Information Sharing in Criminal Justice Mental Health Collaborations

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JMHCP National Training and TA Event:

Achieving and Communicating Public Health and Safety Outcomes for Our Communities
Learning Objectives

• Develop understanding of **practical and legal** barriers to information sharing between criminal justice and mental health/substance abuse systems

• **Identify key federal statutes/regulations** governing disclosure of health information for adults and juveniles

• **Understand resources** available for general guidance, technical assistance, and legal advice concerning information sharing
Today’s Presentation

What is an “information-sharing” problem?

Legal considerations

Practical approaches

Q&A (No “legal advice”!)

Achieving and Communicating Outcomes
CSG Justice Center

Justice Center
The Council of State Governments
Collaborative Approaches to Public Safety

Reentry Policy Council

Criminal Justice Mental Health CONSENSUS PROJECT

Justice Reinvestment

The Bureau of Justice Assistance
Justice & Mental Health Collaboration Program

Achieving and Communicating Outcomes
Achieving and Communicating Outcomes
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What is an “information sharing” problem?

“We never know if our clients are in jail” – Community Behavioral Health Clinician

“We don’t know how many people screen positive for mental illness in our county jail” – Mental Health Court Coordinator

“We have HIPAA problems” – Mental Health Court Coordinator
Always a legal problem?

Goal: Profession-based collaboration

http://careers.bmj.com/careers/advice/view-article.html?id=943

www.abanet.org/.../youraba/200712/article02.html
Always a legal problem?

Goal: Profession-based collaboration

“It is against the law for me to tell you. I could get fined.”

“That information would not be able to be admitted as evidence.”

“It’s against my professional ethics to tell you. I could be sanctioned.”

“Who are you? Why would I share my patient’s/client’s personal information with you?”
Diagnosing information sharing barriers

Common obstacles observed

- Knowledge
- Legal
- No process to capture data
- No system to transfer
- Unidentified obstacles
### Convene stakeholders; discuss approaches

#### Breakdown type: Knowledge

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<tr>
<th>Institutions Involved</th>
<th>Preliminary approach</th>
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| *Example: Initial detention-Jail/Prison* | • Cross-training to increase knowledge of needs for other parts of system  
• Focus/working groups on data collection |

#### Breakdown type: Legal

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<tr>
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<th>Preliminary approach</th>
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| *Example: Medical staff in jails-community providers* | • Discuss precise legal concerns of staff  
• Develop training on applicable law  
• Introduce waivers/consent forms at jail booking |
Convene stakeholders; discuss approaches

**Breakdown type: Lack of process**

**Institutions Involved**

*Example: Department of Corrections - Court*

**Preliminary approach**

- Compare current intake form and process with those of other jurisdictions
- Get input from judges/mental health professionals
- Provide training for jail staff on assessment
Convene stakeholders; discuss approaches

**Breakdown type: No System**

**Institutions Involved**
- *Example: Community providers-
Department of Corrections*

**Preliminary approach**
- Identify systems used by each institution
- Explore opportunities for MOUs or other non-IT system solutions
- Bring together IT experts from each system to develop longer term approach

**Breakdown type: Unknown**

**Institutions Involved**
- *Example: Jail- Reentry Planning
Court- Parole & Probation*

**Preliminary approach**
- Conduct interviews with stakeholders to gain additional understanding of the type of barrier
Overall goal: To improve outcomes for youth and reduce their unnecessary penetration deeper into the juvenile and criminal justice systems

Personally Identifiable Information

Data Collection
PRINCIPLES in Models for Change

- Personal and institutional responsibility
- Legal, constitutional, and ethical concerns regarding privacy
- Presumption of non-disclosure
- Permitted disclosure - required disclosure
- Presumption of disclosure for de-identified data
- Answer questions about youth and the systems’ policies and practices
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Health Insurance Portability and Accountability Act (HIPAA)
What is HIPAA’s purpose?

- to ensure that health care information can be protected when privacy is important, and disclosed when sharing is important

- use and disclose only the **minimum amount** of information necessary to accomplish the intended purpose.
What does HIPAA do?

- HIPAA imposes rules on certain entities that handle *protected health information* regarding storage and disclosure

  - **BUT** HIPAA sets a floor for privacy protections. HIPAA does NOT preempt any federal or state laws or regulations that are more stringent and give greater protections.
What is Protected Health Information?

Protected health information (PHI) is information maintained or transmitted by covered entities regarding:

- Individual’s past, present or future physical or mental health condition OR
- Provision of health care to the individual OR
- Past, present or future payment for health care AND
- That identifies the individual or could reasonably identify the individual (social security numbers, phone numbers, DOBs, photos, etc)

Note: there are no restrictions on use/disclosure of de-identified information.
Who has to follow HIPAA rules?

- **Covered entities** are
  - health plans
  - healthcare clearinghouses
  - healthcare providers that transmit *PHI* in electronic form

- **Hybrid Entities** perform covered functions with respect to *PHI* (i.e., what **covered entities** do) and non-covered functions. HIPAA rules apply to that part of organization that performs covered functions.

- **Business Associates** are entities that perform functions involving the use and/or disclosure of *PHI* on behalf of, or provide certain services to, covered entities.
HIPAA protections belong to...

- HIPAA’s protections and rights generally belong to the *individual* who is the subject of the *PHI*
- With limited exceptions, the *individual* has access to his/her *PHI* and controls disclosure and third-party access to his/her *PHI*
  - **BUT** sometimes these rights belong to the *individual’s personal representative*!!!!
HIPPA and minors’ records

- **Parent/guardian** is the unemancipated minor’s personal representative and **controls minor’s health care records** when the parent consents to health care service on behalf of a minor.

- **Emancipated minors** control their health care records.

- **An unemancipated minor controls his health care records when:**
  - Minor consented to the health care and no other consent is required by law.
  - Minor obtained health care, and a court order or adult authorized by law gave consent.
  - Parent/guardian agreed to confidentiality agreement between provider and minor.
Permitted Disclosure of PHI

Written Authorizations

Covered entities can use/discard PHI when the individual (or individual’s personal representative, when applicable) authorizes use/disclosure
Permitted Disclosure of PHI

Authorization to release records must contain 8 elements:

1. Specific description of PHI to be released
2. Name/description of persons or class of persons authorized to disclose PHI
3. Name/description of persons or class of persons authorized to receive PHI
4. Expiration date or event
5. Statement of individual’s right/procedure to revoke authorization
6. Statement that disclosed PHI may be subject to redisclosure by recipient and not protected by HIPAA
7. Signature of individual & date (or of personal rep. w/description of that person’s authority to act)
8. Purpose of disclosure (‘at request of individual’ suffices)
Permitted Disclosure of PHI

**Court Orders and Subpoenas**

- HIPAA allows *covered entities* to disclose *PHI* without obtaining the *individual’s* written authorization in response to a court order
  - **BUT** does not specify what has to be in the court order

- HIPAA allows covered entities to disclose *PHI* without obtaining the *individual’s* written authorization in response to a subpoena IF person seeking the disclosure demonstrates that s/he has:
  - Made reasonable efforts to notify the individual of the request for disclosure  
     **OR**  
  - Obtained a protective order prohibiting use of *PHI* for any other purpose than the litigation for which it was requested.

- **BUT** can only disclose psychotherapy notes with individual’s written authorization.
Permitted Disclosure of PHI

• **Covered entities** can use/disclose **PHI** without first obtaining signed authorization:
  – For treatment, payment activities, health care operations
  – To *individual’s* healthcare providers for treatment
  – When necessary to prevent/lessen serious, imminent threat to health or safety of others, to person(s) reasonably able to prevent/lessen the threat
  – To law enforcement and correctional institutions having lawful custody of individual if needed to provide health care to individual or ensure health and safety of others
Federal Drug and Alcohol Law
(42 CFR Part 2)
To impose restrictions on the disclosure and use of alcohol and drug abuse patient information maintained by *federally assisted* alcohol and drug abuse programs, and to specify the limited circumstances under which this information may be released without first obtaining the client’s written consent, for the client’s protection.
Who must follow 42 CFR Part 2?

• Applies to *federally assisted programs*:
  
  – Receive federal financial assistance in any form, including $$$ not used directly for D&A treatment; OR
  
  – Run by state or local gov’t unit that receives any federal $; OR
  
  – Have IRS tax exempt status
What information is protected?

- Information held by *federally assisted programs* that would directly or indirectly identify a client and that was obtained for the purposes of:
  - treating drug or alcohol abuse, or
  - making a diagnosis for that treatment, or
  - making a referral for that treatment
Fed D&A law and minors’ records

In states where minors can voluntarily consent to substance abuse treatment without parental consent, federal d&a law states that the minor must give prior written consent for the disclosure of records, even if the disclosure is to the minor’s own parents.
Permited Disclosures

**Written Authorizations**

_Federally assisted d&a programs_ may disclose client information when they have a signed authorization that contains 8 elements:

1. Name/designation of persons authorized to disclose information
2. Name/designation of persons or organization authorized to receive the information
3. Patient’s name
4. Purpose of the disclosure
5. Specifics as to what information is to be disclosed
6. Patient’s signature and the date
7. Statement of individual’s right/procedure to revoke authorization
8. Expiration date or event
Courts Orders and Subpoenas

- A court order accompanied by a subpoena may compel a federally assisted program to disclose information without the client’s written authorization
  - The order must be made on a showing of good cause & court must weigh public interest against injury to client.
  - The client must be given notice prior to complying with the order and subpoena.
State D&A law

- If a disclosure that is permitted under federal D&A law is prohibited under state law, the federal D&A law does not override the prohibition.

- And state law cannot compel or authorize any disclosure that is prohibited under federal D&A law.
Big points on legal framework: Federal

**HIPAA**
- Protected health information ("PHI")
- Applies to "covered entities"
- Depends on the circumstance:
  - Consent
  - Authorization
  - Opportunity to agree or object

**42 CFR Part 2**
- Substance use treatment information
- Applies to "federally assisted" "programs"
- Written consent (requirements specified in regulations)
**Big points on legal framework:**

**Federal**

How do you work with others?

- **HIPAA**
  - Work with others through “business associate agreements”
  - Generally more permissive but check state law

- **42 CFR Part 2**
  - Work with others through “qualified service organization agreements”
  - Generally more restrictive
If individual health information is being requested...

- Who is being asked for the information?
- Who is asking for the information?
- What do they want the information for?

Rule of Thumb: *Minimum necessary disclosure*
Family Educational Rights and Privacy Act
(FERPA)
What is FERPA?

FERPA governs access to and release of educational records by public and private schools that receive federal funding.

Student’s education record -- records, files, documents, and other material which contain information directly related to a student that are maintained by a school or a person acting for the school.
Parents’ Access to Education Records

• Parents have the right to review their children’s education records, including any health-related information contained in the education record. Parents also control third party access to their children’s records

• When student turns 18 or in post-secondary, the student assumes the rights of review and controlling third-party access
Permitted disclosures under FERPA

Written Authorizations

Authorization to release educational records must:
1. Specify the records to be disclosed
2. State the purpose of the disclosure
3. Identify the party or class of parties to whom disclosure is to be made
4. Be signed and dated by the parent.
Court Orders and Subpoenas

- School may release educational records to comply with a judicial order or lawfully issued subpoena
  - BUT the school must make a “reasonable effort” to notify the parent of the order or subpoena before releasing the records.
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Models for Change Information Sharing Tool Kit

Models for Change Information Sharing Tool Kit: Accelerating Progress Toward a More Rational, Fair, Effective, and Developmentally Appropriate Juvenile Justice System

Child Welfare League of America and Juvenile Law Center

http://modelsforchange.wufoo.com/forms/tool-kit-request/

• Provides a step-by-step guide on how to undertake an information sharing project across systems working with youth

• Contains a variety of tools to assist users in identifying gaps in protections and developing MOUs, consent forms, court orders, and legislation

• MfC Information Sharing Project Team provides TA
For Criminal Justice/Mental Health Collaborations

- Legal analysis focused on practitioners, including answers to FAQs
- Program examples from NACo
- Template forms

http://www.consensusproject.org/jc_publications/info-sharing
Resources on legal aspects of information sharing- More available on handout

• The U.S. Department of Health and Human Services (HHS) has primary responsibility for enforcing HIPAA, and their website provides an excellent background on what the law covers, FAQs, and specific guidance for how the law affects consumers and covered entities, such as treatment providers.
http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html

• “Dispelling the Myths about Information Sharing Between the Mental Health and Criminal Justice Systems” by John Petrila, JD, LLM, for the CMHS National GAINS Center, is a brief overview of common misperceptions about HIPAA, available at http://www.gainscenter.samhsa.gov/text/integrated/Dispelling_Myths.asp

• Legal Action Center resources on confidentiality, including published book and courses
Resources on Juvenile Justice/Mental Health Collaborations


Thank You

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