Seton Hall Law
Center for Health &
Pharmaceutical Law & Policy

Case Study: Variety of Federal and State Legal Requirements for the Sharing of Patient Health Information among Treatment Providers in New Jersey

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Overview of Case Study

- Report prepared as part of NJ's SIM planning grant: *Integrating Behavioral and Physical Health Care in New Jersey: Legal Requirements for the Sharing of Patient Health Information among Treatment Providers* (June 2016)
- Behavioral health integration requires providers to share health information so they may coordinate care
- Yet many records remain siloed
  - Even among innovators

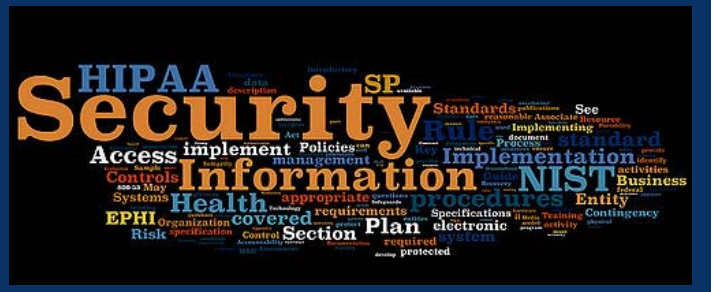
Source: John Hritz, Flickr

  - Much misinformation re: what the law permits, but is that all?

Sources of Federal Health Privacy Protections

Federal Law - 2 principal bodies of law

- Health Insurance Portability and Accountability Act (HIPAA)



- 42 C.F.R. Part 2 (Part 2)

Substance Abuse and Mental Health Services Administration
SAMHSA

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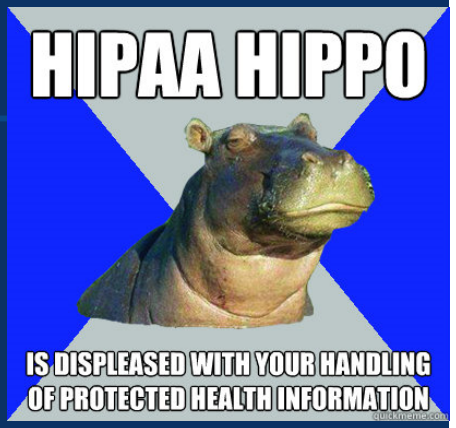

HIPAA

- Applies to most health care providers
- But generally not a barrier to exchange among treatment providers in integrated settings
  - Treatment exception (but special handling of psychotherapy notes)
  - Health care operations exception
- ACOs and HIOs may be Business Associates

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Part 2

- Heightened confidentiality protections for substance use disorder treatment and prevention records
  - generally requires written consent
  - Medical emergency and internal communications exceptions
  - Redisclosure notification requirement
  - HIO may be Qualified Service Organization

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In sum: generally, federal law permits sharing among treatment providers, at least with consent.

- Sample consent forms, BAAs, QSOAs, etc. to facilitate sharing among treatment providers
  - E.g., Legal Action Center web site offers number of publications, webinars, training materials, and sample forms: http://lac.org/resources/substance-use-resources/confidentiality-resources/
  - N.B. more stringent consent requirements for certain grantees of federal funding to provide services for domestic violence, sexual assault, or stalking

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Scores of **NJ state requirements**

- Generally do not prohibit providers in integrated settings from sharing patient health information.
- Often may exchange among treatment providers or at least with consent
- Several potential barriers, however
  - Misinformation and Fear
  - Legal Challenges
  - Operational Challenges

Source: https://en.wikipedia.org/wiki/Tile

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Misinformation and Fear

- Often providers inappropriately blame HIPAA
- Some know about Part 2, but few know its fine details
- Even fewer are well-versed in the matrix of State-specific laws that govern in New Jersey
- There simply is too little knowledge of what the law requires
- Can act to chill exchange of information, which can result in information that is important for coordinated care being withheld from treatment providers

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Examples of **Legal Challenges**

- Several condition disclosure on various requirements, which sometimes vary from federal
- Specific requirements vary depending on a variety of factors, including
  - custodian of patient information
  - entity that will receive the information
  - purpose for which information is being shared
  - type of health information

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- Applicability and scope vary by health care facility, provider, professional licensing, sensitive information, disease or condition-specific
- Unique requirements, such as consent or redaction re individual family members
- Use of inconsistent and/or undefined terms
- Some internal inconsistencies
- Different rules re: consent by minors
- Provisions that need to be updated – e.g., intoxicated persons

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- **Varying consequences for violations** – e.g.,
  - **Genetic Privacy Act** includes criminal and civil penalties
  - **Aids Assistance Act** authorizes civil action seeking "appropriate relief, including actual damages, equitable relief and reasonable attorney's fees and court costs. Punitive damages may be awarded when the violation evidences wantonly reckless or intentionally malicious conduct by the person or institution who committed the violation"
  - Many other provisions are **silent**

In short: laws are complex, incomplete, and unclear

- Difficult for providers to navigate complex web

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Some examples:

- **Varying requirements re who may receive and when:**
  - Undefined terms: “another such agency,” “health care provider,” “personal physician,” “qualified personnel,” “directly involved”
  - Need to know if recipient has a contract with, is licensed by, or is funded by DHS
  - To be used for the treatment of v. for the benefit of the patient
- **Vestiges of the past**: e.g., “mark confidential” requirements – do they apply to electronic records?
- **Varying specificity**: some have specific content requirements or redisclosure requirements, others are silent; some expire, others do not

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Some examples:

❖Variations based on professional licensure:

BME/Dental/Chiropractic Board

In the **exercise of professional and in the best interests** of the patient may release pertinent information about treatment to another licensed health care professional who is providing or has been asked to provide treatment or whose expertise may assist

V.

SWs

Disclosure to another licensed health care professional, hospital, nursing home, or similar licensed institution that is providing or has been asked to provide treatment **requires written request** from patient of authorized representative

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Some examples:

Facility variations

- Sometimes treatment exceptions are restricted to sharing within a facility
- When transferring patient from a facility:
  - Sometimes recipient facility must require records, but other times doesn't
  - To transferee facility v. to health care professional treating the patient

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Some examples:

Varying definitions of **who may consent/waive/authorize:**

- **SW regs**: § 13:44G-12.4 Release of client record

  "(a) For purposes of this section, "**authorized representative**" means, **but is not limited to**, a person designated by the client or a court to exercise rights under this section. An authorized representative may be the client's attorney or an agent of a third-party payor …"

- **Marriage and Family Therapists, Rehabilitation Counselors, Professional Counselors, and Associate Counselors:** regs refer to waiver by client or patient; no reference to authorized representatives

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Some examples:

- **Special rules re minors:**
  - ≥14 for voluntary admit to psychiatric facility, special psychiatric hospital, or children's crisis intervention service
  - ≥ 12 for AIDS/HIV records
  - When parents or legal representatives of minors are authorized representatives:
    - Dental Board: deems parent or guardian who has custody (whether sole or joint) an authorized rep
    - BME: ditto except where the condition being treated relates to pregnancy, sexually transmitted disease, or substance abuse
    - SWs, psychologists, and PCs/associate counselors: authorization must be signed by parent or legal guardian and client ≥14 unless court order

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Some examples:

- **Special rules re family services:**
  - **Marriage and Family Therapist, Rehabilitation Counselor, Professional Counselor, or Associate Counselor**: to disclose any information received from any family member, each family member **≥ 18** (unless federal or State law requires < 18 years as well) must agree to waive
  - **Social Workers**: similar provision - requires agreement from anyone in the family **≥ 14**
  - **Alcohol and Drug Counselors:** require signed release from all persons referred to in family counseling notes

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Some examples:

- No consent provision?
  - Venereal diseases - silent
  - Intoxicated persons – need court order?
- Requiring replacement of patient's name with initials
- Requiring redaction of family member names
- Limited to records generated by provider agency
- Gap in New Jersey law re whether HIOs may send and receive laboratory orders and test results

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Operational Challenges:

- Complex web of federal and state requirements can be operationally daunting in the context of health care delivery
- Managing consents and revocations
  - E.g., minors
- Data segmentation
  - Break the glass requirements
- Interoperability concerns
- High staff turnover rates

Source: clumsy_juggler, Flickr

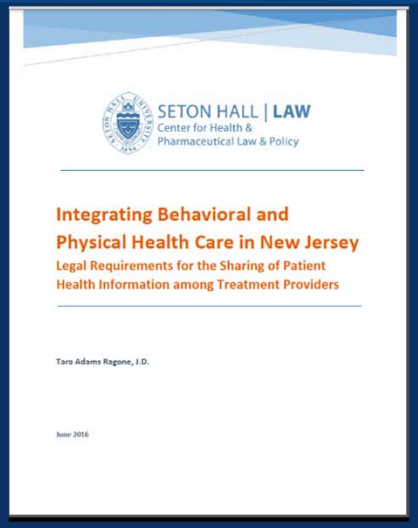
Opportunities to Reduce Barriers and Support Integration

- Harmonize federal and state requirements where appropriate
  - Intentional rather than artifactual variations
- Regulatory Guidance
  - FAQs
  - Sample consent forms
    - E.g., New York developed universal authorization: https://www.health.ny.gov/forms/doh-5032.pdf
    - Michigan BH Standard Consent Form: http://www.michigan.gov/mdhhs/0,5885,7-339-71550_2941_58005-343686--,00.html

Source: Sonny Abesanis, Flickr

- Support for Technical Improvements
  - E.g., technical standards for consent management, data segmentation, and interoperability
- Education of Providers and Consumers
  - Webinars, Trainings, etc.

Questions? Feedback?



Report available at https://issuu.com/seton-hall-law-school/docs/behavioral-physical-health-care-in-?e=19054437/36892034

Please contact me with any questions or feedback:

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Thank you