



U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office for Civil Rights

Federal Nondiscrimination Protections for Individuals with Opioid Use Disorders

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Presentation Overview

- Introduction
- The Opioid Epidemic: A Public Health Emergency
- The OCR Public Education Campaign: An Overview
- Federal Disability Rights Protections and Opioid Use Disorders
- Examples of Prohibited Conduct
- HIPAA: Initiatives in Response To the Opioid Crisis

HHS Office For Civil Rights (OCR)

OCR enforces Federal civil rights laws, conscience and religious freedom laws, the Health Insurance Portability and Accountability Act (HIPAA) Privacy, Security, and Breach Notification Rules, and the Patient Safety Act and Rule, which together protect fundamental rights of nondiscrimination, conscience, religious freedom, and health information privacy.

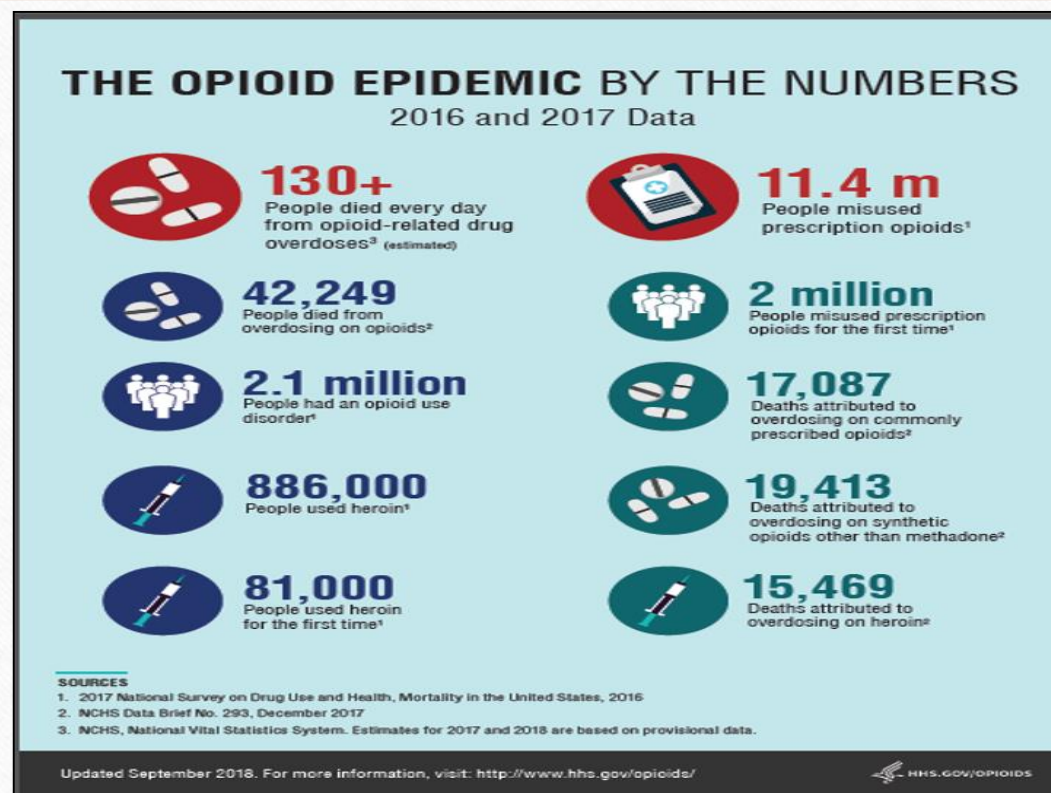
The Opioid Crisis: A Public Health Emergency

October 26, 2017:

HHS Declares Public Health Emergency to Address National Opioid Crisis

The Opioid Epidemic In Numbers

HHS.GOV/OPIOIDS



HHS 5-Point Strategy

HHS 5-POINT STRATEGY TO COMBAT THE OPIOIDS CRISIS



1

Better addiction
prevention,
treatment, and
recovery services



2

Better data



3

Better pain
management



4

Better targeting
of overdose
reversing drugs



5

Better research



HHS.GOV/OPIOIDS

The OCR Public Education Campaign

An Overview of Nondiscrimination Laws and Opioid Use Disorders

OCR's Opioid Public Education Campaign

Goals

GOAL 1:

Improve access to evidence-based opioid use disorder treatment and recovery services such as Medication Assisted Treatment (MAT)...

BY ensuring that covered entities aware of their obligations under federal non-discrimination laws.

GOAL 2:

Educate the public about civil rights protections that may apply to a person in recovery from an opioid addiction...

WHO because of a substance use disorder, may qualify as a person with a disability entitled to reasonable modifications in federally-funded programs.

GOAL 3:

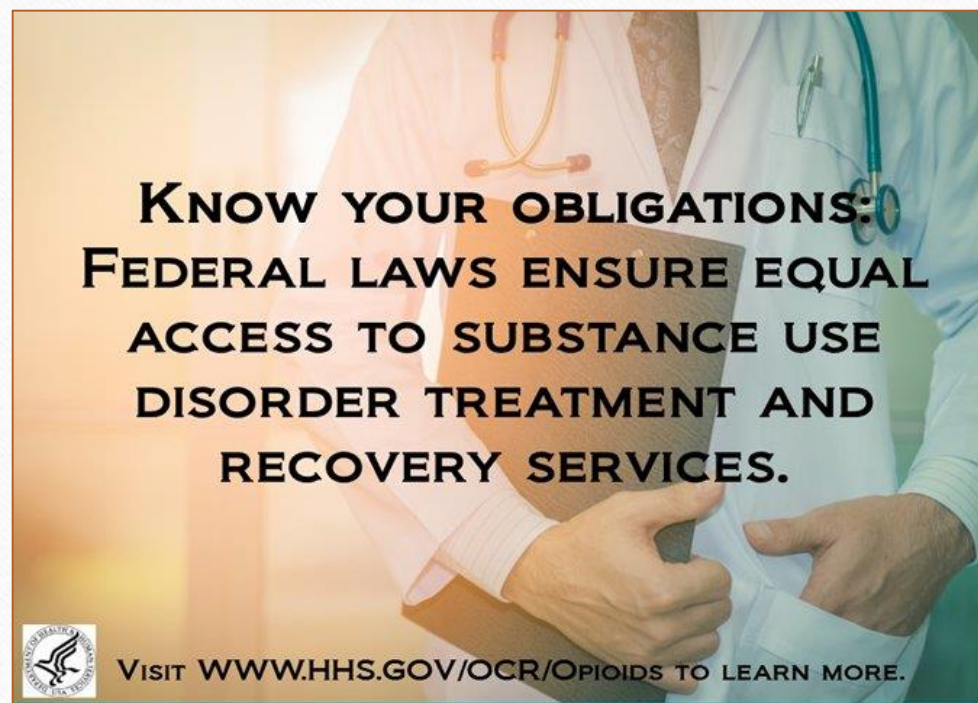
Provide guidance on when and how healthcare providers can share a patient's health information with family members or caregivers...

WHEN that patient may be in crisis and incapacitated, such as during an opioid overdose.

OCR's Opioid Public Education Campaign Resources

- Director's Video Announcing OCR's Response to the Opioid Epidemic
- Dedicated Opioid Public Education Website - www.hhs.gov/ocr/opioids
- Fact Sheets: Nondiscrimination and Opioid Use Disorders
Drug Addiction and Federal Disability Rights Laws
- OCR Newsletter and Digital Postcards
- HIPAA Guidance on Responding to an Opioid Overdose

Share OCR's Digital Post Cards via Twitter



Covered Entities & Best Practices

WHO MUST COMPLY WITH THE LAW

- Substance use disorder treatment programs
- Hospitals, health clinics, and pharmacies
- Medical and dental providers
- Nursing homes
- State and local governments

COMPLIANCE BEST PRACTICES

- Examine program eligibility and admission criteria to identify and eliminate discriminatory barriers.
- Ensure that LEP individuals have meaningful access to evidence-based opioid use disorder treatment.
- Ensure that treatment and recovery programs are accessible to persons with physical, mobility and communication impairments.

Drug Addiction is a Disability under Federal Disability Rights Laws

Drug addiction, including an **addiction to opioids**, is a disability under Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act, when it substantially limits a major life activity.

Federal Disability Rights Protections for Qualified Individuals with Opioid Use Disorders

- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794
- Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §12132
- Section 1557 of the Affordable Care Act, 42 USC §18116

Federal Disability Rights and Opioid Use Disorders

Federal disability rights laws protect **“qualified”** individuals with a disability.

- To be considered a qualified individual, the individual must meet the essential eligibility requirements for receipt of services or participation in a covered entity's programs, activities, or services.

Federal Disability Rights & Opioid Use Disorders (cont.)

“Qualified” individuals with a disability may not:

- Be excluded from participation in programs and services,
- Be denied the benefits of, or otherwise be subjected to discrimination based on the disability.

Covered entities are required to:

- Reasonably modify rules, policies or practices, provide appropriate auxiliary aids and services, or remove architectural and communication barriers to ensure equal opportunities for qualified individuals with disabilities.

Federal Disability Rights & Opioid Use Disorders (cont.)

Federal disability rights laws also protect individuals if they:

- Have successfully completed a supervised drug rehabilitation program or have otherwise been successfully rehabilitated and are not currently engaged in the illegal use of drugs;
- Are participating in a supervised drug rehabilitation program and are currently not engaged in the illegal use of drugs; or
- Are erroneously regarded as engaging in such use, but are not engaging in such use.

Exception - Current Illegal Use of Drugs

- Individuals who currently engage in the “illegal use of drugs” are specifically excluded from the definition of an individual with a disability when a covered entity takes an adverse action on the basis of that current use.
- However, an individual is not to be denied health services, or services provided in connection with drug rehabilitation, vocational rehabilitation programs and services, and other programs and other specific programs and services funded under the Rehabilitation Act on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

Medication Assisted Treatment

Source: SAMHSA.GOV

- Medication Assisted Treatment (MAT) is the use of FDA- approved medications, in combination with counseling and behavioral therapies, which is effective in the treatment of opioid use disorders (OUD) and can help some people to sustain recovery.
- Three medications commonly used to treat opioid addiction:
 - Methadone – clinic-based opioid agonist that does not block other narcotics while preventing withdrawal while taking it; daily liquid dispensed only in specialty regulated clinics
 - Naltrexone (NAL – TREX- OWN) – office-based non-addictive opioid antagonist that blocks the effects of other narcotics; daily pill or monthly injection
 - Buprenorphine (BU–PRE--NOR-FEEN) – office-based opioid agonist/ antagonist that blocks other narcotics while reducing withdrawal risk; daily dissolving tablet, cheek film, or 6-month implant under the skin

Are Individuals Receiving Medication Assisted Treatment Protected By Federal Disability Rights Laws ?

It Depends.

- The determination of whether an individual receiving MAT is entitled to federal disability rights protections is a fact-specific inquiry.

Also Note:

- Persons receiving MAT cannot be, by virtue of that fact, excluded from protection under federal disability rights laws.
- Because MAT related medications are prescribed and are taken under the supervision of a licensed health care professional, MAT is not the illegal use of drugs.

Prohibited Conduct

- Unsupported assumptions that a MAT participant poses a “direct threat” based on generalizations or biased opinions about persons who receive MAT for opioid use disorders.
- Denying an otherwise qualified individual with a disability admission for treatment because the individual receives MAT to treat an opioid use disorder.

Health Care Information Privacy and the Opioid Crisis

Support from family members and friends is key to helping people struggling with opioid addiction, but their loved ones can't help if they aren't informed of the problem or if misunderstandings create obstacles crucial to the care and treatment of people experiencing a crisis situation, such as an opioid overdose.

HIPAA

The opioid crisis and other national health emergencies have heightened concerns about providers':



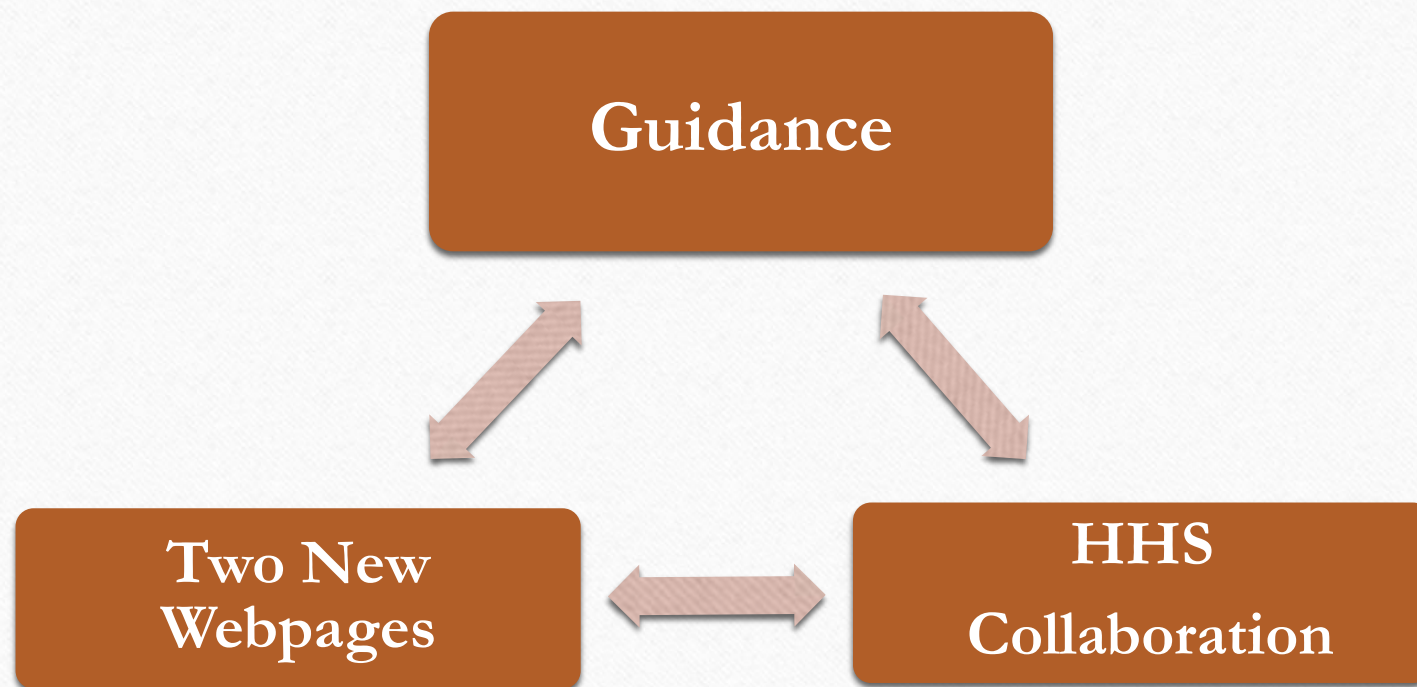
Ability to notify patients' family and friends when a patient has overdosed;

Reluctance to share health information with patients' families in an emergency or crisis situation, particularly when patients have serious mental illness and/or substance use disorder;

Uncertainty about HIPAA permissions for sharing information when a patient is incapacitated or presents a threat to self or others.

HIPAA

Initiatives in Response To the Opioid Crisis



HIPAA

Initiatives in Response To the Opioid Crisis (Cont'd)

Guidance: “How HIPAA Allows Doctors to Respond to the Opioid Crisis”

- Following President Trump’s 2017 call to action that led to the declaration of a nationwide public health emergency regarding the opioid crisis, OCR released new Guidance clarifying the circumstances under which HIPAA permits healthcare providers and other covered entities to share a patient’s health information with family members and caregivers.
- <https://www.hhs.gov/sites/default/files/hipaa-opioid-crisis.pdf>

HIPAA

Initiatives in Response To the Opioid Crisis (Cont'd)

HHS Partner Collaboration

- OCR has been collaborating with partner agencies within HHS to identify and develop model programs and materials for training healthcare providers, patients, and their families regarding permitted uses and disclosures of the protected health information of patients seeking or undergoing mental health or substance use disorder treatment and to develop a plan to share the programs and materials with professionals and consumers.

HIPAA

Initiatives in Response To the Opioid Crisis (Cont'd)

HIPAA Opioid and Mental Health Related Web pages

- OCR launched two webpages which serve as a one stop resource for HIPAA opioid and mental health related guidance and materials. They include:
 - FAQs, Fact Sheets for specific audiences and information-sharing decision charts and other materials
- **For Individuals**: <https://www.hhs.gov/hipaa/for-individuals/mental-health/index.html> > Mental Health & Substance Use Disorders
- **For Professionals**: <https://www.hhs.gov/hipaa/for-professionals/special-topics/mental-health/index.html> > Special Topics > Mental Health & Substance Use Disorders

Title XI 21st Century Cures Compassionate Communication on HIPAA

- Opioid Overdose Guidance (October, 2017)
- Updated Guidance on Sharing Information Related to Mental Health (December, 2017 additions to 2014 guidance)
- 30 Frequently Asked Questions:
 - New tab for mental health in “FAQs for Professionals”
 - 9 new FAQs added (as PDF and in database)
- New Materials for Professionals and Consumers
 - Fact Sheets for Specific Audiences
 - Information-sharing Decision Charts

HIPAA

**PROVIDERS TREATING PATIENTS
WHO HAVE DECISION MAKING
CAPACITY**

Communications with Family, Friends and
Others Involved in a Patient's Care—Individuals Who are Present
and Have Decision Making Capacity

45 CFR § 164.510(b)

Must give patient opportunity to agree or object:

- Ask patient's permission
- Inform patient of intent to inform family or friends and give opportunity to object
- Infer from circumstances, using professional judgment, that patient does not object

Communications with Family, Friends and
Others Involved in a Patient's Care—Individuals Who are Present
and Have Decision Making Capacity

45 CFR § 164.510(b)

- HIPAA doesn't require written permission or authorization by patient or personal representative (can be verbal or implied, based on circumstances)
- Share only information that is directly related to the person's involvement with the patient's health care or payment for care.

Patients With Decision Making Capacity

Examples of sharing information with family and friends when the patient agrees, or does not object when given the opportunity:

- A psychotherapist may contact a close friend of a patient in crisis and enlist the friend's assistance to take the patient to a psychiatric consult or to pick up new medication.
- A therapist may contact a patient's mother, knowing the patient's mother has been involved in coordinating the patient's appointments, to ensure the patient attends.

HIPAA

**PROVIDERS TREATING PATIENTS
WHO LACK DECISION MAKING
CAPACITY OR WHO ARE NOT
AVAILABLE**

Communications with Family, Friends and
Others Involved in a Patient's Care—Individuals Not Present or
Without Decision Making Capacity
45 CFR § 164.510(b)(3)

- The patient is not available due to an emergency or the health care provider determines that the patient is incapacitated
- Health care provider determines, based on professional judgment, that sharing information is in best interests of the patient
- May disclose only the PHI directly relevant to person's involvement in patient's care/payment for care

Incapacitated Patient Example

An adult young man has been prescribed medication to treat anxiety, and his parents are helping him by providing supervision or housing, and the treating provider has determined that the patient is unable to make health decisions independently:

- The discharge nurse may inform the parents what medication he will be taking, as well as side effects to watch for, or symptoms that indicate the medication isn't working or isn't being taken properly.

Best Interests Determinations

Example of considering incapacitated patient's prior responses to sharing information with family:

- If a patient is unconscious, delirious, or sedated, and the health care providers know that a patient's family, friends, or caregivers have been involved in the patient's health care and the patient has not objected to the sharing of information with them in the past, then providers may use their professional judgment to determine that sharing certain information about the patient's health condition is in their best interests.

- Health Care Decision Making Incapacity - Health & Mental Conditions, Including Substance Intoxication or Overdose, May Constitute Incapacity

- Decision-making incapacity may be temporary and situational, and does not have to rise to the level where another decision maker has been or will be appointed by law.
- **For example, a patient who arrives at an emergency room severely intoxicated or unconscious will be unable to meaningfully agree or object to information-sharing upon admission, but may have sufficient capacity several hours later.**
- Once patient regains capacity, provider should offer patient opportunity to agree or object to any future sharing of information.

Absent Patient

Sharing information with family and friends is permitted when the patient is not present due to some emergency & the provider determines it is in the patient's best interests:

- A patient who is addicted to opioids misses important medical appointments without any explanation, a primary health care provider at a general practice may believe that there is an emergency related to the opioid addiction and under the circumstances, may use professional judgment to determine that it is in the patient's best interests to reach out to emergency contacts, such as parents or family, and inform them of the situation.

**PROVIDERS TREATING PATIENTS
WHEN THERE IS A SERIOUS AND
IMMINENT THREAT TO THE
PATIENT'S HEALTH OR SAFETY OR
THAT OF OTHERS**

Dangerous Patients and Public Safety Disclosures

45 CFR 164.512(j)

- Disclosures are permitted without the patient's authorization or permission to law enforcement, family, friends or others who are in a position to lessen the threatened harm—when disclosure “is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others.”
- Disclosures must be consistent with applicable law and standards of ethical conduct.

Good Faith Presumption

What constitutes a “serious and imminent” threat?

HIPAA expressly defers to the professional judgment of health care professionals when they make determinations about the nature and severity of the threat to health or safety. Specifically, HIPAA presumes the health care professional is acting in good faith in making this determination, if the professional relies on his or her actual knowledge or on credible information from another person who has knowledge or authority.

OCR would not second guess a health professional’s good faith belief that a patient poses a serious and imminent threat to the health or safety of the patient or others and that the situation requires the disclosure of patient information to prevent or lessen the threat.

Absent Patients

Example of what constitutes a “serious and imminent” threat?

An adult patient who may pose a danger to self stops coming to psychotherapy sessions and does not respond to attempts to make contact. The patient has told the therapist that they do not want information shared with a certain person who has been involved in the patient’s mental health care. In making the determination about the patient’s best interests, the provider may take into account the patient’s prior expressed preferences regarding disclosures of their information, if any, as well as the circumstances of the current situation, which may be considered an emergency.

HIPAA Permits Disclosures to Avert a Threat of Serious or Imminent Harm

45 CFR 164 .512(j)

- If a patient tells their psychotherapist that they have persistent images of harming their spouse, the psychotherapist may:
 - notify the spouse;
 - call the patient's psychiatrist or primary care doctor to review medications and develop a plan for voluntary or involuntary hospitalization or other treatment;
 - call 911, if emergency intervention is required; and /or
 - notify law enforcement, if needed

Disclosures to Prevent Harm

Opioid Overdose may Constitute Imminent Threat to Self

For example, a doctor whose patient has overdosed on opioids is presumed to have complied with HIPAA if the doctor informs family, friends, or caregivers of the opioid abuse after determining, based on the facts and circumstances, that the patient poses a serious and imminent threat to his or her health through continued opioid abuse upon discharge. This is based on the doctor's belief that the persons informed are in a position to prevent or lessen the threatened harm as required under 45 CFR 164.512(j).

PROVIDERS TREATING MINORS

Parents and Minors

45 CFR § 164.502(g)

- Generally, parents are the personal representatives of their minor children for HIPAA purposes, and providers may share patient information with a patient's personal representative.
- However, there are certain exceptions, e.g., where a minor may obtain certain health care services without parental consent under State or other law.
- HIPAA defers to state law to determine age of majority.
- See OCR Guidance on Personal Representatives,
<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/personalreps.html>

Professional Judgment & Sharing Minors' PHI with a Parent

When may a mental health professional use professional judgment to decide whether to share a minor patient's treatment information with a parent?

If the parent is not a personal representative, *and* there is no applicable state or other law about sharing protected health information with a parent, a licensed health professional may use professional judgment to decide whether or not to share or provide parental access to information.

- See 45 CFR 164.502(g)(3)(ii)

Infographic on Professional Judgment, Minors' PHI, & Parents

When is a parent not the personal representative of their minor child?

- A: Parent has voluntarily agreed to minor's confidentiality
- B: Minor consented to treatment & no other consent is required by law
- C: Minor may obtain a health care service without parental consent, and the child, a court, or authorized person has consented
- D: Provider has a reasonable belief that the parent has abused or neglected the minor or could endanger the minor and uses professional judgment to not treat the parent as the personal representative.

HEALTH CARE CONSUMERS

Notification of Family & Friends

HIPAA allows notification of family and friends if something happens to you

Example:

If you pass out while driving alone and are injured in a car accident, emergency personnel can use your identification and other personal information to find your family and notify them that you are being transported to a nearby hospital. If you are conscious at the time of notification, they need tell you that's what they plan to do and give you the chance to object.

Family Notification of Incapacitated Patient

HIPAA allows notification of family and friends if you have a mental health condition

Example:

If you have a mental health condition and become disoriented or confused and you are unaware of your surroundings or who you are, a police officer could contact the nearest hospital and the staff may call someone who has been your helping companion;

Family Notification of Incapacitated Patient

HIPAA allows notification of family and friends if you have a mental health condition

Example:

If you are so disoriented that you are unable to make decisions, the medical staff may decide to check their records to find someone to contact on your behalf to find out more about your needs or health conditions, if they need the information to be able to care for you.

More Information

- <https://www.hhs.gov/ocr/index.html>
- <https://www.hhs.gov/civil-rights/for-individuals/special-topics/opioids/index.html>
- <https://www.hhs.gov/civil-rights/for-providers/training/index.html>
- <https://www.hhs.gov/hipaa/for-professionals/index.html>