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Health Subcommittee

Improving the Coordination and Quality of Substance Use Disorder Treatment

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My name is Gerald (Jud) E. DeLoss and I am a partner with the law firm of Greensfelder, Hemker & Gale, P.C. in Chicago, Illinois. I am a health law attorney that focuses on health information privacy and confidentiality and behavioral health law. I have previously served as the Chair of the Health Information & Technology Practice Group of the American Health Lawyers Association (AHLA) and Chair of the Behavioral Health Task Force of the AHLA. I represent several substance use disorder (SUD) treatment programs covered by Part 2 and other behavioral health provider clients including Lake County, NICASA, North Central Behavioral Health Systems, Stepping Stones Treatment Center, and TASC. I am here today on behalf of Netsmart Technologies, a technology partner to behavioral health, substance use treatment, and post-acute providers nationwide.

I am here today to explain the existing protections under the Health Insurance Portability and Accountability Act of 1996 and the Privacy and Security Regulations promulgated thereunder (jointly "HIPAA") and Part 2 and the protections that would remain in place following enactment of HR 3545 and HR 3545 as amended. My testimony is intended to provide a correct

summary of the law and clear up any misunderstandings of the substantial protections in place for the privacy of SUD patient records.

Limited Impact of HR 3545 on Part 2

At the outset it is important to note that the Bill only modifies uses and disclosures of Part 2 SUD patient information for purposes of "treatment", "payment", and "health care operations", each as defined under HIPAA. The Bill does not reduce or remove Part 2 protections against disclosures to employers, landlords, life insurance companies, or in response to subpoenas or discovery requests. Those disclosures are not "TPO" (Treatment, Payment, and health care Operations) as defined by HIPAA. Those disclosures would still be governed by, and protected by, Part 2.

Furthermore, the amended Bill only allows for disclosure "[t]o a covered entity by a covered entity, or to a covered entity by a [Part 2] program" for purposes of TPO. Under HR 3545, as amended, the only disclosures authorized for TPO would be to covered entities, which under HIPAA only include certain health care providers, health plans, and health care clearinghouses. Disclosures to third parties that are not considered HIPAA covered entities would not be allowed. Employers, landlords, life insurance companies, marketers, and the courts are not covered entities. Disclosure to those entities or individuals would not be allowed under the amended Bill. Under HR 3545 as amended, health information cannot be disclosed to third parties – only covered entities. Because health information may only be disclosed to covered entities under HR 3545 as amended, there is no ability for the information to be shared or re-disclosed by a Part 2 program or covered entity to any other recipient unless the recipient is a

covered entity. Covered entities would be bound by HR 3545 as amended, by HIPAA, and could not disclose or re-disclose the health information to any other third party, except for other covered entities.

The Bill as amended also dramatically increases the protections for SUD information in any criminal prosecution or civil action. Under the HR 3545, a court order or patient consent would be required before:

- Entering the information into evidence in a civil or criminal proceeding
- Forming the part of the record or taken into account in a proceeding before a Federal agency
- Being used to conduct an investigation of a plaintiff
- Being used in any application for a warrant

Legal Protections Provided by HIPAA

In addition to the limitations on disclosures set forth in HR 3545, HIPAA provides stringent protections against the use of health information by employers, for child custody determinations, and by law enforcement. Like Part 2, HIPAA generally prohibits the disclosure of health information to third parties without patient authorization or court order.

Any disclosure to an employer under HIPAA would be governed by specific regulations that generally prohibit the disclosure of health information to an employer without an authorization or court order. Under HIPAA, the health care provider must provide the health care service to the individual at the request of his or her employer or as a member of the employer's workforce.

Generally, under the Americans with Disabilities Act ("ADA"), an employee with an SUD may be entitled to a reasonable accommodation and the employer could not discriminate against the employee based upon the SUD, which is considered a disability. The ADA would not allow for an employee to engage in the use of substances while at work, if the employer prohibited such illegal use.

Part 2 does not allow for the disclosure of SUD treatment information to a landlord or housing agency without patient consent or a court order. HIPAA would allow for the disclosure of limited types of health information to a landlord or housing agency only if it were a necessary part of the patient's treatment – such a supportive housing. Generally, under the ADA, a landlord or agency would not be able to discriminate against an individual with a disability such as an SUD.

HIPAA also imposes specific requirements for the use or disclosure of health information in legal proceedings, including child custody and family court cases. Where a covered entity is a party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose health information for purposes of the litigation as part of its health care operations. Where the covered entity is not a party – such as when the patient is involved in legal action with a different party, health information may only be produced in court pursuant to an order by the court or patient authorization.

The vast majority of disclosures to law enforcement under HIPAA require patient authorization, a crime, emergency, threat to public health/safety, or court involvement. Similar to Part 2,

generally under HIPAA a disclosure to law enforcement requires patient authorization (in limited circumstances) or a court order. HIPAA only permits limited disclosures to law enforcement.

Under the newly-created general designation process promulgated under the Final Part 2 regulations, a patient may consent to share his or her information with an intermediary, such as a health information exchange (HIE), accountable care organization (ACO), or other integrated care setting which may then share the information with all members of the integrated care model that possess a treating provider relationship with the patient. However, a recipient of SUD treatment information within an HIE or ACO with a treating provider relationship would not be able to re-disclose that information to another participant in the same HIE or ACO without additional patient consent, rendering the new process unusable in practice.

Under prior versions of Part 2 (pre-2017), an organization with mental health and SUD treatment facilities and clinicians could address the legal restrictions on sharing SUD information by using a qualified service organization agreement (QSOA) between the Part 2 program and the mental health department to share Part 2 information without client consent. That is no longer possible.

If HR 3545 as amended becomes law, a Part 2 program would not have to disclose patient information without consent if it chose to continue to require it. The opponents argue that Part 2 programs will engage in dishonest and unethical acts with patient information and that to date, have only acted with honesty and integrity because Part 2 prevented them from deviating. Having dealt with Part 2 programs and clinicians, I know that nothing could be further from the truth and that Part 2 providers are honest, trustworthy, and act with integrity.

Today, a patient cannot share their SUD treatment information freely in an HIE or ACO because consent and re-disclosure requirements imposed under Part 2 are too restrictive. This artificial barrier prevents fully-integrated healthcare for patients wishing to include their SUD treatment information. Any person, whether suffering from mental illness, diabetes, a SUD or multiple co-occurring conditions, should be able to share his or her health information with their healthcare providers, regardless of diagnosis, if they so desire.

The Bill as amended would apply the breach notification requirements of HIPAA to all Part 2 programs. The breach notification provisions will provide additional compliance and enforcement opportunities to ensure patient information is protected.

Since the compliance date of the Privacy Rule in April 2003, OCR has received over 173,426 HIPAA complaints and has initiated over 871 compliance reviews. To date, OCR has settled or imposed a civil money penalty in 53 cases resulting in a total dollar amount of $75,229,182.00.

As of this writing, the author is unaware of a single substantive enforcement action taken under Part 2. Although the Final Part 2 Rule will increase enforcement opportunities, historically it has been HIPAA that has been enforced more stringently and more effectively than Part 2.

Conclusion

HR 3545 as amended will allow for the legitimate sharing of health information for specific treatment, payment, and health care operations purposes. The sharing of the information will only be with covered entities – those individuals and organizations that are bound by HIPAA and

must have policies and procedures in place, training for their workforce, and agreements that protect the use or disclosure of all health information. Those entities could only re-disclose SUD information to another covered entity. The substantial protections and new rights and antidiscrimination provisions in HR 3545 as amended address the concerns raised by opponents and further the goal of effective, timely, and quality integrated care.