

GETTING MILITARY HEALTH AND EDUCATION RECORDS

by Mark E. Sullivan*

*Mr. Sullivan, a retired Army Reserve JAG colonel, is chair of the Military Committee of the Family Law Section, American Bar Association and author of THE MILITARY DIVORCE HANDBOOK (ABA Spring 2006), from which this article is adapted. Practicing with Sullivan & Grace, P.A. in Raleigh, North Carolina, he is a fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989.

In custody cases involving one or both parents who are in the armed forces, it sometimes is necessary to obtain school and medical records of the children involved. Far from being a minefield, as most civilian practitioners suspect, the procedures for access to military educational and health records are simple and straightforward.

Voluntary release of records and medical information from an armed forces medical treatment facility (MTF) is governed by the same federal law, the Health Insurance Portability and Accountability Act (HIPAA), as civilian health facilities. The primary legal references pertaining to the release of medical information are the following:

1. Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. Sections 1320d - 1320d-8 (2004).
2. DoD REG 6025.18-R, DOD Health Information Privacy Regulation (2003) and DoD Directive 5405.2.
3. AR (Army Regulation) 40-400, *Patient Administration*.
4. AR 40-66, *Medical Record Administration and Health Care Administration*.
5. AR 27-40, *Litigation*.

The latter three are for cases involving U.S. Army records.

Perry Wadsworth, a hospital attorney for Womack Army Medical Center at Ft. Bragg, NC and an Army Reserve JAG major, describes the records access issues as follows:

The old analysis of a Privacy Act vs. FOIA (Freedom of Information Act)@ used to be one of our standards, but HIPAA is now the controlling Federal legal authority on medical information. The law was not written for the military *per se*; this has caused some confusion in its application, particularly because military functions and command authority are fairly broad-based in comparison to civilian institutions.

Requesting records from an MTF can be both easy and hard. The request is easy but getting the records is sometimes hard. The spectrum, from easy to hard, is summarized as follows:

1. Easy. If the patient is requesting his own records or completes a HIPAA release form giving authority to someone else to get his records, then the request is straightforward. The MTF will release copies of the records in the normal course of business. This is the preferred method. If an attorney is representing a client whose records are needed, then he can simply have the client complete the appropriate release form with the HIPAA language. The attorney then mails the request and release form to "Medical Correspondence, Patient Administration Division" of the appropriate MTF. It may behoove the attorney to state the purpose of the request, such as At this case involves a custody lawsuit, or At this case involves a potential federal tort claim. If the government has an interest in the case, whether it is the opportunity to recover money for treatment provided or its exposure to damages in a tort suit, then the case can flow more smoothly by explaining that the government. If you know someone in the JAG claims office handling the tort claim, he or she can usually assist you in getting the records in these cases because the JAG office has an interest in obtaining the records as well.

2. Moderately Easy. When litigation is involved and the judge signs an order or a subpoena for the release of records, the release process is relatively easy. Attorneys for the patient or party opponent often make it difficult by not getting a judge's signature on the subpoena or order. They frequently issue subpoenas in their own names. This makes it more difficult and delays the whole process, because the MTF will contact its servicing JAG office and the request for records will be denied. This occurs more frequently in civil cases, particularly domestic ones, than you might imagine. The other factor that most commonly causes a denial or delay of the release, is the failure to make a timely request. An Army facility needs to get the judge's order or subpoena at least 14 days in advance of the date the materials are due. AR 27-40 details this from the Army's perspective.

3. Hard. Whether litigation is involved or not, when there is no judge's order and no release authorization signed by a proper representative, the analysis becomes more nuanced. We then have to look to exceptions under HIPAA and implementing agency regulations for release of medical information. Child custody disputes seem to bring out the worst case scenarios. Other common examples include criminal investigations, social service involvement (e.g., child abuse), and command-directed mental health evaluations. The main reason these types of cases can be

more complicated is because often there is one party who does not want the records released, yet the requesting party argues that some other interest is more compelling than the individual's right to privacy, such as the best interests of a child, a government investigation, the need for justice, etc.

The constraints on release of medical information also apply to conversations or testimony of health care providers, not just the release of medical records. Some attorneys would like to get information directly from the physicians as a back-door approach to avoid requesting the records. Unfortunately, this can ultimately backfire on the attorneys. If or when the physician mentions it to his legal counsel (the JAG officer or civilian federal attorney representing the MTF, for example), he or she will be reminded of the rules of release and may be hesitant to cooperate in the future. AR 27-40 provides a great deal of leeway in allowing a military command (through its attorney) to determine whether a physician can provide testimony and, if so, what the limits of that testimony will be. Overall, it is better for attorneys and patients to be candid and honest about their intentions in a case. Most of them are, but there are of course exceptions; this leaves a bad taste in one's mouth and decreases the spirit of cooperation that might otherwise prevail. For example, I've seen doctors who, although they were technically not reasonably available to testify or did not receive at least 14 days' notice of the scheduled testimonial appearance, were still willing to bend over backwards just a few days before their deployment or PCS¹ or discharge to provide testimony or talk to an attorney about the patient. If they had felt they were being tricked or misled by the patient or his attorney, then they just would not have provided assistance and testimony.

The following are some tips that may be helpful in trying to obtain records:

1. Learn the name of a proper point of contact in the Medical Correspondence office, such as the office chief. Then send the request for records by certified mail to that person's attention at her work address. This is not a guarantee that you will get records faster, but it does provide a record of your request.
2. Be as specific in your request as you can if time is of the essence. If you need to dot every 'i' and cross every 't' by requesting every single record, lab and radiograph from every single clinic for the past 50 years, then by all means request them. Otherwise, narrow your request to those records you really want. If you are only concerned about the inpatient

¹ Permanent Change of Station, or transfer to another base.

admission of February 14-22, then say so. If you only want a specific treatment notes or radiology results, then say so. Few things bog down a request like overstating the amount of records one wants.

3. Know which clinic and/or institution has possession of the records. This is the corollary to being specific. If you need a person=s outpatient records, then the hard copies will almost always be located at the clinic of the installation to which he and his family are currently assigned. For example, a spouse might have gotten treatment at Fort Bragg, NC, but when she moved with her military sponsor to Fort Lewis, WA the outpatient records should have moved with her. On the other hand, inpatient records remain with the facility where the admission occurred. A caveat to this is that inpatient records are retired to the National Personnel Records Center, St. Louis, Missouri after a certain period of time (usually five years after date of treatment). Electronic records also remain in database storage at the facility where they originated.

4. Know that some clinic records are maintained separately from the main medical record. If you want these, mention them specifically: behavioral health, (e.g. Psychotherapy) records, social work services, Early Development Intervention Services (for minors), disability evaluations, and (sometimes) physical therapy and occupational health. Also, certain electronic records may not appear in the medical record jacket B things like lab results, radiology reports, telephone consults, autopsy reports. These items usually are printed off and placed in the records jacket, but it is worth asking for them, even if you have to do so in a subsequent records request.

5. Show some grace if your request takes longer than you think it should. Remember that administrative staff members are often busy trying to maintain records and perform their various duties. Those who copy records are doing so for many agencies, including patients, health care providers, government agencies, insurance companies, and other attorneys. They also have to gather the records from a number of sources, including outlying clinics, radiology, social work, etc. It goes without saying that being cordial and professional in your conversations with staff can only help your cause. If you ever have to complain, you can always use the chain of command to express any concerns.²

For Army cases, it is helpful to have a copy of 32 C.F.R. part 516.40-46 for information on Army litigation policies regarding the release of information. Briefly

² E-mail, Perry Wadsworth, to the author, subject: Protected Health Information and Legal Issues (July 26, 2004) (on file with the author).

summarized, this regulation provides that:

- Except as provided in this regulation, DA (Department of the Army) personnel will not disclose official information in response to subpoenas, court orders or requests.
- The appropriate legal authority (e.g., staff judge advocate or hospital legal advisor) must approve in writing the release of information.
- If DA personnel receive a subpoena, court order or request for attendance at a trial, deposition or interview which reasonably might require disclosure of official information, they should immediately contact the appropriate legal authority, who will attempt to satisfy the subpoena, order or request informally under this regulation or else will consult with the Litigation Division, Headquarters, Department of the Army.
- Those who seek official information must submit at least 14 days before the desired date of production a specific written request setting out the nature and relevance of the official information sought, and DA personnel may only disclose those matters specified in writing and approved by the appropriate legal authority.³
- DA personnel will not release originals; only authenticated copies will be provided when disclosure is authorized.
- AR 37-60 provides a schedule of fees and charges for searching, copying and certifying Army records for release in response to litigation-related requests.
- If the request complies with this regulation, it is DA policy to make the information available for use in court unless the information is classified, privileged or otherwise restricted from public disclosure.
- There are a number of factors which must be considered in determining whether to release information; they are found at 32 C.F.R. part 516.44(b).
- If the deciding official determines that all or part of the requested documents or information shall not be disclosed, then he will promptly communicate directly with the attorney who requested the documents or information to attempt to resolve the matter informally. If the order or subpoena is invalid, the reasons should be explained to the attorney. An explanation is also warranted when the records are deemed to be privileged. The military attorney should try to obtain the attorney's agreement to withdraw or modify the subpoena, order or request.

³ See *United States ex rel. Ragen*, 340 U.S. 462, 71 S. Ct. 416, 95 L. Ed. 417 (1951).

- A subpoena *duces tecum* or other legal process signed by an attorney or a clerk for DA records protected by the Privacy Act, 5 U.S.C. § 552a, does not justify the release of the protected records. The deciding official should explain to the requester that the Act precludes the release of such records without the written consent of the individual involved or pursuant to the order of a court of competent jurisdiction.⁴ Such an order is one signed by a judge or magistrate.
- If the records are unclassified and are otherwise privileged from release under 5 U.S.C. 552a, they may be released *to the court* if there is an order signed by a judge or magistrate directing the person to whom the records pertain to release the specific records, or that orders copies of the records to be delivered to the clerk of court and indicates that the court has determined the materiality of the records and the nonavailability of a claim of privilege. The clerk must be empowered to receive the records under seal, subject to request that they be withheld from the parties until the court determines whether they are material to the issues and until any question of privilege is resolved.
- A subpoena or court order for alcohol abuse or drug abuse treatment records shall be processed under 42 U.S.C. 290dd-3 and 290ee-3, and Public Health Service regulations published at 42 C.F.R. 2.1-2.67.

The final rule on Standards for Privacy of Individually Identifiable Health Information, published by the Department of Health and Human Services, is found at 45 C.F.R. Parts 1160 and 164.⁵ The Military Health System Notice of Privacy Practices, effective April 14, 2003, also provides useful information on what records and data are confidential and how they may be disclosed.⁶

GETTING CHILDREN'S EDUCATIONAL RECORDS

Parents or legal guardians of a student may be given access to the student's academic records, disciplinary files, and other student information without regard to who has custody of the child, unless the divorce decree or court-approved parenting plan states that such access should be denied or indicates that the non-custodial parent is denied access to the child. State law is generally the key to release of educational records from local public and private schools. North Carolina law, for example, specifies these rights at N.C. Gen. Stat. § 50-13.2(b). It's another story for schools run by the Department of Defense (DoD).

Many on-base primary and secondary schools for military dependent children are run by the Department of Defense Education Activity (DoDEA). Children's school records are available to a parent or legal guardian of the children (including academic

⁴ 5 U.S.C. § 552a (b)(11).

⁵ <http://www.tricare.osd.mil/hipaa/downloads/privupdate14aug02.pdf> (last visited August 18, 2004).

⁶ http://www.tricare.osd.mil/hipaa/downloads/Notice-of-Privacy-Practice-FINAL-FOR-PRINTING-10_21_02.pdf (last visited August 18, 2004).

records, disciplinary files and other student information) without regard to who has custody of the child, unless the decree of divorce or dissolution or the court-approved parenting plan (including a custody order) requires that records access should be denied or states that the non-custodial parent is denied access to the child.

The request to a DoDEA school should comply with the Privacy Act, and citations to the system notices for educational records are found below. The Department of Defense Dependent Schools system notice which covers all DoD-operated overseas dependent schools is known as DODDS 22.⁷ Covering selected domestic schools (e.g., Ft. Bragg, Ft. Rucker, U.S. Military Academy) is DODDS 26⁸; DoDEA has not yet published a system notice for *all* domestic dependent schools. Further information on requesting student records and transcripts can be found at the DoDEA website, www.odedodea.edu under A Student Records and Transcript Request Procedures.@ General information on the interrelationship between FOIA (the Freedom of Information Act) and the Privacy Act can be found at AFOIA/PA in DoDEA@ at the DoDEA website.

If a child is presently in a non-DoDEA school (e.g., private school, charter school or public school), the records from previous DoDEA schools will not be in the child=s educational records folder unless a parent copied the records and brought them to the non-DoDEA school or else that school, with the consent of a parent, requested the DoDEA records from a previous DoDEA school. A non-DoDEA school cannot simply request the previous military school records; due to the Privacy Act, a parental consent form must accompany the school=s request. Conversely, on-base schools may and usually do require previous non-DoDEA schools to copy and produce the child=s records for inclusion in the child=s DoDEA educational records folder. The best course of action for the requesting party is to contact the particular school involved, speak to the school administrator and provide the following information:

REQUEST FOR EDUCATIONAL RECORDS - DoDEA

Full name of student:	
Name used during school attendance:	
Date of birth:	Dates of attendance:
Identity and location of school:	
Name of requesting party:	
Address of requesting party:	
Signature of requesting party:	

Getting access to school and medical records may initially appear to be a daunting task. By following these procedures, the attorney will find it much easier to obtain

⁷ <http://www.defenselink.mil/privacy/notices/osd/DODDS22.htm> (last visited August 18, 2004).

⁸ <http://www.defenselink.mil/privacy/notices/osd/DODDS26.html> (last visited August 18, 2004).

data and records from these sources for litigation, discovery, or settlement.
