

**ACTION:** Final rule.

**SUMMARY:** This document establishes Department of Veterans Affairs (VA) regulations to implement specific provisions of the Veterans Omnibus Health Care Act of 1976 and the Veterans' Benefits and Services Act of 1988 concerning the confidentiality of certain medical records. These regulations protect the confidentiality of VA records pertaining to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), and sickle cell anemia.

**EFFECTIVE DATE:** January 12, 1996.

**FOR FURTHER INFORMATION CONTACT:** Celia Winter, Program Specialist, Veterans Health Administration (161F), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-6274.

**SUPPLEMENTARY INFORMATION:** On July 26, 1993, at 58 FR 39703, VA published a notice of proposed rulemaking (NPRM) concerning the confidentiality of VA records pertaining to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV) and sickle cell anemia treatment, rehabilitation, education, training, evaluation and research information. Interested parties were invited to submit written comments on or before August 25, 1993. Two comments were received.

### Background

VA was mandated by the Veterans Omnibus Health Care Act of 1976 and the Veterans' Benefits and Services Act of 1988 to publish its own regulations relative to the confidentiality of medical records relating to drug abuse, alcoholism or alcohol abuse, infection with the HIV, and sickle cell anemia. VA, generally, has been following the Department of Health and Human Services' regulations on drug and alcohol abuse which were published in the Federal Register, July 1, 1975. The Department of Health and Human Services (HHS) regulations (42 CFR §§ 2.1-2.67) were promulgated with the enactment of legislation specific to alcohol and drug abuse programs and confidentiality of records. The regulations take into consideration the existing HHS regulations in implementing the confidentiality section of the Veterans Omnibus Health Care Act of 1976. Editorial and substantive changes were made to the HHS regulations which were published in the Federal Register, June 9, 1987.

The historical development of the regulations begins with Pub. L. 93-282, "Comprehensive Alcohol Abuse and

Alcoholism Prevention, Treatment, and Rehabilitation Act Amendments of 1974," which provided that the then Administrator of Veterans Affairs, through the then Chief Medical Director, consistent with responsibilities under Title 38, United States Code, prescribe regulations applicable to the confidentiality of medical records maintained in connection with the provision of hospital care, nursing home care, domiciliary care and medical services under Title 38 to patients suffering from alcohol abuse, alcoholism, and drug abuse. In prescribing and implementing these regulations, the Secretary of Veterans Affairs was required to consult with the Secretary of HHS in order to achieve the maximum possible coordination of the regulations.

Congress, recognizing that the particular problems of confidentiality of records in the VA health care system would best be handled by placing applicable provisions in Title 38, United States Code, added a new § 4132, now § 7332, to Title 38, United States Code, with the enactment of Pub. L. 94-581, Veterans Omnibus Health Care Act of 1976. The intent of this legislation was to ensure confidentiality of certain medical records by establishing sanctions for unauthorized disclosure of information, while at the same time, meeting the legitimate needs for disclosure under certain conditions. As part of this legislation, Congress imposed upon VA requirements similar to those of Pub. L. 93-282 noted above (38 U.S.C. § 7334, formerly § 4134).

Section 111 of Pub. L. 94-581 replaced, for VA purposes, the provisions of Sections 122(a) and 303 of Pub. L. 93-282 (21 U.S.C. § 1175, for drug records; 42 U.S.C. § 4582, for alcohol records) as the statutory base for confidentiality of drug and alcohol abuse records for those patients treated by VA medical facilities. Additionally, it replaced Section 109 of Pub. L. 93-82 (38 U.S.C. § 1753(b), formerly § 653(b)) which provided for confidentiality of sickle cell anemia records and required VA to promulgate regulations. Pub. L. 94-581, Veterans Omnibus Health Care Act of 1976, addressed all three subjects—drug abuse, alcoholism and sickle cell anemia records—in its confidentiality mandate. Section 121 of Pub. L. 100-322 provided for the confidentiality of records relating to infection with the HIV. Accordingly, drug and alcohol abuse, infection with the HIV, and sickle cell anemia records are included in these regulations.

VA has followed regulations on the confidentiality of patients' records

related to drug and alcohol abuse as prescribed in 1975 by the Secretary of HHS. Certain provisions of the HHS regulations are inconsistent with VA requirements and these new VA regulations address those inconsistencies. Staff at HHS reviewed a draft of the regulations prior to publication and changes were made based on the comments where there was statutory authority for the change.

The HHS regulations as revised in 1987 and further amended on May 5, 1995, cover only alcohol and drug abuse information that is obtained by a specialized program or specific provider whose primary function is the provision of alcohol or drug abuse diagnosis, treatment, or referral for treatment. The 1987 regulations do not cover alcohol and drug abuse information obtained by health care facilities which provide alcohol and drug abuse care only as an incident to the provision of general medical care. The VA regulations include *all* records which are maintained in connection with the performance of any VA program or activity (including education, training, evaluation, treatment, rehabilitation or research) relating to drug abuse, alcoholism, infection with the HIV, or sickle cell anemia in order to provide greater confidentiality for patients who are provided care for these conditions. On May 5, 1995, HHS published a final rule in 60 FR 22296, amending its confidentiality regulations with regard to the definition of "program." HHS's final rule was in direct response to the holding made by the Ninth Circuit in a case involving the VA, *United States v. Eide*, 875 F.2d 1429, 1438 (9th Cir. 1989). There the court held the VAMC's (VA medical center) general emergency room to be a "program" as defined by the HHS regulations, upon which VA's policy is based. In its final rule, HHS limited the definition of "program" to: (1) an individual or entity, or an identified unit within a medical care facility, who holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment, or (2) medical personnel or other staff in a general medical care facility, whose primary function is the provision of alcohol or drug abuse diagnosis, treatment or referral for treatment and who are identified as such providers. VA's final regulations DO NOT reflect the same regulatory language concerning the definition of a "program" as the HHS regulations due to the VA's treatment of the encompassed conditions as an integral part of the VA medical health care system and not a separate program