FROM THE FIELD

What should we tell patients about the privacy of Their SUD records?

By William Stauffer

What do we tell clients about the privacy of their records? This is now harder to answer than ever before. There have been many changes to federal SUD privacy laws in recent years. We no longer can say with reliability that SUD records are private. In some instances, 42 CFR Part 2 (or simply Part II) records now only require initial consent. Information just flows out from there in compliance with the weaker HIPAA standard, which saw a 300% increase in data hacking or breaches (50 million Americans) in 2021. Providers are also largely unaware of their own liability when such breaches occur downstream from them as information flows out into the medical data river.

- Part II regulations historically limited record sharing for healthcare operations and business associates. HIPAA allows broader sharing with these entities than Part II. Part II now allows records to convert to HIPAA when verbally transmitted. Unlike Part II, HIPAA does not require consent.
- HIPAA records are now more easily obtained by law enforcement entities through administrative subpoenas or even written requests with no court involvement. This latter point is a result of the HIPAA Omnibus Rule, which identifies that in HIPAA both a "covered entity" and any business associate (BA) are directly subject to law enforcement access rules. Part II was created as a firewall against such actions, but no longer serve in this way when information converts to HIPAA.
- Other Part II regulatory changes now allow criminal investigations beyond the patient. They now permit access to records where crime was allegedly committed by either a patient or an individual other than the patient. These records contain a lot of highly sensitive information providers need to help people. They contain information about illegal drug use of family members and close associates as collected in patient histories. These records are now opens to fishing trips to search for illegal conduct to prosecute, which makes treatment unsafe for patients.
- In 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act. In section 3221 of the Act, the law creates an avenue for patients to consent to permit their SUD records used to be used in criminal, civil or administrative manners. There was never the case before the CARES Act. It was long recognized that clients would be coerced to allow their records to be used to prosecute them or be used civilly in divorce, child custody cases, and administratively to deny them loans and insurance benefits. The CARES Act has some protections against using the information in these ways but then creates a way around these protections by expressly permitting such uses.

As a person in long term recovery working for decades in this field, this is not just an academic matter to me. The first question I asked when I sought help decades ago was about privacy. I knew I had to talk about illegal drug use or addiction would kill me. I was assured privacy. Part II was created to ensure people like me help without fear of consequences. I have spent decades on the other side of that desk promising people that they had control over their own information, and it was safe to talk to me about illegal drug use. We can no longer be sure. We really do not know where it goes or how it is used. If we want people to seek help, it is imperative that we can look them in the eyes and be able to tell them their information is safe from misuse. Let's strengthen these protections in ways that allow access when needed but also to ensure adequate privacy.

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