LEGAL ACTION CENTER
Breaking Barriers. Defending Dignity.

February 6, 2025

Re: Protections Against Law Enforcement Access to Addiction Treatment Records Protected by Federal Privacy Laws

To whom it may concern:

Police, sheriffs, prosecutors, immigration, and other law enforcement officials seeking information from addiction treatment providers must understand two federal privacy laws: the Health Insurance Portability and Accountability Act (HIPAA) and the Confidentiality of Substance Use Disorder Patient Records, codified at 42 USC § 290dd-2 and implemented by regulations at 42 CFR Part 2 (herein referred to collectively as "Part 2").[1] ***These privacy laws apply equally to federal, state, and local law enforcement, including immigration enforcement agents.***

Law enforcement officials face civil and criminal penalties for using protected records in violation of Part 2.[2] Officials who know and follow the federal privacy laws are also more likely to obtain cooperation and avoid escalating a conflict with local providers, because providers face civil and criminal penalties for disclosing records in violation of HIPAA or Part 2.[3] Violations of the federal privacy laws threaten the health and safety of individuals receiving services at substance use disorder treatment programs, and may discourage individuals from seeking necessary services in the future.

HIPAA and Part 2 permit disclosures of protected health information to law enforcement officials in specific circumstances; Part 2 is generally more restrictive and therefore the applicable standard for substance use disorder treatment programs covered by both laws.[4] These privacy protections serve the important public policy goal of promoting access to healthcare services generally, and addiction treatment in particular.[5] Both providers and law enforcement must follow the federal privacy laws *even if* state law authorizes or compels a disclosure.[6]

Unconditional compliance required: Part 2 requires unconditional compliance, including in response to law enforcement requests for protected information:

> *Unconditional compliance required.* The restrictions on use and disclosure in the regulations in this part apply whether or not the Part 2 program or other lawful holder of the patient identifying information believes that the person seeking the information already has it, has other means of obtaining it, is a law enforcement agency or official or other government official, has obtained a subpoena, or asserts any other justification for a use or disclosure which is not permitted by the regulations in this part.
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> 42 CFR § 2.13(b).

Restrictions on how programs may respond to law enforcement: Programs covered by Part 2 (called "Part 2 programs"[7]) and their staff are prohibited from confirming whether an individual is a patient at the program or disclosing any other patient-identifying information to law enforcement, unless one of the following applies:

1. The patient signs a written consent authorizing the disclosure, *see* 42 CFR § 2.31;
2. Law enforcement has obtained a Part 2-specific court order signed by a judge, *see* 42 CFR Part 2, subpart E; or
3. The program is making a report of a crime on program premises or against program personnel, *see* 42 CFR § 2.12.

***There are no exceptions for subpoenas, search warrants, arrest warrants, or law enforcement inquiries related to an open investigation*.** Even if law enforcement is authorized under state law to receive information, Part 2 programs may only share patient-identifying information if one of the three circumstances above applies. Even if law enforcement is authorized by a valid judicial warrant to enter non-public spaces in a Part 2 program, staff cannot disclose any patient-identifying information unless one of the three circumstances above applies. Program staff who point out these restrictions are doing so because it is the law.

Restrictions on acknowledging a patient's presence: Part 2 programs may not acknowledge the presence of patients in response to an inquiry from law enforcement, absent written patient consent or a Part 2 court order:

> *Acknowledging the presence of patients: Responding to requests.*
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> (1) The presence of an identified patient in a health care facility or component of a health care facility that is publicly identified as a place where only substance use disorder diagnosis, treatment, or referral for treatment is provided may be acknowledged *only if the patient's written consent is obtained* in accordance with subpart C of this part *or if an authorizing court order is entered in accordance with subpart E of this part*. The regulations permit acknowledgment of the presence of an identified patient in a health care facility or part of a health care facility if the health care facility is not publicly identified as only a substance use disorder diagnosis, treatment, or referral for treatment facility, and if the acknowledgement does not reveal that the patient has a substance use disorder. [8]
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> 42 CFR § 2.13(c) (emphasis added).

This means that if a law enforcement official arrives at a Part 2 program to execute a valid arrest warrant and asks the program staff to identify a patient, the law only allows the program staff to respond to law enforcement inquiries in a way that does not affirmatively reveal that an identified individual has been,

or is being, diagnosed or treated for a substance use disorder.[9] For example, the program can show the law enforcement official a copy of the Part 2 regulations and advise that federal law restricts the disclosure of substance use disorder patient records, without confirming that the identified individual is, or has ever been, a patient at the program.[10]

Law enforcement obligations prior to seeking patient information: Law enforcement agencies must exercise reasonable diligence to determine whether a provider is a Part 2 program *before* seeking patient records or patient-identifying information:

> . . . Reasonable diligence means taking all of the following actions where it is reasonable to believe that the practice or provider provides substance use disorder diagnostic, treatment, or referral for treatment services:
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> (i) Searching for the practice or provider among the substance use disorder treatment facilities in the online treatment locator maintained by the Substance Abuse and Mental Health Services Administration.
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> (ii) Searching in a similar state database of treatment facilities where available.
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> (iii) Checking a provider's publicly available website, where available, or its physical location to determine whether in fact such services are provided.
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> (iv) Viewing the provider's Patient Notice or the Health Insurance Portability and Accountability Act (HIPAA) Notice of Privacy Practices (NPP) if it is available online or at the physical location.
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> (v) Taking all these actions within a reasonable period of time (no more than 60 days) before requesting records from, or placing an undercover agent or informant in, a health care practice or provider.
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> 42 CFR § 2.3(b)(1).

Exercising reasonable diligence is sufficient to protect a law enforcement official from civil or criminal liability when investigating or prosecuting the Part 2 program or person holding protected records.[11] This "safe harbor" from liability, however, does not apply when officials are investigating or prosecuting an individual patient.[12] Law enforcement officials should therefore proceed cautiously when requesting records or information from a substance use disorder treatment program.

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This is a very brief summary of the applicable federal privacy protections for substance use disorder treatment records. A copy of this letter can be found online at www.lac.org. Legal Action Center works with people throughout the country to promote better understanding of the federal privacy protections for patients in substance use disorder treatment. The information in this letter is not legal advice; contact an attorney in your state for legal advice and state-specific information.

For more information, review the following resources:

- SAMHSA, Confidentiality Regulations FAQs, https://www.samhsa.gov/about-us/who-we-are/laws-regulations/confidentiality-regulations-faqs.
- Center of Excellence for Protected Health Information, Resources Related to Law Enforcement, https://coephi.org/topic/law-enforcement/.
- Legal Action Center, Fundamentals of 42 CFR Part 2 and SUD Treatment Privacy, https://www.lac.org/resource/the-fundamentals-of-42-cfr-part-2.

Sincerely,

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[1] Other privacy laws, including state and local law, may also apply. *See generally* Seyfarth Shaw LLP, "50-State Survey of Health Care Information Privacy Laws: 2023-2024 Edition," (2023) https://www.seyfarth.com/dir_docs/publications/50-state-survey-of-health-care-information-privacy-laws-2023-2024-edition.pdf.
[2] *See* 42 USC 290dd-2(c) *and* 42 CFR § 2.3.
[3] *See* 42 USC §§ 1320d-5, 1320d-6, 290dd-2(f).
[4] For more guidance on the HIPAA Privacy Rule and disclosures to law enforcement, *see* U.S. Dep't of Health & Human Svcs., "What does the privacy rule allow covered entities to disclose to law enforcement officials," (July 23, 2004), https://www.hhs.gov/hipaa/for-professionals/faq/505/what-does-the-privacy-rule-allow-covered-entities-to-disclose-to-law-enforcement-officials/index.html; *see also* HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976 (Apr. 26, 2024), https://www.federalregister.gov/documents/2024/04/26/2024-08503/hipaa-privacy-rule-to-support-reproductive-health-care-privacy (finalizing changes to the HIPAA Privacy Rule to limit disclosures to law enforcement of protected health information potentially related to reproductive health care that was lawful under the circumstances in which it was provided; effective June 25, 2024).
[5] *See generally* 42 CFR § 2.2.
[6] *See* 42 USC § 1320d-7 *and* 45 CFR § 160.203 (general rule and exceptions for HIPAA preemption); 42 CFR § 2.20 (Part 2 relationship to state laws).
[7] *See* 42 CFR § 2.11 (definition of "Part 2 program").
[8] Note, however, that HIPAA and other privacy laws may also apply and impose restrictions on disclosures to law enforcement. *See* 45 CFR § 164.(e), (f).
[9] 42 CFR § 2.13(c)(2).
[10] *Id.*
[11] 42 CFR § 2.3(b)(1).
[12] *Id. See also* Confidentiality of Substance Use Disorder Patient Records, 89 Fed. Reg. 12,472, 12,485 (Feb. 16, 2024) ("The proposed safe harbor applies only in instances where records are obtained for the purposes of investigating a part 2 program or person holding the record, not a patient.").