Confidentiality of MH/DD/SA Service Records: Disclosures Required by Law

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I. Introduction: This outline discusses disclosures that are required by law. For the most part, "required-by-law" disclosures arise from provisions of state statutes or rules intended to regulate matters other than the confidentiality or privacy of medical records. For example, state statues requiring the reporting of communicable diseases or child abuse and neglect are intended for the protection of public health or child welfare. This outline discusses *some* of the laws that require disclosure of information otherwise protected by confidentiality or privacy law.

II. Child welfare laws:

A. Reporting child abuse and neglect: 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 to report the case to the department of social services in the county where the child resides or is found. G.S. 7B-301. A report may be made in person, by telephone, or in writing. The report must include as much of the following as the person reporting knows:

- the child's name, age, and address;
- the name and address of the child's parent, guardian, custodian, or caretaker;
- the names and ages of other children in the home;
- the child's location if the child is not at the home address;
- the nature/extent of any injury or condition resulting from abuse, neglect, or dependency; and
- any other information that might be helpful to establish the need for protective services or court intervention.

1. Information confidential under state law, G.S. Chapter 122C: G.S. 122C-54(h) says that MH/DD/SA providers are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B (which includes 7B-301). Thus, providers must disclose confidential information when necessary to comply with the child abuse reporting statute**.**

2. Information confidential under the HIPAA privacy rule: The privacy rule permits a covered 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. 45 CFR 164.512(b). Thus, the privacy rule permits a covered provider to disclose protected health information when making a report required by the state reporting law, GS 7B-301.

3. Information confidential under federal law, 42 C.F.R. Part 2: The restrictions on disclosure and use in the federal regulations do not apply to the reporting under state law of incidents of suspected child abuse and neglect to appropriate state or local authorities.

42 C.F.R. § 2.12(c)(6). Therefore, the federal law does not bar complying with the reporting law, even if compliance means disclosing patient identifying information.

B. Investigation of child abuse and neglect: 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 may in the director's opinion be relevant to *the assessment* or to *the provision of protective services*. Upon such demand, an agency is required to provide access to can copies of confidential information to the extent permitted by federal law.

1. **State confidentiality law, G.S. 122C:** G.S. 122C-54(h) says that MH/DD/SA providers are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B (which includes 7B-302). Thus, whether or not the information sought by DSS falls within the scope of G.S. 122C, MH/DD/SA providers must provide access to and copies of the requested information, unless disclosure is prohibited by federal law and regulations.

2. **Information confidential under the HIPAA privacy rule:** The privacy rule permits a covered provider to disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to the department of social services when that department demands the information pursuant to GS 7B-302.

3. **Federal confidentiality law, 42 C.F.R. Part 2:** Although substance abuse programs (or third party payers who have received information from substance abuse programs) must make the report mandated by G.S. 7B-301, they may *not* provide information beyond the initial report when DSS demands further information pursuant to G.S. 7B-302. The federal rules do not permit disclosure of further information for follow-up investigations or for court proceedings that may arise from the report, absent 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). "No state law may either authorize or compel any disclosure prohibited by these regulations." 42 C.F.R. 2.20.
    a. Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." An inquiring party may be given a copy of the federal regulations and advised that they restrict the disclosure of substance abuse patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient. 42 CFR 2.13(c)(2).

C. Guardian Ad Litem access to confidential 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 same statute gives the GAL 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."

1. **Information confidential under state law, G.S. Chapter 122C:** G.S. 122C-54(h) provides that facilities governed by G.S. 122C must disclose confidential information for purposes of complying with other state 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.

2. **Information confidential under the HIPAA privacy rule:** The privacy rule says that a covered health care provider may disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to the guardian ad litem as necessary to comply with GS 7B-601.

3. **Information confidential under federal law, 42 C.F.R. Part 2:** Although a federal or state court may authorize the disclosure of information protected by federal law, courts issuing the standard form order appointing a GAL (AOC-J-300) usually do not issue the order according to the specific procedures and criteria required by the federal regulations for court-ordered disclosures. Substance abuse programs must not disclose confidential information to a GAL unless presented with a court order issued according to the special procedures and criteria set forth at 42 C.F.R. §§ 2.61-2.67.

    a. Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." 42 CFR 2.13(c)(2). See B, 3, a, above.

D. Interagency sharing about juveniles: G.S. 7B-3100 directs the Department of Juvenile Justice and Delinquency Prevention to adopt 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 or *the provision or arrangement of protective services* in a child abuse, neglect, or dependency case by a local department of social services . . . or to *any case in which a petition is filed* alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent and shall continue to do so until the protective services case is closed . . . , or if a petition is filed when the juvenile is no longer subject to the jurisdiction of juvenile court." The Department adopted rules, effective July 15, 2002 (28 NCAC 01A .0301) designating area MH/DD/SA 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."

1. **Information confidential under state law, GS 122C:** G.S. 122C-54(h) provides that facilities governed by G.S. 122C must disclose confidential information as required by other state law. Therefore, area authorities (known also as "local management entities" or "LMEs") must disclose information as required by G.S. 7B-3100. Information shared must
    - be used only for the protection of the juvenile or others or to improve educational opportunities of the juvenile;

- remain confidential, and
- be withheld from public inspection

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2. **Information confidential under the HIPAA privacy rule:** The privacy rule says that a covered health care provider may disclose protected health information to the extent that such disclosure is required by law. 45 CFR 164.512(a). Thus, the privacy rule permits a covered health care provider to disclose protected health information as required by G.S. 7B-3100 and 28 NCAC 01A. 0301.

3. **Information confidential under federal law, 42 CFR 2:** G.S. 7B-3100 and 28 NCAC 01A .0301 do not authorize or compel the disclosure of information protected by the federal drug and alcohol confidentiality law, and the federal law does not permit the disclosure of patient-identifying information pursuant to these state laws.
    a. Unless a provision in the federal law applies that would permit disclosure, substance abuse programs should not, in response to a request for information under the rules, disclose information protected by the federal drug and alcohol confidentiality law.
    b. At the request of the agency soliciting information protected by the federal law, the agency refusing the request must inform "that agency of the specific law or regulation that is the basis for the refusal." 28 NCAC 01A .0302(b). Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." 42 CFR 2.13(c)(2). See section B, 3, a, above.

III. Adult protective services laws:

A. Reporting. Any person having reasonable cause to believe that a disabled adult[1] is in need of protective services[2] must report such information to the department of social services in the county in which the disabled adult resides or is present. G.S. 108A-102. A report may be made orally or in writing, but must include:

- the disabled adult's name, age, and address;
- the name and address of the disabled adult's caretaker;
- the nature and extent of the disabled adult's injury or condition resulting from abuse or neglect; and
- other pertinent information.

1. **Information that is confidential under state mental health confidentiality law, G.S. Chapter 122C:** G.S. 122C-54(h) provides that "facilities" (MH/DD/SA) must disclose confidential information for purposes of complying with Article 6, Chapter 108A of the

[1] "Disabled adult" means any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

[2] A disabled adult is in need of protective services if he or she is "abused," " neglected," or "exploited" as defined in G.S. 108A-101(a), (j), or (m), and, due to his or her physical or mental incapacity, is unable to perform or obtain for himself or herself essential services and is without able, responsible, and willing persons to perform or obtain essential services. G.S. 108A-101(e); N.C. Admin. Code tit. 10, subchap. 42V § .0209.

North Carolina General Statutes (which includes G.S. 108A-102). Thus, MH/DD/SA facilities must disclose confidential information when necessary to make an adult protective services report.

2. **HIPAA Privacy Rule:** 45 C.F.R. § 164.512(c)(1) provides that a covered health care provider, or other covered entity, may disclose protected health information about an individual whom the provider reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority authorized by law to receive such reports, to the extent the disclosure is required by law and complies with and is limited to the relevant requirements of law. The privacy rule, therefore, permits the disclosure of protected health information to DSS as required by G.S. 108A-102 as long as the information disclosed is limited to the requirements of G.S. 108A-102.

    a. A covered health care provider or other covered entity that makes such a disclosure must promptly inform the individual that such a report has been or will be made, unless the entity
        - believes informing the individual would create a risk of serious harm,
        - would be informing a personal representative who the entity believes is responsible for the abuse or neglect, or
        - informing the personal representative would not be in the individual's best interest. See 45 C.F.R. 164.512(c)(2)

3. **Information that is confidential under federal law, 42 C.F.R. Part 2:** The federal law does not permit the disclosure of confidential information for the purpose of complying with state adult protective services laws. However, a substance abuse program may provide information about a particular, identified person if doing so would not identify the individual, directly or indirectly, as an alcohol or drug abuser or a recipient of alcohol or drug abuse services. Examples:
    a. A substance abuse program that is part of a larger general mental health center may make the report if the employee of the program tells the department of social services that he or she is calling from the mental health center (or area authority) rather than from the specific substance abuse unit. The employee must not identify him or herself as a substance abuse professional nor indicate that the client is a substance abuser or recipient of substance abuse services.
    b. A free-standing drug program (which may contract with the area authority to provide substance abuse services) may not use its name in contacting DSS, but may report anonymously, as long as nothing said indicates the person is a drug or alcohol abuser.

B. Investigation: The director of the county department of social services (or his or her representative) is required to evaluate the report to determine whether the disabled adult is in need of protective services and what services are needed.

1. **Information confidential under state confidentiality law (GS 122C):**

a. Caretaker records: When necessary for a complete evaluation, the director has the authority to review and copy *any records related to the care and treatment* of the disabled adult that have been maintained by a *caretaker*. G.S. 108A-103(a). A "caretaker" is any individual, facility or agency who is responsible for the disabled adult's care as a result of family relationship or who has assumed the responsibility for care voluntarily or by contract, and includes facilities licensed under G.S. 122C to provide mental health, developmental disabilities, and substance abuse services. MH/DD/SA facilities that are caretakers must disclose confidential information when necessary to the evaluation. G.S. 108A-103; G.S. 122C-54(h).

b. Consultation and cooperation. The director's evaluation must include "consultation with persons having knowledge of the facts of the particular case." G.S. 108A-103(a). "The staff and physicians of local health departments, area mental health, developmental disabilities, and substance abuse authorities, and other public or private agencies shall cooperate fully with the director in the performance of his duties." G.S. 108A-103(b). The statute further provides that director can request "immediate accessible evaluations and in-home evaluations."

   If these statutory provisions are construed as *requiring* the sharing of information, then G.S. 122C-54(h), which requires MH/DD/SA facilities to disclose confidential client information when required by other state law, would operate to require the disclosure. If these statutes are so construed, facility staff should be careful to limit disclosure to *information necessary to the evaluation*, i.e., necessary to determine whether the adult is disabled; is abused, neglected, or exploited; is in need of protective services; and lacks the capacity to consent to protective services.

c. G.S. 108A-103 expressly states that information obtained pursuant to the DSS director's authority to access caretaker records and engage in consultation (above two items) remains confidential and governed by G.S. 108-80 and the confidentiality provisions of G.S. 122C.

2. HIPAA Privacy Rule: A covered health care provider may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. 45 C.F.R. § 164.512(a). Thus, to the extent that G.S. 108A-103 requires disclosure, the privacy rule permits the disclosure of protected health information. G.S. 108A-103 certainly requires the disclosure of caretaker records, and it is possible to construe the statute as requiring the disclosure of PHI through the "consultation" and "cooperation" processes referred to in the statute. See B., 1.b., above.

3. Federal substance abuse records law, 42 C.F.R. Part 2: The federal law does not permit the disclosure of confidential information for the purpose of complying with state adult protective services laws.

   a. Caretaker records: If the caretaker is a federally assisted "program" whose records are governed by the federal confidentiality rules, 42 C.F.R. § 2.11, the caretaker could *not*

provide access to information that (i) it obtained for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment, and (ii) would identify a person, directly or indirectly, as a drug or alcohol abuser or a recipient of alcohol or drug services. 42 C.F.R. § 2.12(a)(1).

b. Consultation pursuant to G.S. 108A-103(b): Restrictions applicable to caretaker records, above, apply. Staff of an area authority or MH/DD/SA facility that provides all three kinds of services are not permitted to reveal whether the disabled adult has been or is being treated for alcohol or drug abuse. Employees of a facility publicly identified as a place where only substance abuse services are provided may not acknowledge whether the individual is a patient of the facility. 42 C.F.R. § 2.13(c).

c. Evaluations: The director may arrange for area authorities (LMEs) or other agencies to conduct medical, psychological, or psychiatric evaluations. G.S. 108A-103(b). An evaluation performed by a federally assisted drug or alcohol program that contains references to the individual's alcohol or drug abuse or to a condition that is identified as having been caused by that abuse is protected by the federal rules (and may not be disclosed without patient consent) *if* the evaluation and the references contained therein can be construed as being made *for the purpose of recommending treatment or making a referral treatment.* 42 C.F.R. §§ 2.11, 2.12(a)(1)(ii).