

Chapter 14

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Resources:

For a discussion of confidentiality and disclosure and the laws discussed in this Chapter, see AIMEE WALL, [DISCLOSING PROTECTIVE SERVICES INFORMATION: A GUIDE FOR NORTH CAROLINA SOCIAL SERVICES AGENCIES](#) (UNC School of Government, 2015).

For a searchable online database of statutes, regulations, cases, and guidance materials that apply to confidentiality requirements for protective services and public assistance programs, see the [Social Services Confidentiality Research Tool](#) (UNC School of Government, 2015).

For discussions of confidentiality in the context of social services programs, including a useful framework for analyzing confidentiality issues, see the following bulletin series from the UNC School of Government (formerly the Institute of Government):

- John L. Saxon, [Confidentiality and Social Services \(Part I\): What Is Confidentiality?](#), SOCIAL SERVICES LAW BULLETIN No. 30 (UNC Institute of Government, Feb. 2001).

- John L. Saxon, [*Confidentiality and Social Services \(Part II\): Where Do Confidentiality Rules Come From?*](#), SOCIAL SERVICES LAW BULLETIN No. 31 (UNC Institute of Government, May 2001).
- John L. Saxon, [*Confidentiality and Social Services \(Part III\): A Process for Analyzing Issues Involving Confidentiality*](#), SOCIAL SERVICES LAW BULLETIN No. 35 (UNC Institute of Government, April 2002).

NC DHHS DSS Form:

DSS-5297, [Consent for Release of Confidential Information](#) (Dec. 2013).

14.1 Juvenile Records

Most information related to abuse, neglect, or dependency cases is confidential and has special protections under laws governing departments of social services, juvenile court proceedings, and adoption proceedings.

A. Department of Social Services Information

1. Public agency and public records law. Each of North Carolina’s 100 counties are political subdivisions of the state. Each county must provide social services programs pursuant to Chapters 108A (social services) and 111 (aid to the blind) of the General Statutes. G.S. 153A-255. The county board of commissioners creates agencies of the county government, which includes a department of social services (DSS). *See* G.S. 153A-76.

Note, for purposes of this Manual, “department of social services” or “DSS” refers to a department as defined by G.S. 7B-101(8a) regardless of how it is titled or structured.

The county DSS administers public assistance and social services programs. Public assistance programs relate to financial benefits that assist the county’s indigent citizens (e.g., Food and Nutrition Services, Work First), and social services programs relate to the protection of the county’s citizens (e.g., child welfare, public guardianship). *See* G.S. 108A-14; 108A-15; *see also* G.S. Chapter 108A, Articles 2 (Programs of Public Assistance), 3 (Social Services Programs), 6 (Protection of the Abused, Neglected, or Exploited Disabled Adult Act), and 6A (Protection of Disabled and Older Adults from Financial Exploitation).

A public record includes all documents, photographs, recordings, and other documentary materials made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of the North Carolina government or its subdivisions. G.S. 132-1(a). Generally, records maintained by a county DSS are public records. People have a right to have access to public records. G.S. 132-1(b). However, a statutory exception may apply that limits and/or prohibits disclosure of a public record. The confidentiality of and access to DSS records are governed by several state and federal laws and regulations, some of which are discussed below.

Resources:

For a discussion about public records and disclosure, see

- Frayda Bluestein, [*Is This a Public Record? A Framework for Answering Questions About Public Records Requests*](#), UNC SCH. OF GOV'T: COATES' CANONS: NC LOCAL GOVERNMENT LAW BLOG (June 9, 2010).
- DAVID LAWRENCE, [*PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS*](#) (UNC School of Government, 2d ed. 2010).

For further information about social services, see JOHN L. SAXON, [*SOCIAL SERVICES IN NORTH CAROLINA*](#) (UNC School of Government, 2008).

For information about consolidated human services agencies, see "[Consolidated Human Services Agencies \(CHSAs\)](#)" on the UNC School of Government website.

2. Disclosure prohibited for public assistance and social services information. One of the confidentiality statutes that applies to DSS is G.S. 108A-80, and it covers client (including applicant) information generally. Absent limited statutory exceptions, G.S. 108A-80(a) prohibits the disclosure of names or other information concerning persons applying for or receiving public assistance or social services that may be directly or indirectly derived from DSS records. Although the term "social services" is not defined, statutory context and usage indicate that child welfare is clearly encompassed within the scope of the expansive term. For example, child welfare services are specifically included in Article 3 of G.S. Chapter 108A, which is titled "Social Services Programs". Specific reference is also made to "grants-in-aid available for social services under the Social Security Act." G.S. 108A-71. Child welfare services and foster care and adoption maintenance payments are funded by Titles IV-B and IV-E of the Social Security Act. *See e.g.*, 42 U.S.C. 622; 42 U.S.C. 671; 45 C.F.R. Parts 1355, 1356, and 1357.

G.S. 108A-80(a) has broad application. It makes it unlawful for "any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of" the protected information. This particular subsection, G.S. 108A-80(a), does not include a criminal penalty; however, a violation is likely a misdemeanor. *See* G.S. 108A-80(b), (c) (both stating a violation of "this section" is a Class 1 misdemeanor); *see also State v. Bishop*, 228 N.C. 371 (1947) (holding common law authorizes punishment by misdemeanor when a statute, in the interests of the public, forbids an act and does not expressly include a penalty).

In addition to the statute, state regulations (or Rules) based on G.S. 108A-80 that address confidentiality and access to client records are set forth in Title 10A of the North Carolina Administrative Code (N.C.A.C.) Chapter 69. The Rules consist of six sections:

- general provisions,
- safeguarding client information,
- client access to records,
- release of client information,
- disclosure of information without client consent, and
- service providers.

Under the Rules, the director of the state Division of Social Services or a county department of social services is required to disseminate written policy to and provide trainings for all persons with access to client information. 10A N.C.A.C. 69.0203(d); *see* 10A N.C.A.C. 69.0101(4) (definition of “director”). An employee who violates the confidentiality Rules is subject to disciplinary action including suspension or dismissal. 10A N.C.A.C. 69.0205.

The Rules specifically address conflict of laws with federal regulations or state statutes addressing confidentiality and require that DSS follow the statutes or regulations that provide more protection for the client. 10A N.C.A.C. 69.0201. The federal Child Abuse Prevention and Treatment Act (CAPTA), Titles IV-E and IV-B of the Social Security Act, and North Carolina’s Juvenile Code (G.S. Chapter 7B) provide for additional restrictions on the disclosure of confidential information as it relates to information concerning a juvenile’s abuse, neglect, or dependency. *See* 42 U.S.C. 5106a(b)(2)(B)(viii)–(xi); 42 U.S.C. 671(a)(8); 45 C.F.R. 1355.21(a); G.S. 7B-302(a1); 7B-2901(b); 7B-3100.

3. Disclosure prohibited for abuse, neglect, dependency information. In addition to the disclosure prohibition for social services client records under G.S. 108A-80, the Juvenile Code addresses the confidentiality and disclosure of DSS records related to abuse, neglect, or dependency in three different statutes: G.S. 7B-302(a1), 7B-2901(b), and 7B-3100. Additionally, the Rules regulating confidentiality of DSS child protective services information are found in 10A N.C.A.C. 70A.

G.S. 7B-302(a1) requires that all information received by DSS be held in “strictest confidence” unless a disclosure is authorized by statute. The requirement to maintain the information in “strictest confidence” starts when DSS first receives information about a child, typically from a report of suspected abuse, neglect, or dependency. DSS must maintain a case record for a child for whom protective services are initiated or who the court places in the custody of a DSS. 10A N.C.A.C. 70A.0112. The case record contains information about the assessment; family background information; safety responses; the case decision; notifications made to the family and others; the family services case plan and reviews of the case plan; and if applicable, court pleadings and reports, medical and psychological reports, and a summary of services. G.S. 7B-2901(b); 10A N.C.A.C. 70A.0112. The case record is confidential and information from it may only be disclosed in accordance with the Juvenile Code or other applicable law. 10A N.C.A.C. 70A.0112(a); *see* G.S. 7B-302(a1); 7B-2901(b); 10A N.C.A.C. 70A.0113.

Resource: For information about DSS policies and procedures related to confidentiality in the child welfare setting, see DIV. OF SOC. SERVS., N.C. DEP’T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL “Cross Function,” available [here](#).

(a) Exceptions authorizing disclosure. There are a number of statutory exceptions to the requirement of confidentiality for DSS records and information.

- **Circumstances affecting the reporter.** There is an extra layer of protection for the identity of the person who made the report of a child’s suspected abuse, neglect, or dependency. A reporter’s identity is confidential and may only be disclosed when

authorized by court order or when the disclosure is to a federal, state, or local government entity or agent when that entity demonstrates a need for the reporter's name to carry out its mandated responsibilities. G.S. 7B-302(a1)(1a); 7B-303(e) (interference or obstruction petition); 7B-700(a) (reporter's identity may not be shared); *see Ritter v. Kimball*, 67 N.C. App. 333 (1984) (holding trial court did not abuse its discretion in limiting in a custody action the discovery of the reporter's identity based on (1) the statute requiring information received by DSS concerning reports of abuse or neglect be held in "strictest confidence" and the trial court's perception of the purpose of that statute as encouraging the reporting of abuse or neglect, and (2) G.S. 1A-1, Rule 26(c), which protects a person from "unreasonable annoyance, embarrassment, oppression, or undue burden").

DSS is required to disclose certain information to the reporter, specifically, whether the report was accepted for an assessment and/or referred to the appropriate law enforcement agency; whether there was a finding of abuse, neglect, or dependency; and whether and what action DSS is taking to protect the juvenile. G.S. 7B-302(f), (g).

Resource: Sara DePasquale, [A/N/D Reporting: Rights, Protections, and Prosecutor Review](#), UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 21, 2017).

- **Discovery and parties sharing information.** The Juvenile Code addresses information sharing among the parties and discovery in abuse, neglect, dependency, and termination of parental rights proceedings. When a juvenile case is pending, DSS is authorized to share with any other party information that is relevant to the subject matter of the action. G.S. 7B-700(a). *See* G.S. 7B-302(a1)(2) and (5); 7B-2901(b)(1) and (4). There may be a local rule or administrative order that addresses information sharing among the parties (including the sharing of predisposition reports) and the use of discovery. G.S. 7B-700(b); 7B-808(c). Although G.S. 7B-700(c) permits parties to file motions for discovery, they may do so only if they have been unable to obtain information through information sharing authorized by G.S. 7B-700(a) and local rules (if applicable). *See* G.S. 7B-700(b). Motions for protective orders are a means by which any party can seek to protect information that he or she believes should not be disclosed. Requests for a protective order in a juvenile proceeding are governed by G.S. 7B-700(d). Information that is obtained through discovery or information sharing authorized by G.S. 7B-700 may not be redisclosed if the redisclosure is prohibited by state or federal law. G.S. 7B-700(e).

See Chapters 4.6 (discussing discovery) and 7.2.E.3 (discussing predisposition reports).

- **The child's guardian ad litem (GAL).** The Juvenile Code gives the child's GAL the authority to obtain any information or reports, whether or not confidential, that may in the GAL's opinion be relevant to the case. This includes information received and maintained by DSS. G.S. 7B-302(a1)(2); 7B-2901(b)(1). The only privilege that may be invoked to prevent the GAL from obtaining the information is the attorney-client privilege. G.S. 7B-601(c). Absent a court order or statutory authorization, the GAL is

required to keep information confidential. G.S. 7B-601(c). Effective October 1, 2019, the GAL attorney advocate is authorized to disclose confidential information about the juvenile to an attorney who is representing the juvenile in a delinquency or undisciplined action. G.S. 7B-3100(c); *see* S.L. 2019-33. For a further discussion of a GAL's access to information and disclosures by a GAL generally, see section 14.1.D, below.

- **The child.** The child has a right to examine his or her DSS records, even after reaching the age of majority or becoming emancipated. G.S. 7B-302(a1)(2); 7B-2901(b)(1). This right to examine the records includes the child's attorney. 10A N.C.A.C. 70A.0113(a)(2).
- **Law enforcement and district attorney.** In certain circumstances, DSS will be required to notify law enforcement and the district attorney of a report or results of its assessment. If DSS receives a report that a child may have been physically harmed as a result of a crime that was not committed by the child's parent, guardian, custodian, or caretaker, the director must report that information to the district attorney (or designee) and the appropriate law enforcement agency so that the initiation of a criminal investigation and possible prosecution can commence. G.S. 7B-307(a).

If, during the course of its assessment, DSS finds evidence that the child may have been abused, DSS must report those findings to the district attorney (or designee) and the appropriate law enforcement agency so as to coordinate the criminal investigation with the DSS assessment. G.S. 7B-307(a). In both situations, DSS must make an immediate oral report and a subsequent written report within forty-eight hours after receiving the information. G.S. 7B-307(a). If a report alleges that a child is abandoned, DSS must request law enforcement investigate through the North Carolina Center for Missing Persons and other national and state resources. G.S. 7B-302(a).

Effective December 1, 2019, a new mandated universal reporting law requires any adult who knows or reasonably should have known that a juvenile has been or is a victim of a violent offense, sexual offense, or misdemeanor child abuse to immediately report that case to the appropriate local law enforcement agency in the county where the juvenile resides or is found. There is no exception for a DSS. G.S. 14-318.6; *see* S.L. 2019-245.

If the person who reports the suspected abuse, neglect, or dependency requests a prosecutor review of a DSS decision not to file a petition, DSS must allow the district attorney (or designee) to access the case record. G.S. 7B-305; 10A N.C.A.C. 70A.0113(c).

Resources:

Sara DePasquale, [*BIG NEWS: S.L. 2019-245 Creates a New Universal Mandated Reporting Law for Child Victims of Crimes and Changes the Definition of "Caretaker."*](#) UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Nov. 13, 2019).

Sara DePasquale, [A/N/D Reporting: Rights, Protections, and Prosecutor Review](#), UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 21, 2017).

- **Government entity to protect a child.** DSS must disclose confidential information to any federal, state, or local government entity or its agent that needs the information to protect a child from abuse or neglect. G.S. 7B-302(a1)(1). The government entity may redisclose confidential information received from DSS if redisclosure is for purposes directly connected with carrying out the entity's mandated responsibilities. G.S. 7B-302(a1)(1).

If DSS receives a report of a child's suspected maltreatment occurring in a child care facility, DSS must notify the North Carolina Department of Health and Human Services (NC DHHS) within twenty-four hours or on the next working day after receiving the report. G.S. 7B-307(a); *see* G.S. 110-105.3(a), (c).

Practice Note: Effective January 1, 2016, investigations and responses involving protective actions and sanctions involving suspected child maltreatment occurring in a child care facility are part of the child care licensing system of the NC DHHS Division of Child Development and Early Education and are no longer regulated by the Juvenile Code. S.L. 2015-123.

Resources: For more information about alleged child maltreatment occurring in a child care facility, including mandated reporting, investigations, and confidentiality of those records, see

- SARA DEPASQUALE, [Suspected Child Maltreatment Occurring in a Child Care Facility](#) (UNC School of Government, 2016) supplemental Chapter 13a in JANET MASON, [REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA](#), (UNC School of Government, 3d ed. 2013).
 - Sara DePasquale, [The New Law Addressing Child Maltreatment in Child Care Facilities: It's the State's Responsibility](#), UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Jan. 6, 2016).
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- **Military affiliation.** As part of its assessment of a report of abuse, neglect, or dependency, DSS should collect information about the military affiliation (if any) of the juvenile's parent, guardian, custodian, or caretaker. G.S. 7B-302(a). If DSS finds evidence that the juvenile may have been abused or neglected, DSS must (1) notify the appropriate military authority by making an immediate oral report and a subsequent written report within forty-eight hours after receipt of the information and (2) share information with that military authority. G.S. 7B-307(a); 7B-302(a); *see* S.L. 2019-201 (effective August 23, 2019).
- **Court order.** Confidential social services information may be disclosed pursuant to court order. 10A N.C.A.C. 70A.0113(a)(1). There are several different situations in which a court may order disclosure.

The court may order public agencies to share information regarding a child victim who is under DSS protective custody or placement by the court if the court finds that information sharing is necessary to reduce the trauma to the child victim. G.S. 7B-2901(c).

A district or superior court judge who is hearing a civil matter in which DSS is not a party (e.g., child custody) may order DSS to release confidential information if (1) DSS has reasonable notice and an opportunity to be heard and (2) the court determines the information is relevant and necessary to the trial and is unavailable from another source. G.S. 7B-302(a1)(3); 7B-2901(b)(2). The court may conduct an in camera review if needed to make that determination. G.S. 7B-302(a1)(3).

A defendant in a criminal action has a constitutional right to access third party information if that information is favorable and material to his or her defense. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In a criminal or delinquency action, the district or superior court judge presiding over that action must conduct an in camera review before releasing confidential DSS records to the defendant unless it is the child (who may now be an adult) who is the criminal defendant or alleged delinquent juvenile. G.S. 7B-302(a1)(4); 7B-2901(b)(3). The child (even upon reaching the age of majority) is entitled to examine the records without a court order. G.S. 7B-302(a1)(2); 7B-2901(b)(1).

Resource: For a discussion on a criminal defendant’s right to access, see Jessica Smith, [Defendant’s Right to Third Party Confidential Records](#), UNC SCH. OF GOV’T: NORTH CAROLINA CRIMINAL LAW BLOG (Oct. 2, 2014).

- **Provision of protective services.** In conducting its assessment or arranging for and providing protective services, DSS may consult with any agency or individual. G.S. 7B-302(e). DSS may share information and a “summary of documentation” from the case record without a court order with agencies or individuals that provide or facilitate the provision of protective services to a child. 10A N.C.A.C. 70A.0113(b). Protective services include screening reports, conducting assessments, and providing casework or other counseling services to the families to improve, preserve, and stabilize the family’s life. G.S. 7B-300.

DSS is required to identify and notify the child’s relatives and other persons with legal custody of the child’s siblings that the child is the subject of an abuse, neglect, or dependency action and, when applicable, is in nonsecure custody. G.S. 7B-505(b); 7B-800.1(a)(4); 7B-901(b). This notification is part of DSS efforts to explore the willingness and appropriateness of the relatives and other persons with legal custody of a child’s siblings as potential resources for support or placement of the child. Under the Indian Child Welfare Act (ICWA), when the court knows or has reason to know the child is an Indian child, DSS, as the petitioner, is required to send notice to (i) the federally recognized tribe(s) the child is believed to be either a member of or eligible for membership of when a biological parent is a member of a federally recognized tribe, (ii) the regional director of the Bureau of Indian Affairs, (iii) the child’s parents,

and (iv) the Indian custodian (if any). 25 U.S.C. 1912(a); 25 C.F.R. 23.11(a) and 23.111. See Chapter 13.2 (discussing ICWA).

Foster parents and DSS (or the supervising agency) are required to exchange information about matters affecting the child's adjustment to the home, and the foster parent must agree to keep the information confidential and may only discuss it with DSS (or the supervising agency) or professionals designated by the agency. 10A N.C.A.C. 70E.0902(a)(4). Foster parents are also to be included in the child's decision-making team. 10A N.C.A.C. 70E.0902(b)(9). Foster parents must receive training on confidentiality. 10A N.C.A.C. 70E.1117(1)(n).

(b) Disclosure in child fatality or near-fatality cases. The Juvenile Code addresses a child's fatality or near fatality resulting from suspected abuse, neglect, or dependency, including the disclosure of information. A public agency (this includes but is not limited to DSS) that receives a request to disclose information related to a child fatality or near fatality must disclose the findings and information as defined by G.S. 7B-2901(a)(2) and limited by G.S. 7B-2902(c) through (f) if

- a person is criminally charged with causing the death or near death of a child or
- a district attorney certifies that a person would be charged but for that person's death.

However, not all confidential information is required to be disclosed, and there are circumstances under which the agency is permitted to deny a request for information. If a request is denied, the person seeking the information may go to superior court to seek an order compelling disclosure, and the court must conduct an in camera review to determine whether denial of the request was warranted. G.S. 7B-2902.

North Carolina has a Child Fatality Prevention System that consists of the

- North Carolina Child Fatality Task Force,
- North Carolina Child Fatality Prevention Team (State Prevention Team),
- State Child Fatality Review Team (State Review Team),
- local Community Child Protection Teams (CCPT) in every county, and
- local Child Fatality Prevention Teams in every county (note the local Child Fatality Prevention Team in a county may be blended with, rather than separate from, the local CCPT (*see* G.S. 7B-1406(b))).

Article 14 of G.S. Chapter 7B; G.S. 143B-150.20.

The Child Fatality Prevention System creates a multidisciplinary, community-wide approach to promote safe and healthy child development and to prevent future child abuse, neglect, and death by understanding the causes of childhood deaths, identifying gaps in services, improving coordination between state and local entities, and recommending changes to laws and policies. *See* G.S. 7B-1400 through -1414; 143B-150.20(b).

The State Prevention Team and local CCPTs review child deaths that are attributed to abuse or neglect or when a mandated report of suspected abuse or neglect was made before the child's death. G.S. 7B-1405(1), (6); 7B-1406(a), (b). The CCPT also reviews (1) selected active cases where children are receiving protective services and (2) cases that are brought to them for review by a member. G.S. 7B-1406(a)(1); 7B-1409(4). The local Child Fatality Prevention Team reviews all other child deaths (meaning those where the child's and family's involvement with DSS did not occur in the twelve months prior to the child's death, such as an accidental death or death resulting from a medical condition or illness). The State Review Team conducts in-depth reviews of any child fatalities where the child and family were involved with child protective services at some point in the twelve months before the child's death. The reviews by the State Review Team may include interviews with relevant persons and an examination of pertinent written materials. G.S. 143B-150.20(a). If necessary, the State Review Team may seek an order from the district court in the county where the investigation is pending that compels the disclosure of requested information that has not been received within thirty days of the request. G.S. 143B-150.20(d).

The various types of teams that make up the state's Child Fatality Prevention System have access to records, including medical, hospital, state, county, or local agency (including DSS) records. G.S. 7B-1413(a); 143B-150.20(d). Any confidential records that are acquired remain confidential and are not subject to discovery or introduction in evidence in any proceeding and may be disclosed only as necessary to carry out the purpose of the applicable team. G.S. 7B-1413(c); 143B-150.20(f).

The State Prevention Team, State Review Team, and local team meetings are not open meetings, although the State Review Team and/or a local team may hold periodic public meetings to discuss generally the findings and recommendations resulting from its reviews. G.S. 7B-1413(b); 143B-150.20(e). Members of any team or persons attending a team meeting may not testify about what happened at the meeting, the information presented at the meeting, or opinions the person formed as a result of the meeting. G.S. 7B-1413(c); 143B-150.20(f). Training on confidentiality requirements must be provided to team members. 10A N.C.A.C. 70A.0202(a)(2). Members and invited participants must sign a confidentiality statement. G.S. 7B-1413(d); 143B-150.20(g); 10A N.C.A.C. 70A.0203(b). However, nothing prohibits a person from testifying in a civil or criminal action about information within that person's independent knowledge. G.S. 7B-1413(c); 143B-150.20(f).

The NC DHHS Division of Social Services, after consulting with the appropriate district attorney to ensure the criteria for disclosure under G.S. 7B-2902(d) is satisfied, makes public the State Review Team's findings and recommendations for each fatality reviewed that relates to improving coordination between local and State entities. G.S. 143B-150.20(b).

Resource: For more information about child fatality reviews, see DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Cross Function" and "Child Fatality Prevention and Review," available [here](#).

B. Court Records and Proceedings

1. The juvenile court record. The clerk of superior court is responsible for maintaining all records pertaining to juvenile cases. The clerk's record includes the summons, the petition, custody orders, other court orders, written motions, other papers filed in the proceeding, and recordings of hearings. G.S. 7B-2901(a). All adjudicatory and dispositional hearings in abuse, neglect, or dependency proceedings are recorded; the court may order that other hearings be recorded. G.S. 7B-806. The recordings may be reduced to a written transcript only when notice of appeal has been timely filed. G.S. 7B-806; 7B-2901(a); *see* G.S. 7B-1001(appeal). Recordings may be erased after the time for appeal has expired with no appeal having been filed pursuant to a court order or the retention schedule that is approved by the Director of the Administrative Office of the Courts and Department of Natural and Cultural Resources. G.S. 7B-2901(a).

Records of juvenile cases alleging abuse, neglect, or dependency are withheld from public inspection and may be examined only by court order unless an exception applies. G.S. 7B-2901(a); *see* G.S. 1-72.1(f). The following persons may examine the court record and obtain copies of written parts of the record without a court order:

- the child who is named in the petition;
- the child's guardian ad litem;
- the county department of social services; and
- the child's parent, guardian, or custodian, or the attorney for the child, parent, guardian, or custodian.

G.S. 7B-2901(a).

For more information about the clerk's records and court administration, see Appendices 3 (JWise), 4 (Rules of Recordkeeping Procedures for the Office of the Clerk of Superior Court, Chapter XII), and 5 (Case Management). Note that Comment D. of Rule 12.5, Access to Files, of the Rules of Recordingkeeping states that "Entry of a TPR changes the legal relationship between a parent and child. The parent should not have access to documents filed subsequent to the TPR even if the TPR is on appeal unless the court has stayed the TPR order on appeal."

2. Juvenile court hearings: open or closed to the public. Federal law allows a state to determine its own policy related to public access to court proceedings that determine child abuse or neglect, but the state policy must ensure the safety and well-being of the child, parents, and family. 42 U.S.C. 671(c). In North Carolina, although court and DSS records related to abuse, neglect, or dependency are withheld from public inspection, the court hearings are open to the public. However, the court has the discretion to close a hearing or any part of a hearing so long as the child does not request that it remain open. G.S. 7B-801(a), (b).

When determining whether to close all or part of the hearing, the court considers the circumstances of the case, including but not limited to

- the nature of the allegations,

- the child's age and maturity,
- the benefit to the child of confidentiality,
- the benefit to the child of an open hearing, and
- the extent to which the confidentiality afforded the child's record pursuant to G.S. 132-1.4(l) (which addresses criminal investigations and refers to Article 29 of G.S. Chapter 7B) and G.S. 7B-2901 will be compromised by an open hearing.

G.S. 7B-801.

Even if a hearing is open, Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure prohibits electronic media coverage and still photography of judicial proceedings.

3. Adoption proceedings and records. An adoption proceeding is a special proceeding that is heard before the clerk of superior court and is a separate proceeding from an abuse, neglect, dependency, or termination of parental rights proceeding. G.S. 48-2-100(a). However, when there is a question of fact, an equitable defense, or a request for equitable relief, the clerk must transfer the proceeding to district court. G.S. 48-2-601(a1). Judicial hearings related to an adoption must be held in closed court. G.S. 48-2-203.

Subject to very limited exceptions, all records related to an adoption, including those that are in the possession of the court, an agency, the State, a county, an attorney, or other professional, are confidential and may not be disclosed unless authorized by statute. G.S. 48-9-102(a). The only two exceptions to this strict confidentiality rule are the adoption decree and the entry in a special proceedings index in the office of the clerk of superior court. Records subject to this confidentiality rule include any documents, notes, pleadings, or other types of records that pertain to an adoption proceeding regardless of the physical form of the record, such as printed, written, microfilmed, audio- or video-tape recorded, and electronic materials. G.S. 48-9-101. During an adoption proceeding, records are not open to inspection by anyone without a court order that finds disclosure is necessary to protect the adoptee's interests. G.S. 48-9-102(b). When the adoption decree is final, all records except the Special Proceedings Index must be permanently retained and sealed. G.S. 48-9-102(c). Information may only be disclosed pursuant to the criteria set forth in Article 9 of G.S. Chapter 48. *See* G.S. 48-9-103 (release of non-identifying information); 48-9-104 (release of identifying information); 48-9-105 (written motion for release of information); 48-9-109 (certain disclosures authorized). The Indian Child Welfare Act (ICWA) requires certain disclosures that are not addressed in North Carolina law. *See* Chapter 13.2 (discussing ICWA, section K regarding adoptions).

C. DSS Access to Information

When DSS is assessing whether a child is abused, neglected, or dependent and is subsequently providing services to that child and family, DSS will need to acquire information about the child and family from collateral sources. The Juvenile Code authorizes DSS to access information, including some confidential information, but that access to information is complicated by several factors, including federal laws that prohibit or limit access to certain types of records.

DSS may *demand in writing* any information or reports, whether or not confidential, that in the director's opinion may be relevant to an assessment of an abuse, neglect, or dependency report or to the provision of protective services. G.S. 7B-302(e). This authority does not extend to information protected by the attorney-client privilege. G.S. 7B-302(e). An agency or individual must provide access to and copies of the requested information to the extent the disclosure is permitted by federal law and regulations. G.S. 7B-302(e). For a discussion of selected federal laws related to health, substance abuse, and educational records, see sections 14.2 (HIPAA), 14.4 (42 C.F.R. Part 2) and 14.5 (FERPA), below.

State laws restrict access to, or provide for the confidentiality of, some types of records and information. However, the broad access to confidential information DSS has under the Juvenile Code does not refer to state laws when limiting the authority of DSS to access confidential information. Additionally, some state laws explicitly make an exception to confidentiality for situations involving the reporting or assessment of abuse or neglect. *See, e.g.*, G.S. 122C-54(h) (although Mental Health, Developmental Disability and Substance Abuse Services providers are restricted from disclosing information, this provision states that providers are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B, which includes the mandatory reporting law and the DSS assessment).

A custodian of criminal investigative information or records may seek a court order preventing disclosure to DSS when a written request has been made for that information if the custodian believes that the disclosure would jeopardize an ongoing or future investigation, the rights of the state to prosecute a defendant, or a defendant's right to receive a fair trial. G.S. 7B-302(e). The custodian must prove by a preponderance of the evidence that one of these three criteria exists. G.S. 7B-302(e).

An agency or individual's refusal to disclose information sought by DSS might be considered interference with or obstruction of an assessment and subject him or her to an interference proceeding brought under G.S. 7B-303. See Chapter 5.1.G (relating to interference proceedings).

D. The Child's GAL Access to and Disclosure of Information

Unless protected by attorney-client privilege, the child's guardian ad litem (GAL) has the authority to obtain any information or reports, whether or not confidential, that in the opinion of the GAL may be relevant to the case. G.S. 7B-601(c). Given the GAL's duties, the type of information that he or she considers relevant may be very broad. The GAL represents the child to assure the protection of the child's legal rights and protect and promote the child's best interests. G.S. 7B-601(a). A GAL's duties include making an investigation to determine the facts, the child's needs, and available resources within the family and community to meet those needs; exploring options with the court at dispositional hearings; conducting follow-up investigations to insure that court orders are being properly executed; and reporting to the court when the child's needs are not being met. G.S. 7B-601(a).

Although G.S. 7B-700(a) permits DSS to share with any other party information relevant to the juvenile proceeding, the same is not true for the GAL. The GAL is not generally authorized to share information he or she obtains unless ordered by the court, local rules provide otherwise, or if the sharing is pursuant to agency sharing provisions or disclosure to the juvenile's attorney in a delinquency or undisciplined action under G.S. 7B-3100. G.S. 7B-700(f); *see* G.S. 7B-601(c). However, the GAL must share with all parties reports and records before submitting the reports and records to the court. G.S. 7B-700(f). The AOC form Order to Appoint or Release Guardian Ad Litem and Attorney Advocate contains the following language related to this provision:

The Guardian ad Litem has the authority to obtain any information or reports, whether or not confidential, that may in the Guardian ad Litem's opinion be relevant to the case. This order includes the release of confidential information subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). 45 C.F.R. 164.512(a), (e). No privilege other than the attorney-client privilege may be invoked to prevent the Guardian ad Litem and the Court from obtaining such information. The confidentiality of the information or reports shall be respected by the Guardian ad Litem and no disclosure of any information or reports shall be made to anyone, except by order of the Court or unless otherwise provided by law.

Practice Note: Some custodians of records ask for a certified copy of the GAL appointment order before allowing access to or copies of records. Others accept a copy of a certified copy or simply look at the appointment order to verify the appointment before allowing access to records. Occasionally a records custodian will refuse to release information or records without a subpoena.

AOC Form:

AOC-J-207, [Order to Appoint or Release Guardian Ad Litem and Attorney Advocate](#) (June 2014).

E. Designated Agency Information Sharing

The Juvenile Code provides for information sharing among agencies who work with children that are receiving protective services in abuse, neglect, or dependency cases. Specifically, G.S. 7B-3100(a) requires that "designated agencies" share with other designated agencies information that is in their possession (even if it is confidential) and has been requested and is relevant to

- any DSS assessment of a report of child abuse, neglect, or dependency;
- DSS's provision or arrangement of protective services in a child abuse, neglect, or dependency case; or
- any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent.

Designated agencies must share information, however, only to the extent permitted by federal law and regulations (such as the Confidentiality of Substance Use Disorder Patient Records regulations and the Family Educational Rights and Privacy Act, discussed respectively in sections 14.4 and 14.5, below). G.S. 7B-3100(a). See also sections 14.2.D.4 and 14.4.D.4, below (discussing the Health Insurance Portability and Accountability Act and 42 C.F.R. Part 2 as related to G.S. 7B-3100). Designated agencies sharing information must document the name of the agency to which the information was provided and the date it was provided. 14B N.C.A.C. 11A.0302.

Practice Note: Information sharing is not defined. The applicable statute and rules do not explicitly authorize or prohibit the exchange of agency records. When determining whether copies of documents may be provided, the designated agencies should first look to any applicable federal laws. If a federal law prohibits the release of documents, that law must be followed. If there is no prohibition, absent a signed consent to release or court order that allows records to be released from one designated agency to another, the designated agencies will need to determine whether information sharing means releasing copies of records or disclosing information contained in the agency's records without providing copies of those records.

The purpose of the information sharing is limited. Designated agencies that receive information pursuant to these provisions may use the information only for the protection of the child and others or to improve the child's educational opportunities. G.S. 7B-3100(a).

Designated agencies must continue to share information until DSS closes the protective services case or, if a petition is filed, until the juvenile is no longer subject to the jurisdiction of the juvenile court. Designated agencies must keep shared information confidential and may not permit public inspection of the information. G.S. 7B-3100(a). Information shared with a local educational agency shall not be part of the student's official education record, and the principal must destroy the information when he or she finds that the school no longer needs the information to protect the safety of or improve the education opportunities for the student or others. G.S. 115C-404(a). The purpose of the information for use by the school, the sharing of that information to necessary school employees, and the sanction of the employee's dismissal for not maintaining the confidentiality of the shared information is addressed in G.S. 115C-404.

The Juvenile Code requires that the Division of Adult Correction and Juvenile Justice of the Department of Public Safety consult with the Conference of Chief District Court Judges and adopt rules that designate certain local agencies that are authorized to share information. G.S. 7B-3100(a). The applicable rules are 14B N.C.A.C. 11A.0301 and 11A.0302. The designated agencies include

- the Division of Adult Correction and Juvenile Justice of the Department of Public Safety (note the Division is still referred to as the Department of Juvenile Justice and Delinquency Prevention in the rules), which includes juvenile court counselors;
- GAL offices;
- county departments of social services;

- local management entities or area mental health, developmental disability, and substance abuse authorities;
- local law enforcement agencies;
- the district attorney's office in the district (however, while a district attorney (DA) may obtain information, the statute does not impose on a DA a requirement to disclose or release any information in the DA's possession);
- county mental health facilities and developmental disabilities and substance abuse programs;
- local school administrative units;
- local health departments; and
- any local agency that is located in the judicial district and is designated by an administrative order issued by the chief district court judge.

G.S. 7B-3100(a); 14B N.C.A.C. 11A.0301.

The court is not an “agency” and records maintained by the clerk of superior court are not subject to these provisions. The court records are governed by G.S. 7B-2901 (discussed in section 14.1.B, above).

Practice Note: In 2006, G.S. 7B-3100 was amended to expand its application to situations where DSS is assessing a report of or arranging for protective services for a child in an abuse, neglect, or dependency case. The rule governing information sharing among designated agencies, 14B N.C.A.C. 11A.0301, has not been revised since the statutory amendment and only authorizes information sharing between designated agencies in those cases where a petition is filed that alleges a juvenile is abused, neglected, dependent, delinquent, or undisciplined. Designated agencies may rely on G.S. 7B-3100. A chief district court judge may want to include in an administrative order authorized by G.S. 7B-3100 the language in that statute regarding the circumstances that allow for information sharing to occur between the agencies designated in that administrative order.

Resource: For more information about agency information sharing pursuant to G.S. 7B-3100 and the confidentiality laws that apply to health, mental health, and substance abuse services, see Mark F. Botts, LaToya B. Powell, Rachel Johnson, Jessica Jones, [North Carolina Juvenile Justice - Behavioral Health Information Sharing Guide](#) (UNC School of Government, 2015).

F. Subpoenas

A subpoena may be served on a DSS, other agency, or person to acquire information through testimony or the production of records. *See* N.C. R. CIV. P. 45. Depending on state and federal laws related to confidentiality or privilege that apply to the agency or person served with a subpoena, the disclosure of the requested information may be prohibited or require a court order to disclose the information. In those cases, the service of a subpoena will not be sufficient to obtain the sought-after information. Additionally, agencies and attorneys sometimes may feel caught between the duty to protect information based on a belief that sharing the information would be damaging and a statutory authority to share the information. In situations where the recipient of the subpoena does not believe it has the statutory authority

to disclose the information or it would be harmful to disclose the information, a written objection to the subpoena or motion to quash the subpoena may be necessary. *See* N.C. R. CIV. P. 45(c). The court will then resolve the dispute about whether the information should be disclosed, and if so, result in any necessary court orders for disclosure.

Resource: For a discussion of subpoenas, see John Rubin & Aimee Wall, [Responding to Subpoenas for Health Department Records](#), HEALTH LAW BULLETIN No. 82 (UNC School of Government, Sept. 2005).

14.2 Health Records and HIPAA¹

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations at Chapter 45 of the Code of Federal Regulations, Parts 160 and 164 (the “privacy rule”) govern the use and disclosure of health care information. Generally, information acquired or created in connection with providing health care is confidential and may not be disclosed except as permitted or required by the privacy rule. *See* 45 C.F.R. Parts 160 and 164.

Note, mental health records are governed by both the privacy rule and the state law discussed in section 14.3. The use and disclosure of mental health records must comply with both laws. Substance use disorder treatment records are governed by the privacy rule, the state law discussed in section 14.3, below, and a federal law discussed in section 14.4, below. The use and disclosure of substance use disorder treatment records must comply with all three laws.

HIPAA is a complex federal law. For purposes of this Manual, this section focuses on disclosure of information by a covered health care provider when there is cause to suspect or a substantiation by DSS that a child is abused, neglected, or dependent. This section is an introductory overview of the relevant provisions of HIPAA and does not provide a comprehensive review of this federal law. Additionally, it does not address when DSS is subject to HIPAA requirements as a covered entity.

Resource: For information about whether DSS is a HIPAA covered entity, see Aimee Wall, [Should a Local Government Be a HIPAA Hybrid Entity?](#), UNC SCH. OF GOV'T: COATES' CANONS: NC LOCAL GOVERNMENT LAW BLOG (April 28, 2015).

A. Covered Health Care Providers

The privacy rule applies to any “health care provider” that transmits health information in electronic form in connection with certain transactions, including the electronic transmission of information to a health plan for purposes of obtaining authorization or payment for health care services. *See* 45 C.F.R. 160.103, 164.500. While the transmission of information in electronic form for specified activities makes a health care provider a “covered entity” under

¹ This section was written by School of Government faculty member Mark Botts.

the privacy rule, once covered, the privacy rule protects health information maintained by the provider in any form, whether electronic or on paper. (Other covered entities include health plans and health care clearinghouses.) “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. This includes services relating to the mental condition or functional status of an individual. *See* 45 C.F.R. 160.103 for definitions of “health care provider” and “health care”.

B. Protected Health Information

The privacy rule governs 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 clearinghouse;
- identifies an individual or provides a reasonable basis to believe that the 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.

C. 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. Any person or organization alleging a HIPAA violation may file a complaint with the U.S. DHHS Office of Civil Rights (OCR). Because OCR has the authority to impose significant civil monetary penalties for impermissible disclosures of protected health information, anyone seeking information from a health care provider will often be asked to point to a provision of the privacy rule that authorizes the provider to disclose the information. *See* 45 C.F.R. 160.402.

D. Impact on Abuse, Neglect, Dependency Laws

1. Reporting child abuse, neglect, or dependency. Anyone who has cause to suspect that a child is abused, neglected, or dependent, or has died as a result of maltreatment, has a legal duty under state law to report the case to the department of social services in the county where the child resides or is found. G.S. 7B-301. The HIPAA privacy rule permits a covered health care 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 does not prevent a covered provider from complying with North Carolina’s reporting law nor does it bar the provider from disclosing protected health information when making a report required by G.S. 7B-301.

2. Assessment and protective services. The department of social services is required to assess every abuse, neglect, and dependency report that falls within the scope of the Juvenile Code. G.S.7B-302. The director of social services (or the director's representative) may make

a *written* demand for any information or reports, whether or not confidential, that in the director's opinion may be relevant to the assessment of a report or to the provision of protective services. G.S. 7B-302(e). Upon such demand, any agency or individual is required to provide access to and copies of confidential information to the extent permitted by federal law. The privacy rule permits a health care 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 DSS makes a written demand for the information pursuant to G.S. 7B-302(e).

3. The child's GAL access to information. G.S. 7B-601 authorizes the court to appoint a guardian ad litem (GAL) to represent children alleged to be abused, neglected, or dependent in juvenile court proceedings. The GAL has the authority to obtain "any information or reports, whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case." G.S. 7B-601(c). Because the privacy rule says a health care provider may disclose protected health information to the extent that such disclosure is required by law, 45 C.F.R. 164.512(a), and because state law requires disclosure of information to a GAL appointed under G.S. 7B-601, the privacy rule permits a health care provider to disclose protected health information to the GAL as necessary to comply with G.S. 7B-601.

The form order used by courts to appoint a GAL includes the authorizing language of G.S. 7B-601(c) and adds that the authority includes the ability to obtain information protected by the HIPAA privacy rule. *See* AOC-J-207, Order to Appoint or Release Guardian ad Litem and Attorney Advocate (June 2014), quoted in section 14.1.D, above.

4. Interagency information sharing. As discussed in section 14.1.E, the Juvenile Code requires the adoption of rules designating local agencies that are *required* to share with one another, upon request and to the extent permitted by federal law and regulations, information in their possession that is relevant to

- any assessment of a report of child abuse, neglect, or dependency;
- the provision or arrangement of protective services in a child abuse, neglect, or dependency case by a local department of social services; or
- any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined or delinquent.

G.S. 7B-3100.

To the extent that the rules designate health care providers or other HIPAA covered entities to disclose information pursuant to G.S. 7B-3100, the HIPAA privacy rule permits the information sharing because it authorizes a covered entity to disclose protected health information to the extent that such disclosure is required by law. 45 C.F.R. 164.512(a). The state law requirement to share information, combined with the privacy law's permission to disclose information when required by state law, requires the health care provider to disclose information in accordance with G.S. 7B-3100 if the health care provider is a designated agency by rule. *See* 14B N.C.A.C. 11A.0301 for a list of agencies designated to share information pursuant to G.S. 7B-3100.

5. Disclosure pursuant to a subpoena. The privacy rule permits a health care provider or other covered entity to disclose protected health information in response to a subpoena if the covered entity receives *satisfactory assurance* from the party seeking the information that reasonable efforts have been made by the party either to

- ensure that the individual who is the subject of the information has been given notice of the request or
- secure a qualified protective order.

See 45 C.F.R. 164.512(e).

Satisfactory assurance of notice means a written statement and accompanying documentation that the party requesting records has made a good faith attempt to provide written notice to the individual that includes sufficient information about the proceeding to permit the individual to raise an objection to the court and the time for the individual to raise objections has elapsed and either no objections were filed or all objections filed were resolved by the court and the disclosures being sought are consistent with such resolution.

Satisfactory assurance of a qualified protective order means a written statement and accompanying documentation demonstrating that the parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or tribunal, or the party seeking the information has requested a qualified protective order. (See 45 C.F.R. 164.512(e) for more information on protective orders.)

Practice Note: The HIPAA privacy rule does not preempt state and federal confidentiality laws that place greater restrictions on the disclosure of protected information. Because the state mental health confidentiality law and the federal law governing substance use disorder patient records do not permit the disclosure of protected information in response to a subpoena alone, information that is governed by those laws cannot be disclosed pursuant to a subpoena, notwithstanding the fact that the same information also may be subject to the HIPAA privacy rule. See sections 14.3 and 14.4, below.

6. Disclosure pursuant to a court order. A health care provider or other HIPAA covered entity 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 privacy rule expresses no particular procedure or criteria for obtaining a court order to disclose protected health information.

7. Disclosure with patient authorization. A health care provider may disclose protected health information as authorized by the patient. The authorization must be voluntary and in writing. It also must be informed, which means that the individual signing the authorization must understand what information will be shared, with whom it will be shared, and for what purpose. Toward this end, the privacy rule specifies required content for a valid authorization. See 45 C.F.R. 164.508(c).

The patient’s written authorization permits, but does not require, the health care provider or other covered entity to disclose information. Any disclosure made by a health care provider pursuant to a patient’s authorization must be consistent with, and may not exceed, the terms of the written authorization. The patient may revoke the authorization at any time.

Resources:

For a detailed guide to HIPAA, see “[The HIPAA Privacy Rule](#)” section of the U.S. Department of Health and Human Services website.

For a sample patient-authorization-to-disclose form that meets the requirements of the HIPAA privacy rule, see Mark F. Botts, LaToya B. Powell, Rachel Johnson, Jessica Jones, [North Carolina Juvenile Justice - Behavioral Health Information Sharing Guide](#) (UNC School of Government, 2015).

14.3 Mental Health Records and G.S. 122C²

The Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985, G.S. Chapter 122C, governs providers of mental health, developmental disabilities, and substance abuse services (MH/DD/SA services). G.S. 122C-52 through -56 govern the information relating to those services.

A. Covered Providers

G.S. 122C applies to any “facility”—meaning any individual, agency, company, area authority, or state facility—at one location *whose primary purpose* is to provide services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers. This definition includes public and private agencies, providers of outpatient as well as inpatient services, state-operated psychiatric hospitals, psychiatric residential treatment centers, and agencies and individuals who contract with area authorities to provide services to area authority clients.

An “area authority” is commonly referred to as a “local management entity/managed care organization” or “LME/MCO.” Though these terms have distinct meanings in some contexts, for the purposes of this section of the Manual, the terms are interchangeable and refer to the public authorities responsible for contracting for the provision of publicly-funded MH/DD/SA services within a specified geographic service area. *See* G.S. 122C-3 for the definitions of these terms.

In addition to G.S. 122C, regulations at 10A N.C.A.C. 26B impose additional confidentiality requirements on a subset of MH/DD/SA facilities: area authorities, state facilities, and the individuals and agencies that contract to provide services on behalf of area authorities and state facilities.

² This section was written by School of Government faculty member Mark Botts.

B. 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 is confidential and may not be disclosed except as authorized by G.S. 122C-52 through -56 and, where applicable, 10A N.C.A.C. 26B. *See* G.S. 122C-3(9); 122C-52.

C. The Duty of Confidentiality

No individual having access to confidential information may disclose it except as authorized by G.S. 122C and, where applicable, 10A N.C.A.C. 26B. The unauthorized disclosure of confidential information is a Class 3 misdemeanor (*see* G.S. 122C-52(e)) and could result in civil liability for the treatment facility or its employees. Further, because employees of area and state facilities are subject to disciplinary action if they disclose information in violation of G.S. 122C (*see* 10 N.C.A.C. 26B.0104), agencies subject to G.S. 122C will generally insist on identifying the legal authority for a disclosure before making the disclosure.

D. Impact on Abuse, Neglect, Dependency Laws

1. Reporting child abuse, neglect, or dependency. Anyone who has cause to suspect that a child is abused, neglected, or dependent, or has died as a result of maltreatment, is required to report the case to the department of social services in the county where the child resides or is found. G.S. 7B-301. Under G.S. 122C-54(h), providers of MH/DD/SA services are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B, which includes 7B-301. Thus, the state law governing the confidentiality of MH/DD/SA services is not a bar to complying with the state’s child abuse reporting statute, and providers of services must disclose confidential information when necessary to comply with the mandatory reporting law.

2. Assessment and protective services. The department of social services is required to assess every abuse, neglect, and dependency report that falls within the scope of the Juvenile Code. G.S. 7B-302. The director or director’s representative may make a *written* demand for any information or reports, whether or not confidential, that in the director’s opinion may be relevant to the assessment or to the provision of protective services. Upon such demand, any agency or individual must provide access to and copies of confidential information to the extent permitted by federal law.

The state mental health confidentiality law requires individuals and agencies subject to the law to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B, which includes 7B-302. *See* G.S. 122C-54(h). Thus, even if DSS seeks information that falls within the scope of the confidentiality protections of G.S. 122C, providers of MH/DDSA services must provide access to and copies of the requested information, unless disclosure is prohibited by federal law and regulations.

3. The child’s GAL access to information. A guardian ad litem (GAL) appointed under G.S. 7B-601 to represent children who are alleged to be abused, neglected, or dependent, has the

authority to obtain “any information or reports, whether or not confidential, that may in the guardian ad litem’s opinion be relevant to the case.” G.S. 7B-601(c).

G.S. 122C-54(h) provides that facilities governed by G.S. 122C must disclose confidential information “as required by other State or federal law.” Thus, when a court order appoints someone to be a GAL under G.S. 7B-601, the GAL must be granted access to any information, whether or not protected by G.S. 122C, that the GAL believes is relevant to the case.

4. Interagency information sharing. As discussed in sections 14.1.E and 14.2.D.4, above, the Juvenile Code requires the adoption of rules designating local agencies that are *required* to share with one another, upon request and to the extent permitted by federal law and regulations, information that is in their possession that is relevant to

- any assessment of a report of child abuse, neglect, or dependency;
- the provision or arrangement of protective services in a child abuse, neglect, or dependency case by a local department of social services; or
- any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined or delinquent.

To the extent that the applicable rules, 14B N.C.A.C. 11A.0301, designate MH/DD/SA service providers among the agencies required to share information in accordance with G.S. 7B-3100, those service providers would be required to share information upon the request of another designated agency because G.S. 122C requires providers to disclose confidential information as required by other state law. *See* G.S. 122C-54(h).

The rules designate area mental health, developmental disabilities, and substance abuse authorities among the agencies required to share information pursuant to the statute, as well as any “local agency designated by an administrative order issued by the chief district court judge of the district court district in which the agency is located.” 14B N.C.A.C. 11A.0301(j). Because the rules do not designate individuals and agencies who contract with area authorities to provide services to area authority clients, such providers of services do not come under G.S. 7B-3100 and, therefore, would not be permitted to disclose confidential information pursuant to the statute unless they are designated by an administrative court order as provided for in the rule. *See* 14B N.C.A.C. 11A.0301 for a list of agencies designated to share information pursuant to G.S. 7B-3100.

5. Disclosure pursuant to a subpoena. Unlike the privacy rule governing health records, discussed in section 14.2, above, G.S. 122C does not include a provision permitting a provider of MH/DD/SA services to disclose confidential information in response to a subpoena alone. A subpoena would compel disclosure of confidential information only if the confidentiality bar is removed by the client’s written authorization to disclose, a court order requiring disclosure, or some other legal mandate, such as a statute or regulation, that requires disclosure under the particular circumstances.

6. Disclosure pursuant to a court order. A facility must disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure. G.S. 122C-54(a). G.S. 122C-54(a) expresses no standard or criteria for the issuance of a court order. Presumably, the court should use a public interest test similar to the test articulated in the regulations governing substance abuse records, see section 14.4, below, which requires the court to balance the public interest and need for the disclosure against the potential injury to the patient, the patient-provider relationship, and the provider’s on-going treatment services.

The evidentiary privilege statutes for mental health professionals may provide some guidance to the court. The privilege statutes for psychologists and other mental health professionals provide that a judge may order disclosure of privileged information when “necessary to the proper administration of justice” (e.g., in order that the truth be known and justice done). *See* G.S. 8-53.3 (psychologists); 8-53.5 (marital and family therapists); and 8-54.7 (social workers) and case annotations.

7. Disclosure with patient authorization. A facility may disclose confidential information if the client or his or her legally responsible person consents in writing to the release of the information to a specified person or agency. *See* G.S. 122C-53(a); 122C-3(28).

The state regulations that apply to area authorities and their contracted providers of services specify the required content for consent forms. *See* 10A N.C.A.C. 26B.0200. The consent must be voluntary, informed, and in writing. The client’s consent is revocable, and it permits, but does not require, a facility to disclose confidential information.

Any consent form used for the disclosure of information that is confidential under G.S. 122C will probably need to conform to the HIPAA privacy rule requirements for patient authorization, as most MH/DD/SA providers also are healthcare providers covered by the privacy rule. The most effective way to ensure that you are using a consent form that meets the requirement of law is to have the patient sign and fully complete the treatment provider’s own consent form.

Resource: For a sample patient-authorization-to-disclose form that meets the requirements of the HIPAA privacy rule and G.S. 122C, see Mark F. Botts, LaToya B. Powell, Rachel Johnson, Jessica Jones, [North Carolina Juvenile Justice - Behavioral Health Information Sharing Guide](#) (UNC School of Government, 2015).

14.4 Substance Abuse Records and 42 C.F.R. Part 2³

Federal law restricts 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. Part 2.

³ This section was written by School of Government faculty member Mark Botts.

A. Covered Programs

The federal law governs federally assisted programs. A “program” is

- an individual or entity (other than a general medical facility) that holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment;
- an identified unit with a general medical facility that holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment; or
- medical personnel or other staff in a general medical facility whose primary function is the provision of substance use disorder diagnosis, treatment, or referral for treatment and who are identified as such providers.

See 42 C.F.R. 2.11 (definition of “substance use disorder”).

A program is considered “federally assisted” if it participates in Medicare, has tax exempt status, is registered to dispense a controlled substance used in the treatment of substance use disorders, receives federal financial assistance in any form even if the financial assistance does not directly pay for substance use disorder treatment, and is a local government unit that receives federal funds that could be but are not necessarily spent for a substance abuse disorder program. See 42 C.F.R. 2.12(b). By participating in Medicaid and receiving federal block grant funding, area authorities (LME/MCOs) and the agencies that contract with them to provide substance use disorder diagnosis, treatment, or referral for treatment are federally assisted programs governed by 42 C.F.R. Part 2.

The federal regulations cover those treatment or rehabilitation programs, employee assistance programs, programs in general hospitals, and school-based programs who hold themselves out as providing and provide substance use disorder diagnosis, treatment, or referral for treatment. A private practitioner who specializes, and holds herself out as specializing, in diagnosing substance use disorders and referring patients elsewhere for treatment is covered by the regulations even though she does not treat substance use disorders.

However, as the three-part definition of “program” indicates, when it comes to general medical facilities, the regulations define “program” differently. The federal regulations would not apply to hospital emergency department personnel who refer a patient to the hospital’s intensive care unit for an apparent drug overdose unless the *primary* function of such personnel is the provision of substance use disorder diagnosis, treatment, or referral for treatment and they are identified as providing such services. Alternatively, if the general hospital has promoted its emergency department or other 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 covered by the regulations.

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, this alone would not make the hospital emergency room a “program” covered by the regulations and, therefore, the drug test results would not be protected by 42 C.F.R. Part 2. If, however, a substance abuse counselor

evaluates the same patient for drug abuse and referral for treatment after the patient is admitted to a medical floor of the hospital, then the substance abuse counselor would be considered a “program.”

B. Confidential Information

The federal restrictions on disclosure apply to any information, whether recorded or not, that

- would identify a “patient” (defined as an individual who has applied for or been given substance use disorder treatment, diagnosis, or referral for treatment) as having or having had a substance use disorder and
- is alcohol or drug abuse information obtained by a federally assisted alcohol or drug abuse program for the purpose of treating substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.

The mere acknowledgement by program staff of the presence of an identified patient at a residential or inpatient facility would involve the disclosure of confidential information if the facility is publicly identified as a place where only substance use disorder diagnosis, treatment, or referral for treatment is provided. Acknowledging the presence of a patient in this circumstance would require either the patient’s written consent or an authorizing court order issued in compliance with the regulations. For disclosures pursuant to a court order or patient consent, *see* section 14.4.D, below (discussing impact on abuse and neglect laws).

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 the intake 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 be covered because it does not identify the mother as a person who has applied for or received substance use disorder treatment, diagnosis, or referral for treatment.

A diagnosis that is made solely for the purpose of providing evidence for use by law enforcement agencies or officials is not confidential information because it is not obtained for the purpose of treating substance use disorder, making a diagnosis for treatment, or making a referral for that treatment. On the other hand, a diagnosis that is initially prepared by a program in connection with treatment or referral for treatment of a substance use disorder patient is covered by the regulations even if the diagnosis is not used for treatment because the patient does not follow up on the referral.

C. 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).

It is important for social services departments, guardians ad litem (GALs), and others who receive program information to understand that the duty of confidentiality imposed by the federal regulations may sometimes fall on them. The restrictions on disclosure apply to individuals and entities who receive patient information directly from a program or other lawful holder of information if they are notified of the prohibition on redisclosure in accordance with section 2.32 of the regulations. That section requires a program that discloses information pursuant to the patient's written consent to notify the recipient that the information continues to be protected by 42 C.F.R. Part 2 and may be redisclosed only as permitted by the regulations.

D. Impact on Abuse, Neglect, Dependency Laws

If the federal law does not expressly permit the disclosure of confidential patient information in a particular circumstance, then the disclosure is prohibited. To understand the impact of 42 C.F.R. Part 2 on North Carolina's laws pertaining to child abuse, neglect, and dependency, we must start with the federal law's own rule regarding its relationship to state law: "no state law may either authorize or compel any disclosure prohibited by this part." 42 C.F.R. 2.20. Thus, where the Juvenile Code or other state law authorizes or compels a disclosure that is not permitted by 42 C.F.R. Part 2, the federal prohibition on disclosure must be followed. Conversely, the federal regulation does not preempt the field of state law. If the federal law permits a particular disclosure, but state law prohibits it, then state law controls. The federal law does not compel disclosure under any circumstance.

In addition to restricting the *disclosure* of information, the regulations also restrict the *use* of information to initiate or substantiate criminal charges against a patient. Generally, when a department of social services or guardian ad litem seeks information from programs for the purpose of carrying out their functions relating to child abuse, neglect, or dependency, the restrictions on program *disclosures* will apply to guide programs on how to respond to requests for information. Because the restrictions on *use* apply only to the use of information for purposes of criminal investigation or prosecution, those restrictions are not discussed here. See 42 C.F.R. 2.12 for the restrictions on use of information.

1. Reporting child abuse, neglect, or dependency. The federal restrictions on the disclosure of confidential information do not apply to the reporting of suspected child abuse or neglect under state laws mandating such reports. 42 C.F.R. 2.12(c)(6). Therefore, the federal law does not bar compliance with North Carolina's mandatory reporting statute (G.S. 7B-301), even if it means disclosing patient identifying information.

2. Assessment and protective services. Although substance use disorder programs (or third party payers who have received information from such programs) must make a report of suspected abuse, neglect, or dependency as mandated by G.S. 7B-301, they are not authorized to provide information beyond the initial report when DSS requests further information pursuant to its duty under G.S. 7B-302(e) to assess the report. The federal rules permit the disclosure of 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).

3. The child’s GAL access to information. A guardian ad litem (GAL) appointed under G.S. 7B-601 to represent children who are alleged to be abused, neglected, or dependent, has the authority to obtain “any information or reports, whether or not confidential, that may in the guardian ad litem’s opinion be relevant to the case.” G.S. 7B-601(c). However, the federal regulations governing substance use disorder treatment records do not recognize this as a policy exception to the confidentiality of patient information. The federal rules permit the disclosure of information to a GAL only with the patient’s written consent or a court order issued in compliance with Subpart E of the federal regulations.

4. Interagency information sharing. Although the HIPAA privacy rule and state mental health law permit the interagency sharing of confidential information as required by G.S. 7B-3100 and 14B N.C.A.C. 11A.0301 and discussed in sections 14.2.D.4 and 14.3.D.4, above, the federal drug and alcohol confidentiality law and its implementing regulations at 42 C.F.R. Part 2 do not permit the disclosure of confidential information pursuant to these state laws.

5. Disclosure pursuant to a subpoena. Unlike the privacy rule governing health records, discussed in section 14.2, above, and like the state confidentiality law governing MH/DD/SA services, 42 C.F.R. Part 2 does not include a provision permitting a provider of services to disclose confidential information in response to a subpoena alone. A subpoena compels disclosure of confidential information only if accompanied by the client’s authorization to disclose, a court order to disclose, or some other legal mandate, such as a statute or regulation that requires disclosure under the circumstances.

6. Disclosure pursuant to a court order. Under Subpart E of 42 C.F.R. Part 2, a court of competent jurisdiction may authorize a use or disclosure that would otherwise be prohibited under the regulations. *See* 42 C.F.R. 2.61. Such an order does not compel disclosure; to compel disclosure a subpoena or similar mandate must be issued.

Subpart E sets forth the procedure and criteria for court orders authorizing

- disclosure for noncriminal purposes,
- disclosure and use of information to criminally investigate or prosecute patients,
- disclosure and use of information to investigate or prosecute a program or the person holding the records, and
- the use of undercover agents and informants to investigate employees or agents of a program in connection with a criminal matter.

The kind of order needed by a department of social services to obtain confidential information in the context of child abuse, neglect, or dependency proceedings is an order authorizing disclosure for noncriminal purposes. Any person having a legally recognized interest in the disclosure that is sought may apply for the order. The application may be filed separately or as part of a pending action and must use a fictitious name, such as John Doe, to refer to the patient unless the court orders the record of the proceeding sealed from public scrutiny. *See* 42 C.F.R. 2.64. When seeking a court order where there is no pending action, *see In re Albemarle Mental Health Center*, 42 N.C. App. 292 (1979) (where no civil or criminal proceeding has been commenced, the superior court has jurisdiction to hear a motion

requesting an in camera hearing to determine whether information in the possession of a mental health center should be disclosed; the action is in the nature of a special proceeding.).

When the information is sought for noncriminal purposes, the patient and person holding the records must be given adequate notice and opportunity to file a written response or appear in person for the limited purpose of providing evidence on the legal criteria for issuance of the order. 42 C.F.R. 2.64. The judge may examine the records before making a decision. Any oral argument, review of evidence, or hearing on the application must be held in camera.

To order disclosure, the court must find “good cause” for the disclosure. For an order authorizing disclosure for noncriminal purposes, this means the court must find that

- other ways of obtaining the information are not available or would not be effective and
- 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 those parts of the record that are essential to fulfill the purpose of the order, (ii) limit disclosure to those persons whose need for the information forms the basis for the order, and (iii) include any other measures that are necessary to limit disclosure for the protection of the patient, the patient-treatment provider relationship, and the program’s ongoing treatment services (e.g., sealing from public scrutiny the record of any proceeding for which the disclosure of information has been ordered). *See* 42 C.F.R. 2.64.

The disclosure of certain information—the things a patient says to program personnel—requires additional findings by the court. A court may order the disclosure of “confidential communications” made by a patient to a program in the course of diagnosis, treatment, or referral for treatment only if the 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;
- necessary to the investigation or prosecution of an extremely serious crime; or
- in connection with litigation in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. 42 C.F.R. 2.63.

7. Disclosure with patient authorization. A program may disclose confidential information with the consent of the patient. As with the HIPAA privacy rule and the state mental health law, patient consent must be voluntary and in writing. It also must be informed, which means that the individual signing the authorization must understand what information will be shared, with whom it will be shared, and for what purpose. Toward this end, the federal law governing substance use disorder programs specifies certain content that must be included in the written consent for it to be considered valid. *See* 42 C.F.R. 2.31.

Any consent form used for the disclosure of information that is confidential under 42 C.F.R. Part 2 will need to conform to the state law requirements for consent because G.S. 122C also

applies to substance abuse treatment services. In addition, if the program is a covered entity under the HIPAA privacy rule, the privacy rule's requirements for patient authorization will apply. The most effective way to ensure that you are using a consent form that meets the requirement of law is to have the patient sign and fully complete the treatment program's own consent form.

Resource: For a sample consent-to-disclose form that meets the requirements of the HIPAA privacy rule, G.S. 122C, and 42 C.F.R. Part 2, see Mark F. Botts, LaToya B. Powell, Rachel Johnson, Jessica Jones, [*North Carolina Juvenile Justice - Behavioral Health Information Sharing Guide*](#) (UNC School of Government, 2015).

14.5 Education Records and FERPA

A. Introduction

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, was enacted in 1974; the corresponding regulations are found at 34 C.F.R. Part 99. Amendments were made to FERPA by the Uninterrupted Scholars Act (USA) to address timely access to records. *See* Pub. L. No. 112-278, 126 Stat. 2480, effective January 14, 2013. Federal regulations have not been amended to include the USA provisions.

FERPA is a complex federal law that provides for access to education records by parents and “eligible students” while protecting the privacy of students and parents by governing the disclosure of education records by all educational institutions that receive federal funds. A parent includes a natural parent, guardian, or individual acting as a parent in the absence of a parent or guardian. An eligible student is a student who is 18 years old or attending a postsecondary institution. 34 C.F.R. 99.3. FERPA gives parents and eligible students certain rights with respect to inspecting, requesting changes to, and preventing disclosure of education records.

A county DSS that is providing child welfare (including an initial assessment) services to a child needs to access a child's education record. A DSS assessment of abuse, neglect, or dependency may require information from the child's school records. 10A N.C.A.C. 70A.0106(i)(4). A child's case plan with a county DSS includes the child's education records. 42 U.S.C. 675(1)(C); 10A N.C.A.C. 70G.0506(a)(5). Although state laws give certain individuals and agencies access to confidential information for the purpose of child protection and abuse, neglect, or dependency proceedings, access to and disclosure of education records in some circumstances are subject to FERPA requirements.

For the purposes of this Manual, this section focuses on consent to disclose information and certain exceptions to the need for consent. This section is an introductory overview of FERPA requirements most relevant to abuse, neglect, or dependency proceedings and does not comprehensively address FERPA.

Resources:

For more detailed information about FERPA, including regulations, explanations, fact sheets, and model forms, see

- [“Student Privacy Policy Office”](#) page on the U.S. Department of Education website.
 - The [“Protecting Student Privacy”](#) website by the U.S. Department of Education: A Service of the Privacy Technical Assistance Center and the Student Privacy Policy Office.
 - Areas of Focus, [“Data & Information Sharing”](#) section of the Legal Center for Foster Care and Education website.
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B. Consent Required for Disclosure

1. Consent required. Under FERPA, an educational agency or institution may not provide personally identifiable information from a student’s education records without obtaining a *specific dated written consent* from the parent or eligible student, unless an exception to the consent requirement applies. 20 U.S.C. 1232g(b)(2)(A); 34 C.F.R. 99.30(a); *see* 20 U.S.C. 1232g(d) (student consent). The consent signature may be in an electronic form. 34 C.F.R. 99.30(d).

A consent to release records protected by FERPA must

- specify the records that may be disclosed,
- state the purpose of the disclosure, and
- identify the party or class of parties to whom the disclosure may be made.

34 C.F.R. 99.30(b).

Upon request, a parent or eligible student must also receive a copy of the records disclosed. 34 C.F.R. 99.30(c).

An educational agency must give FERPA rights and protections to a parent unless the school has been provided with evidence of a court order, state statute, or legally binding document that relates to divorce, separation, or custody that specifically revokes these rights. 34 C.F.R. 99.4.

2. Personally identifiable information. “Personally identifiable information” includes but is not limited to

- the student’s name;
- the name of the student’s parent or other family members;
- the address of the student or student’s family;
- a personal identifier, such as the student’s social security number, student number, or biometric record;
- other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- other information that, alone or in combination, is linked or linkable to a specific student

that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

- information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. 99.3. *See also* G.S. 115C-402.5(a)(4)a.

3. Education records. The term “education records” used in FERPA generally includes all records (which is information recorded in any way including handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche) that are maintained by the agency or institution (or by a party acting for the agency or institution) and contain information directly related to a student. 20 U.S.C. 1232g(a)(4)(A); 34 C.F.R. 99.3. This means the records themselves and the information in them, wherever they are stored. Educational records are broadly defined. The health records of a student enrolled in elementary or secondary school, such as immunization and school nurse’s records that are maintained by the school, are education records under FERPA. *See [Joint Guidance on the Application of the Family Educational Rights and Privacy Act \(FERPA\) and the Health Insurance Portability and Accountability Act of 1996 \(HIPAA\) to Student Health Records](#)*, (U.S. Department of Health and Human Services and U.S. Department of Public Education, Dec. 2019 Update).

North Carolina law identifies what information must be included in a student’s official record. At a minimum, there must be adequate student identification data including a date of birth, attendance, grading and promotion, notices of long-term suspensions and expulsions and the conduct for which the suspension or expulsion was based, and other factual information deemed appropriate by the local board of education. G.S. 115C-402(b).

There are a number of exceptions in the definition of “education records.” One narrow exception excludes personal notes kept in the sole possession of the maker, are used as a memory aid, and are not accessible or revealed to anyone except a temporary substitute for the person who made the notes. 20 U.S.C. 1232g(a)(4)(B)(i); 34 C.F.R. 99.3. Thus, a teacher’s or administrator’s personal notes that are not shared and are based on the personal knowledge and observations of the teacher or administrator are likely not subject to FERPA requirements.

Another exception involves “records of a law enforcement unit” of the education agency that were created and maintained by that unit for law enforcement purposes. 20 U.S.C. 1232g(a)(4)(B)(ii); 34 C.F.R. 99.3 and 99.8(b)(1). A law enforcement unit includes any individual, office, department, division, or other component of the agency such as a unit of commissioned police officers or non-commissioned security guards that is officially authorized by the agency to (1) maintain the physical security and safety of the agency; (2) enforce federal, state, or local law; or (3) refer to appropriate authorities a matter for enforcement of any federal, state, or local law against an individual or organization (that is not the education agency). 34 C.F.R. 99.8(a)(1). A law enforcement unit may also perform non-law enforcement functions, such as investigating incidents resulting in school disciplinary action. 34 C.F.R. 99.8(a)(2). Law enforcement records are not covered by FERPA. 34 C.F.R. 99.8(d). But, records that are not law enforcement records and are subject to FERPA are those

records that (1) are created by the law enforcement unit for law enforcement purposes but are maintained by the educational agency and not the law enforcement unit and (2) are created and maintained by the law enforcement unit exclusively for a non-law enforcement purpose, such as school disciplinary action. 34 C.F.R. 99.8(b)(2).

Resource: For more information see [School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act \(FERPA\)](#) (Feb. 2019) on the U.S Department of Education Protecting Student Privacy website.

C. Exceptions to Consent Requirement

1. Overview. There are a number of exceptions to the requirement of written consent to allow disclosure to certain parties under certain conditions. Those most relevant to juvenile proceedings are disclosures

- to an agency caseworker or tribal organization authorized to access a student’s case plan when legally responsible for the care and protection of the student;
- to comply with a judicial order or lawfully issued subpoena;
- to appropriate officials in cases of health and safety emergencies;
- of information that is “directory” information such as name, address, phone number, dates of attendance, etc.

See 34 C.F.R. 99.31, 99.36, 99.37, and 99.38 and the Uninterrupted Scholars Act, Pub. L. No. 112-278, 126 Stat. 2480.

2. Disclosure to child welfare agency responsible for child. The Uninterrupted Scholars Act allows educational agencies to release records without first obtaining written consent from a parent to a child welfare agency caseworker or other representative who has the right to access a student’s case plan when the agency is legally responsible for the care and protection of the student. 20 U.S.C. 1232g(b)(1)(L). Note that this provision is permissive and not mandatory.

The child welfare agency may only disclose (or redisclose) the education record to an individual or entity that is authorized by the agency to receive the information and is engaged in addressing the student’s education needs. The disclosure must be consistent with the applicable state law that protects the confidentiality of a student’s education record. 20 U.S.C. 1232g(b)(1)(L).

Resource: NC DHHS Division of Social Services Dear County Directors Letter, [CWS-07-2013: Family Educational Rights and Privacy Act](#) (June 1, 2013).

3. Disclosure to comply with judicial order or subpoena. An educational agency or institution may disclose information to comply with a judicial order or lawfully issued subpoena. 34 C.F.R. 99.31(a)(9)(i). A juvenile court may order that the information be disclosed. The educational agency or institution must make a reasonable effort to notify the parent or eligible student of the order or subpoena before complying so the parent or eligible

student may seek legal recourse. 34 C.F.R. 99.31(a)(9)(ii). However, notification to the parent is not required if

- the parent is a party to a court proceeding involving child abuse, neglect, or dependency and the order to disclose information is issued in that proceeding (this exception applies even if there is not an order removing the child from the home);
- the disclosure is in compliance with a federal grand jury subpoena or a subpoena issued for law enforcement purposes for which a court has ordered that the existence or contents of the subpoena or information furnished in response to the subpoena not be disclosed; or
- the disclosure is in compliance with an ex parte court order obtained by the U.S. Attorney General or that person's designee concerning certain investigations or prosecutions related to terrorism.

20 U.S.C. 1232g(b)(2)(B); 34 C.F.R. 99.31(a)(9)(ii)(A)–(C).

4. Disclosure for health or safety emergency. An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. 34 C.F.R. 99.36(a); *see* 20 U.S.C. 1232g(b)(1)(I); 34 C.F.R. 99.31(a)(10). In making a determination as to whether this exception applies, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the determination is made that there is an articulable and significant threat to the health or safety of a student or other individual, disclosure may be made to any person whose knowledge of the information is necessary to protect the health or safety of the student or others. 34 C.F.R. 99.31(a)(10) and 99.36(c). When personally identifiable information is disclosed under the health and safety emergency exception, the education agency must record the articulable and significant threat to the health or safety of a student or other persons and the parties to whom the information was disclosed. 34 C.F.R. 99.32(a)(5).

Although FERPA does not include a specific exception for reporting child abuse or neglect, the health or safety exception may apply in the few cases in which it is necessary to consult school records to determine whether a report should be made. The exception also may apply when a social services director acting pursuant to G.S. 7B-302(e) makes a written demand for information or reports the director believes are relevant to an assessment or to the provision of protective services. It will depend on the education agency's determination, based on the totality of the circumstances, whether there is an articulable and significant threat to the child (who is the student whose record is sought) or others.

5. Disclosure to school personnel and schools where the child seeks to enroll. A student's school records may be shared with other school officials (including teachers) who the educational agency has determined has a legitimate educational interest in the information; the access should only be to those portions of the record in which there is a legitimate educational interest. 20 U.S.C. 1232g(b)(1)(A); 34 C.F.R. 99.31(a)(1). This provision limits who may access selected information contained in the student's record.

A student's educational record may be shared with other schools that the student seeks or intends to enroll in upon the condition that the student's parents are notified, receive a copy of the record if requested, and have an opportunity for a hearing to challenge the contents of the record. 20 U.S.C. 1232g(b)(1)(B). This issue may arise when children are moved to placements that result in a school transfer. School transfers should only happen when it is in the child's best interests to do so and is made in compliance with the Fostering Connections and Increasing Adoptions Act and the Every Student Succeeds Act as discussed in Chapter 13.7. In North Carolina, when a child transfers school systems, the receiving school shall obtain the child's record from the transferring school within thirty days of the child's enrollment. If a parent, custodian, or guardian provides the new school system with a copy of the child's records, the receiving school must request written verification of the records from the prior school. G.S. 115C-403(b).

6. Disclosure of directory information. Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, email address, photograph, date and place of birth, major field of study, grade level, enrollment status, honors and awards, dates of attendance (which does not mean specific daily records of attendance), participation in recognized activities and sports, and most recent educational agency attended. 20 U.S.C. 1232g(a)(5)(A); 34 C.F.R. 99.31(a)(11) and 99.37; *see* 34 C.F.R. 99.3 (definition of "directory information"). Directory information does not include a student's social security number or a student identification number that is used to gain access to education records (when not used in conjunction with other authenticating factors such as a PIN or password). 34 C.F.R. 99.3.

Parents and eligible students must be informed about directory information and their right to ask the school not to disclose it. 34 C.F.R. 99.31(a)(11) and 99.37(a); *see* G.S. 115C-402.5(a)(4)b.; 115C-402.15.

D. Documentation of Disclosure, Redisclosure, and Use of Information

An educational agency must use reasonable methods to authenticate the identity of the person to whom it discloses personally identifiable information from the education record. 34 C.F.R. 99.31(c). An educational agency must maintain a record within each student's education record that indicates (1) all agencies and individuals (other than personnel within the agency) who have requested or obtained access to the student's record and (2) the person's or agency's legitimate interests in obtaining the information. 20 U.S.C. 1232g(b)(4)(A); 34 C.F.R. 99.32(a).

When an educational agency or institution is permitted to disclose personally identifiable information from an education record, it may do so only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. 20 U.S.C. 1232g(b)(4)(B); 34 C.F.R. 99.33(a)(1). The disclosed information may be used only for the purposes for which the disclosure was made. 34 C.F.R. 99.33(a)(2). This restriction on redisclosure does not include disclosure that is required by a court order or subpoena, for directory information, or when redisclosure has been authorized and documented by the education agency. 34 C.F.R. 99.33(b), (c); *see* 34 C.F.R. 99.32(b).

Note that redisclosure by child welfare agencies is also governed by G.S. 7B-302 and 7B-2901(b), which require information received by the department of social services to be maintained confidentially except for one of the enumerated statutory conditions.

E. Complaints and Enforcement

A parent or eligible student may file a written complaint regarding an alleged violation of FERPA with the

U.S. Department of Education
Student Privacy Policy Office
400 Maryland Avenue, S.W.
Washington, DC 20202

Or by email to FERPA.Complaints@ed.gov

34 C.F.R. 99.63; “[File a Complaint](#)” page of the U.S. Department of Education Protecting Student Privacy website.

The complaint contents, investigation procedures, and enforcement actions are explained in 34 C.F.R. 99.64 through 99.67. The United States Supreme Court has held that FERPA’s nondisclosure provisions create no personal rights that are enforceable under 42 U.S.C. 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).