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YOU'VE HEARD THE RUMORS, BUT HAVE YOU SEEN THESE FIVE FACTS?

Protections People would Lose if HIPAA Becomes the Standard for Substance Use Information:

FACT #1:

Law enforcement authorities could seize patient records with subpoenas and general court orders and use them to prosecute people in addiction treatment programs. The Health Insurance Portability and Accountability Act ("HIPAA") does not provide significant protections against information in substance use disorder ("SUD") records being routinely seized to investigate and prosecute patients in substance use treatment.

- *Under the federal substance use disorder confidentiality regulation, 42 C.F.R. Part 2 ("Part 2"): Treatment programs are prevented from releasing patients' SUD information to law enforcement authorities, and judicial or administrative bodies, without a special court order.ⁱ*

FACT #2:

People undergoing alcohol and/or drug treatment will be more likely to lose the ability to obtain health insurance. HIPAA allows disclosures of SUD treatment information to health plans without the patient's consent, including those entities with collections, fundraising, consumer reporting, and underwriting functions.ⁱⁱ

- *Under Part 2: This type of treatment information can only be disclosed to insurers with the patient's written consent. Part 2 also limits the disclosed patient information to just that amount of information that is needed to accomplish the purpose of the disclosure.ⁱⁱⁱ*

FACT #3:

Those patients in the process of divorce or child custody proceedings are more likely to lose legal custody of their children, even if they are doing well in treatment. This is because prejudicial evidence of SUD (which is not indicative of parenting abilities) is easier to disclose under a HIPAA standard. HIPAA provides no meaningful protections against civil litigants obtaining SUD treatment information through the release of confidential records or testimony with a subpoena or a general court order for use in court proceedings.

- *Under Part 2: Additional requirements govern whether and how SUD information may be disclosed in civil legal proceedings. Even when a subpoena or a general court order requesting a patient's confidential information from a SUD treatment program or provider exists, treatment information can only be disclosed for court proceedings with the patient's written consent or with a special court order.^{iv}*

FACT #4:

Anyone who receives confidential substance use disorder information, even with the patient's written consent, could re-disclose the information to others without the patient's knowledge or permission – since HIPAA does not prohibit this. This re-disclosed information could cause the patient to experience unnecessary stigma and negative consequences (such as loss of employment, incarceration, or loss of housing). Studies have shown that the continuing association of stigma with substance use disorder also prevents individuals from seeking SUD treatment.^v

- *Under Part 2: Anyone who receives patient-identifying SUD information through patient consent or other Part 2 requirements cannot re-disclose this information to anyone else – unless the patient provides written consent to do so, a court order exists, or if an exception to the Part 2 regulations applies.^{vi}*

FACT #5 (The Bottom Line):

Without Part 2's protections, many people would not enter substance use disorder treatment for fear that if they did, they would be arrested and prosecuted, lose their jobs and insurance, lose custody of their children and suffer discrimination in all facets of their lives. The resulting explosion and spread of addiction would devastate communities across the country, costing untold lives and billions of dollars.

- **Part 2, not HIPAA, was designed to protect information that identifies a person as a patient or an applicant for SUD treatment.^{vii} As a result, Part 2 provides greater protection to SUD information, which serves as a support for individuals to seek out and stay in alcohol or drug treatment.**

ⁱ 42 C.F.R. §§ 2.61 - 2.67. Some of the requirements to disclose patient SUD information for the purposes of criminal investigations or prosecutions through a special court order include: A court must first determine that the crime involved is extremely serious (e.g., causing loss of life or serious bodily harm); there is a reasonable likelihood that the information is of value to the investigation or prosecution; other ways of obtaining the information are not available or effective; the public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the ability of the program to provide services to other patients; and if law enforcement entities request the patient information, the person or program holding the patient records must have been given the opportunity to be represented by independent counsel. Legal counsel must represent treatment programs that are governmental entities.

ⁱⁱ U.S. Dep't of Health & Human Services, Office for Civil Rights, *Uses and Disclosures for Treatment, Payment, and Health Care Operations* (Apr. 2003), available at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/coveredentities/sharingfortp_o.pdf.

ⁱⁱⁱ 42 C.F.R. § 2.13(a).

^{iv} 42 C.F.R. §§ 2.61 - 2.67. Some of the requirements to disclose patient SUD information for the purpose of civil proceedings through a special court order include: Notice must be given to the SUD treatment program or provider and the patient that another party is requesting the patient's confidential information, and allow them an opportunity to make a statement to the court. In addition, before the special court order is issued -- the court has a hearing to determine that the public's interest to disclose the confidential information outweighs the potential harm to the patient, and other ways of obtaining the information are not available or effective. Lastly, the amount of information to be disclosed must be limited to those parts of the patient's treatment record that are essential to fulfill the purpose of the order, and restricted to those persons who have a need for the information.

^v Nat'l Center on Addiction & Substance Abuse at Columbia U., *Addiction Medicine: Closing the Gap between Science and Practice* 12 (June 2012), available at <https://ia800406.us.archive.org/10/items/781862-casa-columbia-addiction-med/781862-casa-columbia-addiction-med.pdf>; James D. Livingston, *et al.*, "The Effectiveness of Interventions for Reducing Stigma Related to Substance Use Disorders," 107 *Addiction* 39, 40 (2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3272222/pdf/add0107-0039.pdf>; Faces & Voices of Recovery, *Policy Position Paper on Discrimination*, available at <https://tinyurl.com/y98z5eer>.

^{vi} 42 C.F.R. §§ 2.32, 2.33.

^{vii} 42 U.S.C. § 290dd-3; 42 C.F.R. Part 2.