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42 CFR Part 2 Is Not the Problem:

Changing the Privacy Requirement Could Cause a Lot of Harm Without Any Real Benefit

The Health Insurance Portability and Accountability Act (HIPAA) is the federal law establishing the minimum “floor” of privacy protections for health information. For certain highly stigmatized medical conditions, additional confidentiality protection is necessary to encourage patients to seek and stay in care. Examples of medical care protected by heightened confidentiality include reproductive health, HIV and AIDS, and substance use disorders.

The federal regulations governing confidentiality protections for substance use disorder treatment are in 42 CFR Part 2 (known as “Part 2”). These regulations have been in place since the 1970s to assure patients that obtaining specialty care for addiction would not make them more vulnerable to negative legal and civil consequences by exposing information about their substance use. Purchasing and possessing illicit substances is illegal, which makes the need for heightened protection particularly critical for this population, including so they will not be afraid to seek treatment.

Part 2 generally applies to treatment providers, health units, and facilities who provide specialty substance use disorder care. Part 2 does NOT apply to most other providers who see patients in general medical settings – even if that patient has a substance use disorder.

In response to the opioid epidemic, some have called for relaxation of Part 2’s protections. But Part 2 is not the problem. Indeed, many of the arguments for dismantling Part 2 center on general medical and emergency care scenarios – settings not ordinarily governed by Part 2.

The following clinical scenarios exemplify how medical professionals can share information about a patient with an opioid use disorder under current law:

Q.1: I am an emergency room physician; EMTs brought in an unconscious patient following an opioid overdose. Can I alert the family?

A: Yes. You can notify the family as permitted by HIPAA, just as you could for any other medical emergency care. As an emergency room physician in a hospital, neither you nor the healthcare setting is subject to Part 2.

Q.2: I am an orthopedic surgeon; I just operated on a patient in recovery from an opioid use disorder. His parents shared this information to make sure we would not prescribe opioid painkillers. Can I put this into the Electronic Health Record to alert all members of the clinical treatment team?

A: Yes. If a patient or his family discloses a substance use disorder, this information can be entered into the Electronic Health Record to ensure that all providers within the health system are informed. Part 2 does not apply to information disclosed in this way.

Q.3: I am an emergency room physician. A patient has come in following an overdose and is in and out of consciousness. The regional health information exchange system keeps health information subject to heightened privacy protections in a separate repository that requires patient consent to access. Can I check to see if the patient has information in that separate repository without her consent, to see if it might help inform her care and bring her back to consciousness?

A: Yes. In medical emergencies, such as the described scenario, information protected by Part 2 may be disclosed without patient consent to medical personnel treating the emergency.

In the midst of a devastating national opioid epidemic, we must take every precaution against worsening the situation. Loosening confidentiality protections for substance use disorder treatment would discourage patients from seeking the care they need to get and stay well and to stay alive. Furthermore, most of the tragic scenarios cited by critics of Part 2's protections would not be addressed by weakening the protections, because Part 2 already permits disclosure of information in most emergency settings.

Additional education of providers -- not weakening regulations -- is the best way to encourage people to seek and receive treatment, and to protect those who have already done so.