April 19, 2018

Representative Greg Walden, Chair
U.S. House of Representatives
Energy and Commerce Committee
2185 Rayburn House Office Building
Washington, DC 20515

Representative Frank Pallone, Jr., Ranking Member
U.S. House of Representatives
Energy and Commerce Committee
237 Cannon House Office Building
Washington, DC 20515

Opposition to H.R. 3545 “Overdose Prevention and Patient Safety Act” and Support for Preserving and Improving Medical Confidentiality for People Receiving Treatment for Substance Use Disorders

Dear Chair Walden and Ranking Member Pallone:

National Advocates for Pregnant Women (NAPW), a non-profit organization advocating for the health and rights of pregnant women, opposes H.R. 3545, the “Overdose Prevention and Patient Safety Act.” H.R. 3545 would eliminate key confidentiality protections in the Confidentiality of Substance Use Disorder Records regulations, 42 C.F.R. Part 2 (“Part 2”). These privacy protections are essential to public health efforts to engage people in life-saving treatment for substance use disorder (“SUD”). Without these protections, people will be deterred from seeking this important health care and will have devastating health consequences. In fact, experience under the existing regulations demonstrate the need to both preserve and enhance the protections of Part 2.

Alternative methods of protecting the privacy of patients with SUD – such as relying on HIPAA, relying on medical ethics guidelines, and relying on health care workers being trained and knowledgeable about SUD and what they may and may not report – simply do not work. NAPW’s peer-reviewed research documented hundreds of cases in which women have been charged with crimes or otherwise punished (e.g. detained, jailed, forced into treatment that is not warranted) in relationship to pregnancy and alleged current or former drug use (including
prescribed medications). Approximately 25% of the pregnant women subject to arrest for crimes including fetal assault, attempted feticide, chemical endangerment of a child, delivery of drugs to a minor via the umbilical cord, and criminal child abuse between 1973 and 2005 were initially reported to law enforcement by doctors and other health care providers, who made those disclosures despite their clear legal and ethical obligations to maintain patient privacy. Since 2005, there have been more than 800 new arrests and detentions, many based on reports from health care providers to police and other public officials. Such reports are not necessarily mandated by any law, violate principles of medical ethics and are contrary to the positions of every leading medical group addressing issues involving pregnant women and drug use.

For example, health care providers in South Carolina played a primary role in reporting pregnant patients who tested positive for certain drugs to police. The U.S. Supreme Court eventually found these violations of patient privacy to be unconstitutional. Even so, similar violations of patient privacy, particularly of pregnant women, are all too common.

- Since 2006, Alabama health care providers have reported hundreds of pregnant patients who come to them for medical help to law enforcement officials because of suspected drug use.

- Jamie Lynn Russell went to an emergency room in Oklahoma in such debilitating pain that she was unable to move. Because her excruciating pain prevented her from lying down for an examination, hospital staff labeled her “noncompliant,” and called the police. The police discovered that she had two pain pills that weren’t hers. Still in pain, she was released by the hospital as “fit to incarcerate,” arrested for drug possession, and taken to jail, where she died two hours later from a ruptured ectopic pregnancy.

Pregnant women’s experiences when they have specifically sought drug treatment not only demonstrate the continued need for the confidentiality protections of Part 2 but also the need to strengthen it.

- When Rachael Lowe was pregnant in Wisconsin and sought help for her opioid dependency problem, hospital staff failed to ensure her confidentiality. Instead they reported her to state authorities. The result was to undermine medically appropriate interventions that were being put into place; she was, instead, taken into custody by

---

1 https://read.dukeupress.edu/jhpl/article/38/2/299/13533/Arrests-of-and-Forced-Interventions-on-Pregnant
2 https://thinkprogress.org/criminalization-pregnancy-us-43e4741bb514/
3 Ferguson v. City of Charleston, 532 U.S. 67 (2001)
4 https://www.propublica.org/article/when-the-womb-is-a-crime-scene
5 https://rewire.news/article/2013/01/14/dehumanizing-pregnant-women-leads-to-real-loss-life/
police, locked in a mental hospital, put on dangerous medications, and left without prenatal care⁶.

- In New York, a pregnant woman’s past treatment for alcoholism was released to state authorities in violation of federal confidentiality protections and used by a prosecutor to support criminal charges against her⁷.

- A Massachusetts public health department policy supports health care providers reporting pregnant women who are receiving SUD treatment – the treatment recommended and supported by the U.S. Substance Abuse and Mental Health Services Administration and the World Health Organization – to the state child welfare agency⁸.

- NAPW recently learned of a South Dakota SUD treatment facility that routinely shares drug test results with law enforcement. Those results are then used to support criminal drug possession charges based on prior use.

Every major medical and public health group in the United States, including the American Medical Association, the American College of Obstetricians and Gynecologists, and the American Academy of Pediatrics, supports measures that encourage people to get SUD treatment when needed and opposes measures such as reporting and punishment, precisely because they deter people from seeking help⁹.

For these reasons, NAPW opposes H.R. 3545 and instead supports legislative action that is critical to preserving patient confidentiality and coordinating care between various health care providers. Among these are:

- The Senate’s bipartisan “Opioid Crisis Response Act of 2018,” providing model programs and materials for training health providers and compliance staff on the permitted uses and disclosures of substance use disorder information, and for training family members and patients on their rights to protect and obtain substance use disorder information.

- H.R. 3331, providing needed incentive payments to SUD and behavioral health providers to obtain certified electronic health record technology.

---

• Amending 42 U.S.C. §290dd-2 and Part 2 to provide a private right of action for patients whose SUD information has been improperly disclosed in violation of the federal drug treatment confidentiality law.

• Amending 42 U.S.C. §290dd-2 and Part 2 to clarify that the reporting provision for suspected child abuse and neglect does not create a sex-discriminatory exception to confidentiality protections for pregnant women or new mothers.

Patients in SUD treatment must retain the power to decide when and to whom their records are disclosed.

Respectfully submitted,

[Signature]

Lynn M. Paltrow, Executive Director
Nancy Rosenbloom, Director of Legal Advocacy