

January 31, 2023

United States Department of Health and Human Services
Office of Civil Rights
Hubert H. Humphrey Building
Room 509F
Attention: SUD Patient Records
200 Independence Avenue SW
Washington DC 20201

RE: Confidentiality of Substance Use Disorder (SUD) Patient Records

Submitted Electronically: <http://regulations.gov>

Dear Sir:

On behalf of the National Association of Social Workers (NASW), I am submitting comments on the Notice of Proposed Rule Making (NPRM) on Confidentiality of Substance Use Disorder (SUDs) Patient Records.

NASW represents more than 110,000 social workers nationwide. The association promotes professional growth and is a strong advocate for social justice policies and procedures that are aligned with our professional standards and *Code of Ethics*. Promoting high standards of practice and protecting consumer services are major association principles.

Social workers are key providers of mental health and substance use services. They assess patient's needs from a biopsychosocial perspective using a holistic approach ensuring care collaboration and coordination. NASW supports the use and disclosure of information as outlined in the proposed rule. According to the NASW Code of Ethics, the general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or others. In all instances, social workers should disclose the least amount of confidential information

necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed. Social workers are responsible for ensuring the use of and the disclosure of records do not bring harm to patients receiving services. Patients should feel safe and protected when their information is disclosed.

NASW is providing comments in the following areas:

- SUD Counseling Notes and Psychotherapy Notes
- Patients Who Lack Capacity and Deceased Patients
- Notice of Privacy Practices
- Disposition of Records by Discontinued Programs
- Minors
- Uses and Disclosures Permitted with Written Consent (proposed heading)
- Compliance Timelines

SUD Counseling Notes and Psychotherapy Notes

NASW supports the Department's consideration of adopting the Health Information Portability and Accountability Act's (HIPAA) policy on psychotherapy notes. Since SUDs are frequently a dual diagnosis with mental health disorders, it is most appropriate for SUD counseling notes to be like psychotherapy notes. Doing so would lessen the provider's burden when treating dual diagnoses by requiring the same type of notes.

We do have concerns that a separate consent requirement, if adopted, would not apply to training programs in which students, trainees or practitioners use to improve their skills in a SUD treatment environment. This conflicts with NASW *Code of Ethics* 1:03(h) which states:

“Social workers should obtain clients' informed consent before making audio or video recordings of clients or permitting observation of service provision by a third-party.”

NASW requests Health and Human Services (HHS) to consider patient's consent for educational training using audio or video recordings. In addition, NASW supports a regulatory definition of a SUD professional who is qualified to perform treatment and prepare SUD counseling notes.

Patients who Lack Capacity and Deceased Patients

NASW supports the proposal to replace the outdated term “incompetent” to “patients who lack capacity to make health care decisions” whether adjudicated or not. For payment purposes, NASW supports the addition of health plans to the list of entities to which a program may disclose records without consent. Families often request the records of deceased patients and there does not appear to be a consistent policy about this among SUD treatment centers. It would be helpful to have this matter addressed.

Notice of Privacy Practices

NASW applauds HHS for aligning SUD records and policies to HIPAA rules and the Coronavirus Aid, Relief, and Economic Security (CARES) Act for the Notice of Privacy Practice. Doing so creates consistent uniform treatment guidelines across the continuum of care and lessens provider burdens to keep abreast of several different policies for one patient.

Patients receiving treatment should be made aware of their rights, how to exercise their rights and the responsibility of the provider to protect their health information. SUD and other health records contain delicate and confidential matters that should not be shared with those who do not need them to provide treatment.

Disposition of Records by Discontinued Programs

Providing discontinued programs with the authority to destroy records is of concern to NASW. Records are important legal documents that should be maintained for the number of years required by relevant federal and state statutes and regulations, health plans and agency policies, and contracts. We request that this clarification be added to the disposition of records.

Minors

NASW supports the requirement of SUD programs to obtain appropriate consent to use or disclose records of a minor. The proposed changes also include clarification that a program director may clinically evaluate whether a minor has decision-making capacity, but not issue a legal judgement. The proposed rule does not provide the credentials of the program director. The decision-making of a minor should be made in consultation with the treatment plan team and not in isolation of the program director. When working with minors, it is imperative to understand both consent and confidentiality in individual states and jurisdictions. Further considerations should be explored regarding the refusal of consent by the minor or the guardian and how to safeguard information of minor patients, specifically those in danger.

Uses and Disclosures Permitted With Written Consent (proposed heading)

NASW applauds HHS efforts to strengthen privacy protection while improving coordination of care for those receiving treatment. Covered entities and business associates should be allowed to use and redisclose records in accordance with the standards that apply to the privacy rule. In addition, permitting programs to use, disclose, and redisclose records for treatment purposes, when the records are obtained under a written consent given once for all future uses and disclosures, would help alleviate provider burden. The expanded ability to use and disclose records would facilitate greater integration of SUD treatment information with other personal health information. NASW agrees this would improve communication and care coordination between providers and other health care systems, including the sharing of claims information. NASW also supports the sharing of records among health care entities and patients. This would provide continuity of care resulting in positive health outcomes.

Compliance Timeline

NASW supports the compliance period of 22 months. This would provide SUD programs with more than adequate time to address technology concerns when implementing the rule into their treatment facilities. NASW encourages HHS to offer robust training, webinars, and technical assistance to help social workers and other providers become familiar with the changes.

Thank you for the opportunity to provide comments and for your consideration of NASW's comments. If you have any questions, please do not hesitate to contact me at bbedney.nasw@socialworkers.org

Sincerely

Barbara Bedney

Barbara Bedney, PhD, MSW
NASW Chief of Programs

References

National Association of Social Workers (2021). *Code of Ethics of the National Association of Social Workers*. <https://www.socialworkers.org/about/ethics/code-of-ethics>