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Confidentiality and Overdose: Q & A

QUESTIONS:

- Which confidentiality laws and regulations determine the ability of health care providers to notify a patient's family, friends, or others involved in the patient's care of the patient's condition when the patient is experiencing a drug or alcohol overdose?
- Do those laws allow family notification in these circumstances?

SHORT ANSWERS:

- The federal confidentiality law (42 U.S.C. § 290dd-2) and regulations (42 C.F.R. Part 2) governing substance use disorder patient records, referred to collectively as "Part 2," only apply in very limited circumstances, while the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule applies in most situations.
- HIPAA generally allows family notification when the patient is experiencing an overdose, and Part 2 typically does not apply in an emergency department and therefore would not prevent family notification.

DISCUSSION:

When Does Part 2 Apply?

- Part 2 applies to "programs" that are federally assisted. Part 2 defines a program as, "[other than a general medical care facility]. . .any person or organization that *holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment, referral for treatment or prevention.*"¹ In addition, Part 2 governs substance use disorder ("SUD") patient records for those patients who receive treatment (or diagnosis or referral for treatment) from (a) *an identified unit of a general medical facility that holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment, or (b) medical personnel or other staff in the general medical care facility whose primary function is to provide those services.*²

¹ 42 C.F.R. § 2.11 (emphasis added).

² 42 C.F.R. §§ 2.11, 2.12(e) (1) (emphasis added).

- Generally, a patient experiencing a drug or alcohol overdose in a hospital or medical center's emergency department would not be protected by Part 2 -- since Part 2 applies to SUD information in "programs." Typically, a patient having a drug or alcohol overdose is brought in for diagnosis and treatment to a hospital emergency department. Emergency departments and their mix of providers diagnose and treat patients for a wide variety of health issues, and do not just diagnose and treat patients for overdose and other substance use issues, nor do they hold themselves out as doing so.³ Therefore, emergency departments are not considered to be Part 2 programs. As a result, Part 2 would not apply and would not be a factor in the emergency department provider's decision to disclose the patient's condition to his/her family members, friends, and others -- which could include information that would identify the patient as having a SUD.
- The exception to this would be *if* the patient in a hospital or medical center's emergency department was diagnosed or treated in the facility's specified unit for SUD services, or seen by medical personnel whose primary function is to provide SUD services. These would be considered to be Part 2 programs. In this essentially theoretical circumstance, which very rarely if ever occurs since emergency departments routinely treat overdoses, these health providers would need the patient's written consent to disclose his/her SUD information. In addition, the health provider would have to also adhere to the HIPAA Privacy Rule's requirements to share the patient's health information with family members, friends, or others involved in the patient's care or payment.

When Does HIPAA Apply?

- Health care providers treating patients experiencing a drug or alcohol overdose, who wish to share the patient's health information with family members, friends, or others involved with the patient's care or payment for care must adhere to the requirements of the HIPAA Privacy Rule to do so.
- If the patient is available and has the capacity to make health decisions, and if the patient agrees (or does not object when given the opportunity) – a health care provider may discuss the patient's health information with a family member, friend, or other person involved in the patient's care or payment for care.⁴ In

³ See generally Amy Sutton, "In Case of Emergency: Who's Who in the Emergency Room?" *Center for Advancing Health*, available at <http://www.cfah.org/prepared-patient/prepared-patient-articles/in-case-of-emergency-whos-who-in-the-er>.

⁴ 45 C.F.R. §164.510 (b)(2). *But see* 45 C.F.R. §164.508(a)(2) (HIPAA requires a patient's written authorization for the disclosure of psychotherapy notes). See generally U.S. Dep't of Health & Hum. Services, Off for Civ. Rts., *A Health Care Provider's Guide to the HIPAA Privacy Rule: Communicating with a Patient's Family, Friends, or Others Involved in the Patient's Care*, available at https://www.hhs.gov/sites/default/files/provider_ffg.pdf.

addition, if in his/her professional judgement, the provider decides that the patient does not object – the provider can share information with these individuals.⁵

- Examples:
 - The emergency department provider decides to discuss the patient's overdose treatment plan with the patient's adult son, if the provider informs the patient that she intends to do so and the patient does not object.
 - The emergency department attending physician asks the patient if the provider can discuss the patient's alcohol consumption with the patient's live-in partner, and the patient does not object.
- *Best interest of the patient standard:* If the patient is incapacitated or not present, the health provider can share the patient's health information with family, friends, or others involved in the patient's care or payment for care, if the health provider determines, based on his/her professional judgment – that this communication is in the best interest of the patient.⁶ However, the provider must only share information that the involved person needs to know about the patient's care or payment.⁷
 - Examples:
 - While the patient is unconscious, the health care provider tells the patient's spouse that the patient needs emergency surgery to repair damage due to the patient's drug overdose.
 - While the patient is incoherent, the emergency department provider asks the family member if he is aware of any specific drugs the patient might have taken, in order to appropriately treat the patient.

⁵ 45 C.F.R. §164.510 (b)(2).

⁶ 45 C.F.R. §164.510 (b)(3).

⁷ *Id.*