

41 N.J.R. 2266(a)

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RULE ADOPTIONS

**HUMAN SERVICES
DIVISION OF MENTAL HEALTH SERVICES**

41 N.J.R. 2266(a)

Adopted Amendments: [N.J.A.C. 10:37F-1.3](#) and [2.4](#)

Partial Care Services Standards

Proposed: May 5, 2008 at [40 N.J.R. 2184\(a\)](#).

Adopted: April 7, 2009 by Jennifer Velez, Commissioner, Department of Human Services.

Filed: May 4, 2009 as R.2009 d.182, **with substantive changes** not requiring additional public notice and comment (see [N.J.A.C. 1:30-6.3](#)).

Authority: [N.J.S.A. 30:9A-10](#).

Effective Date: **June 1, 2009**.

Expiration Date: October 13, 2011.

Summary of Public Comments and Agency Response:

COMMENT: The New Jersey Association of Mental Health Agencies (NJAMHA) commented that the proposed language conflicted with the Health Insurance Portability and Accountability Act (HIPAA), 45 CFR 160 and 164, requiring providers to obtain consumers' expressed authorization prior to the release of their psychotherapy notes ([45 CFR 164.508](#)). It urged the Department to add regulatory language reflecting this provision, as well as HIPAA language defining psychotherapy notes.

RESPONSE: The Department agrees with the commenter and has added to [N.J.A.C. 10:37F](#) provisions delineating both the HIPAA definition of "psychotherapy notes" and the requirement that the consumer's valid written authorization be obtained prior to disclosure of this information, in accordance with HIPAA at [45 CFR 164.508\(a\)\(2\)](#). Upon adoption, [N.J.A.C. 10:37F-1.3](#) is changed to include a definition for psychotherapy notes, which is defined as in [45 CFR 164.501](#), and means notes

recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

In addition, the adopted rule text, at [N.J.A.C. 10:37F-2.4\(d\)](#), includes a specific reference to the HIPAA requirement that a consumer's written authorization must be obtained before a provider can disclose the consumer's psychotherapy notes, pursuant to [45 CFR 164.508\(a\)\(2\)](#).

COMMENT: NJAMHA expressed concern regarding the requirement that where a consumer does not indicate overtly his or her objection to disclosure, providers infer that a consumer does not object to disclosure. NJAMHA recommended that the Department "more clearly indicate . . . protections to providers, including treatment teams, regarding disclosure in the absence of authorization" or emergency circumstances. Specifically, an NJAMHA member requested direction on the following [page=2267] issues: (1) what is the definition of incapacity and who will make that determination; (2) a clear definition of the phrase "exercise of professional judgment" is needed to avoid subjective judgments; and (3) what are the necessary qualifications for staff that will be making these judgments.

RESPONSE: The comment does not specify which provision of the regulation is at issue. However, as two provisions-- [N.J.A.C. 10:37F-2.4\(b\)4ii\(3\)](#) and (4) reference professional judgment, the Department will attempt to address the commenter's concerns under both provisions.

[N.J.A.C. 10:37F-2.4\(b\)4ii](#) delineates three conditions under which a provider may disclose protected health information (PHI) in the absence of a valid written authorization. More specifically, if the consumer is present or available prior to the service planning milestone, PHI may be disclosed at that meeting if it is directly relevant to the family member's or close personal friend's involvement with the consumer's care **and** one of three possible scenarios exists. The first scenario is that the consumer agrees to the disclosure at the time of the service planning milestone ([N.J.A.C. 10:37F-2.4\(b\)4ii\(1\)](#)). The second scenario is that the consumer is provided with an opportunity to object to the disclosure at the service planning milestone and does not express an objection ([N.J.A.C. 10:37F-2.4\(b\)4ii\(2\)](#)).

The third scenario references the first instance under [N.J.A.C. 10:37F-2.4\(b\)4](#), where a PA may exercise professional judgment to reasonably infer from the circumstances at the service planning milestone that the consumer does not object to the disclosure ([N.J.A.C. 10:37F-2.4\(b\)4ii\(3\)](#)). Under the third scenario, in the absence of countervailing circumstances, the consumer's agreement to participate in the service planning milestone with the family member or close personal friend who is present indicates that the consumer does not object to disclosure of PHI that is directly relevant to the family member's or close personal friend's involvement with his or her care. This provision is consistent with the Federal regulations implementing the Health Information Portability and Accountability Act (HIPAA) at [45 CFR 164.510\(b\)\(1\)\(i\)](#) and (b)(2)(ii) and (iii).

A second reference to the exercise of professional judgment appears in [N.J.A.C. 10:37F-2.4\(b\)4iii](#). Where a consumer's incapacity or an emergency circumstance prevents the opportunity for the consumer to agree or disagree to disclosure, the PA may exercise professional judgment to determine whether the disclosure is in the best interests of the individual and, if so, disclose only the PHI that is directly relevant to the person's involvement with the consumer's care. This language is consistent with the Federal regulations implementing HIPAA at [45 CFR 164.510\(b\)\(3\)](#).

HIPAA does not provide any additional detail related to "professional judgment." Such detail would be impractical, given the potential variety of professions working in a screening service. Professional judgment is usually assessed according to the practice standards, ethics codes and general understanding commonly accepted as best practice within a particular professional discipline. Based upon these standards and a common sense reading of the HIPAA provision, staff is expected to use their best clinical and professional judgment, combined with their knowledge, history and relationship with a particular consumer to determine whether a consumer does not object to disclosure.

COMMENT: NJMAHA requested that the Department "revisit all mental health program regulations for consistency in regard to release of information." NJAMHA recommended that regulations "consistently indicate that the preferred, or prevalent practice, governing release of private health information should be by consumer/patient written consent at the time of admission to the respective program or at the time when the information needs to be shared." While NJAMHA expressed support for the "notion of engaging friends and families in the recovery process," it perceived the need to balance "competing interests and goals" and recognized the consumer-provider relationship as "tantamount."

RESPONSE: The Department agrees with the commenter's point that consistency in all its regulatory provisions regarding confidentiality is desirable, to the extent that it is legally supportable. It is the Department's goal to ensure this outcome as each rule comes up for readoption and amendment.

Federal Standards Statement

The adopted amendments set forth guidelines for the disclosure of protected health information to a consumer's family members and close personal friends during the service planning process. The preconditions delineated for such disclosure are consistent with those required by Federal law, specifically, the HIPAA privacy rule, [45 CFR 164.510\(b\)](#). Therefore, the adopted amendments do not establish standards more stringent than those applicable under Federal law. Both [N.J.A.C. 10:37F-2.4\(b\)4](#) and [45 CFR 164.510\(b\)](#) allow information to be disclosed to families and friends where the consumer is present at the time of disclosure or otherwise available prior to disclosure and agrees or does not express an objection to the disclosure, the provider, using best professional judgment, reasonable infers that the consumer does not object. For greater clarity, the State standard elaborates further that absent countervailing circumstances, the consumer's agreement to participate in the service planning milestone with the family member or friend present indicates that the consumer does not object to disclosure of protected health information that is directly relevant to the family member's or close personal friend's involvement with his or her care ([N.J.A.C. 10:37F-2.4\(b\)4ii\(3\)](#)). Therefore, a Federal standards analysis is not required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***):

SUBCHAPTER 1. GENERAL PROVISIONS

10:37F-1.3 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

...

"Psychotherapy notes" means as defined in [45 CFR 164.501](#).

...

SUBCHAPTER 2. PARTIAL CARE STANDARDS

10:37F-2.4 Recovery planning

(a) (No change.)

(b) The IRP, developed with the consumer, shall include the following:

1.-3. (No change.)

4. To assure family participation in developing the IRP and revisions, the PA shall seek the input of family members or close personal friends at each service planning milestone; however, the PA may not disclose protected health information to family members or close personal friends, except as follows:

i. Protected health information may be disclosed to the extent permitted by a valid written authorization;

ii. If the consumer is present at the service planning milestone, or otherwise available prior to, protected health information may be disclosed at that meeting if it is directly relevant to the family member's or close personal friend's involvement with the consumer's care and one of the following apply:

(1) The consumer agrees to disclosure of the information at the time of service planning milestone;

(2) The consumer is provided with an opportunity to object to the disclosure at the service planning milestone and does not express an objection; or

(3) Based on the exercise of professional judgment, the PA reasonably infers from the circumstances at the service planning milestone that the consumer does not object to the disclosure. Absent countervailing circumstances, the consumer's agreement to participate in the service planning milestone with the family member or close personal friend present indicates that the consumer does not object to disclosure of protected health information that is directly relevant to the family member's or close personal friend's involvement with his or her care; or

iii. If the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the PA may, in the exercise of his or her professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health [page=2268] information that is directly relevant to the person's involvement with the individual's health care;

5.-8. (No change.)

(c) Where protected health information is disclosed pursuant to (b)4ii or iii above, the PA shall document the basis for the disclosure. Disclosure in accordance with (b)4ii or iii above shall not authorize or otherwise provide a basis for future disclosures not in compliance with this section.

*** (d) Notwithstanding (a), (b) and (c) above, the PA shall not disclose to a consumer's family or close personal friends, psychotherapy notes related to treatment of the consumer without the consumer's valid written authorization, consistent with [45 CFR 164.508\(a\)2](#). ***

Recodify proposed (d)-(h) as *** (e)-(i) *** (No change in text.)