

Deflection: HIPAA-compliant Databases

Does a deflection initiative's database need to be compliant with the Health Insurance Portability and Accountability Act (HIPAA) and 42 Code of Federal Regulations (CFR) Part 2?

Response

It is a best practice for all types of deflection initiatives to maintain participating individuals' information in a database that is compliant with both HIPAA and 42 CFR Part 2. While there is the possibility that neither HIPAA nor 42 CFR Part 2 applies to the initiative managing the database, individuals engaged by a deflection team may be more comfortable sharing their information if they know it will be stored in a safe and secure manner. Moreover, even if health care or substance use disorder (SUD) treatment providers are not initially involved with a deflection initiative, the initiative should anticipate that those providers will be involved in the future as the initiative grows.

Additional Discussion

Both HIPAA and 42 CFR Part 2 require that patient information be maintained in a secure manner.¹ Depending on the purpose of the deflection initiative and the types of collaborating agencies, the initiative or deflection teams within the initiative may qualify as (1) a HIPAA-covered entity, (2) a Part 2 program, (3) both of these, or (4) neither of these.

For example, a common type of deflection team is a post-overdose response team composed of a law enforcement officer, a clinician, and a peer recovery specialist. The law enforcement officer is not, by definition, a HIPAA-covered entity or a Part 2 program. However, if either the clinician or the peer recovery specialist provides health care services and transmits health information, including payment information, in electronic form, then that individual and their respective employer could be considered a HIPAA-covered entity. If the information collected by such deflection team includes individuals' names and treatment referral information, it includes protected health information (PHI) and must be stored in a HIPAA-compliant database.² Moreover, if the clinician and/or peer recovery specialist is employed by a Part 2 program and is acting as a representative of that Part 2 program, Part 2 regulations apply. If any member of the post-overdose response team qualifies as a Part 2 program, then federal regulations require the

¹ See 45 CFR § 164.306 (2020) and 42 CFR § 2.16 (2020) (related to security of patient information).

² Pursuant to HIPAA, covered entities must maintain reasonable and appropriate safeguards for protecting e-PHI ("electronic protected health information," which means "individually identifiable health information that a covered entity creates, receives, maintains or transmits in electronic form"). Specifically, "covered entities must: 1. Ensure the confidentiality, integrity, and availability of all e-PHI they create, receive, maintain, or transmit; 2. Identify and protect against reasonably anticipated threats to the security or integrity of the information; 3. Protect against reasonably anticipated, impermissible uses or disclosures; and 4. Ensure compliance by their workforce." 45 CFR § 164.306(a) (2020). <https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html>.

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team to have formal policies and procedures in place that reasonably protect against unauthorized use and disclosure of patient identifying information.³

Definitions

Deflection initiative—A collaborative intervention designed to (1) connect law enforcement agencies and/or other first responder entities with public health/behavioral health systems to create pathways to community-based treatment, recovery support services, housing, case management, or other services for individuals with SUDs, mental health disorders, or co-occurring disorders; and (2) keep these individuals out of the criminal justice system, when possible, by addressing their unmet health needs. Throughout the country, particular types of deflection initiatives are referred to by a host of names, including pre-arrest diversion, pre-booking diversion, law enforcement diversion, co-responder teams, crisis intervention teams, and mobile crisis teams.

Deflection team—A unit of individuals working together within a deflection initiative to provide deflection services to participants. Examples of deflection teams include an individual post-overdose response team, a crisis intervention team, or a co-responder team.

HIPAA-covered entity [45 CFR § 160.103]—A health plan, health care clearinghouse, or health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA.

Individually identifiable health information [45 CFR § 160.103]—Health information that:

- Identifies the individual or provides a reasonable basis to identify the individual.
- Relates to (1) the individual's past, present, or future physical health or condition; (2) the provision of health care to the individual; or (3) the individual's past, present, or future payment for health care.

Part 2 program [42 CFR §§ 2.11 and 2.12(b)]—An individual or entity that (1) holds itself out as providing, and actually provides, assessment, treatment, or referral to treatment for SUD and (2) receives federal assistance (as defined by regulation). Most SUD treatment providers qualify as Part 2 programs.

Protected health information [45 CFR § 160.103]—Subject to a few exceptions, PHI is individually identifiable health information that is maintained or transmitted in any form or media. In the context of HIPAA-protected information, PHI does not include information about a person deceased for more than 50 years.

³ With respect to electronic records, these safeguards must address (1) creating, receiving, maintaining, and transmitting such records; (2) destroying such records so as to render the patient identifying information nonretrievable; (3) using and accessing electronic records or other electronic media containing patient identifying information; and (4) rendering the patient identifying information nonidentifiable in a manner that creates a very low risk of reidentification. 42 CFR § 2.16(a)(2) (2020).