

Deflection: Data Retention

Can a deflection initiative retain health information it possesses about individuals whom deflection teams cannot locate or who decline services in order to track the outcomes of those individuals?

Response

If the source of the health information is an entity that is neither (1) a covered entity under the Health Insurance Portability and Accountability Act (HIPAA) nor (2) a Part 2 program under 42 Code of Federal Regulations (CFR) Part 2, the deflection initiative may retain the information and use it for any purpose, including to track outcomes, subject to any state law limitations placed on such use. Such sources include law enforcement and statements made by individuals, family members, friends, or bystanders directly to law enforcement or a noncovered entity deflection team member.

If the source of the health information is a HIPAA-covered entity, the deflection initiative may retain the information and use it to track outcomes, subject to any limitations placed on such use by HIPAA, state law, a patient authorization or consent form, or a business associate agreement (BAA) or memorandum of understanding (MOU) entered into between the deflection initiative and the HIPAA-covered entity source. Such sources include an emergency medical services provider, physician, or hospital.

If the source of the health information is a Part 2 program, the deflection initiative may not retain or otherwise use that information without patient consent, unless the information is de-identified. Such sources include most substance use disorder (SUD) treatment providers.

Additional Discussion

The answer to this question depends on one or all of the following: (1) the identity of the entity that provides the health information to the deflection initiative; (2) whether the information is protected health information (PHI) under HIPAA or SUD treatment records under 42 CFR Part 2; (3) the extent to which using the PHI for outcome tracking purposes is addressed in a signed patient authorization, written patient consent, BAA, and/or MOU between the source of the information and the deflection initiative; and (4) the identity of the entity or entities that operate the deflection initiative. These factors govern whether HIPAA and/or 42 CFR Part 2 applies to the information and, if so, how it can be used.

HIPAA only applies to covered entities. Accordingly, if the original source of the health information is not a HIPAA-covered entity, the information does not qualify as PHI under HIPAA and is not, therefore, subject to HIPAA's restrictions on disclosure and use of PHI. As a result, the deflection initiative may use that health information as it wishes, including to track outcomes, subject to any restrictions that may be in place in state law.

If, however, the source of the health information is a HIPAA-covered entity, the information is PHI and subject to any limitations or restrictions in HIPAA regarding its use. If the deflection initiative is managed by a HIPAA-covered entity, the initiative can retain and use the information, including for outcome tracking

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purposes, as it would any other PHI it holds as a HIPAA-covered entity. If the entity managing the deflection initiative is not a HIPAA-covered entity, such as law enforcement, the initiative may retain the information but might be limited in how it is used by the provisions of a BAA or an MOU between the initiative and the HIPAA-covered entity that provided the information. If no such limitations are present, HIPAA does not prevent the deflection initiative from using the information to track outcomes.

Practice Tip: As part of the initial conversation with a potential client, deflection team members should strive to obtain patient authorization to share health information with the deflection initiative and other team members. The standard authorization form should include a provision in which the client consents to the tracking of client outcomes.

In the event that the deflection initiative receives an individual's information from a Part 2 program, such as an SUD treatment provider, disclosure of those records is covered by 42 CFR Part 2. Pursuant to 42 CFR Part 2, the initiative may not retain or otherwise use that information without the patient's consent unless the information is de-identified.

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 program 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.

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.