

Confidentiality of Substance Abuse Patient Records

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Topics

- Applicable Laws
 - What programs are covered?
 - What information is protected?
- Relationship of federal law to state law
- Tools for Accessing SA Records
 - Court order to disclose
 - Patient consent to release

Confidentiality Laws and the Programs and Information They Cover

Applicable Confidentiality Laws

- State law governing MH/DD/SA providers—GS 122C
- Federal law governing health care providers—45 CFR (HIPAA Privacy Rule)
- Federal law governing substance abuse programs—42 CFR Part 2

Each confidentiality law:

- Defines the providers that it governs
- Defines information it protects
- Permits providers to disclose information in certain situations
- Requires providers to disclose information in certain situations
- Imposes penalties for unauthorized disclosures

State Mental Health Law— GS 122C—Covered Facilities

- Any person, business, or agency at one location whose primary purpose is to provide services for mental illness, developmental disabilities, or substance abuse

State Mental Health Law— Confidential Information

- Any information, whether recorded or not, relating to an individual served by a facility and received in connection with the performance of any function of the facility.
- Does not include info regarding treatment or services that is shared for training, treatment, or monitoring purposes that does not identify clients either directly or by reference to publicly known or available information

Privacy Rule—Covered Health Care Providers

- Any health care provider that transmits any health information in electronic form in connection with a HIPAA “transaction”
- 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

Privacy Rule—Protected Health Information

- PHI is any information
 - created or received by a health care provider or other covered entity
 - that identifies an individual and
 - that relates to the
 - physical or mental health of an individual,
 - the provision of health care to an individual, or
 - payment for the provision of health care to an individual

42 CFR Part 2—Covered Programs

- Any person or organization that specializes in substance abuse diagnosis, treatment, or referral for treatment with federal financial assistance. This includes:
 - Most, if not all, area authorities (local management entities of LMEs)
 - Programs providing substance abuse services to LME clients
 - Programs providing only diagnosis and referral for treatment

42 CFR Part 2—Covered Information

- Applies to information
 - that would identify a “patient”—one who has applied for or received SA services—as a substance abuser and
 - is substance abuse information obtained by a covered program
 - for the purpose of treating substance abuse, making a diagnosis for that treatment, or making a referral for that treatment

Relationship of Federal Substance Abuse Law to State Law

State Law—GS 122C-54(h)

- Requires disclosure for purposes of complying with other state laws requiring disclosure:
 - Child protective services laws
 - Adult protective services laws
 - Other state laws, e.g., communicable disease laws
- Requires disclosure as required by federal law

Privacy Rule—45 CFR 164.512(a)

- Permits a disclosure without an individual's permission when the disclosure is required by law
- "Required by law" means a mandate in law that compels a covered entity to make a use or disclosure of PHI and that is enforceable in a court of law

Federal Substance Abuse Law—42 CFR Part 2

- 42 CFR 2.12(c)(6) and 2.15(b) permit programs to disclose patient identifying information when necessary to comply with state law
 - requiring the reporting of child abuse or neglect, or
 - permitting or requiring inquiry into the cause of death
- There is no general provision that permits disclosure when otherwise required by law

Federal Substance Abuse Law—42 CFR Part 2

- Does not permit the disclosure of confidential information for purposes of complying with CPS investigation statutes, APS reporting and investigation statutes, or child fatality prevention statutes
- No state law may authorize or compel any disclosure prohibited by the federal substance abuse records law 42 CFR 2.20

42 CFR Part 2—Covered Information

- Applies to information
 - that would identify a “patient” as a substance abuser and
 - is substance abuse information obtained by a covered program
 - for the purpose of treating substance abuse, making a diagnosis for that treatment, or making a referral for that treatment

42 CFR Part 2—Covered Information—“Patient”

- An individual who has applied for or been given diagnosis or treatment for substance abuse
- Includes one who, after arrest on a criminal charge, is identified as a substance abuser in order to determine eligibility to participate in a program

42 CFR 2 Case Study # 1

The identity of the parent or family member and the information about substance abuse is not covered by the federal rules because (1) the parent or family member is not a "patient" and (2) the information about his or her substance abuse was not obtained for the purpose treating substance abuse, making a diagnosis for treatment, or making a referral for that treatment

42 CFR 2 Case Study # 2

The federal rules would apply to restrict the disclosure of any information that would identify the parent as a drug or alcohol abuser or a recipient of alcohol or drug services. The information identifies the parent as a "patient" and was likely obtained, at least initially, for the purpose treating, diagnosing, or referring for treatment .

Court Orders

Subpoena

- A subpoena, alone, does not permit disclosure of MH/DD/SA information
- Disclosure is not permitted unless
 - A court orders disclosure
 - The client consents to disclosure, or
 - The applicable confidentiality law explicitly makes an exception to confidentiality

Court Order—122C-54(h)

- A facility must disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure.
- The statute does not express the procedure or criteria the court must use before issuing an order.

Privilege Statutes

- Sections 8-53, 8-53.3, 8-53.7, and 8-53.8 of the North Carolina General Statutes protect from disclosure any information which a physician, psychologist, social worker, or counselor acquires in rendering professional services and which information is necessary to enable the person to render his or her professional services.

Court Order—Evidentiary Privileges

- A court may compel disclosure of privileged information if, in the court's opinion, disclosure is “necessary to the proper administration of justice”

Court Order—HIPAA—45 CFR 164.512(e)

- HIPAA permits a provider to disclose protected health information in response to an order of a court or administrative tribunal
- The privacy rule makes no mention of any procedure or standard that a court must follow when issuing a court order

Court Order—SA Records

- Patient and provider must be given notice and opportunity to respond
- Judicial review of records must be *in camera*
- Court must find “good cause” for disclosure
- Court must limit disclosure to essential parts of record and to persons who need the information

“Good Cause” for non-criminal purposes means:

- Other ways of obtaining the information are not available or would not be effective
- The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient privilege, and the treatment services. 42 CFR 2.64

“Good Cause” for criminal purposes—must also find

- The crime involved is extremely serious, e.g., one that causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, child abuse and neglect
- There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution

Court Orders—Confidential Communications

- Cannot order disclosure of “confidential communications” made by patient to program unless the disclosure is
 - necessary to protect against an existing threat to life or serious bodily injury (circumstances that constitute suspected child abuse/neglect and verbal threats against third parties),
 - necessary to the investigation of an extremely serious crime, or
 - the patient has already offered evidence about confidential communications. 2.63

Patient Authorization to Disclose

Patient Authorization

- Must be in writing
- Must contain the elements prescribed by the applicable law or laws
- Must be signed by the person with authority to consent to disclosure
- Redisclosure is prohibited except as authorized in the consent form

Authorization Must Be Informed

- The individual signing the authorization to disclose information must understand what information will be disclosed, with whom it will be shared, and for what purpose
- Any disclosure by a provider must be consistent with the terms of the authorization—the provider is bound by statements in the authorization

Authorization Must Be Voluntary

- An individual may, in writing, revoke an authorization at any time except to the extent that the provider has taken action in reliance on the authorization
- Exception: Federal SA law provides for a “criminal justice system referral” consent that is irrevocable. 42 CFR 2.35

Criminal Justice Referrals

- Criminal justice consent form is only irrevocable if it specifies that it is irrevocable and for what period of time
- The duration of the consent can be linked to the final disposition of the criminal proceeding, rather than duration of treatment. This allows programs to provide info after the client leaves treatment.

Reporting patient “no-show” to probation officer

Virginia was mandated into drug treatment as a condition of probation. She calls the ABC treatment program to make an appointment for intake but never shows up. The PO calls ABC to see if she showed up. ABC looks into her file, but there is no consent authorizing disclosure. ABC tells the PO that federal law prohibits ABC from confirming or denying whether Virginia is a patient unless the PO has a consent form from Virginia. PO says that since Virginia has been mandated into tx., ABC must report about her attendance.

Reporting patient “no-show” to probation officer

- Are Virginia’s records protected by the federal confidentiality law?
- Would it have made a difference if the PO had made the appointment for Virginia?
- Can the court issue an order to authorize the program to release the information?
 - Is the probation violation an extremely serious crime?