

# PCPCC National Briefing/Webinar



**OVERCOMING BARRIERS TO COLLABORATION  
AMONG BEHAVIORAL HEALTH AND PRIMARY  
CARE PROVIDERS**

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# Preliminary Matters



- **Objective:**
  - Offer practical tools and recommendations for how clinicians and other health care professions can better collaborate and share information within integrated care teams in order to deliver comprehensive care that treats the physical, mental, and behavioral health needs of the patient.
- **Disclaimer**
  - Today I will not be providing legal advice
  - Terms “mental health” and “behavioral health” used interchangeably
  - Term “integrated health” used to generally reflect to all models



*"We all deal with it differently."*

# Today's Outline



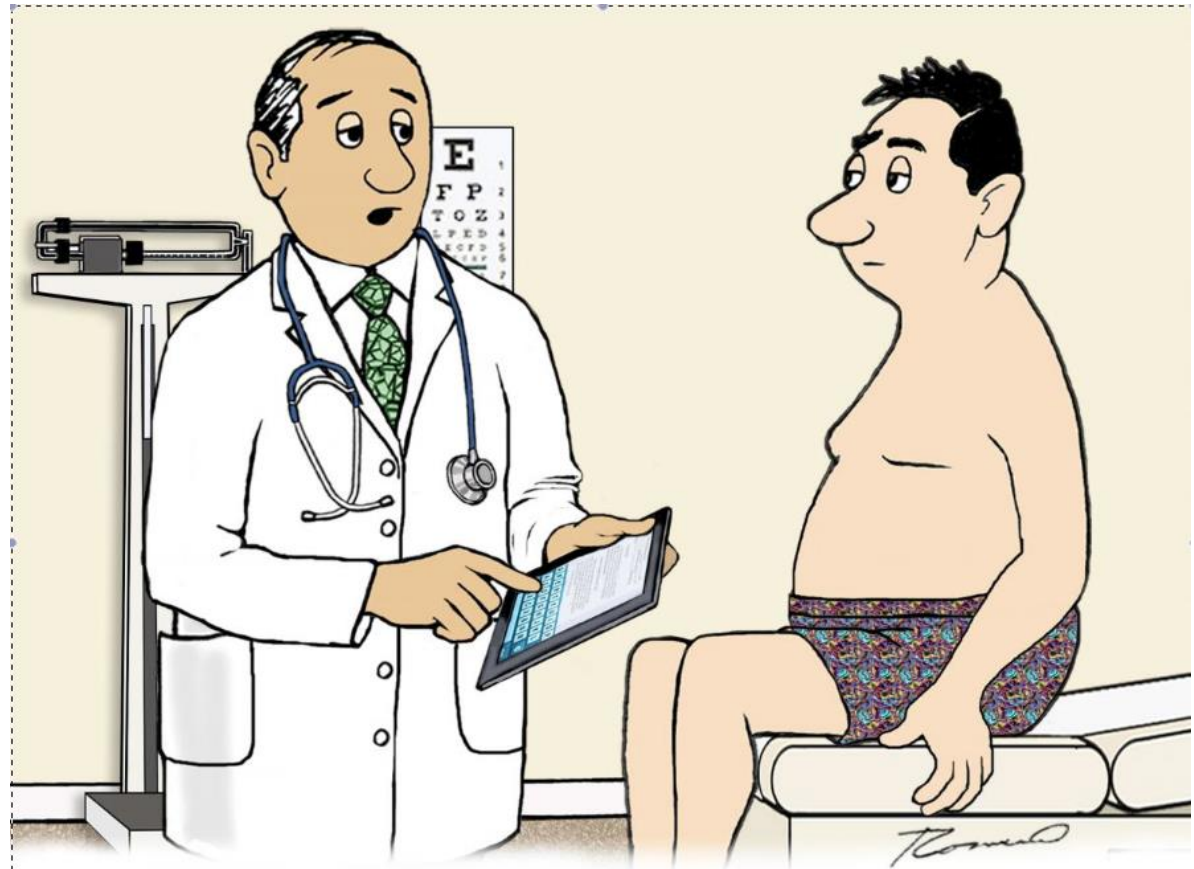
- Benefits of Information Sharing and Coordinated Care
- Legal Barriers to Information Sharing – Real and Perceived
  - Traditional Models of Behavioral Health Embedded in Law
  - HIPAA
    - ✦ Permits Certain Information Sharing
    - ✦ Conflicts with Substance and Alcohol Use Regulations
  - State Laws
  - Health Information Exchanges
- A Practical Checklist
- Conclusion: The “Long Game”

# Laws Encouraging Coordinated Care

Administrative  
Simplification Act of  
HIPAA (1996)

2009 Health  
Information  
Technology for Clinical  
Health Act (HITECH)

Patient Protection and  
Affordable Care Act of  
2010 (ACA)



"According to your HIPAA release form  
I can't share anything with you."

# Recent Health Reforms Efforts



- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
  - Contained “The Administrative Simplification Act” requiring U.S. Department of Health and Human Services to promulgate *regulations* governing use of electronic health records (EHRs)
  - Purpose of the Administrative Simplification Act
    - ✦ To improve the Medicare program, . . . The Medicaid program . . . , and the efficiency and effectiveness of the health care system by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.

# Recent Health Reforms Efforts



- **Health Information Technology for Clinical Health Act of 2009 (HITECH)**
  - Passed as part of the American Recovery and Reinvestment Act of 2009.
  - Provided billions for investment in health information technology and expanded the protection given to information disclosures
  - Strong penalties and incentives for Medicare providers to increase their use and reliance on EHRs

# Recent Health Reforms Efforts



- **Patient Protection and Affordable Care Act of 2010 (ACA)**
  - Focuses on patient-centered care models such as the Patient Centered Medical Home and Accountable Care Organizations
  - Encourages coordinated continuum of care to lower costs through
    - ✦ EHR Incentives
    - ✦ Payment Reforms
    - ✦ Innovative delivery models



## Perceived Legal Barriers

Sharing information for the purposes of care coordination is a permitted activity under HIPAA, not requiring formal consents.



# HIPAA Permits Certain Information Sharing



- **Permits disclosure of PHI for treatment, payment, or healthcare operations**
  - Treatment = “the provision, coordination, or management of health care and related services by one or more health care providers, including the coordination or management of health care by a health care provider with a third party; consultation between health care providers relating to a patient; or the referral of a patient for health care from one health care provider to another.”
- **Other circumstances for PHI use or disclosure**
  - Problem: Each provider will interpret these permitted disclosures differently

# Real Barriers



- **Traditional Model of Behavioral Health**
  - Based on absolute confidentiality between therapist and patient
  - Embedded in many state and some federal laws
- **Disjointed and Conflicting Federal Laws**
  - HIPAA - Federal law and implementing regulations govern disclosure of protected health information by most providers
  - “Part 2” – Federal law governing alcohol and substance abuse
- **Complexity of State Laws**
  - Complex and contradictory state laws governing health information sharing
- **Health Information Exchanges**

# Law Reflects Traditional Model of Psychotherapy



- *Jaffee v. Redmond*, 518 U.S. 1 (1996) –
  - Issue – Whether court can compel disclosure of the therapy notes
  - Held – No – The notes are protected from compelled disclosure under Federal Rule of Evidence 501, “The psychotherapist privilege” that protects the confidential communications between a therapist and patient
  - Rule – Testimonial privilege promotes important public interest in promoting trust.
  - *“Effective psychotherapy depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.”*

# Law Reflects Traditional Model of Psychotherapy



- **The Constitutional Right To Privacy**
  - Whalen v. Roe, 97 S. Ct. 869 (1977)
  - Issue – Physicians challenged constitutionality of New York statutes that required copy of every Schedule II prescription drug be provided to the state health department
  - Held New York statute is constitutional. It is a reasonable exercise of the state’s power and does not impair a physician’s right to practice medicine free from unwarranted state interference
  - Rule – The state may respond to concern that drugs are being diverted to unlawful channels.
  - Defines a Constitutional “Right to Privacy” as in interest in avoiding disclosure of personal matters

# HIPAA



- **The Standards for Privacy of Individually Identifiable Health Information**
  - Governs use and disclosure of
  - Individual's "protected health information"
  - By "covered entities" - Any health care provider who transmits health information in electronic form
  - Protects an individuals' privacy rights to understand how their health information is used
  - Goal = Strike Balance:
    - ✦ Assure individuals' health information is protected and
    - ✦ Allow the flow of health information needed to provide and promote high quality health care and
    - ✦ Protect the public's health and well being

# The HIPAA Privacy Rule



- Limits sharing of psychotherapy notes without a patient's written authorization (45 CFR 164.508)
  - Includes: notes by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the medical record.
  - Excludes: Medication prescriptions, monitoring, counseling session start and stop times, modalities and frequencies of furnished treatment, results of clinical tests, summary of diagnosis, functional status, treatment plan, symptoms, prognosis and progress to date
- Prohibits sharing of medical information for many patients in alcohol or substance abuse treatment in federally-funded program (42 CFR Chapter 1, subchapter A, part 2)

# Alcohol and Substance Abuse Confidentiality Regulations – “Part 2”



- Prohibits sharing of medical information for many patients in alcohol or substance abuse treatment in federally-funded program (42 CFR Chapter 1, subchapter A, part 2)
  - Medication prescriptions, monitoring, counseling session start and stop times, modalities and frequencies of furnished treatment, results of clinical tests, summary of diagnosis, functional status, treatment plan, symptoms, prognosis and progress to date
- Conflicts:  
<http://www.samhsa.gov/HealthPrivacy/docs/SAMHSAPart2-HIPAAComparison2004.pdf>
- It is possible to electronically share drug and alcohol treatment information while also meeting the requirements of “Part 2”



# Disjointed and Conflicting Federal Laws



- Ways of Navigating HIPAA and Part 2 Information on Substance and Alcohol Abuse Confidentiality Regulations
  - Qualified Service Organization Agreements (QSOA)
    - ✦ Billing, data processing, and some consultation
  - Information Sharing with Organizations that have Direct Administrative Control over Part 2 Program
  - Health Information Organization “Patient Choice Models”
  - Medical Emergency
  - Patient Consent

# HIPAA and Complexity of State Laws



- HIPAA Preemption of state laws that “relate to the privacy of individually identifiable health information”
- HIPAA Deference to state law that is more stringent than a standard, requirement, or implementation specification” of HIPPA
  - Problem: Providers must check state laws. Leads to confusion and impedes coordination of care
- HIPAAs preemption and deference rules necessitate assessment of state law provisions re disclosure of behavioral health information

# State Laws



- **Must understand the state law that controls**
  - State Laws governing mental health records
  - State Laws governing confidentiality of substance abuse records
  - State Laws that *do not* allow information sharing for treatment
- **State Laws are widely variable**
  - Inconsistent within classes of health care professionals
  - Exceptions to enforceability for certain events
    - ✦ E.g. mandatory reporting laws
  - Inconsistent penalties for non-compliance

# HIE Barriers



- EHRs do not define psychotherapy notes component separately from medical records components (though HIPAA requires) to allow disclosure of some but not all behavioral health information
- Physicians are not consistent in where they record patient information in the EHR
- EHR vendors not keeping up with coordination-of-care reforms or the laws

# Checklist



- Constitutional Right To Privacy – protects confidentiality
- HIPAA and Implementing Regulations
- Federally Supported Substance Abuse Programs
- Student Campus Clinic Health Records
- State Law
  - State Constitution
  - State Mental Health Record Confidentiality Legislation
  - State Drug or Alcohol Treatment Legislation
  - State Disease Specific Legislation (e.g. HIV/ AIDS)
  - State Case Law

# The Long Game

