Confidential MH/DD/SA Service Records: The Legally Responsible Person

County and DSS Attorneys' 2011 Summer Conference, Sheraton Atlantic Beach

Mark Botts, UNC School of Government

July 21, 2011

I. Introduction: A client of MH/DD/SA services has the right to consent to treatment, access client records, and authorize the disclosure of client records. When a client is legally or clinically unable to exercise these rights, they must be exercised by someone else. In some circumstances, this may be the department of social services where the department is a "legally responsible person."

A. State Mental Health Law—the Legally Responsible Person. Except where the law provides otherwise, whenever in G.S. Chapter 122C the phrase "client or his legally responsible person" is used, and the client is a *minor* (a person under 18 years of age) or an *incompetent adult* (a person judged by a court to be incompetent), the duty or right involved shall be exercised not by the client, but by the "legally responsible person"[1] (defined and discussed in Section II, below).

B. HIPAA Privacy Rule—the Personal Representative. The right to access and to disclose records must be executed by the individual who is the subject of the information (the patient) or the patient's "personal representative." HIPAA generally defines "personal representative" as the person authorized by state law to act on behalf of a minor or an incompetent adult in making decisions related to health care.[2] Therefore, where the "legally responsible person" has authority under state law to act on behalf of a minor or adult, he or she also has the authority to act as the individual's "personal representative" for purposes of the Privacy Rule.

1. One exception is that where a minor's legally responsible person assents to an agreement of confidentiality between the health care provider and a minor regarding a health service, the HIPAA Privacy Rule provides that the minor's legally responsible person must not be treated as a personal representative with respect to protected health information pertaining to that service.
2. In some cases involving abuse, neglect, or endangerment of the individual, a covered entity may choose not to treat a person who would normally be a personal representative as such. See "Materials Related to Specific Privacy Rule Provisions" http://www.sog.unc.edu/programs/medicalprivacy/resources_iogMRSPRP.htm "Personal Representatives" (updated 2008)

C. 42 C.F.R. Part 2. The federal regulations governing substance abuse patient records do not provide a patient right of access to records, but do regulate the question of who may sign a written authorization for the disclosure of records. This is addressed in Part V, below.

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[1] G.S. 122C-4.

[2] 45 CFR 164.502(g).

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II. Legally Responsible Person.

A. Adults. The term "legally responsible person" [3] means

1. When applied to an adult who has been adjudicated incompetent, a person appointed as a guardian of the person or general guardian by the court.

2. When applied to an adult who has *not* been adjudicated incompetent but who currently lacks sufficient understanding or capacity to make and communicate mental health treatment decisions, a health care agent named pursuant to a valid health care power of attorney as prescribed in Article 3 of GS Chapter 32. Decisional incapacity must be determined by a physician or eligible psychologist.[4]

B. Legally Responsible Person for Minors. When applied to a minor, the term "legally responsible person" means a parent, a guardian, a person standing in loco parentis, or a legal custodian other than a parent who has been granted specific authority by law or in a custody order to consent for medical care, including psychiatric treatment.[5]

1. **Parent** means the biological or adoptive mother or father of a minor.
   - Separation or divorce: Whenever parents are legally separated or divorced or have never been married, the "parent" legally responsible for the minor shall be the "parent" granted custody or either parent when joint custody has been granted.[6]
   - Special rule for right to access records: Absent an order of the court to the contrary, each parent has equal access to the records of the minor child involving the health, education, and welfare of the child.[7]

2. **Guardian:** a person appointed as a guardian of the person or general guardian by the court under Chapters 7A or 35A or former Chapters 33 or 35 of the General Statutes**.**

3. **Person Standing in Loco Parentis** means one who has put himself in the place of a lawful parent by assuming the rights and obligations of a parent without formal adoption.[8]

   a. Case-specific. Whether such a relationship exists in a particular circumstance depends on the facts of the particular case, and all of the relevant facts and surrounding circumstances must be considered.
   b. Intent. A person stands in loco parentis only when the person *intends* to assume the status of a parent by taking on the obligations incidental to parenthood, particularly support and maintenance. [9] Intent to assume parental status can be inferred by a

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[3] See G.S. 122C-3(20) for statutory definition of "legally responsible person."
[4] GS 122C-72(4).
[5] G.S. 122C-3(20).
[6] 10A NCAC 26B .0103 (b)(9).
[7] G.S. 50-13.2.
[8] 10A NCAC 26B .0103 (b)(10).
[9] *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809 (1980).

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person's actions and declarations.[10] Because the relationship exists at the will of the party assuming the obligations of parent, it may be abrogated at any time.

c. Other factors. No statute or court decision in North Carolina has set forth a comprehensive or exclusive set of factors that should be assessed in every case. However, factors that have been recognized as relevant to a determination of whether a party stands *in loco parentis* are
   - the age of the child;
   - the degree to which the child is dependent on the person claiming to be standing in loco parentis;
   - the amount of support, if any, provided;
   - the extent to which duties commonly associated with parenthood are exercised;[11]
   - the amount of time the child has lived with the person; and
   - the degree to which a "psychological family" has developed.

4. **Legal custodian** granted specific authority by law or in a custody order**:** When a district court finds that a child is abused, neglected, or dependent, the judge may remove the child from the custody of the parent or person who has legal custody and place the child in the custody of another person or agency, usually the local department of social services. The agency is then responsible for making arrangements for the child's care. In this situation, DSS may, but not necessarily, be considered "a legal custodian other than a parent who has been granted specific authority by law or in a custody order to consent for medical care, including psychiatric treatment."

   a. Legal custodian granted specific authority in a **custody order**: If, in a custody order, the judge specifically authorizes the legal custodian to consent to medical and psychiatric care, then the legal custodian is a legally responsible person for purposes of G.S. 122C. Thus, if there exists a custody order explicitly granting DSS the authority to consent to treatment, then DSS meets the definition of legally responsible person and may consent to the release of information. Where no such order exists, DSS is not a legally responsible person unless it obtains treatment authority by operation of law (part b., below).
   b. Legal custodian granted specific authority **by law** to consent for treatment: Under certain conditions, provisions of the Juvenile Code grant the director of DSS the authority to arrange for, provide, or consent to "any psychiatric, psychological, educational, or other remedial evaluations or treatment" for the juvenile.[12] This authority is *not* automatic and arises only if the following conditions have been met:
      - a judge has placed the child in the custody or physical custody of a county department of social services pursuant to a dispositional order under G.S. 7B-903, -2503, or -2506;

[10] See *Hush v. Devilbiss Co*., 77 Mich. App. 639, 259 N.W.2d 170, 174 (Mich. App. 1977).
[11] *Hush*, 77 Mich. App. at 649, 259 N.W.2d at 174-75.
[12] See G.S. 7B-903(2)(c); 2503(1)(c); and 2506(1)(c).

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- the judge has not "otherwise ordered" (i.e., no provision of the court order overrides the statutory authority of DSS to consent to treatment);
- the parent is unknown, unavailable, or unable to act on the child's behalf; and
- the director has made reasonable efforts to obtain consent from the parent or guardian of the affected child.

III. Consent to Treatment. Each "client or the client's legally responsible person" has the right to consent to or refuse any treatment offered by an MH/DD/SA facility. [13] The client or the client's legally responsible person shall be informed of the potential risks and alleged benefits of the treatment choices.

A. Minors-General Rule: Generally, health services—including mental health and substance abuse services—may not be provided to a minor without first obtaining the consent of the legally responsible person. There are four exceptions:

1. "Emancipated" minors may consent to treatment. A minor is emancipated if married or declared emancipated by court order.
2. Unemancipated minors may give consent to a *physician*[14] for outpatient "medical health services for the prevention, diagnosis, and treatment" of "abuse of controlled substances or alcohol" and "emotional disturbance." GS 90-21.5.
3. In emergency circumstances, a *physician* may treat a minor.[15]
4. A parent or legal guardian may authorize another person to consent to the minor's care during a period in which the parent or guardian is unavailable by executing a Health Care Power of Attorney for Minors.

B. Adult clients:

1. If the client is an adult who has been adjudicated incompetent, consent to treatment must be given by the person appointed by the court as guardian of the person or general guardian.

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[13] G.S. 122C-57(a), (d). In the case of an emergency or involuntary commitment, a client may be administered treatment or medication despite the refusal of the client or legally responsible person.

[14] Although the statute provides for consent to and treatment by a physician, health service functions may be delegated to other health care professionals, including psychologists, so long as the other professional is acting under the supervision and direction of a physician and is professionally qualified to perform the delegated responsibilities.

[15] G.S. 90-21.1 authorizes physicians to treat a minor without the consent of the parent, legal guardian, or person acting in loco parentis under the following emergency circumstances:

a. the parent or other authorized person cannot be located or contacted with reasonable diligence during the time within which the minor needs the treatment, or
b. the minor's identity is unknown, or
c. the need for immediate treatment is so apparent that any effort to secure approval would delay the treatment so long as to endanger the minor's life, or
d. an effort to contact the parent or other authorized person would result in a delay that would seriously worsen the minor's physical condition, or
e. the parent refuses to consent, and the need for immediate treatment is so apparent that the delay required to obtain a court order would endanger the minor's life or seriously worsen the minor's physical condition, and two licensed physicians agree that the treatment is necessary to prevent immediate harm to the minor.

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2. If the client has been declared "incapable" and has not been adjudicated incompetent, a health care agent named pursuant to a valid health care power of attorney may provide consent to treatment as authorized in the power of attorney.

IV. Access to Records. State law provides that, upon request, a client or the client's legally responsible person, shall have access to confidential information in the client's record except information that would be injurious to the client's physical or mental well-being as determined by the attending physician or, if there is none, the facility director or his designee.[16] The HIPAA Privacy Rule provides that an individual or the individual's personal representative shall have a right of access to the individual's protected health information.[17] In general, a client's legally responsible person under state law is also an individual's personal representative for purposes of HIPAA. One exception is that where a minor's legally responsible person assents to an agreement of confidentiality between the health care provider and a minor regarding a health service, the HIPAA Privacy Rule provides that the minor's legally responsible person must not be treated as a personal representative with respect to protected health information pertaining to that service (must not be given access to the information).

A. Minors

1. If a minor client consents to treatment to a physician pursuant to G.S. 90-21.5, then G.S. 90-21.4 provides that the physician cannot notify the legally responsible person of the minor's client status without the minor's permission, except the physician may disclose information if
    - the situation indicates that notification is essential to the life or health of the minor, or
    - the legally responsible person contacts the physician concerning the treatment services being provided to the minor.

   The HIPAA Privacy Rule defers to state law in the two foregoing circumstances, permitting disclosure to the minor's personal representative.

2. Generally, the authority to have access to the client record belongs to the person who authorized the treatment service. Thus, with the exception of number 1, above, if the minor consented to treatment then the minor alone may exercise the right to access records, and if the legally responsible person consented to the treatment, the legally responsible person alone may exercise the right to access records.

3. Parents—Separation or Divorce: Where GS 122C grants the legally responsible person the right to access to a minor child's records, absent an order of the court to the contrary, each parent has equal access to the records of the minor child[18]

[16] GS 122C-53(d) and (c).
[17] 45 C.F.R. 164.524.
[18] G.S. 50-13.2.

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B. Adults

1. If the client is an adult who has been adjudicated incompetent, the right to access records belongs to the person appointed by the court as guardian of the person or general guardian.
2. If the client has been declared "incapable" and has not been adjudicated incompetent, a health care agent named pursuant to a valid health care power of attorney may access records during the period of time that the client is incapable unless otherwise provided for in the power of attorney.

V. Consent to Disclose Records.

Consent to Disclose Records. A facility may disclose confidential information if the client or his legally responsible person consents in writing to the release of the information to a specified person.[19] Generally, the authority to have access to, or to consent to the disclosure of, a client's record belongs to the person who authorized the treatment service. Thus, release of confidential information requires consent from the client or, if the client is a minor or an adult who has been adjudicated incompetent, the client's legally responsible person.

A. Adult clients:

1. If the client is an adult client who has not been adjudicated incompetent and has not been determined incapable (defined at GS 122C-72(4)), consent to release confidential information must be given by the client.
2. If the client is an adult who has been adjudicated incompetent, authorization to release confidential information must be given by the person appointed by the court as guardian of the person or general guardian.
3. If the client has been declared "incapable" and has not been adjudicated incompetent, a health care agent named pursuant to a valid health care power of attorney may authorize disclosure during the client's period of incapacity.

B. Minor clients:

Minor clients: Where a minor has the legal capacity to consent to treatment, the minor exercises control over access to his or her client record.

1. Emancipated minors (married or declared emancipated by court order) may consent to treatment and to the disclosure of confidential information.
2. When an unemancipated minor is being treated pursuant to the consent of his or her "legally responsible person," consent to release information requires the signature of the legally responsible person.
3. When the minor has consented to treatment pursuant to G.S. 90-21.5, release of confidential information requires the minor's consent.

C. Substance Abuse Records.

Substance Abuse Records. The federal regulations governing substance abuse patient records do not regulate consent to treatment, nor do they prohibit—or provide a right for—patient access to records. The regulations do address the question of who may authorize the disclosure of records.

[19] GS 122C-53(a).

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1. **If the patient is a minor**, the patient must always sign the consent form.

    a. When a minor is admitted to substance abuse treatment that requires the consent of the minor's legally responsible person (LRP), any written consent for disclosure must be signed by both the minor and his or her LRP.

    b. When the minor consents to substance abuse treatment pursuant to GS 90-21.5, only the minor may consent to disclose confidential information. The LRP and others have access to information only upon written consent of the minor. This restriction includes the disclosure of patient identifying information to the parent or other LRP for the purpose of obtaining financial reimbursement.

2. **Incompetent patients**

    a. If the patient is adjudicated incompetent, the individual appointed by the court as guardian-for-the-person or general guardian may sign the consent for release.
    b. When a patient has not been adjudicated incompetent, but suffers from a medical condition that prevents knowing or effective action on his or her behalf, the program director may exercise the right of the patient to consent to a disclosure for the sole purpose of obtaining payment for services from a third-party payer.

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