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CONFIDENTIALITY OF SUBSTANCE USE DISORDER (SUD) RECORDS: FEDERAL LAW 42 C.F.R. PART 2



42 C.F.R Part 2

- Restricts the “use” and “disclosure” of patient information obtained by a “federally assisted” alcohol or drug abuse “program”
- Amended effective March 20, 2017




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“Substance Use Disorder”

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

42 C.F.R. § 2.11
(Does not include tobacco and caffeine.)



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What Has Not Changed

- Who must follow 42 CFR Part 2
 - Programs
 - Lawful holders
- What information is protected
- How information may be disclosed
- The prohibition on disclosure and redisclosure

Applicable Confidentiality Laws

NC SUD services providers are subject to two, and possibly three confidentiality laws

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

Basic Rule Confidentiality Rule

To access protected information, you need a

- law
 - patient authorization, or
 - court order
- that permits or requires disclosure

42 CFR 2 Relationship to State Law

- “No state law may either authorize or compel any disclosure prohibited by this part.” 42 C.F.R. § 2.20.
- Where state law authorizes or compels a disclosure that is not permitted by 42 C.F.R. 2, the federal prohibition on disclosure must be followed.

Some Specific State Laws

- Reporting child abuse, neglect, dependency—GS 7B-301
- Assessment and protective services—GS 7B-302(e)
- Child GAL access to info—GS 7B-601(c)
- Designated agency sharing—G.S. 7B-3100, 14B NCAC 11A.0301

The regulations prohibit any use or disclosure of patient records that is not permitted by the regulations

“Program”—Definition One

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

“Program”—Definition Two

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

“Program”—Definition Three

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

Question for Class

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

“General Medical Facilities”

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

“General Medical Facilities”

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

Question for Class

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

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

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

Question for Class

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

42 CFR § 2.12(a)(1)—Covered Information

Restrictions on disclosure apply to any info

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

Question for Class

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

Question for Class—SBIRT

Dr. Smith is a primary care physician. At every physical she spends 5 minutes asking the patient a list of universal screening questions for risky substance use. If patient meets criteria for risky substance use, Dr. Smith has a short discussion with patient and, if appropriate, provides a referral for further assessment and possible treatment. Dr. Smith includes SBIRT screening results in her patient's medical records.

- May Dr. Smith share patient records with DSS in response to a demand letter?

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



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Recipients of Information—§ 2.12(d)(2)

Restrictions on disclosure apply to anyone who *receives* records from a SUD program.

- Not only to SUD programs,
- But also other “lawful holders” of “patient identifying information”
 - Who are notified of the restrictions on disclosure pursuant to § 2.32.
 - Redisclosure prohibition applies only to “patient identifying information,” not other health related info



Court Orders—Four Kinds—Purpose

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



Court Order—non-criminal purposes

- Judicial review of records (inc. hearing, oral argument) must be *in camera*
- Court must find “good cause” for disclosure
- Court must limit disclosure to
 - Parts of record that are essential to fulfilling the objective of the order
 - Persons whose need for information forms the basis for the order



“Good Cause” for Disclosure

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

42 CFR 2.64, 2.65



The Public Interest Test



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

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



The Case of Jackie Jones

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



The Case of Jackie Jones

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



The Case of Jackie Jones

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

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



Court Order—Confidential Communications § 2.63—Only if:

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





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