

HIPAA and Sharing Information Related to Mental Health

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AGENDA

- HIPAA Required and Permitted Uses and Disclosures of Protected Health Information
- Personal Representatives
 - Parents and Minors
- Authorizations
- Disclosures After an Individual Has An Opportunity to Agree or Object
 - Providers Treating Patients Who Have Decision Making Capacity
 - Providers Treating Patients Who Lack Decision Making Capacity or Who Are Not Available
- Disclosures When There Is A Serious And Imminent Threat
- Guidance Materials and Resources

Uses and Disclosures of Protected Health Information (PHI)

- No use or disclosure of PHI unless permitted or required by the Privacy Rule.
- *Required* Disclosures:
 - To the individual who is the subject of the PHI.
 - To the Secretary of HHS in order to determine compliance.
- All other uses and disclosures in the Privacy Rule are *permissive*.

45 CFR § 164.502

Disclosures of PHI to Friends, Family Members, and Others Identified by the Individual

- When they are the personal representative
- When the patient has signed a HIPAA authorization
- When the patient has decision-making capacity
- When the patient does not have decision-making capacity, or is absent
- When it may lessen or prevent a serious and imminent threat

Personal Representatives 45 CFR 164.502(g)

If the Individual Is:	The Personal Representative Is:
An Adult or An Emancipated Minor	A person with legal authority to make health care decisions on behalf of the individual <i>Examples:</i> Health care power of attorney Court appointed legal guardian General power of attorney or durable power of attorney that includes the power to make health care decisions <i>Exceptions:</i> Abuse, neglect, and endangerment situations
An Unemancipated Minor	A parent, guardian, or other person acting in loco parentis with legal authority to make health care decisions on behalf of the minor child <i>Exceptions:</i> Parents and unemancipated minors, and abuse, neglect and endangerment situations
Deceased	A person with legal authority to act on behalf of the decedent or the estate (not restricted to persons with authority to make health care decisions) <i>Examples:</i> Executor or administrator of the estate Next of kin or other family member (if relevant law provides authority)

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/personalreps.html>

Personal Representatives, Parents, and Minors

- Generally, parents are the personal representatives of their minor children for HIPAA purposes, and health care providers may share patient information with a patient's personal representative.
- However, there are certain exceptions, e.g., where a minor may obtain certain health care services without parental consent under State or other law.
- HIPAA defers to state law to determine age of majority.

45 CFR § 164.502(g)

Disclosures of PHI Pursuant to a HIPAA Authorization

- Description of the information to be disclosed
- Name (or other specific identification) of the person(s) authorized to make the requested disclosure
- Name (or other specific identification) of the person(s) to whom the covered entity may make the requested disclosure
- Description of the purpose of the requested disclosure
- Expiration date
- Signature of individual or their personal representative

45 CFR § 164.508

Disclosures After the Individual Has An Opportunity to Agree or Object

- To use PHI in facility directories (name, location, general condition, religious affiliation to clergy)
- To disclose PHI to persons involved in care or payment for care and for notification purposes. For example:
 - Friends may pick up prescriptions.
 - Hospitals may notify family members of a patient's condition.

45 CFR § 164.510

Communications with Family, Friends and Others Involved in a Patient's Care

When Individual is Present and Has Decision Making Capacity:

- Must give patient opportunity to agree or object
 - Ask patient's permission
 - Inform patient of intent to inform family or friends and give opportunity to object
 - Infer from circumstances, using professional judgment, that patient does not object
- Permission can be verbal or implied, based on circumstances
- Share only information that is directly related to the person's involvement with the patient's health care or payment for care.

45 CFR § 164.510(b)

Communications with Family, Friends and Others Involved in a Patient's Care

When Individual is Not Present or Does Not Have Decision Making Capacity:

- The patient is not available due to an emergency or the health care provider determines that the patient is incapacitated
- Health care provider determines, based on professional judgment, that sharing information is in the best interests of the patient
- May disclose only the PHI directly relevant to person's involvement in patient's care/payment for care

45 CFR § 164.510(b)(3)

Incapacitated Patient

Example of sharing information when the patient is unable to meaningfully agree or object to disclosures & the provider determines, using professional judgment, that it is in the patient's best interests to share information:

- A provider may use professional judgment to talk to the parents of someone incapacitated by an opioid overdose about the overdose and related medical information, but generally could not share medical information unrelated to the overdose without permission under the HIPAA Privacy Rule.

Best Interests Determinations

Example of considering incapacitated patient's prior responses to sharing information with family:

- If a patient is unconscious, delirious, or sedated, and the health care providers know that a patient's family, friends, or caregivers have been involved in the patient's health care and the patient has not objected to the sharing of information with them in the past, then providers may use their professional judgment to determine that sharing certain information about the patient's health condition is in their best interests.

Health Care Decision Making Incapacity

Health & Mental Conditions, Including Substance Intoxication or Overdose, May Constitute Incapacity

- Decision-making incapacity may be temporary and situational, and does not have to rise to the level where another decision maker has been or will be appointed by law.
- For example, a patient who arrives at an emergency room severely intoxicated or unconscious will be unable to meaningfully agree or object to information-sharing upon admission, but may have sufficient capacity several hours later.
- Once patient regains capacity, provider should offer patient opportunity to agree or object to any future sharing of information.

Absent Patient

Sharing information with family and friends is permitted when the patient is not present due to some emergency & the provider determines it is in the patient's best interests:

- A patient who is addicted to opioids misses important medical appointments without any explanation, a primary health care provider at a general practice may believe that there is an emergency related to the opioid addiction and under the circumstances, may use professional judgment to determine that it is in the patient's best interests to reach out to emergency contacts, such as parents or family, and inform them of the situation.

Disclosures to Lessen or Prevent a Serious and Imminent Threat to Health or Safety

- Disclosures are permitted without the patient's authorization or permission to law enforcement, family, friends or others who are in a position to lessen the threatened harm—if the covered entity, in good faith, believes that the disclosure “is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public.”
- Disclosures must be consistent with applicable law and standards of ethical conduct.

45 CFR 164.512(j)

Good Faith Presumption

What constitutes a “serious and imminent” threat?

- HIPAA expressly defers to the professional judgment of health care professionals when they make determinations about the nature and severity of the threat to health or safety. Specifically, HIPAA presumes the health care professional is acting in good faith in making this determination, if the professional relies on his or her actual knowledge or on credible information from another person who has knowledge or authority.
- OCR does not second guess a health professional’s good faith belief that a patient poses a serious and imminent threat to the health or safety of the patient or others and that the situation requires the disclosure of patient information to prevent or lessen the threat.

The HIPAA Privacy Rule and Part 2

- Health care providers in federally funded substance use disorder treatment programs are subject to 42 USC § 290dd-2 & 42 CFR part 2.
- Part 2 confidentiality rules are more stringent than HIPAA and may also apply to covered entities if treatment is in a Part 2 program.
- The 2020 CARES Act modified Part 2 to permit covered entities and BAs to disclose substance use disorder information for treatment, payment, and health care operations as permitted by the Privacy Rule after prior written consent is obtained (among other changes). Reference: Pub. L. 116-136 (March 27, 2020), section 3221.

Future HIPAA Rulemaking

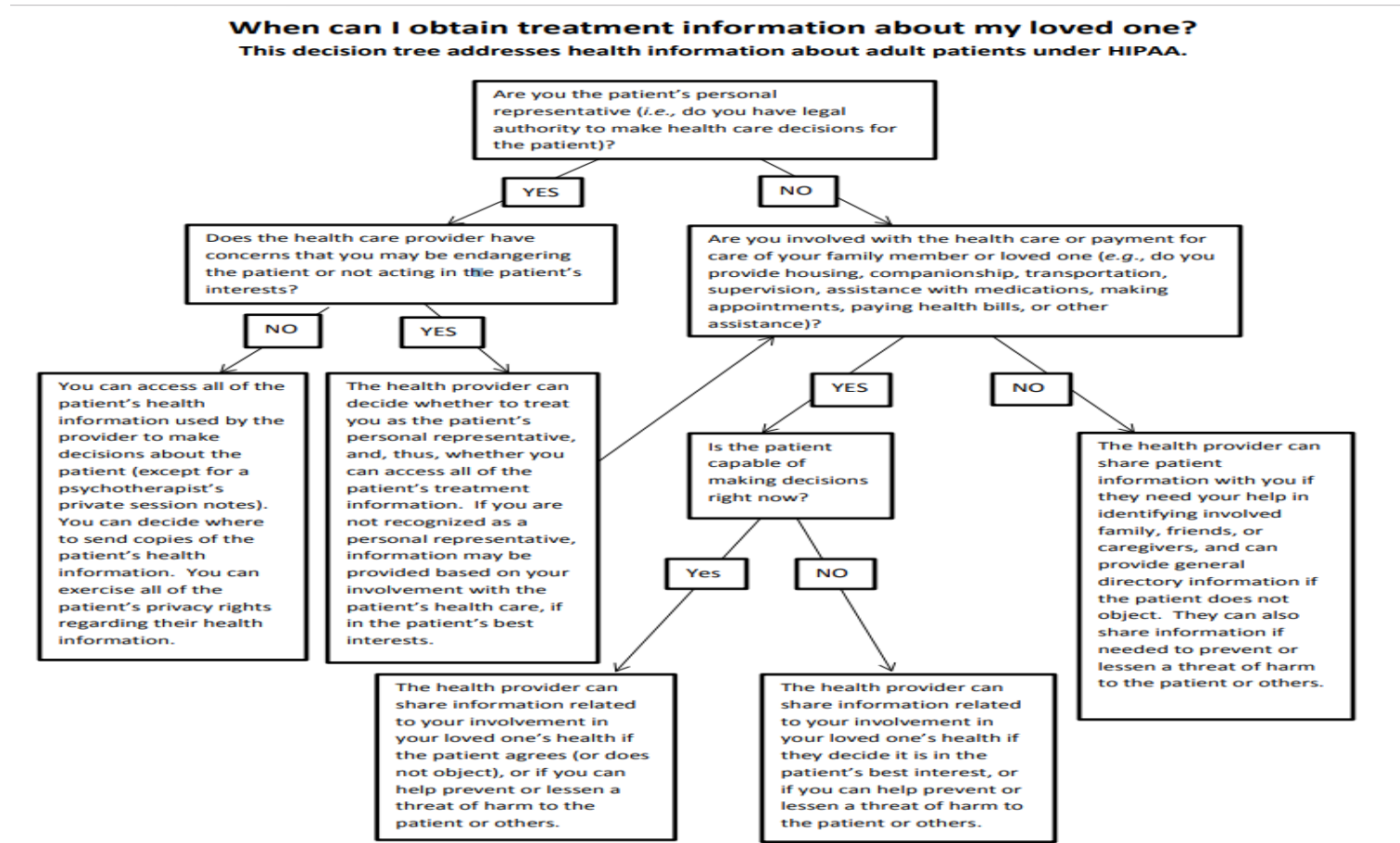
- *Request for Information on Modifying HIPAA Rules To Improve Coordinated Care*
 - Comments closed February 12, 2019
 - More than 1,330 timely comments received
 - 3,823 total pages (estimated)
 - Public comments are viewable at <https://www.regulations.gov/docket?D=HHS-OCR-2018-0028>.
 - Sought information on:
 - Promoting information sharing for treatment and care coordination
 - Addressing the opioid crisis and serious mental illness and promoting parental involvement in care
 - Accounting of disclosures of PHI
 - Notice of Privacy Practices acknowledgement
- Proposed Modifications to the HIPAA Privacy Rule (2020)

Resources Related to Mental and Behavioral Health, including Opioid Overdose

Fact Sheets

- *HIPAA Helps Mental Health Professionals to Prevent Harm*
- *HIPAA Helps Family and Friends Stay Connected with Loved Ones Who Have a Substance Use Disorder, including Opioid Abuse, or a Mental or Behavioral Health Condition*
- *When can I obtain treatment information about my loved one? (decision chart)*
- *If You Experience a Health or Mental Health Crisis, HIPAA Helps Your Doctors, Nurses, and Social Workers to Reconnect You with Family, Friends, and Caregivers*
- *How HIPAA Allows Doctors to Respond to the Opioid Crisis*
- *When Your Child, Teenager, or Young Adult has Mental Illness: What Parents Need to Know about HIPAA*
- *Am I my child's personal representative under HIPAA?*
- *When may a mental health professional use professional judgment to decide whether to share a minor client's treatment information with a parent?*
- *When can parents access information about their minor child's mental health treatment? (Decision Chart)*

Resources Related to Mental and Behavioral Health, including Opioid Overdose



<https://www.hhs.gov/sites/default/files/families-hipaa-decision-tree-adult-patients.pdf>

Resources Related to Mental and Behavioral Health, including Opioid Overdose

Guidance

- HIPAA Privacy Rule and Sharing Information Related to Mental Health
- Guidance on Responding to an Opioid Overdose
- HIPAA and Personal Representatives for Adults and Minors

Resources Related to Mental and Behavioral Health, including Opioid Overdose

Frequently Asked Questions

- HIPAA Privacy Rule and Sharing Information Related to Mental Health
- Additional FAQs on Sharing Information Related to Treatment for Mental Health or Substance Use Disorder

Where to Find OCR's Materials

OCR Website Navigation

- www.hhs.gov/ocr/hipaa
- For professionals: <https://www.hhs.gov/hipaa/for-professionals/index.html> > Special Topics > Mental Health & Substance Use Disorders
- For consumers: <https://www.hhs.gov/hipaa/for-individuals/index.html> > Mental Health & Substance Use Disorders
- For resources related to Mental and Behavioral Health: <https://www.hhs.gov/hipaa/for-professionals/special-topics/mental-health/index.html>

Additional Resources

- Mental Health FAQ Database: <https://www.hhs.gov/hipaa/for-professionals/faq/mental-health>
- Link to SAMHSA Resources for 42 CFR Part 2: <https://www.samhsa.gov/laws-regulations-guidelines/medical-records-privacy-confidentiality>
- SAMHSA Center of Excellence for Protected Health Information: <http://coephi.org/>

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www.hhs.gov/hipaa



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<https://www.hhs.gov/hipaa/for-professionals/list-serve/>



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Questions?