

Memorandum of Law: Privacy Rights and Family Rights for Parents in Addiction Treatment in New York State

Jacqueline Seitz, August 2022

Summary: NY state law does not require – and therefore federal privacy law *prohibits* – mandated reports from Part 2 programs¹ regarding patient drug use, without additional evidence of harm to patient’s child and where patient is voluntarily and regularly attending treatment.

Federal law strictly protects the confidentiality, privacy, and security of substance use disorder (SUD) treatment records: 42 USC § 290dd-2 and 42 CFR Part 2 (referred to collectively as “Part 2”).² These protections serve the important functions of encouraging people to seek help for an addiction and allowing providers to establish a foundation of trust and respect with patients. Improper disclosure of protected information can cause tremendous harm to patients and lead to prosecution, arrest, incarceration, deportation, loss of child custody, and discrimination in healthcare, insurance, housing, employment, benefits, and more. **The central rationale for the federal privacy protections is that patients who seek and enter treatment should not be more vulnerable to investigation, prosecution, or discrimination than patients who do not seek help for an addiction.**³ For this reason, Part 2 strictly limits disclosures to law enforcement and requires written patient consent before sharing protected information, except in limited circumstances.⁴ No state law may authorize or compel disclosure prohibited by the federal law and regulations.⁵

A limited exception exists for state-mandated reports of suspected child abuse and neglect: Part 2 programs may make reports *required by state law* to the appropriate state or local authorities.⁶ This exception only applies to the initial report; disclosures for any resulting investigation or civil or criminal proceedings must be authorized with written patient authorization or pursuant to a Part 2-specific court order.⁷ A subpoena alone is not sufficient to compel or authorize disclosure of Part 2 records,

¹ Part 2 programs are certain substance use disorder treatment programs that receive federal assistance and must comply with the federal confidentiality law and regulations. 42 CFR §§ 2.11, 2.12; *see also Does Part 2 Apply to Me?*, ONC/SAMHSA (2018), <https://www.hhs.gov/guidance/document/does-part-2-apply-me>.

² The privacy protections apply to records from certain SUD treatment programs known as “Part 2 programs” and certain recipients of records, known as “lawful holders.” 42 CFR §§ 2.11, 2.12.

³ Confidentiality of Substance Use Disorder Patient Records, 82 Fed. Reg. 6052, 6053 (Jan. 18, 2017), <https://www.federalregister.gov/d/2017-00719/p-162>.

⁴ *See generally* Deborah Reid et al., *Fundamentals of 42 CFR Part 2*, LEGAL ACTION CENTER (Oct. 2020), <https://www.lac.org/resource/the-fundamentals-of-42-cfr-part-2>.

⁵ 42 CFR § 2.20.

⁶ 42 USC § 290dd-2(e); 42 CFR § 2.12(c)(6).

⁷ *Id.* *See also* 42 CFR Part 2, Subparts C (disclosures with patient consent) and E (court order requirements).

and there is no express or implied waiver of confidentiality in 42 CFR Part 2.⁸

In New York, information about a Part 2 program patient’s drug use is generally *not sufficient* for a mandated report under state law – and therefore *prohibited* under federal law from being disclosed without patient consent or a Part 2-specific court order. Consistent with Part 2’s public policy goal to encourage people to enter treatment, New York’s mandated reporting law does not mandate reports based on a parent’s drug use if the parent is voluntarily and regularly in treatment and if there is no other evidence that the parent’s child was impaired or in imminent danger of being impaired.⁹ In fact, state law *expressly prohibits* this evidence from being sufficient to establish a finding of abuse or neglect:

Where [a parent] is voluntarily and regularly participating in a rehabilitative program; evidence that the [parent] has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions ***shall not*** establish that the child is a neglected child in the absence of evidence establishing that the child’s physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired¹⁰

Since a patient’s drug use information without additional evidence may not form the basis for a mandated report under state law, it is therefore also a violation of federal law to disclose it, absent patient consent or a court order.¹¹

Violations of the federal privacy law are subject to federal enforcement and criminal penalty.¹² Courts may also suppress or disregard records entered into evidence in violation of the federal privacy law. In light of the privacy law’s important public health goals and the catastrophic risk of harm to patients resulting from a breach of privacy, courts should not admit or consider evidence entered in violation of the federal privacy statute and regulations.

The Legal Action Center uses legal and policy strategies to fight discrimination, build health equity, and restore opportunity for people with arrest and conviction records, substance use disorders, and HIV or AIDS. Learn more at www.lac.org.

⁸ See 42 CFR § 2.13(b).

⁹ N.Y. FAM. CT. ACT § 1012(f)(i)(B) (defining “neglected child”); see N.Y. SOC. SERVS. LAW §§ 412, 413 (defining the content of mandated reports, including by reference to the Family Court Act definition of “neglected child”).

¹⁰ N.Y. FAM. CT. ACT § 1012(f)(i)(B) (emphasis added).

¹¹ See 42 USC § 290dd-2(e); 42 CFR § 2.12(c)(6).

¹² 42 CFR § 2.3. In 2020, the CARES Act amended the enforcement provisions in Section 290dd-2 of Title 42 of the U.S. Code to change the criminal penalty to a civil penalty; as of the date of this memorandum, those amendments are not yet in effect. For more information about the effective date of the CARES Act and the federal privacy protections for SUD treatment records, see *Statement on 42 CFR Part 2 Amendments Process*, SAMHSA (April 9, 2021), <https://www.samhsa.gov/newsroom/statements/2021/42-cfr-part-2-amendments-process>.