Children’s Treatment Records: Parental Access and Denial

Introduction

Social workers who provide mental health services to minor children at times are faced with requests from a parent or a parent’s attorney demanding access to a child’s record of clinical treatment. These requests may be troubling to the treating clinician for a number of reasons, including concerns for the emotional well-being of the young client who most likely does not have the authority to make a legally binding decision independently to deny such requests. This Legal Issue of the Month article will review HIPAA provisions for access by parents to their children’s records and the bases which HIPAA provides for mental health records to be denied to parents, attorneys or other requestors. This article does not address issues related to emancipated minors or those who are able to consent to treatment independently.

Background

It is important that social workers have a foundational understanding that parents generally have the right to access the medical and mental health records of their minor children. This is considered a parental right and interfering with this right should only be considered after assessing the child’s emotional condition and relationship to each parent and based on sufficient knowledge of the applicable legal standards for denying parental access to records as well as the appropriate procedures to follow. State health privacy laws may also provide procedures and/or standards for providing and denying parental access and these are not within the scope of this article.

Parental Access to Records Laws

HIPAA permits individuals other than the client to act as the “personal representative” of the client for purposes of exercising their privacy rights, i.e., making decisions about accessing or releasing confidential information, if the client is not legally competent (U.S. DHHS, 2003). Because minor children are generally not permitted by law to make independent decisions about their privacy rights, HIPAA recognizes that in most instances their parents will be considered their “personal representatives.” In the vast majority of cases, this works very smoothly to facilitate treatment and coordinate the child’s care. Clinical social workers will want to ask the parent seeking information from a child’s records to sign an authorization to release information to maintain in the client’s file as documentation that the information was disclosed with valid, written consent from a legally-authorized individual.

Most states have explicit legal provisions clarifying that when parents are not married to each other, both parents have an equal right to access their children’s health, educational and other records (Keller-Micheli and Morgan, et al., 2007; Morgan and Polowy, 2007). This applies regardless of which parent has physical custody of the child(ren), but can be limited by court order. Asking to review the court order that established the custody arrangements for a child can
be a valuable step for the social worker to take in clarifying the validity of a request from a parent for access to a child’s information.

The parental access laws become problematic only when the parents’ interests and that of the child differ. In instances where parents are in conflict with each other or with the child, legal and ethical complexities abound.

Denying Parental Access to Records

- **Parental Abuse or Neglect**

A social worker who is subject to HIPAA may choose not to treat a child’s parent as the “personal representative” when the social worker reasonably believes, in the exercise of professional judgment, that the minor child is subject to abuse or neglect by the parent, or doing so would otherwise endanger the individual (45 CFR 164.502(g)). This is similar to the provision for denying parental access to records, but is available in a separate section of the HIPAA regulations. The clinician’s decision not to treat the parent as the child’s personal representative does not have any specific HIPAA requirement that the decision be reviewed, although denial of access to records based on likelihood of substantial harm (below) does have a review requirement. When there is a documented history of abuse or neglect or credible threats of abuse or neglect that would necessitate a mandatory report to child protection agencies, a decision not to treat the parent as the child’s personal representative is a reasonable option available under HIPAA. If the concern about harm is not at a level of potential dangerousness, the provision below, regarding “substantial harm” may be a useful option if breaching the child’s privacy would still be damaging.

- **Danger of Substantial Harm**

Under HIPAA, a parent’s request for access to a child’s records may be denied if “in the exercise of professional judgment,” the clinical social worker has determined that providing access to that parent is “reasonably likely to cause substantial harm to the individual [client] or another person” (45 C.F.R. § 164.524 (a)(3)(iii)). When records are denied to a parent based on the likelihood of substantial harm, the social worker must provide notice and an opportunity for the parent to request a review of that decision. In some instances a clinical social worker may determine that the child would be emotionally affected in a therapeutically negative way, but there is not a concern about abuse or neglect by the parent. In that case, the procedures for denying parental access are detailed below under the heading, Denial Procedures.

- **Psychotherapy Notes**

Information in a client’s records that is maintained in a separate file as “psychotherapy notes” is not required to be disclosed when a request is made for access to the record (45 C.F.R. § 164.524 (a)(1)(i)). Therefore, maintaining separate session notes in accordance with the HIPAA standards may be a valuable means of protecting the confidentiality of young clients’ information. A primary record with demographic information, financial information, summary progress notes, dates and times of treatment and the like would still be accessible by the parent;
however, the more detailed information about the minor clients’ inner thoughts and other sensitive material could be denied if it is maintained as a separate psychotherapy note. This requires maintaining two files for the client: one with the formal record information necessary for insurance and legal documentation purposes and another with contemporaneous session notes (see Polowy and Morgan, 2001; Morgan and Polowy, 2006).

- **Voluntary Parental Agreement**

HIPAA provides that if a child’s parents voluntarily sign an agreement that the child’s health (or mental health) information will be kept confidential from the parents, this agreement is a binding commitment on which the clinician may rely in refusing to give the parents access to the child’s information (45 C.F.R. § 164.502 (g)(3)(i)(C)). Under this provision, the social worker is electing not to treat the parent as the child’s personal representative. Of course, the child may always voluntarily consent to permit the clinician to disclose information to the parents. Any circumstances where disclosure to the parents was necessary to prevent serious harm would also constitute a professionally and legally acceptable exception to the confidentiality expectation.

**HIPAA Procedures for Providing or Denying Parental Access to Information**

- **Access Deadlines**

If a clinical social worker has accepted the signed authorization from a parent to release the child’s treatment information to the parent (or the parent’s attorney), HIPAA requires that the request be fulfilled within 30 days (45 C.F.R. § 164.524 (b) (2)). If the state’s health privacy law has a shorter deadline, it may be more advantageous to the client (or family) and should be followed. In most instances, responding within a week or ten days is considered reasonable.

- **Denial Procedures**

The HIPAA procedures for denying parental access to their children’s records based on likelihood of substantial harm are fairly straightforward and state that the individual making the request for records “has the right to have the denial reviewed by a licensed health care professional” selected by the clinician, as long as the reviewer did not participate in the original decision to deny parental access. The clinician must provide or deny access in accordance with the determination of the reviewing official (45 C.F.R. § 164.524 (a)(4)).

Details of the denial and review procedure are provided below:

If other information is available that is not subject to denial of access, the social worker is to provide access to that portion which is not being denied. If the social worker does not maintain the requested information, but knows where it is maintained, the necessary contact information must be provided to the requesting parent.

Written notice of the denial is required and it must be in plain language and include:

1. The basis for the denial;
2. A statement of the individual's review rights, including a description of how the individual may exercise such review rights; and

3. A description of how the individual may complain directly to the clinical social worker (or social work agency) or to the Secretary of DHHS pursuant to the HIPAA procedures. The description must include the name or title, and telephone number of the contact person or office designated to receive HIPAA complaints.

The procedures for reviewing a denial of parental access to records are outlined as follows:

If the individual has requested a review of a denial under paragraph (a)(4) of this section, the social worker must designate a licensed health care professional, who was not directly involved in the denial to review the decision to deny access. The social worker must promptly refer a request for review to such designated reviewing official. The designated reviewing official must determine, within a reasonable period of time, whether or not to deny the access requested based on the standards in paragraph (a)(3) of this section [regarding likelihood of substantial harm to the client or someone else]. The social worker must promptly provide written notice to the individual of the determination of the designated reviewing official and take other action as required by this section to carry out the designated reviewing official's determination (45 C.F.R. § 164.524 (d)).

Analysis and Conclusions

Balancing the rights and interests of parents and children in a treatment context is always a difficult clinical task. When these interests result in legal conflicts and access to the child’s information is sought, the task become increasingly complex. Several questions are important for analyzing the best response to a request for a child’s treatment records or information:

- Who is making the request?
- What are the legal rights of the parent making a request for access to the child’s information?
- Have the parents signed a voluntary confidentiality agreement?
- Has the clinical social worker maintained a separate file of the child’s psychotherapy notes?
- What is the child’s stated preference or intent regarding the release of information?
- Are there legitimate safety concerns about disclosing the information requested, due to the possibility of harm by the parent or self-harm?
- If there are not abuse or neglect concerns, is there still a likelihood of substantial harm due to the disclosure?

Of all the bases available under HIPAA for denying parental access to minor children’s records, only denial of information due to the likelihood of substantial harm is subject to a review process. In any event, the review process affords a considerable amount of discretion to the treating clinician, as they are able to select the professional who will review their decision.

Because access to a child’s records is a parental right, it is important whenever denial of access is seriously considered that the social worker follow the procedures outlined by HIPAA or applicable state law. If the request from a parent is in the form of a subpoena and the social
worker has any concerns about a possible complaint against the social worker, legal counsel should be consulted. An initial contact with the social worker’s professional liability insurance carrier is recommended. The NASW Legal Defense Fund also provides brief telephone consultations.

References

45 CFR 164.502 (g).
45 C.F.R. § 164.524 (a)(4).
45 C.F.R. § 164.524 (b) (2).
45 C.F.R. § 164.524 (d).


