



January 31, 2023

U.S. Department of Health and Human Services

Office for Civil Rights

Attention: SUD Patient Records

Hubert H. Humphrey Building, Room 509F

200 Independence Avenue SW

Washington, DC 20201

Re: HHS-OCR-0945-AA16 Notice of Proposed Rulemaking on the Confidentiality of Substance Use Disorder (SUD) Patient Records

On behalf of the University of Wisconsin Hospitals and Clinics Authority (UW Health), we thank you for the opportunity to offer comments on HHS-OCR-0945-AA16 also known as the Notice of Proposed Rulemaking on the Confidentiality of Substance Use Disorder (SUD) Patient Records. UW Health is comprised of the academic health care entities of the University of Wisconsin-Madison. UW Health also offers a network of primary and specialty care clinics throughout south-central Wisconsin, northern Illinois, and beyond and provides access to more than 1,700 primary and specialty care physicians. All of UW Health's comments are intended to improve beneficiary access to low-cost, high-quality, evidence-based health interventions.

UW Health's Behavioral Health and Recovery Clinic provides substance use screenings, assessments, brief intervention, dual-diagnosis treatment, and referral services for eligible youth and their families. We are proud advocates of improving access to addiction services, creating a confidential, supportive environment for patients and families, and connecting families with appropriate community resources. We believe coordinating care is key to successful recovery and better outcomes. We are proud advocates of improving access, quality, and coverage for patients and hope our experience helps the Department of Health and Human Services inform their final rule.

We are pleased to offer the following comments:

Section 2.33 – Uses and disclosures permitted with written consent

We support this provision. We understand the importance of a strong consent regime within addiction treatment services, especially given the social stigma that often surrounds mental health and addiction diagnoses and services. We have worked hard to protect the confidentiality of these patients, and we already obscure more personal information within documentation than any other specialty at UW.

However, there are some situations in which sharing information makes sense and is in the best interest of the patient. For example, currently, if a patient enters our emergency department (ED) for treatment of a related to unrelated issue and is already receiving addiction services at UW, the clinicians in the ED cannot see that those records even exist unless the patient has already consented to share them. This can be a huge issue because it means clinicians cannot see current medications or other treatments the

patient may be taking as part of their addiction services therapy and which could impact their treatment plan in the ED. In addition to complicating treatment decisions, this lack of visibility can also complicate patient transitions of care through the health system- and we know that care coordination is key for successful addiction recovery.

With that in mind, we wish to voice our strong support for a single prior consent option for patients to allow all future uses and disclosures for treatment, payment, and other health care operations. As this information is shared it is our great hope that other providers and stakeholders respond positively and with compassion in order to continue protecting patients from potential stigma due to their addiction treatment.

As you continue to build out what this change would look like practically, we would greatly appreciate more information and clarity on how it would actually work in practice and whether there will be any new rules we need to abide by.

Section 2.2 – Purpose and effect

UW Health supports patients' rights to protect access to their medical records. We request that HHS clarify where the proposed restrictions would begin and end. We also wish to voice our concerns about the potential for this provision to overreach, which could compromise patient care. UW Health wants to avoid creating further administrative and operational burdens on staff and avoid managing patient data retroactively.

Section 2.23 – Patient access and restrictions on use and disclosure

UW Health wants to reiterate our concerns regarding the stigma often surrounding treatment for substance use disorders. Further, we understand the association between substance use disorder and incarceration, whether for a drug-related offense or otherwise. We are concerned that this provision may inadvertently include more patients than necessary to meet its goals. Should a person be incarcerated in Wisconsin, there is a not insignificant chance they have been seen at our facility. UW Health wants to ensure we only provide their treatment records when absolutely necessary and not simply because the patient is incarcerated.

We want to share some data at a high level:

- Adults on supervised release from jail have a rate of substance use diagnosis [approximately four times that of adults not on supervision](#).
- Newly incarcerated prisoners from communities served by hospital systems [have a 25% prevalence of any drug use disorder in men and higher in women](#).
- Any level of opioid use [is associated with involvement in the criminal justice system](#) in the past year compared with no opioid use.
- Pregnant incarcerated women with opioid use disorder in the United States [frequently appear to be denied essential medications and receive substandard medical care](#).

UW Health wants to voice its concerns that patients may be less likely to seek life-saving care if it increases the chance that their private health information may be shared with law enforcement without their consent. We want to reiterate that the stigma of substance use disorders is incredibly polarizing and should not discourage patients from seeking care or contributing to their incarceration.

Section 2.65 – Procedures and criteria for orders authorizing use and disclosure of records to criminally investigate or prosecute patients

As discussed previously, UW Health is dedicated to reducing stigma in addiction treatment where possible. We strongly support stricter prohibitions on using and disclosing Part 2 records in civil, criminal, administrative, and legislative proceedings conducted by a federal, state, or local authority against a patient without a court order or patient consent. Weaker protections on these disclosure requirements could create a higher likelihood of adverse action against patients during these proceedings. We request that HHS create a standard for releasing addiction treatment records for court orders to avoid releasing too much information. UW Health encourages HHS to continue considering the stigma that comes with this disease and protecting patients through meaningful regulatory updates.

Section 2.66 – Procedures and criteria for orders authorizing use and disclosure to investigate or prosecute a part 2 program or the person holding the records

We understand the need to ensure that programs are operating to the highest standards under the law and support efforts to increase transparency. However, we have seen attempts to create so-called “bounty” systems whereby whistleblowers would be paid a portion of penalties under HIPAA and the HITECH Act. We are concerned that these schemas encourage baseless reporting and complaints that can take up the time and energy of staff already operating at high levels with few resources.

We believe transparency and whistleblowers are important to protect patients from fraud and abuse, but UW Health wants to ensure physicians report genuine complaints. We urge you to reject any request of a “bounty” based program.

Further, we respectfully request that you consider a narrower definition of “investigative agency,” which, as written, includes “A state or federal administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the activities of a part 2 program or other person holding part 2 records.” By creating a definition of an investigative agency, the Department aims to establish a limitation on liability for such agencies in certain circumstances when these regulations otherwise require a court order.”

Section 2.64 – Procedures and criteria for orders authorizing uses and disclosures for noncriminal purposes

The rule proposes to “amend the heading and insert requirements consistent with those applicable to HIPAA complaints under 45 CFR 164.530(d), (g), and (h), including a requirement to establish a process for the Part 2 program to receive complaints, a prohibition against taking **adverse action** against patients who file complaints, and a prohibition against requiring individuals to waive the right to file a complaint as a condition of providing treatment, enrollment, payment, or eligibility for services.” UW Health respectfully requests a clear definition for “adverse action” in this situation so we can abide by the regulation in good faith. When we release records per court order, we don’t want to potentially discourage people from seeking treatment for future medical needs.

Thank you again for the opportunity to provide comments on this proposed rule. We look forward to continuing to collaborate with HHS on this critical issue. For any questions or to request more information, please contact Michelle Seger at mseger@vennstrategies.com.

Sincerely,

A handwritten signature in black ink that reads "A. Grey". The signature is written in a cursive, flowing style.

Aaron Grey, MBA, MSW, LICSW
Senior Director of Behavioral Health
UPH and UWH Joint Venture