



The Protection and Advocacy System for South Carolina

Disability Rights South Carolina's Access Authority

DRSC's Authority Under Federal Law

Facilities and Programs

Federal law grants employees of DRSC **reasonable unaccompanied access** to service providers or programs providing services to people with disabilities **for both investigative purposes and under "routine circumstances."**¹

For investigations, service providers **must grant DRSC access immediately, without advance notice, and at all times necessary to conduct a full investigation.** This mandate includes authority to **interview program or facility service recipients, employees or other people** who might have knowledge of the alleged abuse and neglect. DRSC can investigate a facility both when it receives an allegation of abuse or neglect and when it determines probable cause exists for either a prior incident or for "imminent danger of serious abuse or neglect."²

For monitoring, service providers must permit DRSC immediate access to all areas that are accessible to service recipients, at all reasonable times, including beyond normal working and visiting hours. Service providers must allow access without advance notice, but DRSC shall conduct monitoring in a way to minimize interference with programs and to respect the privacy of the services recipients. DRSC may access service providers³ to provide information and training on the rights of individuals with disabilities, monitor compliance with respect to the rights and safety of service recipients, and photograph or videotape premises accessible to people with disabilities.⁴

¹ 42 C.F.R. § 51.42(c); 45 C.F.R. § 1326.27(b).

² 42 C.F.R. § 51.42(b); 45 C.F.R. § 1326.27(b).

³ 45 C.F.R. § 1326.27; See 42 C.F.R. § 51.2 (defining a facility serving people with mental disabilities as a "public or private residential setting that provides overnight care accompanied by treatment services").

⁴ 42 C.F.R. § 51.42(c); 45 C.F.R. § 1326.27(c).

Information and Records

DRSC has authority to access the records of service providers serving people with disabilities and the confidential records of people with disabilities.⁵

Records of Service Providers

The records of service providers available to DRSC include, but are not limited to:

- Information and records prepared or received in the course of providing intake, assessment, evaluation, education, training, or other supportive or assistive services (including medical records, financial records, monitoring reports or other reports prepared or received by the service provider, program or service staff.)⁶
- Reports prepared by an agency or private organization charged with investigating reports of incidents of abuse, neglect, injury, or death occurring at a location where the individual with a disability is receiving services, supports or care.⁷ These reports include personnel records prepared or maintained by the facility or program in connection with reports of incidents.⁸
- Discharge planning records.⁹
- For an investigation into an abuse or neglect allegation, the information in the facility or program's possession, including:
 - Reports prepared by entities performing certification or licensure reviews or by professional accreditation organizations, and related assessments prepared for a facility by its staff, contractors, or related entities;¹⁰ and
 - Information in professional, performance, building or other safety standards, demographic or statistical information relating to a facility.¹¹

DRSC has authority to obtain the records listed above in any medium, written or otherwise, draft or final, including but not limited to handwritten notes, electronic files, photographs, videotapes and audiotapes.¹²

⁵ 42 U.S.C. § 10805(a)(4); 42 U.S.C. § 10806 (b)(3)(A); 42 U.S.C. § 15043(a)(2)(H)-(J); S.C. CODE ANN. § 43-33-370; 42 C.F.R. § 51.41 (a)-(c); 45 C.F.R. § 1326.25 (a)-(f).

⁶ 42 U.S.C. § 15043(c)(1); 42 U.S.C. § 10806(b)(3)(A); 45 C.F.R. § 1326.25(b)(1); 42 U.S.C. § 51.41(c)(1).

⁷ 42 U.S.C. 10806 § (b)(3)(A); 42 U.S.C. § 15043(c)(2); 42 C.F.R. § 51.41(c)(2); 45 C.F.R. § 1326.25(b).

⁸ 42 C.F.R. § 51.41 (c)(2)(iii); 45 CFR § 1326.25(b)(2)(iii).

⁹ 42 C.F.R. § 51.41(c)(3); 45 C.F.R. § 1326.25(b)(3).

¹⁰ 45 C.F.R. § 1326.25(c)(1); 42 C.F.R. § 51.41 (c)(4).

¹¹ 45 C.F.R. § 1326.25 (b)(2); 42 C.F.R. § 51.41 (c)(5).

¹² 42 C.F.R § 51.41(c); 45 C.F.R. § 1326.25(b).

Records of Individual Service Recipients

DRSC is entitled to the confidential records of individuals with disabilities under the following conditions:

- Any person who is a client of DRSC or who requests the assistance of DRSC, if the person, legal guardian, conservator, or other legal representative of that person, has authorized DRSC to have access to the records and information.¹³
- Any person (including one who cannot be located) if all the following conditions apply:
 - The individual, due to a mental or physical condition is unable to authorize access;
 - The individual does not have a legal guardian, conservator, or other legal representative or the representative is the State; and
 - DRSC has probable cause to believe that the individual has been abused or neglected based on a complaint or as a result of monitoring or other activities.¹⁴
- Any person who has a legal guardian, conservator or other legal representative for whom DRSC has received a complaint or has probable cause to believe has been abused or neglected, whenever all the of the following conditions exist:
 - DRSC has made a good faith effort to contact the legal representative and offered assistance; and
 - The legal representative has failed or refused to provide consent on behalf of the person.¹⁵
- Any person who is deceased. Consent from another party is not required.¹⁶
- Any person for whom the DRSC determines there is probable cause to believe that the health or safety of that person is in serious and immediate jeopardy. Consent from another party is not required.¹⁷

If DRSC determines there is probable cause to believe the health or safety of an individual with a disability is in serious or immediate jeopardy or if there is a case of the death of an individual with a disability, a service provider must give DRSC access to both individual and service provider records within twenty-four hours after receiving a written request, without the consent of another party.¹⁸ In all

¹³ 42 U.S.C. § 10805(a)(4)(A); 42 U.S.C. § 15043(a)(2)(I)(i) (stating that permission by any of the persons listed would fulfill the requirements of the statutes).

¹⁴ 42 U.S.C. § 10805(a)(4)(B); 42 U.S.C § 15043(a)(2)(I)(ii).

¹⁵ 42 U.S.C. § 10805(a)(4)(C); 42 U.S.C. § 15043(a)(3) (determining that for a person with a mental disability, P&A may act over a guardian's objection only if P&A determines "there is probable cause to believe that an individual is in serious and immediate jeopardy").

¹⁶ 42 U.S.C. § 10805(a)(4)(B); 42 U.S.C. § 15043(a)(5).

¹⁷ 45 C.F.R. § 1326.25(a)(4).

¹⁸ 45 C.F.R. § 1326.25(c)(1).

other cases, access to records shall be provided to DRSC within three business days after receipt of a written request from DRSC.¹⁹

Under federal law, DRSC is the final arbiter for purposes of determining probable cause for an individual who has been abused or neglected or who is at significant risk of future abuse or neglect.²⁰ Information supporting a probable cause determination may arise from monitoring or other activities, including but not limited to, media reports.²¹

DRSC's Authority and HIPAA

DRSC is exempt under the Health Insurance Portability and Accountability Act (HIPAA).²² The HIPAA Privacy Rule permits disclosure of protected health information to a P&A system without authorization of the individual to the extent that the law requires such disclosure and the disclosure complies with the requirements of that law.²³ Since federal law contains express requirements for DRSC to access health care records of individuals, DRSC can access these records and use them as allowed by law.²⁴ In addition to service providers, educational agencies, including public, private, and charter (residential and non-residential) must provide DRSC with the name of and contact information for the parent or guardian of a student for whom the DRSC has probable cause to obtain records.²⁵

Finally, DRSC's federal access authority on the disclosure of records or other information preempts any state law restrictions to the extent that such restrictions may obstruct DRSC's authority.²⁶

DRSC's Authority Under South Carolina Law

All departments, officers, agencies, and institutions of the State shall cooperate with DRSC in carrying out its duties. Any person providing information to the System or who participates in judicial proceedings resulting therefrom, acting in good faith, shall be immune from civil and criminal liability which might otherwise result by reason of such actions.²⁷

¹⁹ 45 C.F.R. § 1326.25(c)(2).

²⁰ 42 U.S.C. § 15043(a)(2)(J)(ii)(I); *Arizona Ctr. for Disability Law v. Allen*, 197 F.R.D. 689, 692 (D. Ariz. 2000); *Office of Protection and Advocacy Programs for Persons with Disabilities v. Armstrong*, 266 F. Supp.2d 303, 321 (D. Conn. 2003).

²¹ *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 498 (11th Cir. 1996); 42 C.F.R. § 51.2; 45 C.F.R. § 1326.19.

²² *Prot. & Advocacy Sys., Inc., v. Freudenthal*, 412 F. Supp. 2d. 1211, 1212 (D. Wyo. 2006); 45 C.F.R. § 164.512(a)(1); See also Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,594 (Dec. 28, 2000) (codified at 45 C.F.R. pt. 160 and 164) (specifically listing P&A as an exception to HIPAA).

²³ 45 C.F.R. § 1326.25(e).

²⁴ 42 U.S.C. § 10805(a)(4); 42 U.S.C. § 15043(a)(2)(I)-(J); 45 C.F.R. § 1326.25(e).

²⁵ 45 C.F.R. § 1326.25(f).

²⁶ 42 C.F.R. § 51.31(i); 45 C.F.R. § 1326.21(f) (stating that a P&A system may exercise its authority under state law that is more expansive than federal law).

²⁷ S.C. CODE ANN. § 43-33-390 to 400.

In addition to its powers under federal law, DRSC also has several expanded powers and duties under South Carolina law. These include the duty to “protect and advocate for the rights of all developmentally disabled persons” and the power to “investigate complaints by or on behalf of any developmentally disabled or handicapped person.”²⁸

Where DRSC has received a written complaint, or where DRSC has received any form of complaint concerning an individual who cannot give informed consent and who has no parent or guardian who can sign a written request to investigate, DRSC may:

- Interview any staff member of the program or facility which was or is currently providing treatment, services or habilitation to the person making the complaint or on whose behalf the complaint is made.
- Inspect and copy any documents, records, files, books, charts or other writings which the program or facility has maintained in the regular course of business, and which bear upon the subject matter of the individual complaint, except for the individual medical, treatment or other personal records of other persons in the program or facility.
- Request the assistance of any rights protection or advocacy services provided by the program or facility.
- Refer a complaint to the ombudsman, law enforcement agencies or any other public or private programs or facilities, as it deems appropriate.²⁹

Disability Rights South Carolina

☎ 1-866-275-7273

🌐 www.disabilityrightssc.org

🗿 1-866-232-4525

✉ info@disabilityrightssc.org

²⁸ S.C. CODE ANN. § 43-33-350.

²⁹ S.C. CODE ANN. § 43-33-370.