMPLE An SBIRT provider covered by Part 2 would like to refer an 18-year-old patient to a psychologist. Under Part 2, the SBIRT provider needs the patient's written consent on a Part 2-compliant form in order to contact the psychologist and disclose the patient's protected SUD information. This is so even though HIPAA does not require written consent for disclosures for treatment purposes.

2. Internal Program Communications

Staff in a Part 2 program may disclose protected information to other staff within the Part 2 program, or to an entity with direct administrative control over the Part 2 program, if the information is needed in connection with duties that arise out of the provision of SUD diagnosis, treatment, or referral for treatment.

EXAMPLE A SUD counselor at a federally qualified health center's covered adolescent SBIRT program wants to send her patients' SBIRT service information to the FQHC's billing department for billing and reimbursement purposes. Part 2 allows this disclosure without patient consent because the billing department has "administrative control" over the SBIRT program and needs the information in connection with duties that arise out of the provision of SBIRT services. However, the billing department may not further disclose the protected SUD information, except back to the Part 2 program (the covered SBIRT program).

3. Qualified Service Organization Agreement ("QSOA")

Part 2 programs may disclose protected SUD information without patient consent to an outside organization that provides services to the program if the outside organization – called a Qualified Service Organization ("QSO") — has signed a Qualified Service Organization Agreement ("QSOA"). QSOAs allow two-way communication of protected SUD information between the Part 2 program and QSO, but the QSO must agree to comply with Part 2 and resist any efforts to obtain information in violation of Part 2. QSOAs are similar (but not identical) to "business associate agreements" under HIPAA. The services appropriate for QSOAs include bill collection legal, accounting, and other professional services, and services to prevent or treat child abuse or neglect.

EXAMPLE A community health center covered by Part 2 has a QSOA with an outside accounting firm. The center may give the accounting firm protected SUD information about SBIRT patients without patient consent. But the accounting firm must now satisfy Part 2's confidentiality protections with respect to that information.

4. Medical Emergency

Programs may disclose protected SUD information without patient consent to medical personnel when necessary to meet a bona fide medical emergency, if the patient's prior written consent cannot be obtained. The medical personnel treating the patient in the emergency decide whether a medical emergency exists. When information is disclosed without patient consent in a medical emergency, the Part 2 program must document the following in the patient's medical record: the name and the affiliation of the recipient of the patient's protected SUD information; the name of the person making the disclosure of information; the date and time of the disclosure; and the nature of the emergency.

EXAMPLE An SBIRT provider who is covered by Part 2 is meeting with a teen who appears dangerously intoxicated and then passes out. Part 2 permits the provider to call 911 or otherwise contact medical personnel if the Part 2 provider believes that a bona fide medical emergency exists. For example, the provider may believe the teen is overdosing or is at risk of alcohol poisoning. Because the teen is unconscious and cannot give consent to the disclosure, the program may invoke Part 2's medical emergency exception. After the disclosure to medical personnel, the Part 2 program must document the information described above. Note that Part 2's medical emergency exception does not permit the provider to contact the teen's family. Written consent (#1 above) is required to contact family or friends who are involved in the teen's care. For more information about ways to contact family in an emergency, see Tool #3.

5. Child Abuse/Neglect Reporting

Part 2 allows programs to disclose patient information without consent when necessary to comply with their states' mandatory child abuse/neglect reporting laws. This exception only permits the initial report of child abuse/neglect and written confirmation of the report; additional disclosures require patient consent or another exception.

EXAMPLE During an initial intake session, a psychologist at a Part 2-covered SBIRT provider recognizes symptoms of child neglect in a 13-year-old patient. State law requires the provider to make a child abuse and neglect report in these circumstances. Under Part 2, the psychologist may make the initial report and provide written confirmation. However, the psychologist may not provide any additional protected SUD information (including follow-up investigations and court inquiries) without written patient consent or a court order that complies with Part 2.

6. No Patient-Identifying Information

Part 2 programs may disclose information without patient consent if the information does not identify the patient as having a current or past SUD or ever having been a SUD patient.

EXAMPLE The County Department of Health is conducting an anonymous survey of county agencies serving adolescents regarding the number of youth who received the influenza vaccine last year. The administrator of an SBIRT program covered by Part 2 program may submit aggregate survey answers or disclose protected SUD information without patient consent, if she does not disclose information that identifies any patients as ever having a SUD or being a patient in a SUD program.

7. Audit/Evaluation

Part 2 programs may disclose protected SUD information without patient consent for an audit or evaluation conducted by government agencies that fund or regulate the program (including Medicaid, Medicare, and CHIP), private agencies that provide financial assistance or third-party payments to the program, or certain other individuals and entities qualified to conduct an audit or evaluation. But, any individual or entity conducting the audit or evaluation must agree in writing that protected SUD information can only be re-disclosed (a) back to the originating program, (b) pursuant to a court order to investigate or prosecute the program, or (c) to a government agency with oversight authority for a Medicare, Medicaid, or CHIP audit or evaluation. Protected SUD information can also be redacted before it is disclosed.

EXAMPLE A third-party payer is conducting an audit of a Part 2-covered SBIRT program. Part 2 permits the SBIRT program to provide the third-party payer with protected SUD information without patient consent for the purpose of the audit, provided the auditor agrees in writing to the terms noted above. Note, however, that disclosures to third-party payers for reimbursement purposes do not fall within the audit/evaluation exception; written consent on a Part 2-compliant form is required. This differs from HIPAA, which permits unconsented disclosures for payment purposes.

8. Patient Crime on Program Premises or against Program Personnel

Part 2 programs may disclose a patient's protected SUD information without consent to law enforcement if the patient commits or threatens to commit a crime on program premises or against program personnel. Disclosure is limited to the circumstances of the incident and the suspected individual's name and address, status as a patient at the program, and last known whereabouts.

EXAMPLE At the end of the work day a counselor at a Part 2-covered SBIRT program noticed that her SUV was missing from the program's parking lot. The lot's barrier gate arm had been broken and shattered glass was in the parking space. That morning, Jack, a client, had argued with the counselor and screamed at her, "I'll mess you up," and then stormed off the premises. Another patient said he saw Jack trying to break into the SUV. Part 2 permits the program to disclose the following information to the police: a report of the stolen vehicle, the threat against the counselor, Jack's name and address, his status as a patient at the program, and his last known whereabouts. To disclose the identity of the witness, however, the program needs the witness's written consent.

9. Court-Ordered Disclosure

Part 2 programs may disclose protected SUD information without patient consent when a court issues an order that complies with Part 2's heightened requirements:

- Notice and an opportunity to be heard: The Part 2 program and patient must receive notice of the request for the court order and an opportunity to make an oral or written statement to the court. In criminal cases, where the application for a court order seeks information to investigate or prosecute the patient, only the Part 2 program must be notified.
- Fictitious name and confidential proceeding. The application for the court order and the order itself must use fictitious names for patients, and all court proceedings in connection with the application must be confidential.
- Criteria. The court must find "good cause" for the disclosure, meaning that the public interest and need for disclosure outweigh any adverse effect on the patient, the doctor-patient relationship, and effectiveness of the program's services. Disclosure of confidential communications (e.g., case notes) requires an even stricter showing. In criminal cases, disclosure is permitted only if the crime is "extremely serious" (causing or threatening loss of life or serious bodily injury).

Note that a subpoena, search warrant, or arrest warrant is not sufficient to authorize a Part 2 program to disclose protected SUD information unless it meets these heightened Part 2 requirements.

EXAMPLE Police officers arrived at a Part 2-covered SBIRT program with a search warrant for the records of patient Susan, a suspect in a local property crime. The warrant was signed by a judge, but the program never received notice or an opportunity to object to the disclosure. Part 2 does not permit the program to disclose Susan's records because the search warrant, though signed by a judge, does not meet Part 2's requirements for a court order. There was no application for the court order using a fictitious name, nor an opportunity for the program to be heard. Moreover, the crime is not "extremely serious." The program should consult legal counsel about the best way to respond. Simply refusing to produce the records could get the program into legal trouble.

10. Research

Part 2 programs may disclose protected SUD information to scientific researchers without consent if certain safeguards are met. The researchers may not re-disclose that information except back to the Part 2 program. Research reports may not identify any patients, either directly or indirectly.

> **EXAMPLE** Researchers from the local university have requested patient-identifying data from a Part 2-covered SBIRT program as part of a study on the effectiveness of SBIRT programs. The program may provide the data as long as the requirements of the research exception are met.

NOTE: Programs should also check to see if they are subject to other applicable confidentiality laws, such as HIPAA and state privacy laws.

Where can SBIRT providers learn more about Part 2?

SBIRT providers can read the other tools in this series, at lac.org/confidentiality-sbirt, and learn about the Legal Action Center's other confidentiality resources at lac.org/resources/substance-use-resources/confidentiality-resources/.