Tool #3

SBIRT AND THE FEDERAL ALCOHOL & DRUG CONFIDENTIALITY RULES – COMMON SCENARIOS

Third in a series about SBIRT and confidentiality

Introduction

This tool illustrates how the federal confidentiality law governing substance use disorder ("SUD") records (42 C.F.R. Part 2 or "Part 2") applies to common scenarios involving Screening, Brief Intervention and Referral to Treatment ("SBIRT") services for youth. SBIRT providers who want to find out if they are required to follow Part 2 can use Tool #1, and they can use Tool #2 to learn the basic requirements of Part 2. Changes to Part 2 took effect in March 2017; this tool reflects these amendments.

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SBIRT providers who *are not* covered by Part 2

Many SBIRT providers are not covered by Part 2 because they do not meet the definition of a "Part 2 program" (see Tool #1). However, if they receive protected information from a Part 2 program, they will become what Part 2 calls a **"lawful holder"** of Part 2-protected information and will need to follow Part 2 with respect to that information. Such providers should read on for guidance.

SBIRT providers also may need to obtain information from Part 2 programs (for example, status reports about patients referred for treatment). The best way to obtain that information is with patient consent on a Part 2-compliant form. (See Tool #2 and the discussion about consent forms on pages 4-5, below.)

SBIRT providers who *are* covered by Part 2

When SBIRT services are provided by Part 2 programs, the SBIRT services are covered by Part 2 (see Tool #1). Below are helpful pointers for these SBIRT providers.

Relationship Between Part 2 and Other Laws

Some SBIRT providers are required to follow the Health Insurance Portability and Accountability Act (HIPAA) and State privacy laws, in addition to Part 2. When more than one confidentiality law applies, providers generally must comply with the law that is more protective of privacy (usually, Part 2).

> **EXAMPLE** A State law requires compliance with subpoenas for patient records in a civil case. But Part 2 only permits complying with such subpoenas if the patient signed a Part 2-compliant consent form, or a court issued a Part 2-compliant order authorizing that disclosure (see Tool #2). In these cases, programs must comply with Part 2's stricter rule. They may not produce the subpoenaed records without patient consent or a court order issued under Part 2. But programs should not just ignore subpoenas. It is advisable to consult an attorney and/or the Legal Action Center's resources, listed at the end.

School-based SBIRT programs, which need to comply with the Family Educational Rights and Privacy Act (FERPA), can read page 8 for information about the interplay between FERPA and Part 2.

Security of Records

Both Part 2 programs and "lawful holders" of Part 2-protected information are required to have formal policies and procedures to "reasonably protect against unauthorized uses and disclosures of patient-identifying information." These policies and procedures must address both paper records (including transferring, removing, destroying, and securing them) and electronic records (including creating, receiving, using, maintaining, and transmitting the records). The policies and procedures also must address rendering patient-identifying information non-identifiable. More information is available in 42 CFR § 2.16 and at https://www.federalregister.gov/d/2017-00719/p-444.

Disclosures to Parents and Guardians

Part 2 seeks to strike a balance between legitimate competing goals: on the one hand, adolescents need to feel safe seeking SUD treatment without fear of reprisal from parents; on the other hand, parents may want (and feel the right) to engage with their children's care. Accordingly, Part 2 requires programs to obtain a minor's consent on a Part 2-compliant form (see Tool #2) before sharing protected SUD information with parents/guardians. This is true regardless of the minor's age. This means that the program may not even inform the parent/guardian that a minor is receiving services from the Part 2 program without the minor's written consent. This is true even if the parent knows that the minor is receiving SBIRT and/or has already spoken to the program about their minor child.

> **EXAMPLE** An SBIRT provider covered by Part 2 wants to inform a 14-year old's parent that the teen has received a referral for treatment, following motivational counseling. The teen does not want her parent notified. The provider may not notify the parent without the minor's written consent. This is true even if the parent and provider previously spoke about the parent's concerns related to the teen's alcohol use.

When a parent/guardian accompanies a minor child to a visit, SBIRT providers should take measures to ensure that minors have privacy. For example, it would be a good practice to provide minors with a private space in which to fill out an initial screening questionnaire.

Parental or Guardian Consent for SBIRT

The need for parental consent for anyone to provide SBIRT services to a minor depends on State law (not Part 2). To find out a State's applicable law, SBIRT providers can ask the State agency that oversees SUD prevention and treatment. If State law requires parental consent for a minor's health care, the provider still needs to get the minor's consent (see "Consent form strategies," below) in order to contact the parent.

Consent Form Strategies

The basic requirements for Part 2-compliant consent forms are in Tool #2. Below are some additional strategies related to minors.

Who signs the form? The minor always must sign a consent form authorizing disclosure of the minor's information. The program may not rely on a parent/guardian signature instead. The parent or guardian must also sign if parental consent was required under State law to provide SBIRT (see "Parental or guardian consent for SBIRT," above).

> **EXAMPLE** State X does not require parental consent to provide SBIRT to a minor. Therefore, only the minor's signature – not the parent/guardian's – is required on a consent form authorizing disclosure of the minor's protected SUD information. By contrast, State Z requires parental consent to provide SBIRT. In State Z, both the minor's and parent's signatures are required to authorize disclosure of the minor's protected SUD information.

Thinking ahead: getting consent. It may be helpful to ask minors to sign consent forms when they first seek SBIRT services so that consent is in place when needed. For example, if the minor faces a serious risk that is not a "medical emergency," the program may want to inform an appropriate person – such as a parent, another relative, a school counselor or clergy. The SBIRT program could have the minor patient sign consent at the first visit, authorizing disclosure to a parent or other responsible adult in the case of a serious risk to the minor's health or well-being.

Describing the recipient. There are several ways to describe the recipient of Part 2-protected information on the consent form, depending on whether the recipient has a "treating provider relationship" with the client, is a third-party payer, or is another type of recipient.

T**reating providers.** A treating provider relationship exists when the patient *receives* (or agrees or is legally required to receive) and the provider provides (or agrees to provide) consultation, diagnosis, evaluation, and/or treatment for any health condition. An in-person encounter is not necessary to establish a treating provider relationship. Recipients with a "treating provider relationship" can be described by listing their names (either individuals or entities) or, in certain circumstances, by using a *general designation* (see below for more about general designations).

> **EXAMPLE** A Part 2-covered SBIRT provider asks a patient to sign a consent form authorizing disclosure of protected information to "Downtown Hospital" and "Grey Behavioral Healthcare Network" – both of which are treating the patient. The names of the entities are sufficient (no need to name an individual) because these entities have a treating provider relationship with the minor.

Consent forms may also use a "general designation" to describe a group of individuals or entities who have a treating provider relationship with the patient (such as "all my treating providers") and who are participants in a larger, non-treating provider entity (such as a health information exchange). In this situation, both the non-treating provider entity and the group of treating provider recipients (individuals or entities) must be listed on the consent form.

> **EXAMPLE** Any Emergency Department where I am admitted (*general designation of entity with treating provider relationship*) that participates in Blue Island Health Information Exchange (*entity without treating provider relationship*).

> **EXAMPLE** All my treating providers (*general designation of individuals with treating provider relationship*) who participate in Blue Island Health Information Exchange and Uptown Accountable Care Organization (*entities without treating provider relationships*).

When using a general designation, the consent form must include a statement that the patient has the right to receive, upon request, a list of entities to which their information has been disclosed under the general designation.

When the recipient does not have a treating provider relationship with the patient and is not a third-party payer, there are two ways the consent form may describe the recipient. The first option is to name individual recipient(s) (for example, "John Smith"). The second option is to name a non-treating provider entity (like a health information exchange) together with participants in that entity who are permitted to receive the information. There are three permissible ways to describe the participants: (1) names of individuals; (2) names of entities who have a treating provider relationship; or (3) a general designation of participants who have a treating provider relationship. Sample consent form language is included in the sections below on "SBIRT in particular settings."

Disclosures to Third-Party Payers

Disclosures to third-party payers for billing purposes always require the minor patient's written consent. This is true even for pre-authorizations. If State law requires parent/guardian consent to provide SBIRT, then the parent/guardian must also sign the form consenting to disclosures to the third-party payer. The consent form can list the name of the third-party payer entity and does not need to specify an individual. For example, it is permissible to authorize disclosure to "XYZ Health insurance Company."

For minors who do not want their parent/guardian to know that they received SBIRT services, payment can be challenging. The third-party payer might redisclose SUD-related billing codes to a parent/guardian—for example, when sending an Explanation of Benefits to the parent.

(Part 2 requires patient consent for that re-disclosure, but insurers might not always comply with that requirement.) Providers might want to take that into consideration when deciding which billing codes to use. If minors do not want their parent/guardian to know they are receiving SUD services, providers may want to let minors know that total confidentiality from parents may not be possible because the insurer might give their parents information about their SUD services.

SBIRT in particular settings

SBIRT in Schools

Are a school's SBIRT services covered by Part 2?

Many, if not most, SBIRT providers in schools are not covered by Part 2. This is because Part 2 only applies when SBIRT is provided within a federally-assisted "program" (known as a "Part 2 program") (see Tool #1). Part 2 does not apply if SBIRT is the only SUD service provided, or if the provider does not otherwise meet the definition of a Part 2 program.

EXAMPLE A federally qualified health center (FQHC) runs a school health clinic. Several employees of the clinic provide SBIRT, but they do not provide other SUD-related services. These SBIRT services are not covered by Part 2 because they are not being provided by a Part 2 program. FQHCs are general medical facilities, which are only covered by Part 2 if they have an identified unit that provides and holds itself out as providing SUD diagnosis, treatment or referral for treatment, or medical personnel whose primary function is the provision of those services and who are so identified (see Tool #1). Neither is the case here.

EXAMPLE An FQHC runs a health clinic in a school. The clinic has one counselor whose sole job is to provide SBIRT and SUD treatment. These SBIRT services are covered by Part 2 because they are being provided within a Part 2 program. The individual counselor is the Part 2 program because s/he provides and holds herself out as providing SUD treatment and is federally assisted (see Tool #1). This is different from the prior example, where the SBIRT providers *only* provided SBIRT and no other SUD services. The counselor is a one-person "Part 2 program" within the FQHC (and school).

EXAMPLE A local Part 2-covered SUD treatment program assigns a counselor to work in a school. That counselor provides both SBIRT and SUD treatment at the school. These SBIRT services *are* covered by Part 2 because the counselor is providing them in her capacity as an employee of a Part 2 program. Even if the counselor provided only SBIRT (not treatment) at the school, the services would be covered by Part 2.

EXAMPLE A school's Student Assistance Program (SAP) operates as a team (by including a guidance counselor, nurse, and representative from the teaching staff). The SAP provides SBIRT as well as SUD diagnosis and referral for treatment. The SAP is a Part 2 program because it provides and holds itself out as providing SUD diagnosis and referral for treatment and is federally assisted (through its non-profit status). The SBIRT services are subject to Part 2 because they are provided by a Part 2 program.

Disclosures to teachers, administrators and health personnel

A school-based program's ability to communicate Part 2-protected information with teachers, administrators, and other health personnel depends on the structure of the program. Some schools use a team-based approach, where the Student Assistance Program (SAP) includes the SUD counselor as well as a nurse and/or teacher. In these cases, members of the SAP may share protected SUD information with each other under the "internal communications" exception (see Tool #2).

For both team-based and other types of programs, options for sharing Part 2-protected information with people outside the program include:

- Using the "internal communications" exception to disclose protected SUD information to entities with "administrative control" over the program, such as the principal, when necessary for the provision of SUD services. For example, the SBIRT program could communicate limited information to the principal to obtain permission for students to attend the program. But protected information may not be shared with the principal for purposes of disciplinary action. Neither may the principal redisclose the protected SUD information except as authorized by Part 2.

- Getting the student's (patient's) consent on a Part 2-compliant form. If the State also requires parental consent for the SBIRT services, then the parent must also sign the consent form (see "Disclosures to parents and guardians" on page 3). Consent forms may be drafted to include multiple recipients, and must include a stated date, event, or condition upon which they will expire (e.g., "upon completion of SBIRT services" or "end of school year"). Part 2-covered SBIRT providers should remember to provide the notice prohibiting re-disclosure whenever they disclose patient information pursuant to the patient's consent (see Tool #2).

Health emergencies

Part 2-covered SBIRT providers may learn of a student's high-risk behavior, such as heroin use combined with alcohol use. If the provider believes it is clinically or ethically important to disclose this information to others, there are options:

- **Consent.** With patient consent on a Part 2-compliant form, the provider could disclose this information to parents, medical personnel, or others in the school. The provider must also provide the notice prohibiting re-disclosure to any recipients of the information.

- **Medical emergency.** Part 2 permits disclosures to medical personnel (but not parents, schools, or others) "to the extent necessary to meet a bona fide medical emergency in which the patient's prior informed consent cannot be obtained." Because Part 2 was amended in March 2017, the precise definition of "bona fide medical emergency" has yet to unfold. The federal government may issue guidance, so please check the Legal Action Centers' confidentiality resources and/or subscribe to receive updates (see page 14). Following a disclosure in a medical emergency, the Part 2 program must document the name and affiliation of the medical personnel receiving the information, name of individual making the disclosure, date and time of the disclosure, and nature of the emergency.

Disclosures to law enforcement, juvenile justice agencies, or for school discipline

SBIRT providers may learn that a student is engaging in illegal conduct, such as selling drugs or driving while intoxicated. Part 2 only permits the disclosure of this information to the school administration or to law enforcement in three circumstances: (1) without disclosing that the student has an SUD or is receiving SUD services (this may be possible if the SBIRT provider also sees students without SUDs), (2) with a court order issued under Part 2, or (3) if the crime was committed (or threatened) on "program" premises (i.e., the program within the school) or against program personnel.

SBIRT providers – including those who work in Part 2 programs – may be asked to make progress reports to the juvenile justice system. If the SBIRT provider is covered by Part 2, they could do so with patient consent on a Part 2-compliant form. Note, however, that no Part 2-protected information could be used to initiate or substantiate any new charges without a court order issued under Part 2.

Disclosures to parents and guardians

The discussion about parents and guardians on page 3 also applies in school-based settings. The main difference is the Family Educational Rights and Privacy Act (FERPA). This federal law gives parents of students under age 18 the right to inspect and review their children's written educational records, upon request. Unfortunately, FERPA sometimes conflicts with Part 2. One way to avoid conflicts between the two laws is to minimize the SUD information entered into written records, knowing that parents have legal access to it. Another way is to seek student

consent if a parent requests a student's written SBIRT records. The consent can specify that disclosure is only authorized to parents "who make requests under the Family Educational Rights and Privacy Act (FERPA)." This will give the student added assurance that disclosure will only be made if a parent makes a specific request under federal law. Bear in mind, however, that students do have the right to revoke their consent at any time.

A note for SBIRT providers not covered by Part 2

School SBIRT providers who are not covered by Part 2 may occasionally become "lawful holders" of protected SUD information. For example, they may acquire protected SUD information from Part 2-covered SUD treatment programs to which they have referred students. In such circumstances, the SBIRT program should flag that information in the student's file in some way—for example, printing information received from the SUD program on a different color of paper—to indicate that it contains Part 2-protected information. The purpose of flagging the Part 2-protected information in the student's file is to ensure that it is not inadvertently re-disclosed to third parties in violation of Part 2. Also note that Part 2 requires "lawful holders" to have security policies and procedures (see page 3).

SBIRT in Juvenile Justice Settings

Are the SBIRT services covered by Part 2?

SBIRT services in juvenile justice settings often will not be subject to Part 2. As discussed in Tool #1, Part 2 only applies to SBIRT services that are provided within a Part 2 program. Following are some illustrative examples.

> **EXAMPLE** A contracted health care provider runs a general health program at a juvenile justice facility. The health care provider is not a Part 2 program because it is a general medical facility; it does not have an identified unit that provides and holds itself as out as providing SUD diagnosis, treatment, or referral, and does not have personnel whose primary function is the provision of those services. The health care provider has several staff people providing SBIRT. These SBIRT services are not covered by Part 2 because, as noted, the health care provider is not a Part 2 program and neither are the individuals providing SBIRT (they only provide SBIRT).

EXAMPLE A juvenile justice agency runs a general health program at a juvenile justice facility. The health care program has one counselor whose sole job is to provide SBIRT and SUD treatment. The counselor is a one-person Part 2 program because his primary function is the provision of SUD treatment and he is identified as such. These SBIRT services are covered by Part 2 because they are being provided by a Part 2 program (the individual counselor). This is different from the previous example, where SBIRT was the only SUD service provided. In this second example, the counselor also provides treatment.

EXAMPLE A local Part 2-covered program contracts with a juvenile justice agency to operate a SUD program for juvenile-justice involved minors. A counselor from the program comes to the juvenile justice facility to provide both SBIRT and SUD treatment. These SBIRT services are covered by Part 2 because they are being provided by a Part 2 program. Even if the counselor provided only SBIRT (not treatment) at the facility, the services would be covered by Part 2 because they are provided by a Part 2 program.

EXAMPLE As part of a pre-arrest diversion program, a probation officer conducts SBIRT but does not provide any other substance use services. These SBIRT services are not covered by Part 2 because the probation officer is not a Part 2 program. This is because the probation officer only provides SBIRT. This is different from the second example on page 6, where the individual employed by the FQHC provided SBIRT and treatment.

EXAMPLE A juvenile justice agency employs a person who provides SBIRT as well as screening for mental illness at an assessment center where youth are brought after contact with the police. This employee is not a Part 2 program because – like the probation officer in the prior example – this person does not provide any SUD services besides SBIRT. These SBIRT services, therefore, are not covered by Part 2.

Disclosures to others within the juvenile justice system

Part 2-covered SBIRT providers within a juvenile justice agency or system may need to share protected SUD information with others within the agency, or with courts, probation, other juvenile justice officials, and/or social service or health care providers involved with the youth. The balance between protecting patient privacy and sharing information for collaboration is particularly delicate in the juvenile justice system, given the harsh consequences that can result from disclosure. There are two important principals to bear in mind. First, Part 2 prohibits using protected SUD information to bring or substantiate criminal charges. Therefore, the fact that a minor participated in SBIRT or SUD treatment cannot be used as evidence in a future criminal case. Second, Part 2 programs that share protected SUD information with anyone – in the juvenile justice system or otherwise – must limit disclosures to the minimum amount of information necessary to carry out the purpose of the disclosure. For example, in reporting to a court that a juvenile has followed through with a referral to treatment, the SBIRT provider may not also disclose confidential communications; they are not necessary for the purpose of the disclosure (confirming follow-through for the referral).

Options for sharing protected SUD information in a juvenile justice context are listed below.

- **Consent.** Getting the youth's consent on a Part 2-compliant form is the best vehicle for these disclosures; the main limitations to consent are that people have the right to revoke consent, and disclosures made pursuant to consent cannot be used for criminal investigation or prosecution. On the plus side, the consent form can list multiple parties and be multi-directional (allowing disclosure among and between the parties listed). When drafting consent forms, it is helpful to include all necessary parties, provided they all need access to similar information for the same purpose. Per the 2017 amendments to Part 2, recipients on a consent form must be listed by name unless they have a treating provider relationship or are a third-party payer. If an entity does not have a treating provider relationship and is not a third-party payer, the form can list the entity (e.g., "probation department") but then must also list at least one individual. These are just some of the ways the form can describe the recipient(s):
  - "John Smith";
  - "John Smith, my probation officer";
  - "John Smith, my probation officer, at Acorn County Probation Department"; and
  - "John Smith at Acorn County Probation Department; Mary Jones, Marla Hill, and Maple Valley High School."

The form must also list how much and what kind of information will be disclosed, including an "explicit description" of the SUD information to be disclosed. Therefore, the form may not authorize disclosure of "all my health information." An example of an appropriate description is "my attendance and progress reports, including SUD information."

- **Internal communications.** SBIRT providers may disclose protected SUD information to other people in the Part 2 program who need it for the provision of SUD services. They may also disclose it to an entity with administrative control over the program, for example, a central billing office.

- **Medical emergency.** SBIRT providers may learn of a youth's high-risk behavior that puts the youth at immediate risk. If the provider believes it is clinically or ethically important to disclose this information to others, and the youth's consent cannot be obtained, disclosure is allowed to medical personnel "to the extent necessary to meet a bona fide medical emergency." (See discussion on page 8.)

- **Court order.** SBIRT providers rarely would need to seek a court order under Part 2 to disclose information because consent, internal communications, and medical emergency cover most required communications. However, if consent cannot be obtained, or is revoked, and no other exception applies, SBIRT providers could seek a Part 2-compliant court order permitting them to make the disclosure (see Tool #2).

A note for SBIRT providers not covered by Part 2

SBIRT providers in juvenile justice settings who are not covered by Part 2 may occasionally become "lawful holders" of protected SUD information. For example, they may acquire protected SUD information from Part 2-covered SUD treatment programs to which they have referred youth. As in school-based settings, the SBIRT provider should flag that information in the youth's file in some way to indicate that it contains Part 2-protected information and avoid inadvertent re-disclosure to third parties in violation of Part 2. Also note that Part 2 requires "lawful holders" to have security policies and procedures (see page 3).

SBIRT in Primary Care and Integrated Health Settings

Are the SBIRT services covered by Part 2?

SBIRT providers in primary care settings often are not covered by Part 2. As discussed in Tool #1, Part 2 only applies to SBIRT services that are provided within a Part 2 program. Most primary care practices are not Part 2 programs. (They would only be a Part 2 program if they had a unit that provided and held itself out as providing SUD diagnosis, treatment, or referral for treatment or if they had personnel whose primary function was to provide those services and were identified as such.)

> **EXAMPLE** Primary Care Ltd. provides primary care for adolescents. All of its physicians conduct SBIRT. Primary Care Ltd. does not provide any other SUD services. Primary Care Ltd. is not a Part 2 program because it does not provide and hold itself out as providing SUD diagnosis, treatment, and referral for treatment (see Tool #1). Its SBIRT services, therefore, are not subject to Part 2 because they are not being provided by a Part 2 program.

SBIRT providers may be co-located in integrated settings, such as a federally qualified health center (FQHC), behavioral health program, or hospital. If the SBIRT services are provided within a Part 2 program, then Part 2 would apply to the SBIRT services.

> **EXAMPLE** An FQHC provides various health services, including primary care, mental health care, and SUD treatment. Of these three units, only the SUD treatment unit meets the definition of a Part 2 program. Providers in all three units conduct SBIRT. Because the SUD treatment unit is the only Part 2 program at the FQHC, only the SBIRT services provided by the SUD treatment unit are covered by Part 2. SBIRT services provided by units that are not Part 2 programs are not covered by Part 2.

> **EXAMPLE** A behavioral health program is a Part 2 program because it provides and holds itself as providing SUD diagnosis, treatment, and referral for treatment as well as mental health services; it also is federally assisted. Designated staff in the mental health unit provide SBIRT. These SBIRT services are covered by Part 2 because they are provided by a Part 2 program.

Disclosures with co-located/integrated providers

Mechanisms that allow Part 2-covered SBIRT providers to share protected SUD information with others in the integrated health care setting include:

- **Internal communications.** Part 2-covered SBIRT providers may disclose protected SUD information to others in the program who need the information for the provision of SUD services – for example, to other staff in the SUD treatment unit. However, SBIRT providers may not disclose protected SUD information to other staff of the co-located or integrated care entity who are not members of the Part 2 program — for example, staff of the primary care unit. SBIRT providers may also disclose protected SUD information to an entity with administrative control over the program — for example, a central billing office.

- **Consent.** Patient consent on a Part 2-compliant form is generally the most effective way to share information in an integrated care setting, as well as to outside health care providers and other third parties. The 2017 amendments made it easier to share Part 2-protected information with health care providers by allowing the recipient to be described through a general designation (e.g., "all my treating providers") who are participants in a specific entity. Strategies for filling out consent forms in these settings are on pages 4-5.

- **Medical emergency.** The medical emergency provisions described on page 8 and 12 apply equally in a health care setting.

- **Qualified Service Organization Agreements (QSOAs).** Part 2 programs may have QSOAs to authorize disclosures to individuals or entities that provide the program with services, such as medical staffing, billing, population health management, or other professional services.

Where can SBIRT providers learn more about Part 2?

SBIRT providers can review the other tools in this series, at https://lac.org/confidentiality-sbirt/, as well as the Legal Action Center's other confidentiality resources. LAC's book, *Confidentiality & Communications*, was under revision when this tool was being published, and should be available in late 2017 at https://lac.org/resources/substance-use-resources/confidentiality-resources/. SBIRT providers can also subscribe to receive Part 2 updates from the Legal Action Center.