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To: All BSAS Licensees and Contractors Providing Substance Use Disorder Treatment

From: Deirdre Calvert, LICSW, Director of the Bureau of Substance Addiction Services

Date: October 28, 2024

Re: 42 CFR Part 2 Requirements for Law Enforcement Seeking Patient Information/Records to Investigate or Prosecute a Patient

The purpose of this memo is to provide guidance to all Massachusetts Department of Public Health Bureau of Substance Addiction Services (BSAS) licensed/approved/contracted substance use disorder treatment programs on the requirements of 42 CFR Part 2 as they relate to law enforcement seeking to criminally investigate or prosecute a patient.

42 CFR Part 2 *Confidentiality of Substance Use Disorder Patient Records* is a federal regulation that protects the privacy and confidentiality of patients receiving substance use disorder (SUD) treatment. All federally assisted SUD treatment programs, including Licensed Alcohol and Drug Counselors (LADCs), as defined under 42 CFR Part 2.11 (“part 2 programs”), must follow the requirements of 42 CFR Part 2. This includes all BSAS-licensed/approved programs and may include BSAS-contracted programs. See 105 CMR 164.084. Patient identifying information (“PII”) and/or patient records may only be shared outside of the part 2 programs in certain circumstances.

On February 16, 2024, the US Department of Health and Human Services issued a final rule to modify 42 CFR Part 2. The regulation prohibits the use or disclosure of any part 2 record to initiate, substantiate, or investigate any criminal charges against a patient. Patient records/information may only be used for this purpose if law enforcement obtains appropriate court orders or obtains specific consent from the patient to use their records. Without consent, law enforcement officials investigating or prosecuting a patient are required to obtain appropriate

court orders to access PII or patient records from a part 2 program, covered entity, business associate, intermediary, or other lawful holder (“lawful holders”).

“Records” are broadly defined under part 2, and include “any information, whether recorded or not, created, received by, or acquired by a part 2 program relating to a patient.”¹ Without the appropriate court orders or patient consent, part 2 programs and lawful holders (including covered entities, business associates, and intermediaries) may not disclose patient records or information or allow law enforcement into patient areas for the purpose of investigating or prosecuting a patient. A part 2 program may only acknowledge the presence of an identified patient at the part 2 program if a court order authorizing disclosure is obtained or the patient signs a written consent form. If neither consent nor a court order authorizing disclosure exists, the part 2 program is prohibited from affirming the presence of a patient.²

Court Orders.

Two court orders are required to compel disclosure of PII or patient records to law enforcement officials criminally investigating or prosecuting a patient. The first is a unique order that *authorizes* the part 2 program or lawful holder to disclose patient information or records. The second is a subpoena or other similar legal mandate that *compels* disclosure.

Example 1: A program, including LADCs, or lawful holder holding part 2 records receives a subpoena for those records. The person may not disclose the records in response to the subpoena unless an appropriate court enters an authorizing order.

Example 2: An authorizing court order is issued, but the person holding the records does not want to make the disclosure. If there is no subpoena or other order compelling disclosure, that person may refuse to make the disclosure.

Court Order Authorizing Disclosure

The first kind of order that authorizes a part 2 program or lawful holder to disclose PII or records may be applied for either by the program or by law enforcement. This order and the second order may be applied for at the same time.³

If a law enforcement agency applies for a court order authorizing disclosure, the part 2 program or lawful holder must be given adequate notice of the application. The program must also be given an opportunity to appear and be heard by the court regarding the issuance of the order. The court must find that certain criteria are met before issuing a court order authorizing disclosure of patient information. These criteria include that the crime involved must be extremely serious, that the records or information disclosed will provide substantial value to the investigation or prosecution, and that law enforcement has no other way to get the information. Additionally, the court must evaluate the potential harm to the provider-patient relationship as a result of the disclosure.

¹ 42 CFR § 2.11.

² 42 CFR § 2.13(c).

³ 42 CFR § 2.65.

If a court grants an order for disclosure, it must limit disclosure and use to law enforcement officials who are responsible for the investigation or prosecution. The part 2 program or lawful holder will be expected to disclose only those parts of the record that fulfill the objective of the order.

Court Order Compelling Disclosure

Disclosure of patient information or records to law enforcement can only be *compelled* when an authorizing order has been issued, and law enforcement has obtained a subpoena or other mandating order.

Patient Consent

Consent for use and disclosure of patient records in civil, criminal, administrative, or legislative proceedings must be in compliance with 42 CFR Subpart C. The consent for this type of use or disclosure must be specific and unique and cannot be combined with a consent to use or disclose a record for any other purpose.⁴ This requirement is intended to ensure that patients are better aware of the nature of the proceedings against them and how their records may be used. Signing a separate document specific to one purpose draws attention to the consent decision and provides greater opportunity for review of the nature of the consent.

Requirements for Providers:

Providers shall ensure that each program has policies and procedures in place that guide staff through requests for patient information or records, especially the presence of law enforcement. The presence of law enforcement may be distressing for both staff and program participants; ensuring staff are knowledgeable of substance use treatment confidentiality laws and their role in upholding individual confidentiality is critical.

In addition to policies and procedures, the program shall ensure all staff, including any campus safety or security personnel, are trained in appropriate responses when information is requested or when law enforcement is present at a program. If there are identified staff designated to address these situations staff on all shifts should be aware of who those individuals are and how to reach them.

Program staff may inform and educate law enforcement officials about the confidentiality requirements of Part 2. The attached information sheet may also be provided to law enforcement officials.

Programs should seek guidance from their legal counsel when these matters arise and may benefit from involving legal counsel when developing policies and procedures for handling requests for PII or record.

Additional Resources:

<https://www.ecfr.gov/current/title-42/chapter-I/subchapter-A/part-2/subpart-B/section-2.11><https://www.ecfr.gov/current/title-42/chapter-I/subchapter-A/part-2/subpart-E/section-2.65>

⁴ 42 CFR § 2.31(d).

<https://www.lac.org/resource/the-fundamentals-of-42-cfr-part-2>