



**PRIVILEGED AND CONFIDENTIAL**

To:	CalMHSA
From:	Alexander Dworkowitz
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Subject:	SmartCare Compliance with 42 C.F.R Part 2 with Respect to Access Lines

The California Mental Health Services Authority (“CalMHSA”) has been operating SmartCare, a County-based electronic health records system that allows Counties to document and exchange information related to behavioral health and other health care services provided to their clients.

In many cases, Counties will seek to input into SmartCare information obtained from behavioral health care access lines (“Access Lines”), phone lines that often collect information from providers about an individual’s need for behavioral health services. In some cases, the County employees who staff those lines provide the callers with referrals for substance use disorder (“SUD”) services. Such activity raises the question as to whether the Access Lines themselves may be programs subject to the federal SUD confidentiality regulation known as 42 C.F.R. Part 2 (“Part 2”) in some circumstances. If certain Access Lines are subject to Part 2, then oftentimes the data they input into SmartCare will be subject to Part 2 as well; therefore, access to such data must be restricted in accordance with that regulation.

This memorandum addresses the circumstances under which Access Lines might become subject to Part 2 and an option for SmartCare to ensure Part 2 compliance in the case where it ingests Part 2 data from an Access Line.

**A. Background**

California counties offer Access Lines to whom individuals can call to obtain access to behavioral health services. Oftentimes, providers will call these lines to connect individuals with behavioral health treatment. For instance, a clinician in an emergency department will need to connect a patient with mental health services following discharge, and the clinician will call the Access Line to find an appropriate place to refer the patient. In some cases, the referring provider may need to connect an individual to SUD services, in which case the Access Line may refer the individual to an SUD provider.

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Counties have different approaches to their Access Lines. In some Counties, the Access Line is structured to field calls related to a wide variety of health care and social service needs, and the line can be used for referrals to both mental health and SUD services. In other counties, there are multiple Access Lines, with one Access Line dedicated to SUD services.

In order to demonstrate the Counties are meeting state contractual requirements related to providing timely access to services,<sup>1</sup> staff at the Access Lines seek to document information from the calls they receive. The Counties therefore frequently input information from the calls into SmartCare. The recorded information may include demographics on the individual who is the subject of the call and the nature of the services that the individual is being referred to. Therefore, information logged into SmartCare may in some cases indicate that an individual has been referred to SUD services.

## **B. Access Lines and 42 C.F.R. Part 2**

Access Lines typically do not provide SUD treatment; they exist to refer individuals to services, not provide services. Nevertheless, it is possible that certain Access Lines would be subject to 42 C.F.R. Part 2. A Part 2 program includes a federally assisted entity that “holds itself out as providing, and provides, substance use disorder diagnosis, treatment, *or referral for treatment.*”<sup>2</sup> The use of “or” indicates that holding oneself as an organization that refers individuals to SUD treatment can be sufficient to qualify that organization as a Part 2 program.

Because Counties are federally assisted, an Access Line would be subject to Part 2 if the County operating the line held out the Access Line as providing referrals for SUD treatment. The term “referral” is not defined in the regulation. A broader definition of “referral” would encompass the scenario where an Access Line provides information about where a specific individual can obtain SUD services, regardless of whether the Access Line employee actually communicated with the provider of SUD services. Under a narrower definition, an Access Line would only make a “referral for [SUD] treatment” when it conveys information to the SUD provider itself about an individual’s need for SUD services from that provider; simply informing the caller about a place where an individual can obtain services would not qualify as a “referral.” If the broader definition of the term “referral” were to apply, then SUD-specific Access Lines would be subject to Part 2 since Counties promote those lines as places to call for the referral for

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<sup>1</sup> For example, a Drug Medi-Cal Organized Delivery Systems (“DMC-ODSs”) are required to “Make services included in this Agreement available 24 hours a day, 7 days a week, when medically necessary.” Exhibit A, Attachment I, § (II)(E)(1)(iii)(c) By logging inquiries into SmartCare and showing how were referrals were made as a result of those inquiries, DMC-ODS help document compliance with this standard.

<sup>2</sup> 42 C.F.R. § 2.11.

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SUD services. Under this interpretation, information recorded by personnel working for SUD-specific Access Lines generally would be subject to Part 2. If the narrower definition of “referral” applied, then some of these Access Lines might not be subject to Part 2.

In contrast, general Access Lines may not be subject to Part 2, even if the broader definition of “referral for [SUD] treatment” were to apply. While the Substance Abuse and Mental Health Services Administration (“SAMHSA”) has not provided guidance on when SUD referral sources are subject to Part 2, it has noted that not all providers of SUD services are subject to Part 2. For instance, agency guidance indicates that Part 2 does not apply to a physician in a medical group who (1) treats a diverse group of individuals and sometimes provides medication-assisted treatment, and (2) does not issue advertisements highlighting the medical group’s SUD treatment services.<sup>3</sup> Following this logic, an Access Line would not be subject to Part 2 if it (1) handles a diverse set of calls and sometimes refers individuals for SUD treatment, and (2) does not advertise its SUD referrals.

However, some general Access Lines may have a website that indicates that the line provides referrals to SUD services, among many other types of services. SAMHSA has not addressed whether simply mentioning the provision of SUD services – among many other types of services offered – is sufficient to result in the provider “holding itself out” as a provider of SUD services. Arguably, it depends on how prominent the SUD reference is in the applicable materials. If an Access Line website lists 15 different types of referrals made, and only one of those referrals related to SUD services, then there is a lower risk that such Access Line would be subject to Part 2. In contrast, if an Access Line website says the line is used for referrals for “mental health and substance use disorder treatment” only, then there is a greater likelihood that the line is subject to Part 2, given the focus on SUD referrals on the website.

Ultimately, whether a particular Access Line is subject to Part 2 is a decision for the applicable County counsel. For ease of reference, the remainder of this memo refers to Access Lines that are subject to Part 2 as “Part 2 Access Lines.”

### **C. SmartCare and Part 2 Compliance**

Assuming a County determines that at least one of its Access Lines is subject to Part 2, SmartCare will need to provide an option for maintaining Part 2 compliance with respect to such data.

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<sup>3</sup> SAMHSA, Disclosure of Substance Use Disorder Patient Records, Does Part 2 Apply to Me?, <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents//does-part2-apply.pdf>.

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Currently, information from Access Lines and other calls (such as crisis lines) must be logged into SmartCare’s “Inquiry Screen.” The advantage of the Inquiry Screen is that the SmartCare user does not need to go through the manual process of enrolling an individual directly into a particular SUD or mental health program. This enrollment process can take time (approximately five minutes), and therefore in the case where it is important to connect an individual with services quickly – such as may occur when an individual is in an emergency department experiencing a behavioral health crisis or urgent issue and needs to be seen by a mental health or SUD specialist as fast as possible – avoiding the enrollment process can be valuable. Further, the Inquiry Screen is the only part of SmartCare that has been designed to easily record information from phone calls.

However, the downside of the Inquiry Screen is that information inputted into that screen is widely available to SmartCare users. Therefore, inputting Part 2 Access Line data into that screen would violate Part 2 requirements, if current configurations were not modified. Generally, Part 2 data cannot be shared with others outside of a specific Part 2 program without an individual’s written consent. While some individuals who may be the subject to Part 2 Access Line calls may have signed SmartCare’s coordinated care authorization that would permit such data sharing, not all of these individuals will have done so.

If Part 2 Access Line data is to be inputted into the Inquiry Screen, then SmartCare will need to develop a framework to ensure such data is not widely available to other SmartCare users. CalMHSAs has proposed to provide Counties with the option of segmenting certain data inputted into the Inquiry Screen. Under this proposal:

- Counties would have the option of designating data from their Access Lines as Part 2 data.
- Counties would also have the option of making the “Program” field in the Inquiry Screen a mandatory field. This means that data inputted into the Inquiry Screen could be saved only if the user selected the program that was inputting the data (if no program was selected then all data inputted into the Inquiry Screen would be deleted).
- If a County indicated that their Access Line was subject to Part 2 and the County also identified the Access Line as the program that was entering in the applicable data via the “Program” field, then all data entered into the Inquiry Screen for that particular individual would be tagged as Part 2 data.
- This tagged Part 2 Access Line data would only be available to the employees of the Access Line, unless the applicable individual signed a written consent. However, other data inputted into the Inquiry Screen that was not tagged as Part 2 data would remain visible to other SmartCare users.

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If implemented by a particular County, this proposal would effectively prevent Part 2 Access Line data entered into SmartCare from being accessed by most SmartCare users without written consent, thereby promoting compliance with a key Part 2 requirement.