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MEMORANDUM

TO: Netsmart

FROM: Gerald "Jud" E. DeLoss, Member

DATE: October 6, 2015

SUBJECT: Outline of HIPAA Protections for SUD Information

In an August 7, 2015 POLITICO article entitled "Conflict Brewing in Congress Over Mental Health Privacy Rule" the Legal Action Center was quoted as stating:

> Without [42 CFR] Part 2, law enforcement agencies, civil litigants, insurance companies and in some cases employers would have virtually unfettered ability to obtain, use and re-disclose alcohol and drug patient records without restrictions or the individuals' consent.[1]

The Legal Action Center's statement about "virtually unfettered" ability to obtain, use and re-disclose patient records is inaccurate, and fails to mention the substantial protections provided alcohol and drug or substance use disorder ("SUD") treatment information under the Health Insurance Portability and Accountability Act ("HIPAA"), the HIPAA Privacy and Security Regulations, applicable state laws and ethical codes, and federal and state employment laws. A change to 42 CFR Part 2 ("Part 2"), the federal confidentiality regulations governing SUD treatment information, would not result in the dire situation described by Legal Action Center. Rather, existing protections under HIPAA would continue to apply to protect such information -- especially information considered to be most sensitive by the patient – from unauthorized disclosure.

There are numerous restrictions under HIPAA which would protect against unauthorized disclosures of SUD treatment information by third parties, each as set forth below.

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[1] "Conflict Brewing in Congress Over Mental Health Privacy Rule," available at www.politico.com, accessed September 28, 2015.

1. **Law enforcement agencies do not have unfettered access to HIPAA-protected records.**

The vast majority of disclosures to law enforcement under HIPAA require patient authorization, the existence of a crime, emergency, or threat to the health or safety of the public, or Court involvement. In fact, HIPAA provides considerable protections against disclosure to law enforcement officials. Similar to Part 2, generally under HIPAA a disclosure to law enforcement officials requires the patient's authorization or a Court order. HIPAA only permits the following limited disclosures to law enforcement:

- By an employee of a treatment provider of the identity of a suspect who had engaged in a criminal act against the employee. Only the suspect's demographic information, type of injury, treatment dates and distinguishing characteristics are disclosed for this limited purpose.[2]
- To report abuse, neglect or domestic violence[3], which is similar to Part 2's allowance for reporting of child abuse.[4]
- Where required by law, in limited situations such as reporting gunshot wounds or other injuries[5]
- Under a grand jury subpoena[6], or for an administrative request, civil or investigative demand, or similar process provided that the information sought is relevant and material; is specific and limited in scope, and de-identified information could not reasonably be used[7]
- Certain identifying information to identify or locate a suspect, fugitive, material witness or missing person[8]
- If the patient is a victim, then after consent or in the event of an emergency, to law enforcement to assist the victim (but never to be used against the patient)[9]
- When the patient has died and the death may have been the result of criminal activity[10]
- In the event of a crime on the premises (which is virtually identical to Part 2's exception for a crime on program premises)[11]
- In an emergency not on the premises, where the emergency medical provider needs to disclose the information to alert law enforcement of a crime[12]
- To avert a serious threat to health or safety of the patient or others (the so-called "Duty to Warn" exception)[13]

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[2] 45 CFR § 164.502(j)(2).
[3] 45 CFR §§ 164.512(b)(1) and 164.512(c).
[4] 42 CFR § 2.12(c)(6).
[5] 45 CFR § 164.512(f)(1).
[6] 45 CFR § 164.512(f)(1).
[7] 45 CFR § 164.512(f)(1).
[8] 45 CFR § 164.512(f)(2).
[9] 45 CFR § 164.512(f)(3).
[10] 45 CFR § 164.512(f)(4).
[11] 45 CFR § 164.512(f)(5).
[12] 45 CFR § 164.512(f)(6).
[13] 45 CFR § 164.512(j).

- Where necessary to apprehend an individual because he or she admitted to participating in a violent crime or escaped from prison.[14] However, the information regarding the violent crime or escape could not have been learned by the provider as the result of a request for treatment or the treatment of the patient's propensity to commit such an act.[15]
- In order to provide health care to inmates and those in custody[16]

2. Under HIPAA, psychotherapy notes relating to SUD treatment cannot be released without the patient's authorization or in extremely restricted circumstances. In fact, psychotherapy notes are provided greater protections under HIPAA than under Part 2.

The HIPAA Privacy Rule provides extensive protections to "psychotherapy notes" and requires the written authorization of the patient in all but limited circumstances.[17] "Psychotherapy notes" are notes made by a mental health professional about a private, group, joint, or family counseling session and that are kept separate from the rest of the individual's medical record.[18] These notes are of the type that would contain potentially sensitive, embarrassing, or compromising information. As such, HIPAA provides greater protections for them – in many cases surpassing the protections imposed by Part 2.

Under HIPAA, the mental health professional can only use the notes or disclose them for very specific reasons. A provider can use the notes in a legal proceeding, but only to defend itself against a claim brought by the patient.[19] The provider could disclose the notes if required by law, such as for mandatory reporting of abuse.[20] Similar to Part 2[21], the provider may release the notes for audit, evaluation and health oversight activities.[22] SUD treatment providers could release notes about a deceased patient to a coroner.[23] Finally, a provider could disclose psychotherapy notes to prevent or lessen a serious and imminent threat of harm to the patient or the public. In other words, disclosing if the provider felt that disclosure would protect the patient or public.[24]

To restate, under the HIPAA Privacy Rule the release of psychotherapy notes is limited to situations similar to those currently allowed under Part 2; those that protect the public or the patient; or arise where an authorization would have been required anyway, such as in litigation commenced by the patient.

3. HIPAA protects health information from disclosure in civil litigation.

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[14] 45 CFR § 164.512(j)(1).
[15] 45 CFR § 164.512(j)(2).
[16] 45 CFR § 164.512(k)(5). See generally, http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_for_law_enforcement_purposes/505.html, accessed September 28, 2015.
[17] 45 CFR § 164.508(a)(2).
[18] 45 CFR § 164.501.
[19] 45 CFR § 164.508(a)(2).
[20] 45 CFR §§ 164.508(a)(2) and 164.502(a)(2).
[21] 42 CFR § 2.53.
[22] 45 CFR §§ 164.508(a)(2) and 164.512(a), (d).
[23] 45 CFR §§ 164.508(a)(2) and 164.512(g)(1).
[24] 45 CFR §§ 164.508(a)(2) and 164.512(j)(1). *See also Tarasoff v. Regents*, 551 P.2d 354 (1976).

HIPAA also prescribes specific and detailed requirements for the use or disclosure of health information in legal proceedings. SUD treatment information is only produced in Court pursuant to an order of the Court or if the patient had brought suit against the treatment provider, which has placed the health information at issue and necessary for the case.[25] Patient information can only be produced in discovery proceedings pursuant to a Court order, patient authorization, or other due process protections. All subpoenas must be accompanied by notice to the patient with opportunity to object or evidence that the litigant sought a Qualified Protective Order.[26]

4. Insurance companies only receive the minimum information necessary to pay claims under HIPAA.

Contrary to Legal Action Center's comments, health insurers generally only receive that minimum amount of health information under HIPAA that is required in order for them to process and pay for claims.[27] Further, providers are required by HIPAA to develop and implement policies and procedures that appropriately limit the use and disclosure of health information to the minimum necessary to accomplish the intended purpose, such as obtaining payment from a health insurer for services rendered.[28] Also under HIPAA, insurance companies other than health insurers, such as automobile or life insurance companies, must obtain the patient's authorization, a Court order, or pursuant to the legal process, for the disclosure of health information described in section 3, above – as they would under Part 2.

In addition to these restrictions, if a patient pays for an item or service out of pocket and requests that the provider not share information about that treatment or service with his or her health insurer, then the provider must not disclose it to the insurer.[29]

5. Employers cannot receive health information under HIPAA without authorization or Court order.

Like Part 2, HIPAA generally prohibits the disclosure of health information to third parties without patient authorization or Court order. As such, HIPAA, would not allow for disclosure of SUD treatment information by a provider to an employer in virtually all cases without the patient/employee authorizing the disclosure, a valid Court order or valid legal process. In addition, employers, as health plan sponsors, are prohibited from using or disclosing health information for employment-related decisions or in connection with any other benefit decision.[30] There exists only one limited exception for patients undergoing an evaluation or surveillance at the workplace or to evaluate whether the patient has a work-related injury for OSHA or similar circumstances.[31] However, in that situation, the employer must be requesting the evaluation and the provider must

[25] See 45 CFR §§ 164.512(e) and 164.501 (definition of "health care operations").
[26] 45 CFR § 164.512(e).
[27] 45 CFR §§ 164.506(c) and 164.502(b).
[28] 45 CFR § 164.514(d)(3).
[29] 45 CFR § 164.522(a)(1).
[30] 45 CFR § 164.504(f)(2)(ii)(C). In addition, the plan documents must restrict uses or disclosures to those specifically permitted under 45 CFR § 164.504(f). See 45 CFR § 164.504(f)(1).
[31] 45 CFR § 164.512(b)(1).

notify the patient prior to the evaluation. Employers, as third parties, would not have unfettered or unrestricted access to the health information of their employees. HIPAA provides protections nearly identical to those provided under Part 2 in this regard. Accordingly, the Legal Action Center's comments on this point are not supported by the law.

6. **Patient Safety and Patient Choice.**

HIPAA provides substantial protections for any SUD treatment information. However, HIPAA provides an additional feature that Part 2 cannot – patient safety and choice. Pursuant to stringent privacy and security requirements, HIPAA allows healthcare providers to share health information across health information exchanges ("HIEs") and other integrated health care delivery systems. Part 2 currently hamstrings or completely prevents the exchange of SUD treatment information in HIEs.[32]

Studies have shown that HIEs both reduce costs by eliminating unnecessary and duplicative laboratory tests and examinations[33] and increase quality of care and care coordination[34] by minimizing medical errors and maximizing communication and collaboration.[35]

Importantly, HIPAA would allow the exchange of SUD treatment information in a secure, private fashion. But just as importantly for the patient, the exchange of SUD treatment information would only take place if the patient has agreed to allow his or her health information to be included in the HIE. This consent is generally accomplished by the patient through "opt in" which entails an affirmative request to be included in the HIE, or through "opt out" which involves the patient expressing his/her desire not to include some or all health information in the HIE.[36] As such, a patient that desires to share SUD treatment information would have the ability to consent to the inclusion of that information in the HIE. A patient that does not want SUD treatment information, or any health information, included in the HIE would also have the opportunity to do so.

Ironically, by excluding all SUD treatment information from HIE under Part 2 as a default, patients who recognize the benefits of HIE and integration of SUD treatment with primary medical care are barred from exercising their preference, thereby placing their health care and their very lives at risk.

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[32] See, "Protection or Harm? Suppressing Substance-Use Data," New England Journal of Medicine, May 14, 2015 at p. 1879 and "Behavioral Health Data Exchange Consortium ONC State Health Policy Consortium Project Final Report,"
Office of the National Coordinator for Health Information Technology, June 2014.

[33] "An Empirical Analysis of the Financial Benefits of Health Information Exchange in Emergency Departments," Journal of the American Medical Informatics Association, June 27, 2015.

[34] http://www.healthit.gov/providers-professionals/care-coordination-improved-through-health-information-exchange, accessed August 25, 2015.

[35] See, http://www.healthit.gov/providers-professionals/benefits-electronic-health-records-ehrs, access August 25, 2015.

[36] "Consumer Consent Options for Electronic Health Information Exchange: Policy Considerations And Analysis," Jodi Daniel, Steven Posnack, March 23, 2010, http://www.healthit.gov/providers-professionals/patient-consent-electronic-health-information-exchange/health-information-privacy-law-policy, accessed August 25, 2015.