



Substance Use Disorder Counseling Notes: What Behavioral Health Providers and Administrators Need to Know in 2024 About 42 CFR Part 2's New Protections for SUD Counseling Notes

In 2024, HHS amended the substance use disorder (SUD) confidentiality regulations at 42 CFR Part 2 to improve alignment with HIPAA (the Health Insurance Portability and Accountability Act).¹ One of these changes involves new protections for “substance use disorder (SUD) counseling notes,” which has a definition similar to the definition for psychotherapy notes within HIPAA.² Part 2 now provides stricter confidentiality protections for these notes than for other parts of a patient record.³

WHAT YOU NEED TO KNOW

SUD counseling notes, defined.

SUD counseling notes are notes by an SUD or mental health professional at a Part 2 program, in which they document or analyze the contents of a conversation from an SUD counseling session.⁴ SUD counseling sessions include private and group sessions, as well as joint or family SUD counseling sessions.⁵ Notes may be in “any medium,”⁶ including paper or electronic notes. In the context of explaining HIPAA’s psychotherapy notes, HHS has stated that these notes are the personal notes of a therapist, intended to help the therapist recall the discussion and of little or no use to others not involved in the therapy.⁷

The definition of SUD counseling notes specifically **excludes** medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment provided, results of clinical tests, and any summary of the following: diagnosis, functional status, treatment plan, symptoms, prognosis, or progress to date.⁸



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Separation required.

Like HIPAA's definition of psychotherapy notes,⁹ the notes must be separated from the rest of the patient's record in order to meet the definition of SUD counseling notes.¹⁰ If the notes are not kept separate, then they are not "SUD counseling notes" and **not** protected by the stricter confidentiality standard discussed below.¹¹

Stricter confidentiality protections.

Part 2 now provides stricter confidentiality protections for SUD counseling notes. With very limited exceptions (discussed below), these notes may only be used or disclosed with separate written consent; that consent cannot be combined with a consent to disclose any other Part 2 records.¹² Moreover, a Part 2 program **may not require** a patient to sign a consent authorizing use or disclosure of SUD counseling notes as a condition of treatment, payment, enrollment in a health plan, or eligibility for benefits.¹³

The limited exceptions under which a Part 2 program does not need written consent to use or disclose SUD counseling notes include the following examples:¹⁴

- The person who wrote or "originated" the SUD counseling notes may use the notes for treatment;
- The Part 2 program may use or disclose the SUD counseling notes for its own training programs for students, trainees, and SUD or mental health practitioners learning under supervision;
- The Part 2 program may use or disclose the SUD counseling notes to defend itself in a legal action or other proceeding brought by the patient (although any disclosure must be authorized under another Part 2 provision, such as a Part 2-compliant court order¹⁵).

Additional exceptions allow the Part 2 program to use or disclose the SUD counseling notes as required by the HHS Secretary to investigate or determine compliance with Part 2.¹⁶ The Part 2 program may use or disclose SUD counseling notes as permitted by the exception for deceased patients, or as permitted by the audit and evaluation section with respect to oversight of the originator of the SUD counseling notes.¹⁷ Finally, the Part 2 program may use or disclose SUD counseling notes pursuant to a Part 2-compliant court order authorizing uses and disclosures of “confidential communications” or authorizing uses and disclosures for non-criminal purposes.¹⁸

Patient right of access.

There is no patient right of access to SUD counseling notes under Part 2,¹⁹ and HIPAA specifically excludes psychotherapy notes from patients’ right of access.²⁰ A clinician may, however, exercise their discretion and provide a patient with access to their SUD counseling notes and psychotherapy notes, or a portion of the notes.²¹

For More Information

Resources

This resource is one of many that are available within the CoE-PHI’s resource library, which can be found at www.coephi.org/resource-library.

Request Technical Assistance

You can request brief, individualized technical assistance and join our mailing list for updates, including news about the publication of new resources and training opportunities [on our website](#).

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References

1. Confidentiality of Substance Use Disorder Patient Records, 89 Fed. Reg. 12472 (Feb. 16, 2024), <https://www.federalregister.gov/documents/2024/02/16/2024-02544/confidentiality-of-substance-use-disorder-sud-patient-records>. For more information, watch the CoE-PHI’s recorded webinar on the 2024 amendments: <https://coephi.org/resource/archived-webinar-42-cfr-part-2-final-rule-what-you-need-to-know/>.
2. HHS explained: “We believe the final definition of ‘SUD counseling notes’ will ease compliance burdens for part 2 programs because the definition almost exactly matches the definition of ‘psychotherapy notes’ under the HIPAA Privacy Rule except for the references to SUD professionals and SUD notes.” 89 Fed. Reg. at 12506, <https://www.federalregister.gov/documents/2024/02/16/2024-02544/confidentiality-of-substance-use-disorder-sud-patient-records>.
3. Id.; see also 42 CFR §§ 2.11 (definition of “SUD counseling notes”), 2.31(b).
4. 42 CFR § 2.11 (definition of “SUD counseling notes”).
5. Id.
6. Id.
7. 89 Fed. Reg. at 12506, <https://www.federalregister.gov/documents/2024/02/16/2024-02544/confidentiality-of-substance-use-disorder-sud-patient-records> (citing Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82623 (Dec. 28, 2000), <https://www.federalregister.gov/documents/2000/12/28/00-32678/standards-for-privacy-of-individually-identifiable-health-information>).
8. 42 CFR § 2.11 (definition of “SUD counseling notes”).
9. See 45 CFR § 164.501 (definition of “psychotherapy notes”).
10. 42 CFR § 2.11 (definition of “SUD counseling notes”).

References cont.

11. Id. See 89 Fed. Reg. at 12507, <https://www.federalregister.gov/documents/2024/02/16/2024-02544/confidentiality-of-substance-use-disorder-sud-patient-records> (“... the provisions for SUD counseling notes require that they be separated from the rest of the part 2 and/or medical record to be recognized as ‘SUD counseling notes’ and afforded additional privacy protection.”).
12. 42 CFR § 2.31(b)(2).
13. 42 CFR § 2.31(b)(3).
14. 42 CFR § 2.31(b)(1)(i).
15. See 42 CFR Part 2, Subpart E.
16. 42 CFR § 2.31(b)(1)(ii).
17. Id.
18. Id. See 42 CFR § 2.63 (confidential communications) and § 2.64 (procedures and criteria for orders authorizing uses and disclosures for non-criminal purposes).
19. See 42 CFR § 2.23(a).
20. See 45 CFR § 164.524.
21. See 89 Fed. Reg. at 12506, <https://www.federalregister.gov/documents/2024/02/16/2024-02544/confidentiality-of-substance-use-disorder-sud-patient-records>.