

DHHS Overview of Application of Confidentiality Laws to Adult Consumers of Mental Health Services

The Bates v. DHHS Consent Decree Implementation Plan describes a state mental health system that is grounded in consumer-directed recovery and that offers and supports continuous care to consumers. Confidentiality laws sometimes mark the junction between consumer autonomy and system accountability. Inappropriate invocations of confidentiality by service providers inhibit continuous care for mental health system clients. Disregard of the confidentiality laws abrogates consumer rights.

Applying confidentiality laws in a way that protects consumer rights and encourages system accountability is a challenge. The purpose of this memo is to describe in general and practical terms how the Department believes confidentiality laws govern the actions of its mental health service contractors and licensees when they are asked to release consumer-specific information. Because it is not possible to summarize briefly and accurately how the laws might apply in all situations, this memo simply offers an overview related to situations that may arise fairly often for holders of confidential consumer information. The Department expects that if a contractor or licensee has a different understanding of how confidentiality laws govern a specific situation, the contractor will consult its own attorneys, and the Department as appropriate, in an effort to reach an appropriate resolution.

Release to consumers

Consumers generally have the right to review their records at any reasonable time within three working days of the request to review the records, and the right to request copies of records, to be provided at the cost of reproduction.

However, access to psychotherapy notes and to information compiled in anticipation of litigation can be restricted. Access to the record can also be restricted if allowing access would physically endanger someone or if allowing access might cause harm to a person named in the records. The consumer's access can also be restricted if information in the record was obtained from someone other than a health care provider under a promise of confidentiality, and allowing access would reveal the source of the information.

Release by Consumer Authorization or Court Order

Generally, providers can release otherwise confidential information pursuant to a court order or to a written authorization signed by the consumer or the consumer's guardian. In either case, the release of information is limited by the terms of the document that authorizes the release.

Release to Other Providers, Including Psychiatric Hospitals

Release of confidential consumer information to other providers generally requires specific statutory authorization, written client authorization, or a court order.

However, providers can release client mental health records as necessary to ensure continuity, accountability and coordination in service delivery, and must make community support services records available for continuity of care during a psychiatric crisis.

Providers can also release mental health records necessary to allow psychiatric hospitals (and general hospitals with psychiatric beds) to admit, diagnose, care for and treat involuntary patients.

Another exception to this general rule is release of information in dangerous situations. (See below.)

Release to Law Enforcement

In addition to client authorization or court order, release of mental health records to law enforcement is allowed generally under HIPAA exceptions for “law enforcement purposes” related to subpoenas, court orders, and other requirements of law; identification and location; victims of crime; decedents; crime on the premises; and reporting crimes in emergencies.

Hospitals must notify law enforcement if a law enforcement officer transports a person to a hospital for a blue paper examination and the person is not admitted.

Mental health professionals who work at state hospitals and who believe that a committed person has access to a gun must notify law enforcement.

Release of information to law enforcement is allowed in certain dangerous situations. (See below.)

A state hospital must release blue paper information under subpoena to a grand jury that is considering violations of federal gun control laws.

Mandatory Reporting

Providers subject to mandatory reporting related to suspected abuse, neglect, or exploitation, or to suspected misconduct of certain professional licensees may release the information required by the reporting statutes, but may not disclose any otherwise confidential information beyond the minimum required by the reporting statutes.

Release to Family Caretakers

Providers may release some information to live-in family or caretakers without a court order or consumer consent if the providers follow the steps outlined in state regulation (Rules Governing the Disclosure of Information Pertaining to Mentally Disabled Clients), as long as the disclosure of information is for a treatment purpose and does not pertain to substance abuse or HIV.

Release to Disability Rights Center Advocates

Providers can release records to advocates of the Disability Rights Center (DRC) if the consumer or guardian gives permission. DRC advocates further have access if they are investigating a complaint concerning a consumer who is either his or her own guardian or a DHHS ward, and if there is probable cause to believe that abuse or neglect is occurring, and if they are unable to get permission from the consumer because of the consumer’s mental or physical condition. DRC advocates also have access if they are investigating a complaint concerning a consumer’s guardian, if there is probable cause to believe that the health or safety of the consumer is in

serious and immediate jeopardy, and if the advocate's attempts to work with the guardian have failed.

Release to DHHS

Providers can release client information to Department representatives who need the information to do their jobs.

Release in Dangerous Situations

If there is a clear and substantial reason to believe that a consumer poses an immediate danger of serious physical harm, providers must notify any person (including law enforcement and the endangered person) who may reasonably be able to prevent or lessen the threat.

If a person conducting a professional evaluation of a consumer has a clear and substantial reason to believe that the consumer poses an immediate danger of serious physical harm, the evaluator must provide this information to persons to whom the consumer's care or custody is being transferred.

These exceptions would not necessarily support release of substance abuse information.

Release of Substance Abuse or HIV Information

Specific client authorization or a court order is required for release of substance abuse and HIV information.

Release of Records Obtained from Other Sources

Information released under the circumstances described above may include information developed by outside sources, unless there is a competing law or regulation or principle that prevents release. For instance, documents in a record that identify other people who are entitled to confidentiality cannot be released without satisfying confidentiality requirements as to that protected information. If documents were acquired under a promise of confidentiality, the person who provided the document should be notified of the pending release in order to be able to assess whether to challenge the release.

Note:

Consumer confidentiality is governed by many detailed laws and regulations. These include:

- HIPAA (regulations at 45 CFR Parts 160 and 164), the federal law related to privacy of health information;
- Federal substance abuse law (regulations at 42 CFR Part 2);
- State mental health confidentiality law (34-B M.R.S.A. § 1207) and Community Service Network law (34-B M.R.S.A. § 3608);
- Federal protection and advocacy agency regulations (42 CFR Part 51); and
- State mental health confidentiality regulations (Rights of Recipients of Mental Health Services, Part A(IX) and Rules Governing the Disclosure of Information Pertaining to Mentally Disabled Clients).

The information above is drawn from these laws and other sources, but does not represent legal advice or provide comprehensive answers to questions pertaining to consumer confidentiality.