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Federal Privacy Protection for Substance Abuse Treatment Records: Protecting Adolescents

by Rebecca Gudeman

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The federal Public Health Services Act[1] includes comprehensive privacy rules that protect the confidentiality of drug and alcohol abuse treatment records. Established by Congress in part to encourage substance abusers to seek treatment,[2] the regulations are some of the most protective confidentiality rules in federal law. While these federal protections have existed for decades, many treatment providers remain unclear about what the rules say, when they apply, and what to do if they conflict with state law.

This is a particular dilemma for providers of services to teens, as many states have laws which grant broader access to minors' alcohol and drug abuse treatment records than federal law otherwise would allow. Thus, it is critical that adolescents understand their confidentiality rights, and that providers of adolescent services have a clear understanding of the federal rules and when to apply them.

Federal Protection for Drug and Alcohol Treatment Records

Federal law generally requires a patient's written consent before a provider may disclose any information related to the patient's alcohol or drug abuse treatment.[3]

This includes any oral or written information that could identify a patient as a drug or alcohol abuser. Thus, it protects diagnostic information, such as urinalysis results, as well as verbal communications, such as confirmation that a patient is receiving treatment.[4]

When state law allows minors to give consent for their own drug or alcohol abuse treatment, federal law generally prohibits providers from disclosing any information related to that treatment without the minors' written consent.[5]

When state law requires parental consent for a minor's substance abuse treatment, federal law generally prohibits providers from disclosing any information without the written consent of both the minor and the minor's parent.[6] Even when state law requires parental consent for a minor's treatment, providers nevertheless are prohibited from disclosing a minor's application for treatment to a parent without first receiving the minor's written consent.[7]

There are a few exceptions that allow disclosure without written consent. For example, providers may disclose to medical personnel any information necessary to provide emergency treatment;[8] and providers may report child abuse or neglect as required by state law.[9] However, these exceptions allow disclosure only for those specific purposes.

One exception allows providers to share information with parents without the minor's written consent. Providers may disclose drug or alcohol treatment records to parents if the provider determines the following three conditions are met:

1) the minor's situation poses a substantial threat to the life or physical well-being of the minor or another;
2) this threat may be reduced by communicating relevant facts to the minor's parents; and
3) the minor lacks the capacity because of extreme youth or a mental or physical condition to make a rational decision on whether to disclose to her parents.[10]

If state law requires parental consent for a minor's drug treatment, a program may disclose the fact of the minor's drug treatment when only the third

[1] *See* 42 U.S.C. 201 *et seq*.
[2] Confidentiality of Alcohol and Drug Abuse Patient Records, 52 Fed. Reg. 21796, 21797 (Jun 9, 1987).
[3] 42 U.S.C. §§ 290dd-3(b), 290ee-3(b); 42 C.F.R. § 2.11.
[4] *See* 42 C.F.R. §§ 2.11, 2.12(e); *see also U.S. v. Eide*, 875 F.2d 1429, 1435-6 (9th Cir. 1989).
[5] 42 U.S.C. §§ 290dd-3(b), 290ee-3(b); 42 C.F.R. § 2.11.
[6] 42 C.F.R. § 2.14(c).
[7] *Id.*
[8] 42 U.S.C. § 290dd-2(b)(2)(A).
[9] 42 C.F.R. § 2.12(c)(6).
[10] 42 C.F.R. § 2.14.

condition is met.[11] Notably, federal law does not compel disclosure in these circumstances; it simply exempts providers from the federal requirement of written consent.[12]

Providers who violate federal drug privacy laws face criminal penalties and sanctions including, but not limited to, fines of up to $500 for a first offense and $5,000 for subsequent offenses.[13]

When Does Federal Law Apply?

The federal law only applies to the records created by certain providers. Any individual, program, or facility that meets the following criteria must abide by federal drug treatment confidentiality rules.

First, the provider, program or facility must be "federally assisted," which means generally that they are directed, authorized, certified, licensed, supported or funded, in whole or in part, by the federal government.[14] Examples include programs that are tax exempt, receive tax-deductible donations, are registered with Medicare, or receive any federal operating funds, even if they do not directly pay for drug abuse services.[15]

In addition, the individual or program must be:

1) an individual or program that holds itself out as providing alcohol or drug abuse diagnosis, treatment, or referral for treatment; or
2) a staff member at a general medical facility whose primary function is, and who is identified as, a provider of alcohol or drug abuse diagnosis, treatment or referral; or
3) a unit at a general medical facility that hold itself out as providing alcohol or drug abuse diagnosis, treatment or referral for treatment.[16]

[11] 42 C.F.R. § 2.14(c).
[12] *See* 42 C.F.R. § 2.3(b)(1).
[13] 42 C.F.R. § 2.4.
[14] *See* 42 C.F.R. § 2.12(b).
[15] *Id.*

Programs meeting these criteria could include school or hospital-based programs, employee or student assistance programs, and private practitioners. For example, an emergency room (ER) in a hospital that accepts Medicare is considered a federally assisted unit at a general medical facility. Records of drug treatment in that ER would be protected under federal law if the ER has a staff member whose primary function is diagnosis, treatment or referral created the records, or the hospital presents its ER as a resource for drug and alcohol abuse diagnosis, treatment or referral services.[17]

[16] 42 C.F.R. § 2.11; 42 C.F.R. § 2.12.

A program does not need to exclusively provide substance abuse diagnosis, treatment or referral in order to qualify. For example a program that provides treatment for mental health disorders but also provides drug and alcohol counseling may be obligated to comply with federal law.

Programs that are federally assisted and meet the criteria described above must follow federal as well as state law. Programs that are not federally assisted, or do not meet the above criteria, only need to satisfy state law.

[17] See 42. C.F.R. § 2.12(e)(1).

What if Federal and State Privacy in Drug Treatment Laws Conflict?

Usually providers can comply with both federal and state drug confidentiality laws at the same time. When state law conflicts with the federal drug treatment rule, the law that best protects confidentiality applies.[18] In most cases, this means the federal rule.

For example, many states allow broader access than federal law to adolescents' treatment records. In at least 20 states, minors have the right to give consent for drug treatment, but

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[18] 42 C.F.R. § 2.3(b)(1).

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Protecting Treatment Records

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state confidentiality law gives providers the discretion to release treatment records to parents without the minors' consent.[19] In those states in which parental consent is required for drug treatment, state law often allows parents access to treatment records without informing the minor.

Since the federal rule requires a minor's written consent before any disclosure, the federal rule is more restrictive than the state laws described above. In these states, any providers subject to both federal and state law must abide by the federal rule rather than state law.

Hypothetical Case Studies

Two hypothetical examples help illustrate when federal law applies and how it can be interpreted with state law.

Case No. 1

A mother brings her 16 year-old son to a local hospital's emergency room. The emergency room physician does a toxicology screen and a urinalysis. Both tests come back positive for heroin, and it is clear that this minor is a regular user. The physician wants to refer the teen for drug treatment. State law allows providers to share drug abuse diagnosis and treatment information with a parent when providers deem it appropriate. However, federal law requires a written consent from the minor before sharing any information. Can the physician share the test results with the mother without asking the teen for a written consent?

To decide, we must know if this provider is bound by the federal confidentiality rule. The provider is bound to abide by federal law if either the physician or the hospital satisfies the criteria described above.

The first question is whether the physician or program is federally assisted. Most hospitals are federally assisted in some way (non-profit status, licensing, Medicare registration or federal funding). In this case, we will assume this is a federally funded hospital. Since the physician is an employee, s/he too is federally funded.

The second question is whether this provider meets any of the three criteria under federal law, as listed above. Neither the physician nor the hospital is an individual provider or program, so the first category does not apply. A hospital is a general medical facility, and an ER is considered a unit in that facility. Federal law would apply if this physician's primary function is as a provider of drug abuse diagnosis, treatment, or referral, but a general emergency room physician does not meet this standard. Finally, federal law would apply if the ER promotes itself in the community as a provider of substance abuse services. However, most ERs do not do so. In this case, then, federal law would not apply.[20] The physician is only obligated to abide by state restrictions on his communications. In this state, the physician may use individual discretion to decide whether to share the results with the patient's mother.

Case No. 2

A private non-profit program provides drug treatment counseling to teens. It advertises its treatment services at multiple sites, including schools and community centers. One day a father calls to ask if his teenage daughter is receiving treatment there. State law allows a provider to share drug abuse diagnosis and treatment information with a parent when the provider deems it appropriate. Federal law requires the minor's written consent before any disclosure, even a patient's name. Can the program reveal whether this young woman is a client without first seeking her written consent?

To decide, we must know if this non-profit is bound by the federal confidentiality rule. In regard to the question of whether the program is federally assisted, the program does not take federal funds. However, as a non-profit, it is registered with the Internal Revenue Service as a tax-exempt organization. Thus, it is considered a federally assisted program.

The next question is whether the program meets any of the three criteria. Since this program advertises itself in the community as providing drug treatment counseling, it qualifies, and federal law applies. The organization cannot reveal any information without the minor's written consent. Program managers would have to tell the father that they cannot release any client information because federal law prohibits them from doing so.

Conclusion

While the conflicts between state and federal laws do add a challenging legal dimension to adolescent drug and alcohol treatment, federal confidentiality laws exist to help ensure that adolescents have access to treatment. Knowing the federal requirements for confidentiality of records will not only help providers navigate their way through the law, it will also help them provide the care adolescents need.

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[19] Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, The Guttmacher Report on Public Policy, Aug. 2000 at 4, 6-7.

[20] *See* 42 C.F.R. § 2.12(e).