Focus:PHI

The Center of Excellence for Protected Health Information

Understanding the New SAMHSA/OCR Guidance for Telehealth SUD and MH Services

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April 6th, 2020
11:00 AM EST

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IMPORTANT NOTICE

- This Zoom service includes a feature that allows audio and any documents and other materials exchanged or viewed during the session to be **recorded**.

- By joining this session, you automatically consent to such recordings.

- Please note that any such recordings may be subject to discovery in the event of litigation.

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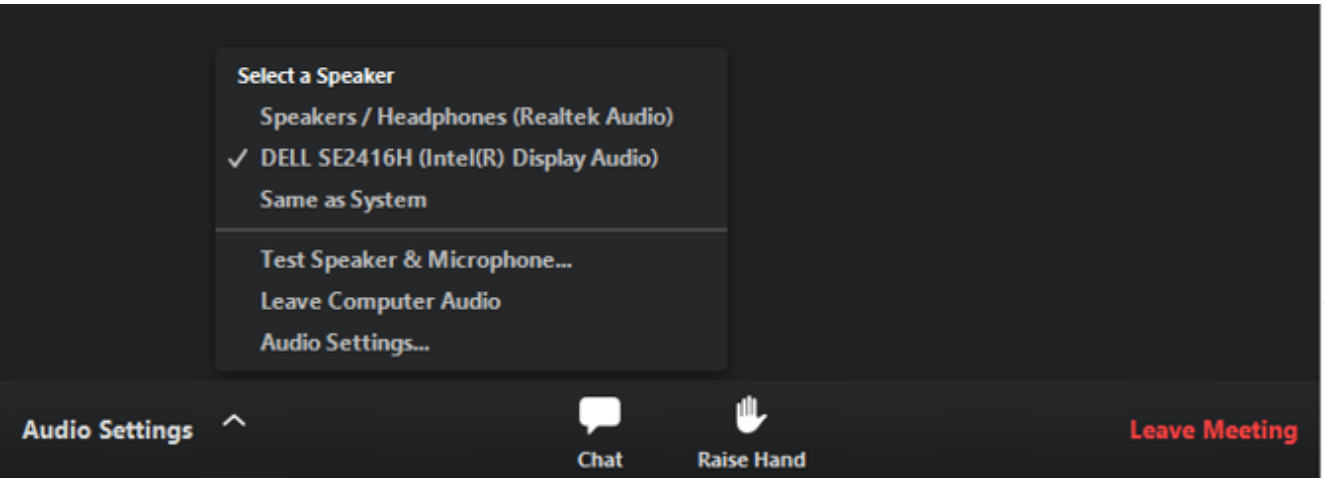
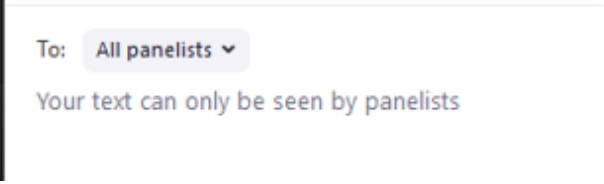
Logistics

- Typed questions/chat
- Tech Difficulties
  - Send message in chat box





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Center of Excellence for Protected Health Information

Funded by SAMHSA, the CoE-PHI develops and disseminates resources, training, and TA for states, healthcare providers, school administrators and individuals and families to improve understanding and application of federal privacy laws and regulations, including FERPA, HIPAA, and 42 CFR Part 2, when providing and receiving treatment for SUD and mental illness.

Resources, training, technical assistance, and any other information provided through the CoE-PHI do not constitute legal advice.

Presenters

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Presentation Objectives

- Describe how the privacy laws apply to telehealth
- Describe OCR/SAMHSA Guidance related to privacy issues in response to the need to rapidly expand telehealth services due to the COVID-19 pandemic
- Facilitate provider sharing to explore practical ideas and innovative approaches to protect patient privacy while providing SUD/MH telehealth services

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Important

Today we will be discussing privacy laws, and **when you need patient consent to *share* or *disclose*** protected health information

- *authorizations, releases of information (ROIs)*

Today we will ***not be*** **discussing consent to treatment** (i.e., the patient's agreement to receive services)

- *Check with your state agency for guidance about how requirements may have changed for consent to treatment*

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PHI regulations protect patient privacy, give you flexibility to provide the best possible treatment, and help clarify the boundaries in protecting and sharing patient information.

COVID-19 AND TELEHEALTH

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Poll Question

How concerned are you about your ability to provide SUD and MH services remotely and still protect patient privacy?

- ❑ not concerned
- ❑ somewhat concerned
- ❑ very concerned
- ❑ not sure

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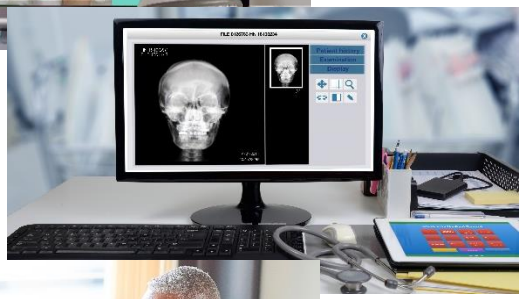
Telehealth Methods

Live video

- Live, two-way interaction between provider and another person (patient, caregiver, or provider) using audiovisual telecom

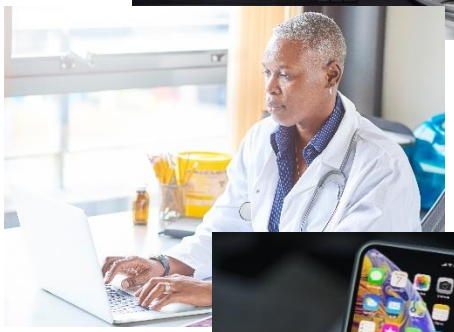
Store-and-forward

- Transmission of videos and digital images through electronic communication system



Remote patient monitoring

- Personal health/medical data collection from individual transmitted to provider in another location



Mobile health

- Smartphone apps that are programmed to send targeted messages to patients, or permit patients to self-disclose information for remote review by clinician

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Poll Question

What methods are you currently (or considering) using to provide telehealth services?

- ❑ HIPAA-compliant video communications (e.g.; Skype for Business, Updox, Zoom Health, Webex, GoTo Meeting)
- ❑ Other video communications (e.g.; Apple FaceTime, Facebook Messenger video, Google Hangouts, Zoom, Skype)
- ❑ Encrypted text messaging
- ❑ Phone calls
- ❑ other

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Privacy Considerations for Telehealth During COVID-19

- How do privacy laws apply?
- How to protect privacy and security at:
  - Provider's location
  - Patient's location

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HIPAA

Applies to covered entities (healthcare providers, health plans, healthcare clearinghouses) and BAs

- Protects privacy and security of general health information

Purpose: to protect health data integrity, confidentiality, and accessibility

Permits disclosures without patient consent for treatment, payment, and healthcare operations

42 CFR Part 2

Applies to SUD patient records from federally-assisted "Part 2 programs"

- Protects privacy and security of records identifying individual as seeking/receiving SUD treatment

Purpose: to encourage people to enter and remain in SUD treatment by guaranteeing confidentiality

Requires patient consent for treatment, payment, and healthcare operations, with limited exceptions

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OCR Bulletin: COVID-19

OCR announced it will waive potential penalties for HIPAA violations arising out of *good-faith use of telehealth*:

- Providers may use popular video chats, like FaceTime, Messenger, Google Hangouts, Zoom, or Skype
- Providers do not need to have a BAA in place
- *Does not matter whether telehealth service is directly related to COVID-19*

If possible, still *best practice* to use secure, HIPAA compliant services and have BAA in place

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Case Study #1

Good-faith Telehealth

- **Maria is a licensed psychiatrist and treats patients at their office**
- **Due to COVID-19, Maria has closed their office and is offering to treat their patients via telehealth.**
- **They set up an account with a video chat app (e.g., Zoom), but do not have a BAA with the service and is not sure if the service meets HIPAA's Security Rule requirements.**

Should Maria be worried about a potential OCR enforcement action?

Poll Question

Based on the previous case study example, *should Maria be worried about a potential OCR enforcement action?*

- ❑ Yes
- ❑ No
- ❑ Not sure

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Case Study #1:
Good-faith Telehealth

No: This meets OCR's "good faith" standard and OCR has said it will not be enforcing penalties for this type of violation during the COVID-19 public health emergency.

How did this violate HIPAA?

- Providers should only use HIPAA-compliant technology vendors, *and* should have BAAs with the vendors before disclosing PHI through telehealth.

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SAMHSA GUIDANCE AND PART 2

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Quick Review: 42 CFR § 2.51 Medical Emergencies

Part 2 permits disclosures w/o written consent to medical personnel in order to treat a ***bona fide* medical emergency**

- Information may be re-disclosed for treatment purposes
- Cannot use this provision to "override" patient's objection to a disclosure
- **Part 2 program must make note in patient file regarding disclosure**

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SAMHSA Guidance: COVID-19

SAMHSA's COVID-19 Part 2 Guidance emphasizes that providers have discretion to determine whether *bona fide* medical emergency exists

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Case Study #2

Part 2 and Telehealth

- Derek is a long-time patient at Sun Valley Clinic, an out-patient SUD clinic (and a Part 2 program).
- Sun Valley closed due to the COVID-19 pandemic and is referring patients to Red Hill FQHC for telehealth services to provide continuity of care.
- Derek meets with a Red Hill FQHC counselor over the phone but **does not have a way to sign a written consent form** authorizing his SUD clinic to share records with Red Hill FQHC.

Can the counselor access Derek's OTP records without Derek's written consent?

Poll Question

Based on the previous case study example, *can the counselor access Derek's OTP records without Derek's written consent?*

- ❑ **yes**
- ❑ **no**
- ❑ **not sure**

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Case study #2:
Part 2 and Telehealth

<u>Yes:</u> If the provider determines that a medical emergency exists (i.e., Derek needs SUD services and cannot get them in person due to COVID-19), then the provider can access the OTP records without written consent.

- Red Hill FQHC may also re-disclose the protected Part 2 information if necessary for *treatment purposes*.
- Sun Valley OTP **must make a note of the disclosure** in Derek's file.

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Case Study #3

Part 2 and Telehealth

- **Beto wants to begin treatment for Opioid Use Disorder.**
- **The local treatment program (a Part 2 program) is only able to provide appointments over the phone because of COVID-19.**

Can the program bill Beto's insurance without obtaining written consent authorizing the disclosure?

Poll Question

Based on the previous case study example, *can the program bill Beto's insurance without obtaining written consent authorizing the disclosure?*

- ❑ **yes**
- ❑ **no**
- ❑ **not sure**

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Case study #3:

Part 2 and Telehealth

No: the program needs Beto's signed consent form; the recent SAMHSA guidance does not apply.

- Medical emergency disclosures may ***only*** be made to medical personnel – **not third-party payers.**
- Remember that Part 2 requires written consent to bill insurance.
- Electronic and photocopied signatures are ok!

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Key Points – Patient Consent

Written consent required for most disclosures of Part 2 records, *including for payment purposes.*

E-signatures are permissible *(if not prohibited by state law)* and photocopied signatures are permissible

Minor's signature always required; question of state law whether parental signature also required.
If telehealth operating across two states, *check both state laws* to make sure no conflict.

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Chat-in Question:

Please share with us any practical ideas and innovative approaches that you are using to protect patient privacy while providing SUD/MH telehealth services

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Privacy Checklist
for Providers and Patients

- ✓ Password-protected device
- ✓ Password-protected internet
- ✓ * If possible, encrypted communication app
  (e.g., Signal, WhatsApp)
- ✓ If not possible, make sure communication app's privacy settings are as secure as possible
- ✓ Physical surroundings (minimize risk of family, roommates, or anyone else overhearing)
- ✓ Secure storage for physical documents

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Accessing the CoE-PHI

Request TA

coephi.org/technical-assistance

Resource Library

coephi.org/resource-center

Discussing privacy protections helps the care team to provide the best possible care.

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Webinar Evaluation

Following the conclusion of this webinar, you will be sent a link to complete a brief evaluation.

We value your opinion- please take the time to complete our evaluation!

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THANK YOU!

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