13.4 Medical, Mental Health, and Substance Abuse Records Protection (HIPAA and 42 C.F.R. Part 2)

Note: Content for this section is an adaptation of an outline written by Mark Botts of the University of North Carolina School of Government, with the author's permission.

A. Connection between Federal Law Records Protection and Juvenile Proceedings

Medical, mental health, and substance abuse records of parents, children, or caregivers are often relevant to the child protective assessment process as well as decisions made throughout juvenile proceedings. Although state laws give certain individuals and agencies access to confidential information for the purpose of child protection and juvenile proceedings, access to and disclosure of the records addressed in this section are also subject to federal law restrictions. See *supra* § 5.8.C for an explanation of access to and disclosure of information in juvenile proceedings under state law.

B. HIPAA[1] Privacy Rule—45 C.F.R. Parts 160, 164[2]

The federal "privacy rule"[3] (HIPAA) governs the privacy of health information.

1. Covered health care providers. This includes any "health care provider" that transmits any health information in electronic form in connection with a HIPAA transaction.[4] "Health care provider" is defined broadly to include any person or organization that, in the normal course of business, furnishes, bills, or is paid for care, services, or supplies related to the health of the individual.[5]

2. Protected health information. This includes health information that is maintained in any form or medium (e.g., electronic, paper, or oral) that

- is created or received by a health care provider, health plan, employer, or health care clearing house;
- identifies an individual (or with respect to which there is a reasonable basis to believe the

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[1]. "HIPAA" stands for The Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936, codified in part at 42 U.S.C. §§ 1320d to 1320d-8. This act directed the U.S. Department of Health and Human Services to develop regulations governing the privacy of health information.

[2]. Jill Moore of the University of North Carolina School of Government also provided input for this subsection.

[3]. The term "privacy rule" in this [chapter] refers to the final rule published in 67 Fed. Reg. 53,181 (Aug. 14, 2002), with modifications published in 78 Fed. Reg. 5566 (Jan. 25, 2013).

[4]. 45 C.F.R. §§ 160.103, 164.500. "Transaction" means the transmission of information between two parties to carry out financial or administrative activities related to health care. Examples of HIPAA transactions include transmitting claims information to a health plan to obtain payment and transmitting an inquiry to a health plan to determine if an enrollee is covered by the health plan.

[5]. 45 C.F.R. § 160.103. This includes (1) preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and (2) sale or dispensing of a drug, device equipment, or other item in accordance with a prescription. For definitions of "health care provider" and "health care," see 45 C.F.R. § 160.103.

information can be used to identify an individual); and

- relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.[6]

3. Duty to comply with HIPAA. A covered entity, including a covered health care provider, may use and disclose protected health information only as permitted or required by the privacy rule. Failure to comply with HIPAA may result in civil monetary penalties. *See* 45 C.F.R. § 160.402. Any person or organization may file a complaint regarding HIPAA violations.

4. Impact on abuse and neglect laws.

(a) Permissible disclosure. The HIPAA privacy rule permits a covered provider or other covered entity to disclose protected health information to a government authority authorized by law to receive reports of child abuse or neglect. *See* 45 C.F.R. § 164.512(b). Thus, the privacy rule permits a covered provider to disclose protected health information when making a report required by the state reporting law, G.S. 7B-301. The privacy rule also permits a covered provider to disclose protected health information to the extent the disclosure is required by law. *See* 45 C.F.R. § 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to DSS when that department demands the information pursuant to G.S. 7B-302 or to the guardian ad litem as necessary to comply with G.S. 7B-601.

(b) Disclosure pursuant to subpoena and court order. The privacy rule permits a covered entity to disclose protected health information in response to a subpoena if certain circumstances apply. *See* 45 C.F.R. § 164.512(e)(1)(ii). However, because HIPAA does not preempt more stringent state and federal confidentiality laws, and because the state mental health confidentiality law and federal substance abuse records law do not permit disclosure in response to a subpoena alone, information governed by the state mental health law or federal substance abuse records law cannot be disclosed pursuant to a subpoena alone. Information that is subject to the state communicable disease confidentiality law may be disclosed pursuant to a subpoena, but the subject of the information may request that the information be reviewed in camera before it is disclosed.[7] A covered provider may disclose protected health information in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by the order. 45 C.F.R. § 164.512(e)(1)(i). The GAL's appointment order from the court specifically provides for the release of confidential information, including information subject to HIPAA, to the GAL. *See* AOC

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[6]. See the definitions of "protected health information" and "individually identifiable health information" at 45 CFR § 160.103. The privacy rule excludes from the definition of "protected health information" certain records, including education records covered by the Federal Educational Rights and Privacy Act and employment records held by a covered entity in its role as employer.

[7]. G.S. 130A-143. The communicable disease confidentiality law applies to information identifying an individual with a reportable communicable disease, including HIV and sexually transmitted diseases. The complete list of diseases covered by the law is at 10A N.C.A.C. 41A.0101.

Form AOC-J-207, "Order to Appoint or Release Guardian ad Litem and Attorney Advocate" (June 2014).

Resource and Tool: For a detailed guide to HIPAA, see OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SUMMARY OF THE HIPAA PRIVACY RULE (2003).

C. Federal Substance Abuse Records Law—42 C.F.R. Part 2

Federal substance abuse records laws restrict the use and disclosure of patient information received or acquired by a federally assisted alcohol or drug abuse program. (42 U.S.C. § 290dd-2; 42 C.F.R. pt. 2).

1. Covered programs: To be covered by 42 C.F.R. part 2, a provider must meet the definition of "program" and must be "federally assisted."[8] "Program" means an individual or entity, other than a general medical care facility, that holds itself out as providing, and does provide, alcohol or drug abuse diagnosis,[9] treatment,[10] or referral for treatment. Patient records maintained by a general medical facility, such as a hospital, are not covered unless the patient receives treatment, diagnosis, or referral for treatment from

a. a specialized drug or alcohol abuse unit of the hospital or medical center, or
b. medical personnel or other staff whose primary function is to provide services for alcohol or drug abuse.

Practice Note: If a hospital emergency room treating a trauma patient performs a blood test that identifies cocaine or other drugs in the patient's blood, the hospital emergency room is not a "program" covered by the regulations and, therefore, the drug test results are not protected by 42 C.F.R. Part 2. If, however, a substance abuse counselor evaluates the same patient for drug abuse after he or she is admitted to a medical floor of the hospital, then the substance abuse counselor would be considered a "program" under b., above, and any information acquired by the counselor that falls within the scope of 2., below, would be governed by 42 C.F.R Part 2. If the hospital emergency room provides detoxification services, then the detox unit of the hospital emergency room would be considered a

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[8]. See 42 C.F.R. 2.12(b) for definition of "federal assistance."

[9]. "Diagnosis" means any reference to an individual's alcohol or drug abuse, or to a condition identified as having been caused by that abuse, which is made for the purpose of treatment or referral for treatment. "Diagnosis" is not limited to the work of medical personnel. A substance abuse evaluation or assessment carried out by a drug counselor or drug court coordinator that identifies alcohol or drug abuse and is made for the purpose of treatment or referral for treatment is a "diagnosis." Thus, the term "program" covers not only treatment programs, but also individuals or entities that diagnose and refer a person to treatment at another program. On the other hand, a "screen" or "prescreen" procedure to identify persons who *may* have alcohol or drug problems for the purpose of referring them to an alcohol or drug specialist for evaluation or assessment is not a "diagnosis." In this instance, the information gathered in the screening process does not constitute a diagnosis and the screening agency is referring individuals for an assessment, not treatment. Therefore, the screening agency is not a program covered by 42 C.F.R. part 2.

[10]. "Treatment" is not limited to care provided by medical personnel under a medical model and can include individual or group counseling.

"program" under a., above.

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2. Confidential information. The federal prohibition against disclosure[11] applies to any information, whether recorded or not, that:

- would identify a "patient"—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as an alcohol or drug abuser;
- is alcohol or drug abuse information obtained by a federally assisted alcohol or drug abuse program; and
- is for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

"Identify" means a communication, either written or oral, of information that identifies someone as a substance abuser, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

Practice Note: Suppose a child protective services worker investigating a report of child neglect requests access to a child's mental health record. The family/social history section of the child's record states that the mother, during an interview with the child's mental health counselor, disclosed that she abuses cocaine. This information is not covered by 42 C.F.R Part 2, because it was not obtained for the purpose of treating or diagnosing the mother or referring her for treatment. The information also would not identify the mother as a person who applied for or received substance abuse treatment.

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3. Duty imposed by federal substance abuse records law. The regulations prohibit the disclosure and use of patient records except as permitted by the regulations themselves. Anyone who violates the law is subject to a criminal penalty in the form of a fine (up to $500 for first offense, up to $5,000 for each subsequent offense).[12]

4. Impact of 42 C.F.R. part 2 on abuse and neglect laws.

(a) Disclosure permissible only for reporting or by consent or court order. The restrictions on disclosure and use in the federal regulations do not apply to the reporting under state law of incidents of suspected child abuse and neglect to appropriate state or local authorities. 42 C.F.R. § 2.12(c)(6). Therefore, the federal law does not bar complying with the reporting law in G.S. 7B-301, even if it means disclosing patient identifying information.

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[11]. In addition to restricting disclosure, the federal regulations restrict the "use" of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient. This restriction on use applies to any information whether or not recorded that is substance abuse information obtained by a federally assisted substance abuse program for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment.

[12]. A substance abuse program must maintain records in a secure room, locked file cabinet, safe or other similar container when not in use; the program must adopt written policies and procedures to regulate and control access to records. *See* 42 C.F.R. § 2.16.

Although substance abuse programs (or third party payers who have received information from substance abuse programs) must make a report of suspected abuse, neglect, or dependency mandated by G.S. 7B-301, they are not authorized to provide information beyond the initial report when DSS requests further information pursuant to G.S. 7B-302 or when the GAL requests information pursuant to G.S. 7B-601. The federal rules permit disclosure of patient-identifying information for follow-up investigations or for court proceedings that may arise from the report only with the patient's written *consent* or a *court order* issued pursuant to Subpart E of the federal regulations. 42 C.F.R. § 2.12(c)(6) "[N]o State law may either authorize or compel any disclosure prohibited by these regulations." 42 C.F.R. § 2.20.

(b) Court order requirements. A person holding records may not disclose the records in response to a subpoena unless a court of competent jurisdiction enters an authorizing order under Subpart E of 42 CFR part 2 (or the regulations explicitly make an exception to confidentiality under the circumstances). Under Subpart E, a federal, state, or local court may authorize a substance abuse program to make a disclosure that would otherwise be prohibited under the regulations, but only in certain circumstances. *See* 42 C.F.R. § 2.64. A permissible circumstance for court orders arising in the context of juvenile proceedings is when the order for disclosure is necessary to protect against an existing threat to life or serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties.

When the information is sought for non-criminal purposes, the patient and program must be notified and given an opportunity to file a written response or appear in person to address the request for court ordered disclosure. The judge may examine the records before making a decision. This inspection must be *in camera*. To order disclosure, the court must find "good cause" for the disclosure. This means that the court must determine that there is no other effective way to obtain the information and that the public interest and need for disclosure outweigh the potential injury to the patient, the patient's relationship to the program, and the program's ongoing treatment services. Any order authorizing disclosure must (i) limit disclosure to parts of the record essential to fulfill the purpose of the order, (ii) limit disclosure to persons who need the information, and (iii) protect the information from disclosure to others by sealing portions of the public record in the case.

(c) Consent requirements (42 C.F.R. § 2.31). A written consent to a disclosure under these regulations must include:

(1) The specific name or general designation of the program or person permitted to make the disclosure.
(2) The name or title of the individual or the name of the organization to which disclosure is to be made.
(3) The name of the patient.
(4) The purpose of the disclosure.
(5) How much and what kind of information is to be disclosed.

(6) The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under 42 C.F.R. § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under 42 C.F.R. § 2.15 in lieu of the patient.
(7) The date on which the consent is signed.
(8) A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.
(9) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

5. Relationship of federal substance abuse law to state law. No state law may authorize or compel any disclosure that is prohibited by the federal drug and alcohol confidentiality law. Where state law authorizes or compels disclosure that 42 C.F.R. pt. 2 prohibits, 42 C.F.R. pt. 2 must be followed. 42 C.F.R. § 2.20. The federal drug and alcohol confidentiality law does not require disclosure under any circumstances. If the federal law permits a particular disclosure, but state law prohibits it, the state law controls. 42 C.F.R. § 2.20.