FAQ About Children in DSS Custody: Sharing Health Information for Treatment

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May a North Carolina health care provider share identifiable health information about a child who is in the custody of a county department of social services (DSS) with another health care provider *without* written permission from the child's parent, guardian, or local government officials?

Most of the time. Health care providers are required by law to keep identifiable health information confidential. But the law recognizes that providers need to communicate with each other about patients in order to provide appropriate and timely care and therefore it allows information sharing without prior permission in many situations. Because the information sharing must be allowed under *both* federal and state law, below is a brief discussion of each.

Federal law

Under the HIPAA Privacy Regulation, the general rule is that health care providers are allowed to share information with one another without written permission for "treatment" activities.[1] The expansive definition of "treatment" includes:

> *the provision, coordination, or management of health care and related services by one or more health care providers, including the coordination or management of health care by a health care provider with a third party; consultation between health care providers relating to a patient; or the referral of a patient for health care from one health care provider to another.*[2]

Providers are allowed to obtain written permission for these types of disclosures,[3] but they are not required to do so.

There are some exceptions to this general rule.

- *Information received from providers that are subject to the federal substance abuse confidentiality regulations:* A provider may receive information about the foster child from a substance abuse provider or treatment program that is subject to a relatively strict federal confidentiality regulation.[4] If a provider receives information that is subject to the law, it may not share that information with another provider for treatment activities without authorization from the subject of the information or the subject's personal representative.[5]

[1] 45 C.F.R. 164.506(a).
[2] 45 C.F.R. 165.501.
[3] 45 C.F.R. 164.506(b).
[4] 42 C.F.R. Part 2. The regulations apply to a program that (1) receives federal assistance and (2) holds itself out as providing, and provide, alcohol or drug abuse diagnosis, treatment or referral for treatment. 42 C.F.R. 2.11. The regulations protect any information held by a covered program that identifies a patient as an alcohol or drug abuser or was collected in order to provide treatment or provide referral for treatment. 42 C.F.R. 2.12(a). The regulation's restrictions generally travel with the information after it has been shared with a non-covered provider. 42 C.F.R. 2.12(d)(2)(iii).
[5] 42 CFR 2.12(d)(2)(iii). When disclosing information subject to the federal regulations, the covered program is required to notify the recipient that the information is protected. See 42 C.F.R. 2.32. The recipient is required to comply with the regulations only if it is appropriately notified.

- *Psychotherapy notes:* A provider must obtain authorization to disclose psychotherapy notes to another provider for treatment purposes.[6]
- *Requested restrictions:* A patient (or the patient's representative) has the right to request restrictions on the disclosure of information for treatment activities. Providers are not required to agree to requests for restrictions but if they do agree to one, they must comply with the restriction.

State law

North Carolina does not have a comprehensive state law addressing confidentiality of patient information. There are, however, several specific laws that require providers to protect certain types of information. For example:

- State law protects information that identifies a person who has a reportable communicable disease.[7]
- State law protects identifiable health information that is in the possession of local health departments or the NC Department of Health and Human Services.[8]
- State law protects identifiable health information that is received by a person, organization, or agency whose *primary* purpose is to provide "services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers…" (MH/DD/SA law).[9]

Like the HIPAA Privacy Regulation, these laws allow providers to share information with other providers for treatment purposes. The first two laws cited above are easy to comply with because they allow providers to share information for treatment purposes in the same way that HIPAA allows it. But the state's MH/DD/SA law is a bit more detailed.

Providers that are subject to the MH/DD/SA law are allowed to share patient information with each other without the patient's permission.[10] In addition, they may share information with other providers for treatment if the others are (1) subject to the HIPAA Privacy Regulation and (2) the patient (or the patient's representative) is informed that the provider may make such disclosures and does not object.[11] Note that any information that is subject to the federal substance abuse confidentiality regulation (see discussion above under "Federal law") is still protected by that law; the state law allowing MH/DD/SA providers to share information for treatment does not override the federal law.

A Child in DSS Custody

The laws described above that allow sharing of information for treatment purposes do not change when the subject of the information is a child in DSS custody. There is a detailed state law that outlines when DSS may consent to the *provision* of treatment to a child in custody,[12] but that law does not interfere with the ability of providers to share information with one another related to the child's treatment.

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[6] 45 C.F.R. 164.508(a)(2). The term "psychotherapy notes" is defined to mean "notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and *that are separated from the rest of the individual's medical record*. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date." (emphasis added).

[7] G.S. 130A-143(3).

[8] G.S. 130A-12.

[9] G.S. 122C-3 (defining the term "facility); G.S. 122C-52 (establishing the right to confidentiality); G.S. 122C-55 (outlining when disclosure is allowed for care and treatment).

[10] G.S. 122C-55(a).

[11] G.S. 122C-55(a6).

[12] G.S. 7B-903(a)(2)(c).