ADMINISTRATIVE DIRECTIVE

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DIVISION: Family and Children Services

TO: Commissioners of Social Services

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SUBJECT: Preventive Services: Using Parent/Child Consent to Share Information

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ATTACHMENTS: Amendments 18 NYCRR 423.7 (Available on line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
NONE	NONE	357 423.7	409 409-a	Preventive Services Program Manual Chapter X	

DSS-296EL (REV. 9/89)

I. PURPOSE

This release advises social services districts and preventive services agencies of amendments to Section 423.7 of Department Regulations which allow the use of a child's or parent's informed consent to authorize the release of individually identifiable preventive services information to providers other than authorized or preventive services agencies.

II. BACKGROUND

Prior to the promulgation of the amendment to Section 423.7, access to preventive services records information has been limited to the State Department of Social Services, social services districts, and authorized agencies and preventive services agencies providing services to a child or family. Other persons or entities could obtain access to preventive services records information only upon an order of a court [18 NYCRR 423.7(b)(4)]. The process of obtaining a court order is often difficult and is not always successful. A mechanism is needed for service providers which are not preventive services agencies or authorized agencies to be able to obtain relevant preventive services record information in order to provide services to children and families as part of a service plan for preventive services.

Accordingly, Section 423.7 has been amended to allow the use of a child's or parent's informed consent to authorize the release of preventive services information to service providers other than authorized or preventive agencies. These regulations were filed on October 22, 1991 and became effective on November 6, 1991. A copy of the text of the revised regulation accompanies this release as an attachment.

III. PROGRAM IMPLICATIONS

Changing needs

The provision of services to children and families in order to preserve family functioning and to prevent foster care placement has become more complex since the inception of the Child Welfare Reform Act of 1979 and the formal promulgation of the preventive services regulations (18 NYCRR Part 423) in October of 1983. At that time, the needs of families and children requiring preventive services were primarily focused on improving parental functioning and abilities, assisting in home management, and arranging for or providing clinical services to help resolve behavioral and emotional problems. These kinds of services could be provided by local districts themselves or by contract with traditional social work or family services agencies.

In the last several years, however, the needs in preventive services cases have become more serious. There has been an increased incidence of alcohol and substance abuse, a heightened awareness of emotional disturbance in children, youth and adults, and a rise of Acquired Immune Deficiency Syndrome (AIDS), Human Immunodeficiency Virus (HIV) infection and HIV-

related illness. These all contribute to a need for wider ranges and types of services to meet the needs that accompany these problems and conditions.

At the same time as the service needs have widened, State and federal laws mandate or authorize programs such as the Teenage Services Act (TASA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA) case management programs to coordinate the provision of services to clients and client groups. More recently, the State's PINS Adjustment Services Act has increased the demand for the coordination of preventive services with those of local probation services and youth bureaus.

Hospitals, health clinics and health service agencies are generally neither authorized agencies nor preventive services agencies. Programs serving alcohol and substance abusers are licensed and supervised by the Division of Alcoholism and Alcohol Abuse (DAAA) and the Division of Substance Abuse Services (DSAS) respectively. Services to the mentally ill, emotionally disturbed or developmentally disabled are available through programs or facilities licensed and supervised by the Office of Mental Health (OMH) or the Office of Mental Retardation and Developmental Disabilities (OMRDD). As with health services, these are neither authorized agencies nor preventive services agencies. The same is generally true of probation services, PINS designated assessment services, and youth bureaus. Employment services programs and educational and vocational programs are other types of programs that may also play a significant role in a service plan of preventive services to prevent foster care placement and/or to preserve family functioning.

As a result of these changes and demands, today's preventive services program involves the referral of children, parents, and families to services not usually provided by preventive services agencies. Information regarding the referred children, parents or families is needed by these providers to enable them to meet identified services needs. This in turn leads to situations in which access to confidential information, including that which is in preventive services records, becomes an issue.

Privacy rights and confidentiality

While there is a need to share relevant information to obtain needed services, parents and children have a right to expect that information which agencies have recorded regarding their personal data, their needs and problems, and the services they are getting will be treated in a manner which respects their privacy and that of their families. Only persons or agencies that have a valid need to know about them in order to provide them with the services to meet their needs and/or solve their problems should have access to private, individually identifying information.

Using informed consent

The use of a client's informed consent, either parent or child, is a means to make information sharing possible and still retain the necessary safeguards of confidentiality. In this way, necessary information can be shared with providers while at the same time assuring that the information remains confidential and is used only to provide necessary care and/or

services for preventive services families. Parents, children and families will remain appropriately informed as to who has personally identifying information about them.

IV. REQUIRED ACTION

Application of rule

The amendment to 18 NYCRR 423.7(b) permits the use of informed written consent by a child or the child's parent to authorize release of individually identifying preventive services information to persons or entities other than authorized agencies or preventive services agencies when these persons or entities provide or agree to provide services to the child, parent or family. Section 423.7 is also amended by adding a new subdivision (e) which establishes how a parent or child may consent to the release of client identifiable preventive services information, the basic requirements of the consent process and format, and definitions of "parent" and "capacity to consent" as they apply to these regulations.

The procedures in this release apply only to preventive services cases and only to obtaining consent to release client identifiable preventive services information to persons or providers not already authorized by law or regulation to receive such information. The regulations do not apply to medical treatment or mental health treatment.

The use of consent in relation to preventive services records applies only to individually identifying information about a parent, child or family. Information that is aggregated in such a way that it would not allow the identification of a specific child, parent, or family would not require the need for consent to release such information.

The regulatory change permits the use of a child's or parent's consent to release information in such circumstances, but does not require it. Parents, and children where applicable, retain their rights to agree or not to agree to the release of personally identifying information in those situations that are not otherwise governed by law or regulation. The regulatory change does require, however, that, when a child's or parent's consent is used as the vehicle to share or disclose information with a provider or prospective provider, the consent process must conform to the standards set forth in the regulation.

Local districts are also reminded that law enforcement officials (police, district attorneys, etc.) may generally have access to client identifiable preventive services records only if access is directed by court order or by a subpoena issued by the court. While some governmental agencies and officials (including law enforcement agencies and officials) may be authorized to issue certain subpoenas without specific court order, Social Services Law is quite clear that confidential preventive services records may be disclosed to such authorities only upon a written court order. This means that even were a parent or child willing to consent to a release of information to law enforcement officials or agencies, release of such information still can not be made unless there is a specific court order

directing the release and identifying the information or records to be made available.

Who may consent

The specific determination of who may consent to the release of information is straightforward. The person to whom the information pertains is the person who generally may authorize its release. This means that a child who has the capacity to consent may sign the release relating to information about himself or herself when the child's parent is unavailable or lacks the capacity to consent. Where a child is not able to consent, the child's parent or legal guardian must consent to the release of information regarding the child. When the information to be released is about the parent or guardian or the family in general, the parent or guardian must consent to the release. For the purposes of this regulation, a parent includes a natural parent, adoptive parent, stepparent, guardian or caretaker with whom a child resides.

A child's consent applies only with regard to information relating to himself of herself and which affects services provided or to be provided to himself or herself. A child may not block release of information that relates to the family as a whole (even though it includes information about him or her) when the child's parent(s) consents to the release of the information regarding the family.

Capacity to consent

As defined in 18 NYCRR 423.7(e)(4), capacity to consent means an individual's ability, determined without regard to such individual's age, to understand and appreciate the nature and consequences of a proposed action, treatment or procedure and to make an informed decision concerning that action, treatment or procedure. Capacity to consent may also be related to such factors as an ability to read and write, to understand what is being read to the person, and to sign one's own name. Yet, as with age, these factors are neither exclusive nor are they absolute, for it is also possible for an illiterate person, who can neither read nor write, to nonetheless be capable of understanding what it means to consent to releasing information about himself or herself from one person to another.

Allowing a child who has the capacity to consent to authorize the release of information about himself or herself and/or to give approval for his or her own care or treatment is consistent with other areas of existing law and regulations which allow children (that is, those below the age of majority) to consent to the release or providing of information and/or to the provision of care and treatment. These include being able to consent to prenatal care, to an abortion, to testing and treatment for sexually transmitted disease, to testing (and treatment) for AIDS/HIV, and to obtaining family planning and contraceptive information.

The key to a child's capacity to consent is whether the child can give truly "informed" consent, that is, whether the child has the capability of determining the likely result or consequence of his or her action. If a child is able to give informed consent, the child's consent would then be

absolute. Such consent is revokable only by the child and not by the parent, guardian or any other person. If a child is not capable of giving informed consent, the child's consent is then not at issue. The appropriate consent for releasing information in that case would be parental consent.

Consent format

The Department is not prescribing a required form. The circumstances for disclosure and release of information are sufficiently varied that a general form would not be appropriate. There are, however, elements that must be included in any consent. These elements are included in 18 NYCRR 423.7(e) and are:

(1) The consent must be in writing and voluntarily executed.

(2) The consent must be dated and specify the person or entity to which disclosure is authorized and whether or not redisclosure of the information by such person or entity is permitted. If redisclosure is permitted, any limitations on disclosure must be specified.

(3) The consent must specify what information may be disclosed.

(4) The consent must identify the purpose of the disclosure and any limitations on the use of the information by the person or entity [to whom the information is being disclosed].

(5) The consent must specify a time period during which the consent is to be effective or a date or event certain upon which the consent will expire.

(6) The consent must state that the person executing the consent may terminate his or her authorization at any time.

(7) A copy of the consent must be given to the person who executed it.

This format provides for very specific consent. The use of general releases of the type such as those authorizing a local commissioner, social services district or authorized agency to consent to medical or other care for a child or family are neither sufficient nor appropriate for this purpose. Also, any consent that is not specific as to the information to be released or the purpose(s) for its disclosure or release or which is general as to who may receive such information or which is open-ended as to the time during which the consent or release is to be effective is not acceptable.

The most important element of the consent process is that it must be voluntary. The social services district or preventive services agency must explain to the parent(s), guardian and/or child(ren) the reasons for and the need to share or disclose individually identifying information with another agency or service provider in order to obtain the necessary services to assist the parent(s), child(ren) or family in meeting their needs or solving their problems. The district or agency may not, however, in any way attempt

to coerce a child's or parent's consent to release individually identifying information.

While the procedures established by the regulations do not require the use of a witness or witnesses to the consent, they do not preclude it, either. The signature of a witness may be used to attest to the voluntariness of the consent and/or that the person giving the consent has been adequately and appropriately informed of its content, meaning and purpose. In cases where the person giving consent cannot sign his or her name but is otherwise capable of expressing verbal consent, the use of witnesses will attest to that fact and that the "X" or other mark of this person was made my him or her in lieu of a signature. Generally, a witness should be someone who knows the person giving the consent and who is not the person from the social services district or preventive services agency that is obtaining the consent in order to be able to release information from its records.

Special notice required

When consent has been received to disclose or redisclose relevant individually identifying information and that information is subsequently released, the following notice (or language which conveys the same meaning) must be given to the person or agency receiving the disclosed information:

> This information has been disclosed to you from confidential records that are protected by State law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is NOT sufficient authorization for further disclusure.

Effect of lack of consent or revocation of consent

A parent's or child's lack of consent to the release of information to a new or prospective provider must not in any way affect any current provision of services to the parent, child or family. While the lack of consent may make the provision of the new or additional services difficult or problematic, this lack of consent may not be used as a reason to terminate or reduce any existing services being received by a parent, child or family.

Revoking a consent means that no more information may be shared about the child, parent or family in the circumstances in which the consent was given. A revocation of consent would also mean that any provision for redisclosure of information that was included in the consent is no longer valid.

V. SYSTEMS APPLICATIONS

None.

VI. ADDITIONAL INFORMATION

None.

VII. EFFECTIVE DATE

This release is effective April 1, 1992 and applies retroactively to November 6, 1991, the effective date of the implemented regulations.

Joseph Semidei
Deputy Commissioner
Division of Family and Children Services

ATTACHMENT A

AMENDMENTS 18 NYCRR 423.7

(This is the text of regulatory amendments filed October 22, 1991, and which are effective November 6, 1991. Information in [brackets] is deleted; information underlined is new.)

Subdivision (b) of section 423.7 is amended to read as follows:

(b) All records established and maintained pursuant to Titles 4 and 4-a of the Social Services Law of applicants for and recipients of preventive services shall be confidential and shall be open to the inspection of only:

(1) the New York State Department of Social Services;

(2) the [local] social services district;

(3) a preventive service agency, as defined in subdivision (a) of section 423.2 of this Part, or an authorized agency, as defined in subdivision (a) of section 371.10 of the Social Services Law, providing services to the child or other family mambers; [or]

(4) any other person or entity upon the order of a court of competent jurisdiction[.]; or

(5) any other person or entity providing or agreeing to provide services to the child or the child's family upon the execution of a written consent by the child or the child's parent in accordance with subdivision (e) of this section.

Subdivision (d) of section 423.7 is amended to read as follows:

(d) An agency or person given access pursuant to subdivisions (b) and (c) of this section to the names or other information identifying the applicants for and recipients of preventive services shall not divulge or make public such information except where authorized by a court of competent jurisdiction[.] or upon the execution of a written consent by a parent or a child in accordance with the provisions of subdivision (e) of this section.

A new subdivision (e) of section 423.7 is added to read as follows:

(e) (1) A child with the capacity to consent or such child's parent may authorize the disclosure of client identifiable preventive services information to a person or entity providing or agreeing to provide services to the child or such child's family by executing a written consent.

(2) A parent may consent to the release of client identifiable preventive services information concerning the parent and the parent's family, including any children in the family. A child may consent to the

release of client identifiable preventive services information about himself or herself where the child's parent is unavailable or lacks the capacity to consent and the child is determined to have the capacity to consent.

(3) A consent authorizing disclosure of client identifiable preventive services information in accordance with this subdivisioin must satisfy the following procedural requirements:

(i) The consent must be in writing and voluntarily executed.

(ii) The consent must be dated and specify the person or entity to which disclosure is authorized, and whether or not redisclosure of the information by such person or entity is permitted. If redisclosure is permitted, any limitations on redisclosure must be specified.

(iii) The consent must specify what information may be disclosed.

(iv) The consent must identify the purpose of the disclosure and any limitations on the use of the information by the person or entity.

(v) The consent must specify a time period during which the consent is to be effective or a date or event certain upon which the consent will expire.

(vi) The consent must state that the person executing the consent may terminate his or her authorization at any time.

(4) For the purpose of this subdivision, the capacity to consent means an individual's ability, determined without regard to such individual's age, to understand and appreciate the nature and consequence of a proposed action, treatment or procedure and to make an informed decision concerning such action, treatment or procedure.

(5) For the purpose of this subdivision, a parent includes a natural parent, adoptive parent, stepparent, guardian , or caretaker with whom a child resides.