

**NDRN 2020**  
***P&A Records Access***  
***Part I***

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# Topics for Discussion

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- Records access authorities / scope
- Process requesting records / handling denials
- Confidentiality / access alternatives
- Requests data/records related COVID-19
- Peer review records / importance
- Peer review privileges
- Arguments in support access

# Record Access Authorities

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- DD Act (2000) 42 U.S.C. §15043(a)(2)(i)-(J)
- DD Regs (July 2015) 45 C.F.R. §1326.25 (a)-(e)
- PAIMI Act (2000) 42 U.S.C. § 10805(a)(4)
- PAIMI Regs (1997) 42 C.F.R. § 51.41
- PAIR (incorp. DD Act) 29 U.S.C. § 794e(f)(2)

# Reasons Exercise Access Authority

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- Abuse and neglect investigations
  - Individual unable consent due disability
  - When guardian notified abuse/neglect fails to act
  - Guardian is state agency
  - Following reported death
  - Seeking directory information
  - Health/safety individual is in immediate jeopardy (DD Act)

# Scope of Records Access

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- “All” records of individual with disability
- Facility/program/service provider records
- Investigation reports (internal/external)
- Other reports prepared/received by service provider (peer review committee)
- “Information in professional, performance, building or other safety standards, and demographic and statistical information relating to a service provider.”

# Making your Request

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- Communicate authority; basis access request
- Specify records requested
- Timeline for production
  - DD Act (3 days request; 24hrs if death or health/safety in immediate jeopardy)
  - PAIMI Regulations (“promptly”)
- Method of production
  - Inspect and copy vs facility production
  - Cost, delay, preservation of documents
- Consider other privacy statutes (FERPA)

# Responding to Denials

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- Prompt written notice, statement of reasons
- Alleged lack of authorization, the name, contact information for the guardian, conservator, other legal representative. 45 C.F.R. §1326.25(f); 42 C.F.R. §51.43
- Courts granted injunctive relief when clear evidence of repeated denials of access to records
  - P&A v. Armstrong, 266 F.Supp.2d 303 (D.Conn 2003)
  - Dis. Rgts. NY v. N. Colonie Bd. of Ed., 2016 WL 1122055
  - Adv. Cntr. v. Stalder, 128 F. Supp. 2d 358 (M.D. La 1999)

# Special Considerations

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- Confidentiality and limits on re-release records obtained using P&A authority
- PADD/PAIR generally not subject to the HIPAA Privacy Rule
- PAIMI “steps into the shoes” of the service provider under the confidentiality provisions of Section 10806(a).



# Alternatives to P&A Authority

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- Exercise of P&A authority / confidentiality requirements may limit or preclude use of certain records in future litigation
- Subject P&A to discovery if relied upon in court
- Depending situation/goals also consider
  - Consent / release of information
  - Individual client representation
  - FOIA request
  - Informal requests
  - Discovery

# Names and Numbers during COVID-19

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Public Health Reports (cases, testing, transmission rates)

- “...**other reports prepared or received by a service provider,**” 42 C.F.R. §51.41(c)(1) (PAIMI)
- “Reports prepared by a Federal, State or local governmental agency, or a private organization charged with investigating incidents of abuse or neglect, injury or death.” 45 C.F.R. § 1326.25(b)(2) (DD)
- “...**statistical information relating to a service provider.**” 45 C.F.R. § 1326.25(b)(4)(DD)
- State public records laws

# COVID-19 Reporting

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- CMS rules requiring nursing facilities report to CDC:
  - Suspected and confirmed infections among residents and staff, including residents previously treated for COVID-19
  - Total deaths among residents and staff
  - Personal protective equipment and hygiene supplies
  - Resident beds and census
  - Access to testing in the facility
  - Staffing shortages

<https://www.cms.gov/files/document/qso-20-26-nh.pdf>

# What Are Peer Review Records?

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- Work of facility-based peer review committee or outside evaluator
- Root cause analysis incident / sentinel event
- Data collection and analysis
- Written report or evaluation with factual and clinical findings (mortality review)
- Quality Assurance reviews
- Program audits

# Why Are They Important?

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- Synthesizes key facts and medical evidence
- Findings of responsibility - admission against interest or evidence of liability
- Contains specific recommendations and corrective actions - basis remedy
- Access can be critically important to protecting the rights of individuals with disabilities

# Peer Review Privileges

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- State laws may protect from disclosure, discovery and admissibility in state court actions, civil liability
- No similar privilege preventing admission/discovery federal court claims
- Appellate courts in 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> Circuits allowed access to peer review records

# Arguments for Access: Pre-emption and Statutory Construction

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- Peer review records fall with definition of “all records of individual with disability”
- PAIMI Act expressly preempts State law
- Reading enabling regulation to the contrary is not a reasonable interpretation of statute 42 C.F.R. 51.41(c)(4)
- Congress had “clearly spoken” to the issue of whether P&A systems are entitled to access peer review records
- PAIMI’s deference to state prohibitions before date certain, requires access after period passed
- Congress unequivocally expressed its intent, the statute controls.

# Arguments for Access: Sample Cases

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- Indiana Prot. & Adv. Servs. v. Indiana Family and Social Services Admin., 603 F.3d 365 (7th Cir., 2010)
- Missouri Prot. & Adv. Servs. v. Missouri Dep't of Mental Health, 447 F.3d 1021(8th Cir. 2006)
- Prot. & Adv. for Persons with Disabilities v. Mental Health & Add'n Servs., 448 F.3d 119 (2nd Cir. 2006)
- Pennsylvania Prot. & Adv., Inc. v. Houstoun, 228 F.3d 423 (3rd Cir. 2000)
- Matter of Disability Rights Idaho Request for Ada Cty. Coroner Records Relating to the Death of D.T., 168 F. Supp. 3d 1282 (D. Idaho 2016)
- Disability Rights N. Carolina v. Mem'l Hosp. Operating Corp., 2013 WL 179034 (M.D.N.C. Jan. 17, 2013)



# Balancing Access vs Privilege

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Dunn v. Dunn, 163 F. Supp. 3d 1196 (M.D. Ala. 2016)

- Internal quality assurance audits of health care provider contracted with Department of Corrections constituted “records” under Act
- Recognizing a federal common-law quality-assurance or peer-review privilege that would undermine the ability of Alabama's P&A to determine whether mentally ill state prisoners are being mistreated
- P&A's confidentiality obligations, presence of protective order, mitigated concern disclosure

# Peer Review under DD Act

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- Advocacy, Inc. v. Horn, 2009 WL 10698769 (W.D. Tex. Mar. 26, 2009) (PADD authorizes access to peer-review reports for purposes of investigating death of an individual with a disability)(unpublished)
- Explicit inclusion of “reports by peer review committees” in 45 C.F.R. § 1326.25(b)

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# Patient Safety and Quality Improvement Act (PSQIA)

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- 42 U.S.C. § § 299b-21 *et seq.*; 42 C.F.R. § § 3.10 *et seq.*
- Creates federal peer review privilege for Patient Safety Organizations (PSOs)
- Provides confidentiality for PSO activities
- PSQIA v. P&A?

# PSO

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- Private or public entity listed by DHHS as PSO
- Appropriately qualified staff, including licensed or certified medical professionals
- Mission and primary activity: conduct Patient Safety Activities (PSAs)

# PSA

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- Efforts to improve patient safety and quality of healthcare
- Collection and analysis of Patient Safety Work Product (PSWP)
- Provision of feedback and dissemination of best practices

# PSES

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- Collection, management, or analysis of information for reporting to or by a PSO

# PSWP

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- Identifiable and non-identifiable
- Must be gathered, created and prepared *for purpose of* reporting to PSO
- Two pathways
  - Reporting
  - Deliberation and analysis



# Reporting Pathway

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- Any data, reports, records, memos, analyses, or written or oral statements
- Assembled or developed by provider for reporting to PSO and are reported to PSO
- *Could* result in improved patient safety, health care quality or outcomes

# Deliberation Pathway

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- Any data, reports, records, memos, analyses, or written or oral statements
  - Identify or constitute deliberation or analysis of PSES; or
  - Identify fact of reporting pursuant to PSES; or
  - Developed by PSO for conduct of patient safety activities, *and* could result in improved patient safety, health care quality or outcomes

# Not PSWP

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- Medical record
- Billing and discharge info
- Info that is removed from PSES without being reported to PSO
- Other original patient or provider info

# Not PSWP

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- "Information that is collected, maintained, or developed separately, or exists separately from" a PSES
  - State incident reporting requirements
  - Adverse drug report to FDA
  - Disclosure pursuant to CoPs
  - "Provision of access to records by Protection and Advocacy organizations as required by law"

# Not PSWP

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- Copy of such info reported to PSO shall not by reason of its reporting be considered PSWP

# Is it PSWP?

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- Written reports of witness accounts of what they observed at time of patient incident
  - If prepared for internal risk management (claims and liability)?
  - If prepared for reporting to PSO?
- Witness testimony

# Is it PSWP?

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- Nursing home QA Committee evaluates death during restraint
  - Data gathered for discussion by Committee?
  - Committee report to NH governing body?
  - Committee report stored in PSES only?
  - Copy of committee report stored in PSES?

# PSWP is Confidential

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- And shall not be disclosed
- Except
  - Non-identifiable PSWP
  - To FDA re: regulated activity
  - Voluntary disclosure to provider's accrediting body



# PSWP is Privileged

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- "Notwithstanding any other provision of Federal, State, or local law"
- Not subject to subpoena or order
- Not subject to discovery
- Not subject to FOIA

# Exceptions to Privilege

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- In criminal case, after *in camera* determination of materiality and unavailability from other sources
- Disclosure of non-identifiable PSWP

# Exceptions to Privilege

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- To law enforcement, if provider reasonably believes, under circumstances, disclosure is necessary for criminal LE purposes
- Disclosure authorized by identified providers
- **\*\*No exception specific to P&A\*\***

# 2016 HHS Guidance

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- 81 Fed. Reg. 32655-32660 (May 24, 2016)
- Intent of PSQIA: protect additional info created through voluntary PSAs, not records created through providers' mandatory info activities.

# P&A Access in a PSO World

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- Is it a PSO?

<https://www.pso.ahrq.gov/listed>

- What is mission or primary activity?

- Is it PSWP?

- Was it collected in PSES?

- Was it reported to PSO

# P&A Access in a PSO World

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- P&A investigation – does privilege apply?
- Info available before PSQIA?
- P&A's access to records despite State Peer Review Privilege
- P&A confidentiality requirements

# PSQIA Cases Mentioned

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- Tibbs v. Bunnell, 448 S.W.3d 796 (Ky. 2014), *cert denied*, 136 S.Ct. 2504 (U.S. 2016)
- Rumsey v. Guthrie Med. Grp., P.C., 2019 U.S. Dist. LEXIS 164731 (M.D. Pa. 2019)
- Martinez v. Hongyi Cui, 2007 U.S. Dist. LEXIS 111152 (D. Mass. 2007)
- Grenier v. Stamford Hosp. Stamford Health Sys., 2016 U.S. Dist. 94424 (D. Conn. 2016)

# PSQIA Cases Mentioned

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- Tinal v. Norton Healthcare, 2014 U.S. Dist. LEXIS 191995 (W.D. Ky. 2014)
- Charles v. Southern Baptist Hosp. of Florida, 209 So. 3d 1199 (Fla. 2017)
- Daley v. Teruel, 2018 Ill. App. (1st) 170891 (Ill. App. Ct. 1st Dist. 2018)
- Venosh v. Henzes, 2013 Pa. Dist. & Cnty. Dec. LEXIS 390 (Lacka. Co. 2013)