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Section 7:  
Privacy and  
Confidentiality

## Privacy and Confidentiality

Staff who provide health, mental health, and substance abuse services to individuals and families have to abide by both federal and state client confidentiality clauses. Volunteer boards of such service providers are held accountable to the same client confidentiality standards as the organizations they serve. There is, however, a great deal of confusion over what those state and federal confidentiality clauses stipulate. This section clarifies privacy requirements, their implications for board discussions, and strategies for ensuring appropriate protection of privacy at board meetings.

### ***The Impact of the Health Insurance Portability and Accountability Act***

HIPAA (the federal Health Insurance Portability and Accountability Act), one of the most well known of the Federal Acts that has specific privacy rules regarding a client's health information, is often cited as the reason why a board may want to have a closed door discussion. For example, volunteer boards may suggest that a family or youth participant on a board leave the room in order to discuss scenarios or strategize on best practices that include identifiable client demographic data.

Is HIPAA or a similar state client confidentiality clause really applicable in this context and, if so, how can one create a structured, standardized approach to protecting client confidentiality that does not exclude the family member consultant on a board?

**HIPAA Defined:** HIPAA (Health Insurance Portability and Accountability Act) is a Federal Act implemented by congress in 1996 with additional amendments over time. Privacy issues arise from the Act's Administrative Simplification (AS) provisions, which provide guidelines for streamlining the administrative aspects of health care administration and information systems. The Privacy Rule protects individuals' personal medical information and includes penalties for non-compliance. These non-compliance penalties include fines up to \$250,000 and possible jail time for severe enough violations (Lorenzen, 2006).

**HIPAA's Privacy Rule:** The Privacy Rule defines what is considered *Protected Health Information* (PHI) as individually identifiable health information transmitted by electronic media, maintained in electronic media, or transmitted or maintained in

any other form or medium. PHI excludes education records covered by the Family Educational Rights and Privacy Act and employment records held by a covered entity in its role as employer.

*Individually Identifiable Health Information* is a subset of health information, including demographic information collected from an individual, and (NIH, 2007):

1. Is created or received by a health care provider, health plan, employer, or health care clearinghouse;
2. 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; and
3. Either identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual.

The HIPAA Privacy Rule also states that an individual who believes that their patient confidentiality has been violated can file a complaint with the [Department of Health and Human Services](#) Office for Civil Rights (OCR). However, the majority of complaints reviewed thus far have been closed because the Office for Civil Rights found no violations – demonstrating a widespread misunderstanding of HIPAA privacy stipulations (Francis, 2006).

### ***The Impact of Other Privacy Rules and Regulations***

It is important to remember that while HIPAA sets specific guidelines for client confidentiality, service providers also have to abide by both State and other Federal Laws regarding client confidentiality. To understand the privacy implications for your board, it is important to understand that:

- If State Law is more stringent than HIPAA, State Law applies
- If State Law is less stringent, HIPAA applies
- If other Federal Law is more stringent (e.g., Substance Abuse), other federal law applies.

## ***Implications for Family and Youth Participation on Boards***

Family members can actively participate in board functions even in the infrequent scenario that confidential health information is being shared.

It is unlikely that a discussion during a board meeting on client or patient cases would include *Individually Identifiable Health Information*. It is far more likely that service practitioners who are working to address a specific client's needs would find themselves in that scenario.

Family members on the board are in no different position than other board members as regards being a recipient of identifiable health information. No board member who is not directly involved with the treatment of the individual in question would have the right to receive individually identifiable health information. All board members would need to sign a confidentiality waiver or privacy statement initiated by the board.

*Confidentiality waivers.* An Additional insurance of privacy protection is a confidentiality waiver. Volunteer board members sign a waiver stating that a client's *individually identifiable health information* will only be discussed by those directly involved in the patient's care.

Therefore, board family members will not be required to recuse themselves when presented with confidential health information during decision-making discussions. This is also true as it applies to board funding decisions.<sup>12</sup> HIPAA and Colorado confidentiality laws balance protecting an individual's privacy while allowing important oversight functions to continue. Psychologist-client confidentiality does not apply where an exception exists in a privilege statute or a regulatory and oversight board's own enabling act.

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<sup>12</sup> If the confidential information belongs to the family member's relative, further precautions may be required. Colorado Revised Statute 27-10-129.5 governing request for release of information, procedures, review of a decision allow treating professionals to determine which information can be released to family members of patients. The treating professional's decision can be administratively appealed.

Under existing laws, only in situations where actual evidence of board member's high probability of bias exists should recusal be considered.<sup>13</sup> Since other board members' biases do not require recusal, it follows that family members can generally participate actively in board decision-making, funding, and voting decisions.

When a family or youth participant is on the board, another type of privacy issue may arise. Self-disclosure of their personal story may play a role in informing the board discussions. Self-disclosure of personal information does not put boards at risk of violating privacy laws but new policies to protect privacy may be indicated.

The relevance and self-disclosure of the family member's experience presents an opportunity for the board to develop bylaws and meeting norms that support confidentiality and create a safe environment for their family and youth participants to self-disclose.

### ***Strategies for Boards to Maintain Appropriate Levels of Privacy***

*Bylaws, Norms, and Confidentiality.* If a board of a service organization believes that it is necessary to access and share client information because it can help shape and improve service delivery, there are standard steps a board can take that meet confidentiality requirements and that do not exclude certain board members.

1. When discussing confidential health information, it is a good idea for boards to operate under the guidelines applicable to an entity covered under HIPAA. This means:
  - a. All board members should be required to sign a *confidentiality form* before joining the board.
  - b. The identity of any client whose records are reviewed should not be disclosed to any person not directly involved in the review process; that is, not on the board.
  - c. Family and youth members, who will have signed the confidentiality form along with the rest of the board, *should not* to be asked to leave when a board reviews privacy-protected information; in fact, there is no legal basis for doing so.

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<sup>13</sup> If the board is primarily an adjudicatory board, a lower appearance of bias may be enough to require recusal. The mental health boards this workbook advises are primarily legislative and oversight boards. Thus, a higher standard of evidence based bias is required for recusal. Where the family member's interest was indirect, remote or minimal such that it could not have influenced their action, the family member may remain an active participant.

2. To protect confidential health information discussed at board meetings, boards may hold closed meetings consisting of board members only, inclusive of family and youth board members. It is important that boards also remove from the minutes all names or identifying information.
3. As discussed earlier, client confidentiality is protected by more than HIPAA. Be aware of state, federal, and even funder confidentiality clauses and how they apply to the individuals served by the organization;
4. The board can assign one person on the board to be the Privacy Officer. This designee will address confidentiality issues and respond to requests for client or employee information. It is important that the person selected consult with the service provider's legal counsel to seek guidance on particular issues as they come up.
5. When dealing with children, boards of service organizations have an obligation to know who has legal rights to access information about the child. If there is a question about the parental status or rights, ask for documentation from the parents. Even if a parent does not have physical custody of the child, s/he may have the legal right to both view and release a child's records. Determining what information may be disclosed, particularly if it relates not only to the child, but also to the parent, may be difficult and require some investigation of both the facts of the case and the state law.
6. The new board, including family and youth members, should be made aware of the full participation of families in policy, funding and program decisions, with any special attention to voting rights as needed. Address any residual rules or procedural board changes not already in place to reflect such inclusion in bylaws.

It is a good idea for service providers to ensure that clients understand and agree to the organization's confidentiality policy. One way to do this is to include an acknowledgement, signed by the client, on the initial intake form. We recommend that organizations develop a standard form that a client can sign that specifically states the client understands that the information may be released to other parties.

### ***Materials and Examples***

- ✓ Example Confidentiality Statement

**Please note:** The resources provided in this workbook are in no way exhaustive.