

MEMORANDUM

To: Suzanne Feeney, General Manager, Medicaid, Behavioral Solutions, OptumHealth
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From: Tom Smith, OMH Director of Operations, NYS BHOs
Don Zalucki, OMH Director, Bureau of Program and Policy Development
Steve Hanson, OASAS Acting Associate Commissioner

Date: December 28, 2011

Re: Guidance to BHOs re confidentiality

The Offices are providing guidance regarding confidentiality questions raised by BHOs and providers. The following are Frequently Asked Questions and Answers concerning the exchange of behavioral health protected health information (PHI) between providers of behavioral health services and the BHOs.

1. Is individual consent required for a substance use provider to communicate with BHOs regarding concurrent reviews, discharge planning, and aftercare follow-up?

Answer: Yes. For the BHO to obtain PHI regarding treatment for alcoholism or substance abuse disorders (SUD) from a provider of SUD services upon the patient's admission to an inpatient SUD setting, except in a medical emergency situation, under Federal confidentiality rules (42 CFR Part 2) the provider must indicate to the BHO that the SUD patient has signed a consent form allowing:

- a. The inpatient provider to notify the BHO of the patient's admission into the inpatient program;
- b. The BHO to check the database and provide claims/treatment history to the provider;
- c. The inpatient provider to notify and communicate with the BHO and any other appropriate identified care coordinator(s) relative to patient's admission and need for treatment.

For the BHO to obtain PHI relating to the patient's discharge and referral to an outpatient provider, the inpatient provider must indicate to the BHO that the SUD patient has signed a consent permitting the BHO and any other identified care coordinator(s), to be notified of the patient's referral to an identified outpatient provider. OASAS has developed a consent form that is available on the OASAS website: <http://www.oasas.ny.gov/mis/forms/trs/trs-51.pdf>

2. Is individual consent required for a mental health provider to communicate with BHOs regarding concurrent reviews, discharge planning, and aftercare follow-up?

Answer: No. Unlike SUD information, which is subject to 42 CFR Part 2, mental health PHI may be shared without consent under specific exceptions provided in the Federal HIPAA regulations (45 CFR Parts 160 and 164) including, among other exceptions, for "treatment, payment and health care operations." Similar exceptions are contained in Section 33.13 of the New York Mental Hygiene Law, which specifically authorizes the exchange of information between or among facilities that are licensed, operated, funded or approved by the OMH, or others providing services to individuals under an approved local services plan, or pursuant to an agreement with the Office of Mental Health or any of its facilities. Accordingly, the BHO may obtain mental health information relating to an individual's admission to, treatment in, and discharge from an inpatient mental health setting, and referral to an outpatient provider, without seeking or obtaining patient consent.

3. Will the BHO need to have a business associate agreement with each provider to share past mental health or SUD information?

Answer: No. The BHO will not need to have a business associate agreement with each provider. SUD information will be exchanged pursuant to patient consent, or without consent in a medical emergency situation. Mental health information may be shared by the BHO with mental health providers without patient consent under provisions of both HIPAA regulations and Section 33.13 of the New York State Mental Hygiene Law.

4. What information can the BHO share with providers about a consumer's past service use without member consent?

Answer:

- a. Mental health providers: As noted above, a BHO may communicate with the treating mental health inpatient provider regarding a client's mental health PHI without consent. If SUD information is also available, the BHO may advise the treating mental health provider that additional health history information is available and will be provided once the provider obtains the client's consent to disclose the additional health history information, or indicates to the BHO that there is an emergent situation which authorizes disclosure without obtaining consent.

- b. SUD providers:
 - i. In non-medical emergency situations, a BHO may only communicate with the treating SUD provider regarding health history PHI when the client has consented to such communication.
 - ii. Where the treating SUD provider determines a **medical emergency exists**, communication between the treating provider and BHO may occur without consent or limitation on the information disclosed.
 - iii. Communication between a BHO and provider(s) can also occur in situations where such communication is authorized by a Court Order.

5. What constitutes a medical emergency under 42 CFR Part 2?

Answer: PHI may be disclosed to medical personnel who have a need for such information for the purpose of treating a condition which poses an **immediate threat to the health of any individual and which requires immediate medical intervention**.

6. Are special procedures involved in releasing information protected by 42 CFR Part 2 in an emergency situation?

Answer: Yes. Part 2 requires that immediately following the disclosure of confidential information, the disclosure must be documented, in writing, in the patient's record, including:

- a. The name of the medical personnel to whom disclosure was made and their affiliation with any health care facility;
- b. The name of the individual making the disclosure;
- c. The date and time of the disclosure; and
- d. The nature of the emergency.

7. Can SUD information be redisclosed without a patient's consent?

Answer: Not in a non-emergent situation. Any PHI received by a treatment provider or BHO, which identifies an individual as being diagnosed as needing, or having received, treatment for alcoholism or substance abuse is covered by 42 CFR Part 2. Therefore, that portion of the patient's medical information is specifically prohibited from redisclosure to agents or subcontractors without specific written consent of the patient, except where an emergency exists. However, the OASAS consent form, which is available on the OASAS website (<http://www.oasas.ny.gov/mis/forms/trs/trs-51.pdf>) is drafted to allow such redisclosure.

8. Can the BHO perform "outreach services" or contact an SUD patient directly?

Answer: Communications between the BHO and a patient relative to the patient's SUD treatment history can only occur when the patient has provided a written consent specifically authorizing such communications between the BHO and the patient.

9. Can BHO staff review PHI with BHOs in another region when an individual uses services in more than one region?

Answer: Yes. The BHOs are OMH/OASAS business associates. The establishment of regions is for administrative purposes, and each BHO has full access to the Medicaid data to the extent necessary to perform this coordination and management for the individuals in question.

We appreciate your feedback and comments regarding these issues.

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