

CHAPTER III: DISCLOSURE OF INFORMATION PERTAINING TO DRUG OR ALCOHOL ABUSE RECORDS

Disclaimer: The information contained in this manual is not intended to be used as legal advice. Please refer to the most current specific state statutes and your own legal counsel when warranted. Some statutes will be referred to throughout this manual.

This chapter deals with the special requirements for confidentiality imposed by the federal government on records of substance abuse treatment programs. It is important to note that these records are also subject to all other general confidentiality and privacy regulations which are described in the General Rules for Release of Information and the HIPAA chapters of this manual. Policies for disclosure of information from substance abuse records should incorporate both the general requirements for authorization for release of information from the above two chapters of this manual as well as the chapter titled Disclosure of Information Pertaining to Drug or Alcohol Abuse Records and also the special requirements outlined below.

OVERVIEW

During the 1970's, Congress passed two acts which instituted special confidentiality requirements for the records of patients being treated for substance abuse. The Department of Health and Human Services published regulations to implement these laws in 1975. These regulations were subsequently extensively revised in 1987 (see 42 CFR § 2.1 et seq.). The 1987 revisions clarified a number of areas which had been problematic in the original regulations. However, some points of confusion remained. In 1994 the regulations were further revised to clarify the definition of a "program" (see below). The current regulations are summarized in the AHIMA Practice Brief entitled "Disclosure of Health Information." Maine law 1711-C and HIPAA both address the confidentiality of records; however, since the federal protection for substance abuse records is "more stringent", these protections are still in force.

The regulations dealing with substance abuse records are extensive and complex. Health information management (HIM) professionals should request assistance from legal counsel when developing policies for release of information on substance abuse patients.

SCOPE OF LAW

The confidentiality provisions of the regulations apply to any program or activity relating to alcohol or drug abuse education, training, treatment, rehabilitation, or research. This includes:

- An individual or entity (other than a general medical facility) that provides alcohol or drug abuse diagnosis, treatment, or referral for treatment;
- An identified unit within a general medical facility that provides alcohol and drug abuse diagnosis, treatment, or referral for treatment; or

- Medical personnel or other staff in a general medical facility whose primary function is the provision of alcohol or drug abuse diagnosis, treatment, or referral for treatment.

Healthcare facilities are exempt from the regulations if they do not have an identified alcohol or drug abuse treatment unit and have no "specialists" whose PRIMARY function is treatment of substance abuse. Those facilities maintaining a substance abuse unit or having substance abuse specialists on staff must comply with the regulations. Facilities unsure of whether these regulations apply should consult legal counsel. However, most HIM professionals, recognizing the potential for harm which exists when disclosing information pertaining to drug and alcohol use, will make sure that the patient fully authorizes disclosure of substance abuse information whenever there is a mention in the records of such a diagnosis, regardless of the type of facility.

CONFIDENTIALITY

The regulations require that all information about patients, regardless of whether or not it exists in writing, be kept confidential and be disclosed only under certain narrowly defined conditions. This applies even to the very fact that a person is or was a patient of the program. Without specific authorization from the patient, revealing that he or she is present in the facility is a breach of the regulations. (An exception would be in the case of a general hospital with a substance abuse unit, where the presence of the patient in the facility could be revealed without revealing that the patient was being treated in the substance abuse unit.) The stringency of the regulations requires that healthcare facilities have protocols in place to prevent inadvertent disclosure of information on substance abuse patients.

DISCLOSURE OF INFORMATION

A general authorization for disclosure of information which does not contain all of the elements listed in Chapter 1 does NOT comply with the regulations and does not permit the program to release information.

It is important to note that the program's submission of a claim form to a third party payor constitutes a disclosure of information. A valid authorization from the patient containing all the components listed in Chapter 1 is required before third party payors can be billed for substance abuse services. The Rights of Recipients of Mental Health Services (Maine) does permit administrative disclosure in order to get the bill paid within certain limited parameters as authorized by the facility's CEO or designee. Again, consult legal counsel in developing policies and procedures for disclosing information in order to receive payment if the patient/facility falls under these guidelines.

REDISCLASURE

The patient may add a clause to the authorization permitting the recipient of the information to redisclose it. Without such a clause, however, the recipient may not disclose the information to anyone else. Furthermore, the regulations require the program to include the following statement regarding redisclosure along with any information which is released:

This information has been disclosed to you from records protected by federal confidentiality rules (42 CFR Part 2). The federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person

to whom it pertains or as otherwise permitted by 42 CFR Part 2. A general authorization for the disclosure of medical or other information is NOT sufficient for this purpose. The federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

This redisclosure statement does not need to be included if the person or agency to which the information is to be disclosed is also subject to the regulations.

Many health information departments have the redisclosure statement made up as a rubber stamp or sticker, which can be applied to copies of substance abuse records which are being released. The statement can also be imprinted onto the margin of blank paper and that paper used to photocopy the substance abuse records.

MINORS

Under the federal regulations, disclosure of information from a minor's record must be authorized by the minor alone in states where minors alone may consent to treatment for substance abuse, or by the minor and parent together in states where parental consent is required for minors to obtain substance abuse treatment. Under Maine law, a minor (under age 18) does not need parental consent to obtain treatment for substance abuse (However, the parent or guardian must be notified if the minor is to be hospitalized for more than 16 hours (see 22 MRS §1823)).

The federal regulations state that the program may notify the parents that the minor is seeking treatment if program personnel believe that the life or well-being of the minor or any other person is being placed in jeopardy and that the minor is unable to make a rational decision as to whether or not to notify the parents.

As with all other minor consented care/treatment, the minor must be made aware of the facility's billing practices and that the parent or legal guardian may become aware of the minor's care/treatment through the receipt of a bill for the services.

Incarcerated minors have the same rights to authorize disclosure of information as non-incarcerated minors and therefore an authorization is required.

INCOMPETENT PATIENTS

If an incompetent patient has a legal guardian, that person must specifically authorize disclosure of substance abuse information. Program personnel should require the guardian to present legal proof of guardianship prior to disclosure, and a copy of this document should be included in the patient's record.

DECEASED PATIENTS

Upon a patient's death any authorizations signed by the patient are no longer valid. Health information concerning a deceased patient can be disclosed only upon the authorization of the patient's personal representative or other LAR. (The personal representative was formerly referred to as the executor or the administrator of the estate.) Legal opinion is divided as to who has the right to authorize release of information when there is no personal representative. Health information practitioners should consult legal counsel on this point. In the absence of a personal representative, some providers choose to accept

an authorization from the patient's next of kin as defined in the Maine advance directive statute (18-A MRS §5; see Chapter 10 of this manual). This includes the patient's spouse; adult child or majority of adult children, if more than one; parent; adult sibling or majority of adult siblings if more than one; or nearest other adult relative.

The content of the information, purpose of request or other circumstances should be used to determine whether information should properly be released. The personal representative (executor) of a deceased patient can authorize disclosure of substance abuse information if a proper authorization is obtained. It is recommended that each facility establish procedures which outline what circumstances such disclosures may occur.

EXCEPTIONS

The program may disclose information without the patient's authorization under certain circumstances. These include cases involving child abuse, continuity of care between programs, crimes, medical emergencies, audit/evaluations, research, court orders, mandatory reporting, and requests by the medical examiner.

SUSPECTED ABUSE OR NEGLECT: Suspected abuse or neglect of children, frail elders, or incapacitated adults (NOT competent adults who retain the right to privacy and may decide not to report) must be reported to the appropriate state or local authorities with or without the patient's authorization. However, the restrictions continue to apply to the original alcohol or drug abuse patient records maintained by the program, including their disclosure and use for civil or criminal proceedings which may arise out of the report of suspected abuse and neglect. In other words, the mandatory reporting should take place, but the records maintained cannot be released for assistance in the ensuing investigation without a proper authorization to release information signed by the patient or a court order (signed by a judge). Maine DHHS investigative subpoenas alone are NOT sufficient.

BETWEEN PROGRAMS: Information may be communicated without patient authorization among personnel within a substance abuse program; between a program and an entity having direct administrative control over that program (e.g., between a substance abuse unit and other hospital departments in a general hospital); and between a program and an agency providing specialized services to the program. (In the latter case, the agency must have agreed in writing to comply with the regulations.)

CRIMES: Program personnel do not need patient authorization to communicate with law enforcement personnel regarding a patient's commission of or threat to commit a crime on the facility's premises or against facility personnel or as defined in the Tarasoff (duty to warn) exception. Again, the minimum necessary to accomplish the purpose should be released. The records themselves may not be released absent an authorization or court order. .

MEDICAL EMERGENCIES: The regulations permit disclosure of information without patient consent to medical personnel treating the patient during a bonafide medical emergency. Program personnel should verify the identity of anyone requesting disclosure of information under emergency circumstances. Facilities may choose to require, at a minimum, a faxed request on the requesting

facility's letterhead, stating that an emergency exists. Program staff must document in the patient's record the circumstances of the disclosure, what information was disclosed, and to whom. As with all disclosures of information, care should be taken to disclose only that information needed for the situation.

AUDIT/EVALUATION: The regulations permit disclosure of information without patient consent for the purpose of audit or evaluation to any governmental agency which provides funding or regulates the program; to third party payors covering patients in the program; and to peer review organizations. The program director may permit other individuals to audit or evaluate the program's records, provided that no copies of records are provided to them and they do not remove records from program premises.

RESEARCH: The regulations permit disclosure of information without patient consent to a researcher whose research protocol has been approved by an institutional review board or similar body. HIPAA guidelines must also be followed.

COURT ORDER: A subpoena alone is **NOT** sufficient to compel a facility to disclose information of a drug or alcohol abuse treatment program without the consent of the patient. A court order is necessary to compel release. It is highly recommended that you seek assistance from legal counsel. .

VITAL STATISTICS: Information which is mandated by law to be reported to Vital Statistics (e.g., death certificate for a patient who expires while in a substance abuse treatment program) may be disclosed without obtaining an authorization.

MEDICAL EXAMINER: Substance abuse records may be disclosed without authorization to the office of the Medical Examiner for a deceased patient.