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THE CONFIDENTIALITY OF MENTAL HEALTH, DEVELOPMENTAL DISABILITIES, AND SUBSTANCE ABUSE INFORMATION

HIPAA AND NC LOCAL HEALTH DEPARTMENTS: 2019
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Applicable Confidentiality Laws

- Federal law governing substance abuse programs—42 CFR Part 2
- State law governing MH/DD/SA providers—GS 122C
- Federal law governing health care providers—45 CFR Parts 160, 164 (HIPAA Privacy Rule)



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Terminology

State MH Law	Privacy Rule	Substance Abuse Law
client	individual	patient
facility	covered entity	program
consent	authorization	consent
confidential information	protected health information	patient identifying information





Is the Information Confidential?

To know when these laws apply, you must know:

- Who is covered by the law?
- What information is protected?
- What is the duty of confidentiality?



Privacy Rule—Covered Health Care Providers

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



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
- 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



Privacy Rule—Duty

Health care provider may use and disclose PHI only as permitted or required by the privacy rule

- A use or disclosure that is not permitted or required by the rule is prohibited



State Mental Health Law—GS 122C—Covered Providers (“Facility”)

Any individual, agency, or company at one location whose primary purpose is to provide services for the care or treatment of mental illness, developmental disabilities, or substance abuse

- Psychiatrists, psychologists, licensed clinical social workers, licensed professional counselors
- Psychiatric hospitals
- LME-MCOs and their contracted providers



State Mental Health Law—Confidential Information

Any information—whether recorded or not—relating to an individual served by a covered provider and received in connection with the performance of any function of the provider



State Mental Health Law—Duty

- No individual having access to information that is confidential under G.S. 122C may disclose it except as authorized by G.S.122C-53 through G.S. 122C-56 (and its implementing regulations).
 - G.S. 122C-52. See also 10A NCAC 26B.
- “No individual”



The Case of Jackie Jones

- Court orders Jackie to mental health treatment at Acme Counseling Center as part of a plan to see if she might regain custody of her children. Jackie authorizes Acme to share patient information with DSS “to provide DSS with the information it needs to determine if I have made sufficient progress in treatment so as to regain custody of my children.”
- Must DSS follow G.S. 122C confidentiality with respect to Jackie’s mental health treatment information received from Acme?



The Case of Jackie Jones

- Jackie receives mental health treatment at Acme Counseling Center. Jackie is also receiving pregnancy services from Coates County Public Health Department. To coordinate care and treatment, including prescribed medications, Acme discloses information to to Coates Public Health.
- Must Coates County PH Department follow G.S. 122C confidentiality with respect to Jackie’s mental health treatment information received from Acme?



State Mental Health Law—Duty

- *No individual having access* to information that is confidential under G.S. 122C may disclose it except as authorized by G.S. 122C and its.
- Provided, however, a HIPAA covered entity or business associate receiving confidential information that has been disclosed pursuant to the confidentiality provisions of G.S. 122C may use and disclose such information as permitted by the HIPAA Privacy Rule.

G.S. 122C-52(b)



Mental Health Disclosures to a HIPAA Covered Entity

- Pursuant to a patient authorization that complies with 10A NCAC 26B. G.S. 122C-53(a).
- Pursuant opt-out authorization: Any “facility” may share client information with a *HIPAA covered entity* when necessary to coordinate care and treatment or to conduct quality assessment and improvement activities *if* the client is informed of the right to opt out of these disclosures and does not object in writing or sign a non-disclosure form provided by the facility . G.S. 122C-55(a7).



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Federal Law Governing SUD Records—42 C.F.R Part 2

Restricts the “use” and “disclosure” of patient information obtained by a “federally assisted” alcohol or drug abuse “program”



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“Substance Use Disorder”

A cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems such as impaired control, social impairment, risky use, and pharmacological tolerance and withdrawal.

42 C.F.R. § 2.11

(Does not include tobacco and caffeine.)

“Program”—Definition One

- An individual or entity (other than a general medical facility) that provides and holds itself out as providing SUD diagnosis, treatment, or referral for treatment.
 - A private practitioner who provides, and holds herself out as providing, diagnosis and referral for treatment is covered by the regulations even though she does not treat SUD.

“Program”—Definition Two

- An identified unit *within a general medical facility* that provides and holds itself out as providing SUD diagnosis, treatment, or referral for treatment
 - If a general hospital has promoted an identified unit, such as a detox unit, to the community as a provider of such services, the identified unit, but not the rest of the general hospital, would be a program



“Program”—Definition Three

- Personnel *in a general medical facility* whose primary function is the provision of SUD diagnosis, treatment, or referral for treatment and who are identified as such
 - Does not apply to hospital ED staff who refer a patient to the hospital’s ICU for an apparent drug overdose unless the *primary* function of such staff is the provision of SUD diagnosis, treatment, or referral for treatment and they are identified as providing such services.

“General Medical Facilities”

- “General medical facility” is not defined in the rule. SAMHSA FAQ says may include:
 - Hospitals
 - Trauma centers
 - Federally qualified health centers
 - Practice comprised of primary care providers

Question for Class

- Patient treated for an apparent drug overdose is transferred from ED to a medical floor. A substance abuse counselor visits and evaluates the patient for substance use disorder and possible referral for treatment.
 - Is the substance abuse counselor a “program” under 42 C.F.R. Part 2?

“General Medical Facilities”

- Health care providers who work in these facilities would only be a “program” if they
 - Work in an identified unit within the facility that provides and holds itself out as providing SUD diagnosis, treatment or referral for treatment, or
 - The primary function of the provider is the provision of such services and they are identified as providers of such services.

Question for Class

Dr. Mallory is an addictions specialist who works in a community health center that provides primary care, pregnancy care, and geriatric care. Dr. Mallory treats patients who have substance use disorders and prescribes buprenorphine for opiate addiction as part of her practice.

- Is Dr. Mallory covered by 42 C.F.R Part 2?
- Is the community health center covered?

Adapted from Legal Action Center, 9-19-13 webinar, Karla Lopez, attorney

Question for Class

- Hospital ED treating a trauma patient performs a blood test that identifies cocaine in patient’s blood
 - Does this make the hospital ED a “program” under 42 C.F.R. Part 2?
 - Are the drug test results protected by 42 C.F.R. Part 2?

Covered Information—42 CFR § 2.12(a)

Restrictions on disclosure apply to any info

- that would directly or indirectly identify a “patient”—one who has applied for or been given SUD diagnosis, treatment, or referral for treatment at an SUD program—as having or having had a substance use disorder, and
- is drug or alcohol abuse information obtained by a program
- for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment

Drug Screens

- Referral for assessment—A “screen,” “pre-screen,” “drug test,” or other preliminary screen to identify patients who “may” have alcohol or drug problems for the purpose of referring them to an SA specialist for “evaluation” and diagnosis is not covered by 42 C.F.R. 2.
- Referral for treatment—Drug tests results used to diagnose and refer for “treatment,” or monitor compliance with treatment, are protected by 42 C.F.R. 2.

Question for Class

- CPS worker investigating report of child abuse or neglect requests access to child’s mental health record. Family/social history section of child MH record states that Mom, during intake of child, disclosed that she is “hooked on pain pills.”
 - Is the information pertaining to Mom’s opiate dependency information protected by 42 C.F.R. 2?

42 CFR Part 2—Duty

- Prohibits any use or disclosure that is not expressly permitted by the regulations
- No state law may authorize or compel a disclosure prohibited by the federal law



The Case of Jackie Jones

Court orders Jackie to get drug treatment at Acme Drug Treatment Center as part of a plan to see if she might regain custody of her children. Jackie authorizes Acme to share patient information (attendance, progress, urinalysis results, and prognosis) with DSS and the court “to provide DSS and the Court with the information they need to determine if I have made sufficient progress in treatment so as to regain custody of my children.”



The Case of Jackie Jones

1. A law enforcement officer requests information about Jackie from Acme. Officer explains that he is conducting a criminal investigation related to Jackie’s abuse of her children. Can Acme comply with the officer’s request?
2. Instead of going to Acme, the officer goes to DSS and requests information about Jackie that DSS has received from Acme. The officer explains that he is conducting a criminal investigation of Jackie. Can DSS comply with the officer’s request?



42 CFR Part 2—Applicability of Disclosure Restrictions

Restrictions on disclosure apply to

- Programs
- “Lawful holders” of “patient identifying information”—those who receive covered information from a program and who are notified of the restrictions on disclosure.

42 C.F.R. § 2.32



42 CFR Part 2—Applicability of Use Restrictions

Any information that

- is SUD information obtained by a covered program
- for the purpose of treating substance abuse, making a diagnosis, or making a referral for treatment
- Cannot be used to criminally investigate or prosecute a patient without a court order authorizing the disclosure and use of the information for that purpose
- Applies to anyone who obtains the information from a program regardless of the status of the person or how the information was obtained

42 C.F.R. 2.12



Is the Information Confidential?

To know when these laws apply, you must know:

- Who is covered by the law?
- What information is protected?
- What is the duty of confidentiality?



When Can You Disclose It?

To legally disclose confidential information, you need either a

- law
- patient authorization, or
- court order

that permits or requires disclosure under the particular circumstances

Disclosures Required by Law

Disclosures Required by Law

- State law—A facility shall disclose confidential information as required by other state or federal law—GS 122C-54(h)
- HIPAA—CE may disclose PHI to the extent the disclosure is required by law—45 CFR 164.512(a)



SUD Records—42 CFR Part 2

- There is no catch-all provision permitting the disclosure of information when otherwise “required by law”
- Patient records may be disclosed or used only as permitted by these regulations. § 2.13
- No state law may authorize or compel any disclosure prohibited by these regulations. § 2.20



Federal Substance Abuse Law— Specific Permitted Disclosures

- Permits programs to disclose patient identifying information
 - relating to the cause of death under laws requiring the collection of death or other vital statistics or permitting inquiry into the cause of death—42 CFR 2.15(b)
 - when necessary to comply with state law requiring the reporting of child abuse or neglect—42 CFR 2.12(c)(6)
- Doesn't permit disclosures for CPS assessment, APS reporting and assessment, GAL requests



Notice of Privacy Practices



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Notice of Privacy Practices—Basic Content Elements

- Uses and disclosures
- Individual rights
- Covered entity’s legal duties and
 - Complaint procedure
 - Contact name and number
 - Effective date of the notice



Notice of Uses and Disclosures

- A description of
 1. The types of disclosures for TPO that do not require authorization--and one example of each
 2. Each of the other purposes for which a disclosure is permitted or required without patient authorization
 3. The types of disclosures that require patient authorization
- For 1. and 2., above
 1. If a disclosure for any purpose described is prohibited or materially limited by other applicable law, the description must reflect the more stringent law
 2. Sufficient detail to place the individual on notice of the uses and disclosures permitted/required by the Privacy Rule and other applicable law



Don't Use A Generic NPP for Behavioral Health Services

The Privacy Rule permits disclosures that are not permitted by G.S. 122C and 42 C.F.R Part 2:

- When law enforcement requests info
 - for identifying or locating a suspect, fugitive, witness, or missing person
 - about an individual who is suspected to be a victim of a crime —§ 164.512(f)
- In response to a subpoena





Notice of Privacy Practices

Any "facility" may share client information with a *HIPAA covered entity* when necessary to coordinate care and treatment or to conduct quality assessment and improvement activities if the client is informed of the right to opt out of these disclosures and does not object in writing or sign a non-disclosure form provided by the facility.

G.S. 122C-55(a7)



Subpoenas and Court Orders



Subpoenas

- HIPAA privacy rule permits disclosure in response to a subpoena. 45 CFR 164.512(e)
- State law governing MH/DD/SA information (G.S. 122C) does not permit disclosure in response to a subpoena
- Federal law governing SUD treatment information does not permit disclosure response to a subpoena





Court Orders—122C and HIPAA

- GS 122C-54(a) requires a facility to disclose in response to a court order
- HIPAA, 45 CFR 164.512(e), permits a covered entity to disclose in response to a court order
- Neither law expresses any particular procedure, standard, or findings



Court Orders—42 CFR 2

There are four kinds of court orders, depending on the purpose for the disclosure

- Any purpose other than for criminal investigation or prosecution. § 2.64
- To criminally investigate or prosecute a patient. § 2.65
- To criminally investigate or prosecute a program or person holding records. § 2.66
- To place an undercover agent or informant in a program. § 2.67



Court Order to Disclose SUD Info

- Court must find “good cause” for the disclosure
- Court must limit disclosure to
 - Parts of record that are essential to fulfilling the objective of the order
 - Persons whose need for information forms the basis for the order



“Good Cause”—Disclosures for Non-Criminal Purposes

To order disclosure, the court must find that:

1. Other ways of obtaining the information are not available or would not be effective
2. The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the program’s ability serve other patients.

42 CFR 2.64, 2.65



In re E.P., M.P. 183 N.C. App. 301, 645 S.E.2d 772 (2007)

SUD records of parents were not relevant during the adjudication stage of neglect and dependency proceeding. County DSS had sufficient evidence of mother and father’s substance abuse without including their substance abuse records, and nothing indicated that the records would provide additional evidence regarding the neglect and dependency of the children.



“Good Cause”—Criminal Investigation or Prosecution of Patient

3. Crime involved is extremely serious, such as one that causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault w/deadly weapon, and child abuse and neglect
4. There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution
5. Person holding records has been given notice and opportunity to appear and be represented by counsel independent of patient.

42 CFR 2.65





The Case of Jackie Jones

DSS is preparing for a hearing to determine if Jackie will be reunited with children. DSS wants to call Jackie's substance abuse counselor to testify about Jackie's prognosis and things Jackie told the counselor. However, Jackie has revoked her consent to disclose to DSS. DSS subpoenas Jackie's counselor to appear and testify.

1. Can the SA counselor testify at the hearing?
2. Can the court order disclosure?
3. If so, what findings must the court make?



Court Order—Confidential Communications § 2.63—Only if:

- Necessary to the investigation of an extremely serious crime (see 2.65), or
- Necessary to protect against an existing threat to life or of serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties, or
- In connection with litigation or administrative proceeding in which patient offers testimony or other evidence pertaining to content of confidential communications



For Patient Authorization Requirements See:

- [NC Juvenile Justice-Behavioral Health Information Sharing Guide](#), a collaborative project by the state's juvenile justice and mental health agencies to better coordinate services for youth and families.
- www.sog.unc.edu/resources/microsites/mental-health/confidentiality





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