

DHHS POLICIES AND PROCEDURES

Section VIII:	Privacy and Security
Title:	Privacy Manual
Chapter:	Client Rights Policies, Personal Representatives
Current Effective Date:	5/1/05
Revision History:	5/8/03
Original Effective Date:	4/14/03

Purpose

The purpose of this policy is to ensure that the North Carolina Department of Health and Human Services (NC DHHS) agencies allow a personal representative, authorized to act on behalf of a client under applicable law, to make decisions related to the use and disclosure of a client's individually identifying health information.

This policy shall apply to the following DHHS agencies:

- *Covered health care components, and*
- *Internal business associates.*

Background

The HIPAA Privacy Rule limits the personal representative's authority to act on behalf of a client to that which is relevant to the matters on which the personal representative is authorized to represent the client as it relates to individually identifying health information.

For the purposes of this policy, DHHS agencies that serve clients with mental illness, developmental disabilities, or substance abuse shall consider the client's personal representative the same as the client's "legally responsible person" as defined in North Carolina General Statute (NCGS) 122C-3.

Policy

DHHS agencies shall recognize personal representatives who are authorized by the courts or by state or federal law to act on behalf of clients regarding their individually identifying health information in a manner consistent with all requirements within this policy. DHHS agencies shall treat the personal representative as the client with regard to the client's individually identifying health information relevant to the matters on which the personal representative is authorized to represent the client.

Implementation

In most situations, clients are authorized to make health care decisions on their own behalf and do not require a personal representative if they are:

- Adults (individuals 18 years of age or older) who have not been adjudicated incompetent;
- Individuals under 18 years of age who are married, serve in the Armed Forces of the United States, or who have been declared emancipated by a court of competent jurisdiction;

A personal representative is usually required to make health care decisions about adults adjudicated incompetent and persons under 18 years of age (unless they meet the exception noted above).

Personal representatives may include the following:

- Person ordered by the court;
- Parent(s), of juveniles under 18 years of age;
- Person, other than parent, acting *in loco parentis* (of minor);
- Guardian as defined in chapter 35A;
- Person with health care power of attorney. The health care power of attorney document should define the scope of the personal representation with respect to access to individually identifying health information. The individual may also be referred to “health care agent” or “health care attorney-in-fact”; or
- Executor/administrator of estate (of deceased person).

Disclosure of individually identifying health information to a personal representative is required (with the exception of those situations described in this policy) only if disclosure to the client is required.

Unemancipated Minors

Generally, a parent, guardian, or other person acting *in loco parentis* who has the authority to make health-related decisions on behalf of a client who is an unemancipated minor must be treated as a personal representative and may access and control health information about the minor.

The minor may control his/her health information related to a particular service and exercise the privacy rights afforded to the client in any of the following circumstances:

- If the parent, guardian or other person acting *in loco parentis* has agreed to a confidential relationship between the minor and the physician for a particular

health care service;

- Where a minor can obtain a particular health care service under their own consent (for example, as specified in NCGS 90-21.5), and no other consent is required by law (regardless of whether such consent has actually been obtained), the parent, guardian or other person acting *in loco parentis* may not be treated as the personal representative, unless the minor requests they be treated as such;
- If the minor may lawfully obtain care without consent of a parent, guardian or person acting *in loco parentis*, and the minor, a court, or another person authorized by law consents to the service (for example, as specified in NCGS 90-21.7), the parent, guardian or person acting *in loco parentis* may not be treated as the personal representative; or
- In DHHS agencies under the Division of Mental Health, Developmental Disabilities and Substance Abuse Services, both the minor and parent, guardian or person acting *in loco parentis* must authorize disclosure of the minor's health information when either of the following applies:
 - In agencies designated as "substance abuse programs" under 42 CFR Part 2, when the minor's parent or guardian has consented to the minor's treatment for substance abuse; or
 - When disclosures are made to external client advocates.

In the case of joint parental custody, either parent may be treated as the personal representative of the minor unless a court order dictates otherwise.

Disclosure of health information about a minor to a parent, guardian or person acting *in loco parentis* to avert a serious and imminent threat to the health or safety of the minor is permitted even if the minor obtained the health service without the consent of the parent, guardian, or person acting *in loco parentis*.

Emancipated Minors and Adults

Any individual who has legal authority to act on behalf of an adult or to act on behalf of an emancipated minor who has been determined to lack the capacity to make health-related decisions, shall be treated as a personal representative as it relates to the client's health information relevant to the matters on which the personal representative is authorized to represent the client.

In the case of shared guardianship, both guardians must be treated as personal representatives and both have equal rights regarding decisions related to the client's individually identifying health information. Both guardians must signify agreement in order to execute a decision, unless a court order dictates otherwise.

Deceased Individuals

An executor, administrator, or other person who has authority to act on behalf of a deceased client or of the client's estate shall be recognized as the personal representative with respect to the deceased client's individually identifying health information. The next of kin of a deceased individual can be treated as the personal representative when there is no executor or administrator.

The following persons, in priority order, can be treated as the personal representative of a deceased individual with respect to authorizing anatomical gifts/organ donations and the individually identifying information pertaining to the making of the anatomical gift/organ donation:

- Spouse;
- Adult child;
- Either of the individual's parents;
- Adult sibling;
- Guardian of the person;
- Any other person authorized or under obligation to dispose of the body.

An agency may disclose individually identifying health information to a funeral director as necessary to carry out their duties with respect to the decedent.

Domestic Violence, Abuse, or Neglect

An agency may decide not to treat an individual as a personal representative of the client if, in the exercise of professional judgment, the agency determines that it is not in the best interest of the client to treat the individual as the client's personal representative, and that either of the following exists:

- The covered entity has a reasonable belief that the client has been or may be subjected to domestic violence, abuse, or neglect by such person; or
- That treating such person as the personal representative could endanger the client.

Family Members and Friends (who are not Personal Representatives)

If the client is present for, or otherwise available prior to a disclosure, the agency may disclose to a family member(s) or friend(s) individually identifying health information that is directly relevant to that person's involvement with the client's health care if the agency meets one of the following criteria:

- Obtains the client's authorization to disclose to the parties involved in their care;

- Provides the client with the opportunity to object to the disclosure, and the client does not object (this provision does not apply to DHHS agencies under the Division of Mental Health, Developmental Disabilities and Substance Abuse Services); or
- Reasonably infers from the circumstances, based on professional judgment, that the client does not object to the disclosure.

If the client is not present for the disclosure, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the client's incapacity or an emergency circumstance, the agency may use professional judgment to determine whether the disclosure is in the best interest of the client. If so, the agency may disclose only the health information that is directly relevant to the family member/friend's involvement with the client's health care.

An agency may use professional judgment and experience with common practice to make reasonable inferences of the client's best interest in allowing a person to act on behalf of the client to pick up filled prescriptions, medical supplies, x-rays, or other similar forms of individually identifying health information.

An agency may disclose the necessary individually identifying health information to notify or assist in the notification of family members, personal representatives, or other persons responsible for a client's care with respect to a client's location, condition, or death.

Implementation Activities

Each DHHS agency shall develop and implement procedures for determining who qualifies as a personal representative. These procedures shall include the identification of persons in the agency who are responsible for confirming the legal status of each individual identified as a personal representative of a client.

The personal representative's name, address and relationship to the client shall be documented in the client's record so that all staff are aware of who is authorized to approve or deny the use and/or disclosure of the client's individually identifying health information. Documentation should also include the name of the staff member confirming the legal status of the personal representative and the date that such legal status of the personal representative was determined.

Procedures shall be developed and implemented that outline steps to be taken should the agency be unable to recognize an individual as a personal representative.

Reference:

DHHS Directive III-11; 45CFR 164.502(g); 45CFR 164.510(b); NCGS 122C-3 (20); NCGS 7B-3402; NCGS 7B-3400; NCGS 35A-1241(a)(3); Article 3 of Chapter 32A of the NC General Statutes; NCGS 8-53; NCGS 130A-404; Chapter 35A of the NC General Statutes.

For questions or clarification on any of the information contained in this policy, please contact [DHHS Privacy Officer](#) For general questions about department-wide policies and procedures, contact the [DHHS Policy Coordinator](#)