Confidentiality Laws Governing MH/DD/SA Service Records

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I. State mental health law - G.S. 122C: 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.

A. Covered providers: Any "facility"—meaning any individual, agency, company, area authority (local management entity), 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.[1]

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[2] and implementing regulations at 10A NCAC 26B.[3]

C. Duty: No individual having access to confidential information may disclose it except as authorized by G.S. 122C and the confidentiality rules.[4]

1. Unauthorized disclosure of confidential information is a Class 3 misdemeanor punishable by a fine up to $500.[5]
2. Employees of area and state facilities that are governed by the State Personnel Act are subject to suspension, dismissal, or other disciplinary action if they disclose information in violation of G.S. 122C and the confidentiality rules at 10A NCAC 26B.[6]
3. The unauthorized disclosure of confidential information could result in civil liability for the treatment facility or the employee disclosing the records.[7]

[1]. *See* G.S. 122C-3(14) for the full definition, including examples, of "facilities".

[2] The pertinent statutes are G.S. 122C-51 through 122C-56.

[3] These regulations apply to area authorities (local management entities), state facilities, and the providers that contract with area and state facilities. The regulations also appear in a publication of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, entitled "Confidentiality Rules" (APSM 45-1).

[4]See G.S. 122C-52(b). Area and state facilities or individuals with access to or control over confidential information must take affirmative measures to safeguard such information in accordance with the state confidentiality rules, which require a secure place for storage of records, written policies and procedures regarding controlled access to paper and electronic records, and staff supervision of client review of records. See 10A NCAC 26B .0102 and .0107.

[5] See G.S. 122C-52(e).

[6] See 10 NCAC 26B .0104.

[7] The unauthorized disclosure of a patient's confidences by a physician, psychiatrist, psychologist, marital and family therapist, or other health care provider constitutes medical malpractice. *See* Watts v. Cumberland County Hosp. System, Inc., 75 N.C. App. 1, 9-11, 330 S.E.2d 242, 248-250 (1985) (holding that malpractice consists of any professional misconduct or lack of fidelity in professional or fiduciary duties, including breach of duty to maintain confidentiality of patient information), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

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II. **HIPAA[8] privacy rule – 45 CFR Parts 160, 164:** The federal "privacy rule"[9]governs the privacy of health information.

A. **Covered health care providers:** Any "health care provider" that transmits any health information in electronic form in connection with a HIPAA transaction.[10] "Health care provider" is defined broadly to include any person who, in the normal course of business, furnishes, bills or is paid for care, services, or supplies related to the health of the individual.[11]

B. **Protected health information:** health information that is maintained in any form or medium (e.g., electronic, paper, or oral) that

1. is created or received by a health care provider, health plan, or health care clearing house
2. identifies an individual (or with respect to which there is a reasonable basis to believe the information can be used to identify an individual), and
3. 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[12]

C. **Duty:** A covered entity, including a covered health care provider, may use and disclose PHI only as permitted or required by the privacy rule.

1. **Monetary penalties.** The Office of Civil Rights (OCR) in U.S. DHHS enforces the privacy rule, investigates complaints, conducts compliance reviews, and may impose civil monetary penalties for violations. State attorneys' general may bring a civil action to enforce the HIPAA Privacy Rule in order to (1) enjoin further violations or (2) obtain damages for individuals harmed (calculated pursuant to a statutory formula).
2. **Filing complaint**. Any person or organization may file a complaint with OCR by mail or electronically. Individuals may also file a complaint with the covered entity.

III. **Federal substance abuse records law - 42 C.F.R. Part 2:** 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).

A. **Covered programs:** The federal law applies to any person or organization that, in whole or in part, holds itself out as providing and does provide alcohol or drug abuse diagnosis, treatment, or referral for treatment with direct or indirect federal financial assistance.[13] Applies to:

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[8] "HIPAA" stands for The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 1320d-1320d(8). This act directed the U.S. Department of Health and Human Services to develop regulations governing the privacy of health information.

[9] The term "privacy rule" in this outline refers to the final rule published in Volume 67, Number 157 of the Federal Register on August 14, 2002.

[10] 45 CFR 160.103, 164.500. "Transaction" means the transmission of information between two parties to carry out financial or administrative activities related to health care. Examples of HIPAA transactions include transmitting claims information to a health plan to obtain payment and transmitting an inquiry to a health plan to determine if an enrollee is covered by the health plan.

[11] 45 CFR 160.103.

[12] See the definitions of "protected health information" and "individually identifiable health information" at 45 CFR 160.103.

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1. Any free-standing substance abuse facility or independent substance abuse program, including
    - an outpatient substance abuse clinic
    - a residential drug or alcohol treatment facility
    - an independent physician or other therapist with a specialty in substance abuse treatment or diagnosis
2. Any part of a broader organization that is identified as providing substance abuse services, for example
    - a school-based program, but not an entire school or school system;
    - a detox unit or substance abuse program of a general hospital, but not the entire hospital.[14]
3. Not only treatment programs, but also programs providing just diagnosis or referral for treatment:
    - employee assistance programs that provide no treatment but evaluate whether a person has a substance abuse problem and then refer the person to treatment at an independent program.
    - a managed care company that evaluates whether a person has a drug or alcohol problem and then refers the person to treatment at an independent program that has a contract with the managed care company.

B. Confidential information: The federal prohibition against **disclosure**, except where permitted by the federal law, applies to any information, whether recorded or not, that:

1. would identify a "patient"—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as an alcohol or drug abuser
2. is alcohol or drug abuse information obtained by a federally assisted alcohol or drug abuse program
3. for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

   "Identify" means a communication, either written or oral, of information that identifies someone as a substance abuser, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

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[13] See 42 CFR 2.11 for definition of "program." The regulations apply only to programs that receive, directly or indirectly, federal financial assistance, including programs that receive federal grants or Medicare or Medicaid reimbursement; through federal revenue sharing or other forms of assistance, receive federal funds which could be (but are not necessarily) spent for an alcohol or drug abuse program (e.g., programs operated or funded by state or local government); are licensed or certified by the federal government (e.g., certification of provider status under the Medicare program, authorization to conduct methadone treatment, or registration to dispense a controlled substance for substance abuse treatment); or organizations exempt from federal taxation.

[14] A general medical care facility (general hospital) is not a "program" unless it has an identified unit that provides alcohol or drug abuse diagnosis, treatment, or referral for treatment, or has staff whose primary function is to provide substance abuse services and who are identified as such providers. In this case, only the identified unit or staff would constitute a "program."

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"Diagnosis" means any reference to an individual's alcohol or drug abuse, or to a condition that is identified as having been caused by that abuse, which is made for the purpose of treatment or referral for treatment.

a. Includes any record of a diagnosis prepared in connection with treatment or referral for treatment of substance abuse but which is not so used.
b. Does not include a diagnosis that is made solely for the purpose of providing evidence for use by law enforcement authorities, or a diagnosis of drug overdose or alcohol intoxication that clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

C. Restrictions on Use of Information to Bring Criminal Charges. In addition to restricting disclosure, the federal regulations restrict the "use" of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient. Any information which is substance abuse information obtained by a federally assisted substance abuse program for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment cannot be used to criminally investigate or prosecute a patient without a court order authorizing the disclosure and use of the information for that purpose. See 42 C.F. R. 2.65.

D. Applicability to recipients of information.

1. **Use:** The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct a criminal investigation of a patient applies to any person who obtains that information from a federally assisted substance abuse program regardless of the status of the person obtaining the information or whether the information was obtained in accordance with the regulations. Without a court order authorizing use for this purpose, the information cannot be so used.
2. **Disclosure:** The restrictions on disclosure apply persons who receive records directly from a substance abuse program and who are notified of the restrictions on redisclosure of the records. See 42 C.F.R. 2.12(d) and 2.32. Such notice must accompany any disclosure made with the patient's written consent.

E. **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).[15]

IV. Relationship of federal substance abuse law to state law.

A. 42 C.F.R 2 controls where it is more restrictive: No state law may authorize or compel any disclosure prohibited by the federal drug and alcohol confidentiality law. Where state law

[15] A substance abuse program must maintain records in a secure room, locked file cabinet, safe or other similar container when not in use; the program must adopt written policies and procedures to regulate and control access to records. *See* 42 C.F.R. §§ 2.3 and 2.16.

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authorizes or compels disclosure that the 42 CFR 2 prohibits, 42 CFR 2 must be followed. 42 C.F.R. § 2.20.

Example: 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. This state law says that 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, the law requires an agency to provide access to and copies of confidential information to the extent permitted by federal law.

- State mental health law says that providers are required to disclose confidential information when necessary to comply with G.S. 7B-302. See G.S. 122C-54(h).
- No provision of the federal substance abuse law permits disclosure of patient identifying information for purposes of complying with G.S. 7B-302. Thus, absent the patient's written *consent* or a *court order* issued pursuant to 42 C.F.R. 2, the federal law prohibits disclosure of confidential information in response to a DSS demand for information under G.S. 7B-302.

B. **State law controls where it is more restrictive:** The federal drug and alcohol confidentiality law does not require disclosure under any circumstances. If the federal law permits a particular disclosure, but state law prohibits it, the state law controls. 42 C.F.R. § 2.20.

E. **Class Exercise—Patient-identifying information:** The restrictions on disclosure apply only to information that would identify a "patient"—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as a substance abuser or a recipient of substance abuse services. A substance abuse program may provide information about a particular, identified person if doing so would not identify a patient, directly or indirectly, as an alcohol or drug abuser or a recipient of alcohol or drug services.

1. An employee of a substance abuse program that is part of a larger MH/DD/SA provider (an area authority or provider of comprehensive outpatient services) wants to report to DSS that a substance abuse patient of hers appears to be a disabled adult in need of protective services. The employee knows that a state law, G.S. 108A-102, requires any person having reasonable cause to believe that a disabled adult is in need of protective services to report such information to the department of social services. How can the employee comply with GS 108A-102 and 42 CFR 2?

2. A free-standing drug program (which contracts with the local management entity to provide substance abuse services) suspects that a disabled adult patient is in need of protective services. The program wants to comply with the state law requiring such suspicion to be reported to the department of social services, but the federal rules do not permit the disclosure of patient identifying information for this purpose. What can the program do?

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