

# HCCA 2018 ORANGE COUNTY REGIONAL CONFERENCE

## ***Behavioral Health Privacy Compliance in a Changing Health Care Environment***

Hyatt Regency Orange County  
11999 Harbor Blvd.  
Garden Grove, California

Friday, June 15, 2018  
9:45 a.m. – 11:00 a.m.

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## Presenters



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## Agenda

- Quick Review of Behavioral Health Privacy Laws
  - Health Insurance Portability and Accountability Act (HIPAA) – 45 CFR 164, Subpart E
  - California Confidentiality of Medical Information Act – Civil Code §§ 56.00 *et seq.*
  - LPS Act - Welfare & Institutions Code § 5328 – Mental health records
  - 42 CFR Part 2 – Substance use disorder treatment program records
- Common Scenarios for Disclosures
  - Through Health Information Exchanges (HIEs)
  - Medical emergencies
  - Subpoenas
  - Care coordination

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## HIPAA Basics

↑  
one "P"      two "P's"



- 45 CFR Part 164 Subpart E - Privacy Rule
  - Governs the uses and disclosures of Protected Health Information (PHI) by Covered Entities (Providers, Plans, Clearinghouses) and their Business Associates (HITECH Act)
  - A covered entity ***may not use or disclose PHI except as permitted or required by the Privacy Rule*** (45 C.F.R 164.502)
    - ***Treatment, payment, and health care operations*** uses and disclosures are generally permitted under HIPAA ***without patient authorization.***

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## To What Information Does HIPAA Apply?

- Protected Health Information (PHI) – any “individually-identifiable health information” that is transmitted or maintained in any form or media (by a Covered Entity) including:
  - Any information**, oral or recorded in any form, relating to the **physical or mental health** of an individual, the **care** provided to the individual, or any **payment for healthcare** provided to an individual.
- PHI **includes ALL behavioral health information** – mental health (MH) and substance use disorder (SUD).
  - No special protections under HIPAA**, except for psychotherapy notes.
  - Psychotherapy notes* means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and **that are separated from the rest of the individual's medical record**.

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## Treatment, Payment, and Health Care Operations

- “Treatment” means the **provision, coordination, or management of health care and related services** among health care providers or by a health care provider with a third party, **consultation** between health care providers regarding a patient, or **the referral of a patient** from one health care provider to another.
- “Payment” includes activities of **health care providers to obtain payment** for their services, and of a **health plan to obtain premiums**, to fulfill its **coverage responsibilities** and provide benefits, and to **obtain or provide reimbursement** for the provision of health care.
- “Health care operations” are certain **administrative, financial, legal, and quality improvement activities** that are necessary to run its business and **to support the core functions of treatment and payment**. These activities include the activities listed in the definition of “health care operations” at 45 CFR 164.501 and include **population-based care management, care coordination, and quality improvement activities**.

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## HIPAA Preemption and State Law

- HIPAA Preemption of State Law
  - If possible to comply with both HIPAA and State law, comply with both.
  - If HIPAA is contrary to State law and State law is more stringent (more protective of privacy or provides the most benefits or rights to the patient), comply with State law. (45 CFR Part 160, Subpart B.)
  - If HIPAA is contrary to State law and State law is less stringent, HIPAA preempts.
  - For example, HIPAA



W&I Code 5328



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## HIPAA and Other Federal Laws (SUD - 42 CFR Part 2)

- Department of Health and Human Services (DHHS) has stated that in enacting HIPAA, it did not intend to repeal other stricter federal privacy laws.
  - 42 CFR Part 2 – very restrictive federal regulations promulgated in 1975 (substantive amendments in 1987, 2017, and 2018) that protect substance use disorder (SUD) treatment program records.

**42 CFR Part 2**



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## Mental Health Records – California Law

- **Welfare & Institutions Code § 5328 , Lanterman-Petris Short Act**
  - Applies to both inpatient and outpatient care, and both voluntary or involuntary care; for example:
    - Inpatient psychiatric units of general acute-care hospitals;
    - Acute psychiatric hospitals, mental health rehabilitation centers, and community residential treatment systems;
    - State hospitals; county or federal psychiatric wards, facilities or hospitals;
    - Programs and services for the developmentally disabled, including early intervention programs for children; and
    - Community mental health programs (county/community-based systems of care for adults and children, court-ordered care or supervised programs, programs funded by Bronzan-McCorquodale Act).
  - Restricts disclosure of information and records obtained in the course of providing services, except as specifically permitted by law.

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## Mental Health Records – California Law

- Permits certain disclosures for:
  - Treatment - in ***communications between qualified professional persons in the provision of services or appropriate referrals*** (professional person not employed by the facility must have “medical or psychological responsibility” for the patient's care).
  - Payment - for a recipient ***to make a claim***, or for a claim to be made on behalf of a recipient ***for aid, insurance, or medical assistance*** to which he or she may be entitled.

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## Recent Changes to State Law on LPS Records

- SB 241 added W&I Code 5328(a)(25)
  - Disclosures permitted **to a business associate or for health care operations purposes**, in accordance with HIPAA regulations: Part 160 (commencing with Section 160.101) and Part 164 (commencing with Section 164.102) of Subchapter C of Subtitle A of Title 45 of the Code of Federal Regulations.
- AB 1119
  - Authorizes, during the provision of emergency services and care, the communication of patient information and records between **a physician and surgeon, licensed psychologist, social worker with a master's degree in social work, licensed marriage and family therapist, licensed professional clinical counselor, nurse, emergency medical personnel at the scene of an emergency or in an emergency medical transport vehicle, or other professional person or emergency medical personnel at a health facility** licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code.

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## Mental Health Records – California Law

- California Confidentiality of Medical Information Act – Civil Code 56.10 (applies to those mental health providers who are NOT covered by Welfare & Institutions Code 5328).
  - Governs **providers of health care, health care service plans, or contractors**.
  - Applies to “Medical Information”, i.e., “individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor **regarding a patient's medical history, mental or physical condition, or treatment.**”

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## Mental Health Records – California Law

- CMIA limits a ***provider of health care, including a primary care clinic, that is subject to Civil Code 56.10 from releasing medical information*** relating to the patient's participation in ***outpatient treatment with a psychotherapist when otherwise “permitted” by Civil Code 56.10(c)*** unless the person or entity requesting the information first ***notifies the patient*** and submits a ***written request*** that contains certain required statements. (Cal. Civil Code § 56.104.)
- ***Note: there are exceptions to this “extra” layer of protection for permissive disclosures:***
  - To providers of health care, health care service plans, contractors, or other health care professionals or facilities ***for purposes of diagnosis and treatment*** of the patient;
  - for Tarasoff warnings; or
  - for reporting of elder/dependent adult or child abuse or neglect.

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## 42 CFR Part 2 - Substance Use Disorder records

- Part 2 Programs are ***prohibited from disclosing any information that would identify a person as having or having had a SUD*** unless that person provides written consent, or some other exception applies.
- Part 2 Programs are ***federally assisted programs, for example,*** programs:
  - Conducted by or under contract with a federal agency;
  - Carried out under license, or certification, or registration by a federal agency (including participation in the Medicare program or registration to dispense controlled substances related to the treatment of SUDs, etc.); or
  - Federally funded (even if the dollars received are not specifically spent on SUD services).

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## 42 CFR Part 2

- Part 2 Programs include:
  - 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 about patients receiving diagnosis, treatment, or referral for treatment for a substance use disorder.***



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## Substance Use Disorder records – CA law

- State law (CMIA at Civil Code 56.30(i) exempts records governed by 42 CFR Part 2 and California Health & Safety Code 11845.5 (CMIA does not apply to SUD programs that are subject to 42 CFR Part 2 or alcohol and drug abuse treatment or prevention effort or function conducted, regulated, or directly or indirectly assisted by the Department of Health Care Services (DHCS)).
- Cal. Health & Safety Code 11845.45 includes protections consistent with those under LPS.
- Most programs funded by DHCS are also governed by 42 CFR Part 2.
- 42 CFR Part 2 is the most “stringent” law, so generally must comply with it and HIPAA/Cal. Health & Safety Code 11845.45.
- HIPAA does not preempt contrary and more stringent State law or 42 CFR Part 2.

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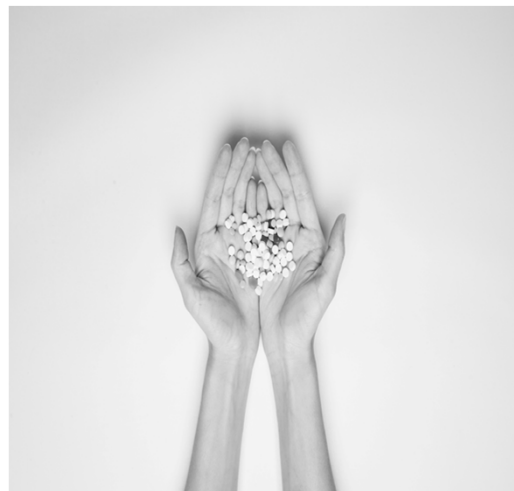
## 42 CFR Part 2 – Recent Changes

- ***Final rule (effective March 21, 2017)***
- ***Update to Final Rule (effective February 2, 2018)***
- Intended to modernize 42 CFR Part 2 by facilitating the electronic exchange of SUD information for treatment and other legitimate healthcare purposes while ensuring appropriate confidentiality protections.
- Allow patients with substance abuse disorders to participate in alternative payment models and integrated health care models like accountable care organizations (ACO) and health homes.

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## 42 CFR Part 2 – Potential Federal Legislation

- Overdose Prevention and Patient Safety Act, HR 5795
  - Would permit disclosures consistent with HIPAA to Covered Entities for the purposes of treatment, payment, and health care operations
  - Would allow disclosure of de-identified health information to public health authorities



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## 42 CFR Part 2 – Recent Changes

- Updated definitions
- Clarified application to general medical practices, Qualified Service Organizations
- Clarified “medical emergencies” exception
- Changed requirements for consent form (must specify name of third party to whom records may be sent if not a healthcare provider or entity with whom the patient has a “treating provider relationship”)
- Added security requirements



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## Clarification of Patient Records

- SUD Patient Records (§ 2.11)
  - “**Records** means any information, *whether recorded or not*, created by, received, or acquired by a part 2 program relating to a patient (e.g., diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts). For the purpose of these regulations, records include both paper and electronic records.”
  - **Patient** means any individual who has *applied for or been given diagnosis, treatment, or referral for treatment for a substance use disorder at a part 2 program*. Patient includes 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.

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## Clarification of Part 2 “Program”

- **“Program”** (defined at § 2.11) means
  - (1) An individual or entity (***other than a general medical facility***) who ***holds itself out as providing, and provides***, substance use disorder diagnosis, treatment, or referral for treatment; or
  - (2) ***An identified unit within a general medical facility that holds itself out as providing, and provides***, substance use disorder diagnosis, treatment, or referral for treatment; or
    - “Holds itself out” means ***any activity that would lead one to reasonably conclude that the individual or entity provides SUD diagnosis, treatment, or referral for treatment*** (e.g., advertising, licensing or certification, consulting activities.)
  - (3) ***Medical personnel or other staff in a general medical facility*** whose ***primary function*** is the provision of substance use disorder diagnosis, treatment, or referral for treatment ***and who are identified as such***

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## Clarification of Activities of Qualified Service Organization (QSO)

- **Qualified Service Organization** means an individual or entity who: 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 neglect or abuse.
  - Care coordination is not a QSO service.
- Patient records can be disclosed under a QSO Agreement (QSOA) to an office/unit responsible for population health management in an organization like an ACC, health home, or managed care organization.
  - QSO cannot re-disclose Part 2 Program data to other parts of the organization or participants. (§ 2.11.)

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## Medical Emergency Exception - Changed

- Now allows disclosure without consent only if patient's prior informed consent cannot be obtained (note: "cannot" is different from "will not")

OLD	NEW
§ 2.51 – <b>Medical Emergencies.</b> "...may be disclosed to medical personnel who have a need for information about the patient for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention..."	§ 2.51 <b>Medical emergencies.</b> "...may be disclosed to medical personnel to the extent necessary to meet a bona fide medical emergency in which the patient's prior informed consent cannot be obtained...."

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## Consent Form Changes (section 2.31) – Specificity

- Previously, consent form had to describe how much and what kind of the information was to be disclosed.
- Now, the consent form must describe how much and what kind of information is to be disclosed, ***including an explicit description of the SUD information that may be disclosed.***

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## Consent Form Changes (2.31) – “To Whom”

- Previously, consent form could include the name or title of the individual or name of the organization to whom disclosure was to be made (e.g., “my probation officer”).
- Now, consent form must identify the recipient of the information more specifically as:
  - (1) A **named individual(s)**,
  - (2) A **named entity(ies) with a treating provider relationship**,
  - (3) A **named entity that is a third-party payer** that requires patient-identifying information for reimbursement, OR
  - (4) If recipient is an **entity that does not have treating provider relationship** (such as an Health Information Exchange (HIE), Accountable Care Organization (ACO), Coordinated Care Organization (CCO), or a research institution), then **the name of the entity PLUS**
    - a) The **name of an individual participant(s)**; or
    - b) The **name of an entity participant(s) that has a treating provider relationship** with the patient whose information is being disclosed; or
    - c) A **\*general designation of an individual or entity participant(s) or class of participants** that must be limited to a participant(s) **with a treating provider relationship** with the patient whose information is being disclosed.

\*If using a general designation, a statement must be included on the consent form that the patient confirms their understanding that upon their request they must be provided a list of entities to which their information has been disclosed pursuant to the general designation

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## Consent Form Changes

- Another new feature of the “To Whom” section
  - ***Patients can specify past, present, and/or future treating providers***
- According to the Substance Abuse and Mental Health Services Administration (SAMHSA), ***if a patient does not specify*** past, present, and/or future treating providers, disclosing entity should presume patient intends ***disclosure only to current treating providers***

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## Consent Form Changes

OLD	NEW
<p><b>§ 2.31 Form of written consent.</b>  <i>(a) Required elements. A written consent to a disclosure under these regulations must include:</i></p> <p><i>(1) The specific name or general designation of the program or person permitted to make the disclosure.</i></p> <p><b><i>(2) The name or title of the individual or the name of the organization to which disclosure is to be made.</i></b></p> <p><i>(3) The name of the patient.</i></p> <p>...</p>	<p><b>§ 2.31 Consent requirements.</b>  <i>(a) Required elements for written consent. A written consent to a disclosure under these regulations may be paper <b>or electronic</b> and must include:</i></p> <p><i>(1) The name of the patient.</i></p> <p><i>(2) The specific name(s) or general designation(s) of the part 2 program(s), entity(ies), or individual(s) permitted to make the disclosure.</i></p> <p><i>(3) 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.</i></p>

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## Consent Form Changes

Old (repeated for comparison's sake)	New
<p>(a)(2) The name or title of the individual or the name of the organization to which disclosure is to be made.</p>	<p><i>(a)(4)(i) The <u>name(s) of the individual(s)</u> to whom a disclosure is to be made; or</i></p> <p><i>(ii) If the entity has a <u>treating provider relationship</u> with the patient whose information is being disclosed, such as a hospital, a health care clinic, or a private practice, <u>the name of that entity</u>; or</i></p> <p><i>(iii) If the entity does not have a treating provider relationship with the patient whose information is being disclosed and is a <u>third-party payer</u> that requires patient identifying information for the purpose of reimbursement for services rendered to the patient by the part 2 program, <u>the name of the entity</u>; or</i></p> <p><i>If the entity does not have a treating provider relationship with the patient whose information is being disclosed and is not (a third-party payer), such as an entity that facilitates the exchange of health information or a research institution, <u>the name(s) of the entity(ies)</u>; and</i></p> <p><i>(A) The <u>name(s) of an individual participant(s)</u>; or</i></p> <p><i>(B) The <u>name(s) of an entity participant(s)</u> that has a <u>treating provider relationship</u> with the patient whose information is being disclosed; or</i></p> <p><i>(C) A <u>general designation</u> of an individual or entity participant(s) or class of participants that must be limited to a participant(s) who has a <u>treating provider relationship</u> with the patient whose information is being disclosed.</i></p> <p><i>When using a general designation, a statement must be included on the consent form that the patient (or other individual authorized to sign in lieu of the patient), confirms their understanding that, upon their request and consistent with this part, they must be provided a list of entities to which their information has been disclosed pursuant to the general designation (see § 2.13(d)).</i></p>

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## Clarification of Prohibition on Re-disclosure

- Prohibition on Re-disclosure (§2.32) :
  - Clarified that the prohibition on re-disclosure only applies to information that would identify, directly or indirectly, an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder, and
  - ***allows other health-related information shared by the Part 2 program to be re-disclosed, if permissible under other applicable laws.***

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## Additional Security Requirements

- Security for Records (§2.16)
  - Clarified that this section requires both Part 2 programs ***and other lawful holders of patient identifying information*** to have in place formal policies and procedures addressing security, including sanitizing associated media.
  - Addresses both paper and electronic records.

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## 2018 Updates to Final Rule

- Update to Final Rule
  - Provides option for Part 2 programs and lawful holders to use an ***abbreviated notice of the re-disclosure prohibition (see next slide)*** when disclosing Part 2 information.
  - Allows lawful holders to ***disclose Part 2 information to their own contractors, subcontractors and legal representatives (“contractors”) for payment and health care operations activities without additional patient consent***, if certain conditions are met.
    - Must have in place a written contract or comparable legal instrument specifically requiring the contractor to comply with Part 2 (BAA/QSOA).
  - Allows lawful holders to ***disclose Part 2 information for Medicaid, Medicare or Children’s Health Insurance Program (“CHIP”) audit or evaluation activities*** if certain conditions are met.

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## Re-disclosure Notice Options

- Section 2.32 – Prohibition on Re-disclosure – Each disclosure made with the patient’s written consent must be accompanied by one of the following written statements:

*“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 information in this record that identifies a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person unless further disclosure is expressly permitted or as otherwise permitted by 42 CFR Part 2.”*

**OR**

***“42 CFR Part 2 prohibits unauthorized disclosure of these records.”***

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## Disclosure of SUD Records to and through an HIE

- With consent, Part 2 Programs can disclose to HIE to disclose to health care providers through the HIE.
  - Health care providers listed on the patient's consent form could access the HIE to view the patient's records.
  - The consent form would need to include the ***name of the HIE***, as well as the:
    - (1) ***name of a specific individual and/or organization*** participating in the HIE, OR
    - (2) a ***general designation of individuals/entities that have a treating provider relationship*** with the patient.



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## Method of Disclosure of SUD Records to HIE

- Part 2 Programs can disclose to HIE pursuant to Business Associate/Qualified Service Organization Agreement (QSOA)
  - HIE cannot re-disclose SUD to third parties, even those who have treating provider relationship and are members unless patient:
    - Provides consent to disclose to individual providers, OR
    - Provides consent to disclose to treating providers under “general designation” (should include consent to disclose to past, present, and future treating providers).
- HIE must have consent registry so that it can limit disclosure to HIE to SUD for which patient has consented to disclosure.

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## Method of Re-disclosure of SUD Records to HIE

- If a general designation (e.g. “all my mental health providers at XYZ Hospital”) is used on the consent form, the entity should have a mechanism in place to determine whether a treating provider relationship exists with the patient whose info is being disclosed, *e.g.*:
  - HIE may require participating providers to attest to having a treating provider relationship before accessing a patient’s Part 2 information.
  - HIE may provide a patient portal where patients can designate their treating providers.
  - HIE must provide patient with accounting of disclosures to treating providers, upon request, so disclosures must be tracked.

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## Medical Emergencies and Disclosures Permitted

- HIPAA (all PHI) – 45 CFR 164.506 – “treatment purposes”
- Physical health information (for “treatment purposes”) – (Civil Code 56.10(c)(1))
- Mental health information (for “treatment purposes”; plus new AB 1119 permissible disclosures)
- SUD information (42 CFR Part 2 “emergency exception” where prior informed consent cannot be obtained)



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## What Behavioral Health Information Can Be Disclosed For Medical Emergencies?

- What behavioral health information can be disclosed?
  - If patient has medical emergency, what information may the emergency department obtain regarding potential SUD without consent?
    - Primary Care Clinic
      - Notes in medical records by general providers
      - Prescriptions for SUD medication assisted therapy if prior informed consent cannot be obtained (42 CFR Part 2 applies)
    - Behavioral Health Clinic
      - Mental health information
      - SUD treatment information if prior informed consent cannot be obtained (42 CFR Part 2 applies)



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## What Behavioral Health Information can be Disclosed for Medical Emergencies?

- Hospital
  - Emergency room records
  - Records from medical units, BUT
    - Not records from detox or other SUD program in hospital, or SUD staff who hold themselves out as SUD providers (not common) unless prior informed consent cannot be obtained (must be separately tagged).
- Part 2 Program
  - To **medical personnel** as necessary to meet a **bona fide medical emergency** in which the **patient's prior informed consent cannot be obtained**.
  - Medical emergency must be determined by treating provider, cannot be automated.

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## Behavioral Health Information and Medical Emergencies

- What information can be re-disclosed by hospital?
  - ***Emergency room record***, including diagnosis and treatment.
    - ***Except for any records received from Part 2 Program that would identify, directly or indirectly, an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder*** (must be separately tagged).

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## Documentation of disclosures for bona fide medical emergency or to avert emergency\*

- Part 2 Program must document :
  - (1) The name of the medical personnel to whom disclosure was made and their affiliation with any health care facility;
  - (2) The name of the individual making the disclosure;
  - (3) The date and time of the disclosure; and
  - (4) The nature of the emergency

\*note: 2.51 Medical Emergencies

(b) Special rule. Ok to disclose SUD info to FDA medical personnel if they assert reason to believe health of any individual may be threatened by error in mfg., labeling, or sale of product under their jurisdiction, and info will be used for purpose of notifying patients or their physicians. (documentation requirements, above, must be met)

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## What if you Receive a Subpoena for Behavioral Health Records?

	Medical Records	LPS Records	42 CFR Part 2 Records
<b>State Civil Subpoena</b>	Qualified Protective Order under HIPAA or Consumer Notice under Cal. Code of Civil Procedure § 1985.3	Court Order, records to be disclosed to Court	Specific Court Order authorizing disclosure of Part 2 records
<b>State Criminal Proceeding (Penal Code §1327)</b>	Qualified Protective Order or Notice under HIPAA	Court Order, records to be disclosed to Court	Specific Court Order authorizing disclosure of Part 2 records
<b>Federal Civil</b>	Qualified Protective Order or Notice under HIPAA	Grey area - should request Court Order, Disclosure to Court	Specific Court Order authorizing disclosure of Part 2 records
<b>Federal Criminal Subpoenas</b>	Qualified Protective Order or Notice under HIPAA	Grey area - should request Court Order, Disclosure to Court	Specific Court Order authorizing disclosure of Part 2 records

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## Court Orders – 42 CFR Part 2

- Civil Order must:
  - Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;
  - Limit disclosure to those persons whose need for information is the basis for the order; and
  - Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.
- Criminal Order must:
  - Limit disclosure and use to those parts of the patient's record which are essential to fulfill the objective of the order;
  - Limit disclosure to those law enforcement/prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and limit their use of the records to investigation and prosecution of extremely serious crime or suspected crime; and
  - Include such other measures as are necessary to limit disclosure and use to the fulfillment of only that public interest and need found by the court.
- Different requirements for investigation or prosecution of a program or the person holding the records.

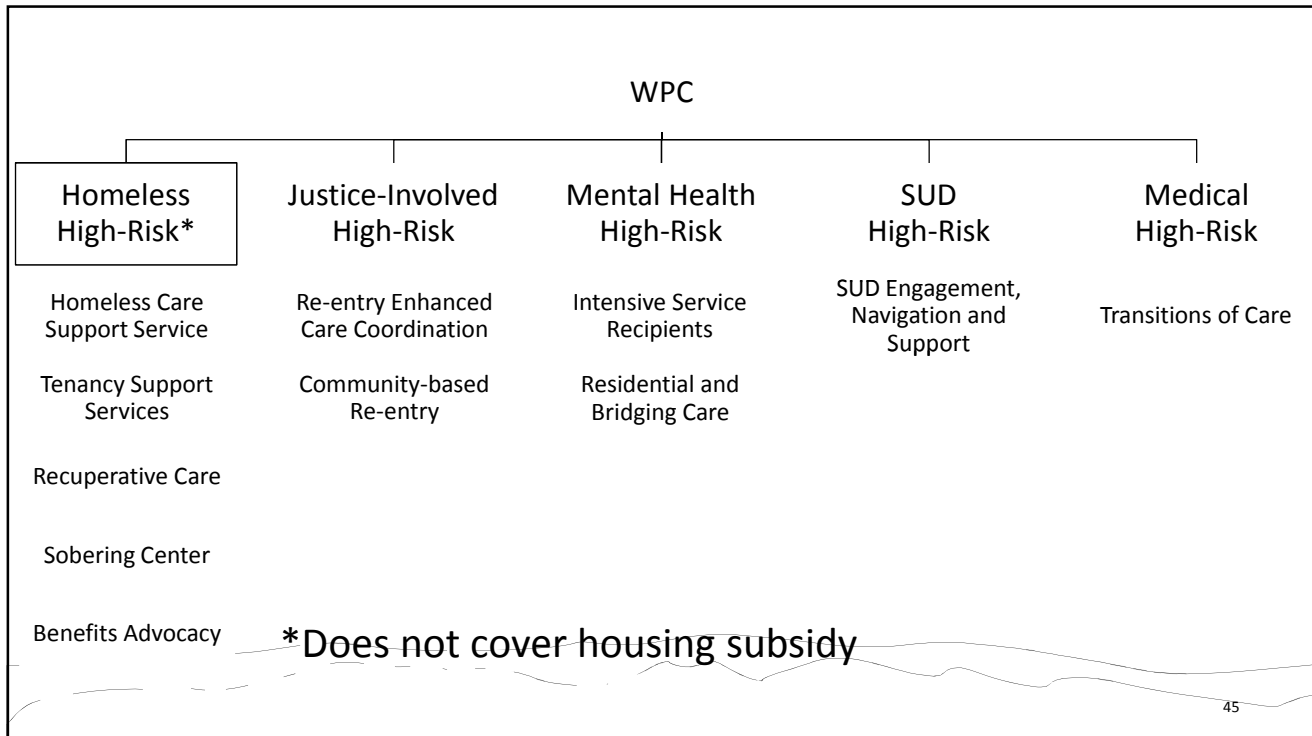
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## How Can Behavioral Health Information be Used for Care Coordination?

- Whole Person Care (WPC) funded under Medi-Cal Waiver
  - \$1.5 Billion in “new” Federal Funds over 5 Program years
  - \$300 million annually
  - 18 counties participating
- Goals
  - Coordination of health, behavioral health and social services
  - Patient-centered manner
  - Improve health (outcomes) and wellbeing (STC 110)

## Whole Person Care – Los Angeles County

- Vision
  - To ensure the most vulnerable individuals living in Los Angeles County have the resources and support they need to thrive
- Mission
  - Build an integrated health system that delivers seamless, coordinated services to the highest risk LA County residents
- Data Sharing
  - Essential to high functioning WPC
  - Impacts Care coordination
  - Respect wishes of client
  - Written client authorization at point of entry to program



## Legal Issues - Written Authorization

- FEDERAL
  - HIPAA
    - TPO exception
    - Authorization for disclosure for other purposes
  - SUD Treatment (42 CFR Part 2)
    - Express authorization (“opt-in”)
    - Applies to SUD providers’ information and re-disclosure

## Legal Issues - Written Authorization

- STATE (privacy statutes)
  - CMIA (Civ. §56.10)
  - Mental health services (WIC §5328)
    - LPS Services
    - Express authorization (“opt-in”)
  - HIV test results (H&S §121025)
    - Express authorization (“opt-in”)
    - Medi-Cal Information (WIC §14100.2)
  - WPC information sharing statute [WIC §14184.60(c)(5)]
    - Allows information sharing
    - Among WPC Lead Entity and PEs to the extent necessary for WPC

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## Legal Issues for Participating Entities

- HIPAA
  - Business Associate agreement
  - Privacy and security
- Contract obligations of Care Management Platform license/vendor
- Express authorization (“opt-in”)
- Result: Data Sharing Agreement must be signed by all Participating Entities to use the Care Management Platform.



## Sharing Information with Social Service Entities

- \*HIPAA permits health care providers to share PHI about an individual who has mental illness with
  - **Other health care providers** who are treating the same individual *for care coordination/continuity of care* purposes.
  - A **third party** that is not a health care provider for *case management or continuity of care purposes*.
    - Health care providers who believe that disclosures to **certain social service entities** are a necessary component of, or may help further, the individual's health or mental health care may, under HIPAA, disclose the minimum necessary PHI to such entities without the individual's authorization.
- These same requirements would apply to MH information **that is not covered by LPS**, such as:
  - Hospital emergency department records where there was no inpatient psychiatric or involuntary hold.
  - Mental health visits for patient in medical care unit of hospital.

**\*NOTE: if LPS rules apply, sharing would be far more limited by more stringent CA law**

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## Information Sharing Among Multi-Disciplinary Teams

- Two Types of Multi-Disciplinary Teams (MDTs)
  - Health care providers only, from different disciplines (e.g., primary care clinic with dentist, mental health professionals, podiatrist and optometrist).
    - LPS MH Records - can share with qualified professional with treatment responsibility.
    - SUD Records - need consent to share.
  - Health care providers plus school, CalWORKS, housing, Social Services Agency, CPS, court, probation, apprenticeship programs, homeless shelters, faith-based charities, law enforcement liaisons, etc.
    - LPS-mental health, 42 CFR Part 2/Cal Health & Safety Code 11845.45, and HIPAA (except to certain social service agencies) – all require patient authorization.
    - Consent required prior to even acknowledging individual is a patient for LPS, SUD records.

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## Information Sharing Among Multi-Disciplinary Teams

- AB 210 – adds 18999.8 to W&I Code re: Multi-disciplinary Teams (MDTs) for Homeless Adults and Families
- Allows counties to develop a homeless adult and family MDTs to facilitate identification and assessment of homeless individuals and link them to housing and supportive services.
- Allows service providers on the team to share confidential information to ensure continuity of care, BUT
  - Even CMIA healthcare providers might violate HIPAA if they share with MDT without permission, since not all members of the team might be there to coordinate health care!
  - LPS behavioral health care providers must still follow CA W&I 5328 and get permission before sharing mental health information.
  - SUD providers must follow 42 CFR Part 2 and get written consent before sharing substance use disorder treatment program information.
    - See: W&I Code 18999.8(g) - ***This section shall not be construed to restrict guarantees of confidentiality provided under state and federal law.***

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## References

- DHHS, Office for Civil Rights, Information Related to Mental and Behavioral Health, including Opioid Overdose, <https://www.hhs.gov/hipaa/for-professionals/special-topics/mental-health/index.html> (last updated Dec. 17 2017).
- State of California, Office of Health Information Integrity, State Health Information Guidance on Sharing Behavioral Health Information (Feb. 2, 2018).
- Office of the National Coordinator for Health Information Technology (ONCHIT) and Substance Abuse and Mental Health Services Administration (SAMHSA), Disclosure of Substance Use Disorder Patient Records: *How Do I Exchange Part 2 Data?* <https://www.samhsa.gov/sites/default/files/how-do-i-exchange-part2.pdf>
- ONCHIT and SAMHSA, Disclosure of Substance Use Disorder Patient Records: *Does Part 2 Apply to Me?* <https://www.samhsa.gov/sites/default/files/does-part2-apply.pdf>

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## Questions?



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