

11th Annual
Tribal Healing to Wellness Court
VIRTUAL ENHANCEMENT TRAINING

HEALING TO WELLNESS COURTS CONFIDENTIALITY AND ETHICS

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DISCLAIMER

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WHY ARE THERE CONFIDENTIALITY RULES?

- Valuable to deal with the stigma of addiction
- Designed to encourage substance abusers to obtain and remain in treatment
- To encourage substance abusers to be open and honest with treating professionals by protecting sensitive information.

***Goals of HTWCs /JHTWCs and
Confidentiality Laws Are Compatible***

***Both Are Designed to Help Substance
Abusers Overcome Alcohol and Other
Drug Problems***

WHAT LAWS?

- 42 USC 290dd- “Confidentiality Law”
- 42 CFR, Part 2- “Part 2”
- HIPAA- Health Insurance Portability and Accountability Act- “Privacy Rule”
- Family Educational Rights and Privacy Act (FERPA)

CONFIDENTIALITY

Information regarding a person's substance abuse history is federally protected to encourage those needing treatment to seek help without fear of repercussions.

HIPAA

*Health Insurance Portability &
Accountability Act of 1996 (45 C.F.R.
parts 160 & 164)*

HIPAA APPLICABILITY

- Applies to “covered entities”- health plans, health care clearinghouses, billing services, community health information systems, and health care providers.
- Wellness Court is not considered a covered entity or program, but treatment provider is.

WHY CARE ABOUT HIPAA?

- All treatment providers are subject to HIPAA requirements, and these providers are the main stewards of the “Protected Health Information” (PHI) that courts want access to!
- Providers can only release PHI in accordance to HIPAA’s Privacy Rule.
- Privacy Rule (HIPAA) and Confidentiality Law (Part 2) generally parallel each other.

HIPAA DEFINITIONS

What is Protected Health Information (PHI)?

- *Protected Health Information (PHI) is individually identifiable health information that is:*
 - Created or received by a health care provider, health plan, employer, or health care clearinghouse and that
 - Relates to the past, present, or future physical or mental health or condition of an individual;
 - Relates to the provision of health care to an individual
 - The past, present or future payment for the provision of health care to an individual.

RELEASE OF INFORMATION (ROI)

- When releasing PHI, it is important to know when a patient's authorization is required. Patient authorizations are governed by state and federal law.

42 CFR Part 2

*The regulations governing
“confidentiality of alcohol and drug
abuse patient records*

42 CFR APPLICABILITY

- Any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research which is directly or indirectly assisted by any department or agency of the United States.
- Courts are included in this definition.

42 CFR PART 2

- First issued 1975, revised 1987
- Designed to help deal with the stigma of addiction.
- Requires notification of confidentiality, consent forms, prohibition of re-disclosure
- “I’m sorry I cannot acknowledge whether someone is or isn’t in our treatment program”.

42 CFR PART 2

- Imposes restrictions upon the disclosure and use of patient records that are maintained in connection with the performance of any federally assisted alcohol and drug abuse program

CONFIDENTIALITY/PRIVACY

Several rules apply to participants in Healing to Wellness Courts.

42 CFR Part 2 – The alcohol and substance abuse treatment confidentiality rule.

HIPAA – New federal rules covering all health related information.

No covered information can be disclosed unless by consent of a participant or as specifically authorized by Part 2.

CARES ACT

Alignment of HIPAA & 42 CFR Part 2

HIPAA v. 42 CFR PART 2

- HIPAA: health care industry
- 42 CFR: drug and alcohol programs
- The laws cover a lot of the same material
- Some points of difference – more specific or more recent rule usually applies
- For treatment providers, in most cases the rules of 42 CFR Part 2 are more stringent

CARES ACT AMENDS PART 2 TO ALIGN WITH HIPAA

- Section 3221 of the CARES Act, which amends Part 2's underlying statute, strikes a balance—the amendments allow for disclosures for treatment, payment, and healthcare operations as permitted by HIPAA regulations, but require an initial consent from the patient that can be revoked.

DISCLOSURE

Always get Consent

GENERAL RULE OF DISCLOSURE

Treatment programs may only release information or records that will directly or indirectly identify a drug court participant as a substance abuser or treatment patient:

With a knowing and written consent from the participant,

and

Nine limited exceptions

9 EXCEPTIONS - NON-DISCLOSURE RULE

1. No Patient-identifying information
2. Internal Communications
3. Proper Consent
4. QSOA
5. Crime on Program Premises or against program personnel anywhere
6. Research/Audit
7. Court Order
8. Medical Emergency
9. Reporting suspected child abuse or neglect

OBTAINING THE CONSENT

- **First** contact with an individual
 - Intake
 - Screening
 - Assessment

ELEMENTS OF A CONSENT

1. Name of person or organization that may make the disclosure;
2. Name or title of person (or organization) to whom disclosure may be made;
3. Participant's name;
4. Purpose of the disclosure;
5. How much and what kind of information may be disclosed;
6. Participant's signature;
7. Date on which the consent was signed; and
8. Date, event, or condition upon which the consent will expire (some states specify maximum duration)

(Consent cannot be revoked unless in the juvenile or family court setting)

CONSENTS

- A proper consent can authorize all parties involved in the drug court to share information necessary to monitor treatment progress and compliance
- Even with proper consent in place, disclosure is not mandated if entity thinks information will harm the individual
- Unless consent specifically permits, program cannot disclose information to law enforcement seeking to prosecute a separate crime

MINORS

- State law governs when parental consent is necessary for minor to obtain treatment
- The minor's signature is required for disclosures, even to parents
- Parental consent also needed in states that require parental consent for treatment

REQUIRING CONSENTS

- HIPAA prohibits a program from conditioning treatment on a patient signing a consent, *but*
- The judge, probation/parole, child welfare can condition participation in the drug court program on the defendant signing the consent form.

SATISFYING 42 CFR AND HIPAA

- HIPAA requires all consents to be revocable, but
- HIPAA also allows for the use of an administrative order for information disclosure. Therefore,
- Wellness courts can pair their 42 CFR consent with a HIPAA administrative order and/or build HIPAA language into their consent.

CONSENTS AND FAMILY COURT

- No criminal justice system exception for family court setting
- Consents in family court must be revocable

Family Educational Rights and Privacy Act (FERPA)

Statute: 20 U.S.C. § 1232g

Regulations: 34 CFR Part 99

FERPA APPLICABILITY

- FERPA is the Federal law that protects the privacy of students' education records.
- FERPA applies to educational agencies and institutions that receive funds under any program administered by the Secretary of Education. § 99.1.
- Most private and parochial schools at the elementary and secondary levels do not receive such funds and are, therefore, not subject to FERPA.

WHAT IS FERPA?

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PRIMARY RIGHTS OF PARENTS UNDER FERPA

- Right to inspect and review education records.
- Right to seek to amend education records.
- Right to consent to the disclosure of information from education records, except as provided by law.

RIGHTS OF ELIGIBLE STUDENTS UNDER FERPA

- These rights under FERPA transfer to the student when he or she turns 18 years of age or enters a postsecondary institution at any age (“eligible student”).

EDUCATION RECORDS

- “Education records” are records that are –
 - Directly related to a student; and
 - Maintained by an educational agency or institution or by a party acting for the agency or institution.

- § 99.3 “Education records”

EDUCATION RECORDS, CONT.

- Records on a student receiving services under Part B of the Individuals with Disabilities Education Act (IDEA) are “education records” subject to FERPA.
- Medical or health related records are “education records” subject to FERPA.

EDUCATION RECORDS, CONT.

Exceptions to “education records” include –

- Records created and maintained by a law enforcement unit for a law enforcement purpose.
- Medical and psychological treatment records of eligible students if they are made, maintained, and used only in connection with treatment of the student and disclosed only to professionals providing the treatment.

PERSONALLY IDENTIFIABLE INFORMATION

Personally identifiable information (PII) includes, but is not limited to:

- The student's name;
- The name of the student's parent or other family members;
- A personal identifier, such as the student's social security number, student number, or biometric record;
- Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

PERSONALLY IDENTIFIABLE INFORMATION, CONT.

- Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education records relates.

§ 99.3

DISCLOSURE OF PII FROM EDUCATION RECORDS BY AN EDUCATIONAL AGENCY OR INSTITUTION

- § 99.30 Under what conditions is prior consent required to disclose information?
- Except for specific exceptions, a parent or eligible student shall provide a signed and dated written consent before a school may disclose education records. The consent must:
- Specify records that may be disclosed;
- State the purpose of disclosure; and
- Identify the party or class of parties to whom disclosure may be made.

EXCEPTIONS TO CONSENT REQUIREMENT

§ 99.31 Under what conditions is prior consent not required to disclose information?

- The exceptions which relate to K-12 schools and school districts are:
- To school officials with legitimate educational interests (defined in the school's annual notification).
- To schools in which a student seeks or intends to enroll.
- To Federal, State, and local educational authorities conducting an audit, evaluation, or enforcement of education programs.

DISCLOSURE PROVISIONS, CONT.

Exceptions, cont.

- To organizations conducting studies for or on behalf of the school.
- To parents of a dependent student.
- To comply with a judicial order or subpoena (reasonable effort to notify).
- In connection with a health or safety emergency.
- Directory information.
- To State and local officials in connection with serving the student under the juvenile justice system (established by State law).

ETHICS

Codes of Conduct

ETHICS

Ethics are the principles of conduct governing an individual or group, especially a professional group. Ethical principles help people make appropriate decisions and respond properly in difficult situations. Following the ethical principles of a profession reduces the risk of job loss, criminal charges, and liability for unsuitable behavior.

Model Code of Conduct for
Court Employees

Model Code for Probation
Officers

Code
of
Judicial Conduct

ETHICS

- Ethical behavior requires more than a familiarity with the profession's code of ethics.
- Counselors also need to develop a personal ethical sense that involves reflection and insight in assuring the best possible service deliver to their clients.

CANON 1

- A Judge Should Uphold the Integrity and Independence of the Judiciary
 - -final decision must remain with judge
 - -be mindful of ex-parte communication

CANON 2

- A Judge Should Avoid Impropriety in all the Judge's Activities
 - -impartial is not disengaged
 - -references not appropriate

CANON 3

- A Judge Should Perform the Duties of the Judge's Office Impartially and Diligently
 - -decorum in courtroom
 - -decorum outside courtroom
 - -use of non-public information
 - -ensure compliance with Confidentiality Law

CANON 4

- A Judge may Participate in Cultural or Historical Activities or Engage in Activities Concerning the Legal, Economic, Educational, or Governmental System, or the Administration of Justice.
 - -service on boards
 - -fundraising
 - -other solicitations

- Questions?
- Comments
- Please Complete
Your Evaluations

THANK YOU

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