AOC Briefing

August 2010

SHARING INFORMATION ABOUT CHILDREN IN FOSTER CARE

Mental Health Care Information

A summary of issues faced by child welfare agencies, juvenile courts, and mental health care providers

ADMINISTRATIVE OFFICE OF THE COURTS

CENTER FOR FAMILIES, CHILDREN & THE COURTS

AOC Briefing

Judicial Council of California
Administrative Office of the Courts
Center for Families, Children & the Courts
455 Golden Gate Avenue
San Francisco, California 94102-3688
cfcc@jud.ca.gov
www.courts.ca.gov

Prepared by the AOC Center for Families, Children & the Courts (CFCC)

All AOC Briefings are available on the California Courts website at *www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm*.

This document is based on laws in effect at the time of publication (August 2010). Federal and state laws and regulations can change at any time.


Printed on recycled and recyclable paper

Judicial Council of California
Administrative Office of the Courts

Chief Justice Ronald M. George
Chair of the Judicial Council

William C. Vickrey
Administrative Director of the Courts

Ronald G. Overholt
Chief Deputy Director

Blue Ribbon Commission on Children in Foster Care

Justice Carlos R. Moreno, Chair
Associate Justice, Supreme Court of California

Center for Families, Children & the Courts

Diane Nunn
Director

Charlene Depner
Assistant Director

Don Will
Manager

Christopher Wu
Supervising Attorney

Sidney Hollar
Attorney

Lee Morhar
Consultant

Carolynn Bernabe
Senior Administrative Coordinator

Alma Balmes
Administrative Coordinator

Rebecca Gudeman
Consultant, National Center for Youth Law

INTRODUCTION

Children in foster care are frequently victims of abuse and neglect owing, in part, to one or both parents' mental health issues. Children in the foster care system may also have mental health issues. Child welfare agencies and juvenile courts need information related to a parent's ability to provide a safe home in the face of mental health issues in order to determine whether a child should return home. Access to the mental health information of children in foster care is also needed to ensure that these children receive appropriate mental health services.

Removing unnecessary barriers to sharing mental health information for the coordination of services for children in foster care is a priority of the California's Child Welfare Council and the Judicial Council's Blue Ribbon Commission on Children in Foster Care. The Administrative Office of the Courts has prepared this overview to assist in the discussion of how best to remove unnecessary barriers to information sharing. The overview is not intended to be an exhaustive analysis of all legal issues related to sharing mental health information concerning children in foster care and their parents. It is intended to provide a basis for further discussions about identifying and removing legal barriers that prevent child welfare services, juvenile courts, and substance abuse providers from obtaining all the information they need to make informed decisions about mental health services for children in foster care and their parents.

This brief addresses disclosure of mental health information held by mental health providers. It does not address disclosure of mental health records held in court or child welfare agency files.

How can sharing mental health information help improve the lives of children in foster care?

- Children continue to receive any mental health services that they need when they are removed from their homes.
- Children continue to take any necessary medications.
- Mental health care providers have access to children's health histories when determining appropriate treatment.
- Foster parents and other caregivers understand all the mental health needs of the children in their care.
- Child welfare agencies and the juvenile court can make sure mental health issues are properly identified for children in foster care and that these children receive appropriate treatment.
- Child welfare agencies and the juvenile court can monitor the health and well-being outcomes of children under their jurisdiction.
- Child welfare agencies and the juvenile court can know whether parents and children in foster care need maintenance medication or follow-up services after completion of treatment.
- Child welfare agencies and the juvenile court can determine when parents have completed court-ordered treatment programs and when it is safe for children to be returned to their parents.

State and federal law requires that child welfare agencies maintain medical information in each child's case plan.

- Sharing mental health information about children in foster care helps ensure that they receive appropriate treatment. When a child is removed from his or her home because of abuse or neglect, it is critical that social workers, caregivers, and judges have access to the child's mental health records.
- Title IV-E of the Social Security Act requires that states develop case plans for children in foster care and that the case plans include the most recent information available regarding the child's health providers, the child's immunization records, the child's medications, and any other relevant health information as determined by the child welfare agency. (42 U.S.C. §§ 671(a)(16), 675(1)(C).) State law also requires that a child's case plan include a summary of the child's health information. (Welf. & Inst. Code, § 16010(a).)
- State law requires the child welfare agency to include the case plan in the court report, which must be filed with the court at the initial hearing and considered at all review hearings. (Welf. & Inst. Code, § 16501.1(f)(14).)
- Federal law requires states to exchange information electronically through the state's automated child welfare and Medicaid systems to the extent it is feasible (45 C.F.R. § 1355.53(b)(2) (2009)) and encourages automated data exchange between child welfare and the courts. (45 C.F.R. § 1355.53(d) (2009).)

Without violating federal and state confidentiality laws, mental health care providers may share much mental health information with the child welfare agency and with other mental health care providers for the purpose of coordinating health care services and treatment for children in foster care.

Federal Law

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides for the confidentiality and privacy of individual medical records.

- HIPAA protects the confidentiality of "protected health information" (PHI). PHI is defined as individually identifiable health information in all forms that is created or received by a health care provider, health plan, employer, or health care clearinghouse and relates to the past, present, or future physical or mental health or condition of an individual. (45 C.F.R. § 160.103 (2009).)
- The entities that must comply with HIPAA ("covered entities") include public and private health care providers. Covered entities may disclose most mental health information if required by law. (45 C.F.R. § 164.512(a) (2009).)
- Covered entities may disclose mental health care information pursuant to a signed authorization. (45 C.F.R. § 164.502(a)(1)(iv) (2009).) To be valid, the authorization must include certain required elements. (45 C.F.R. § 164.508(b) (2009).)
- Covered entities may disclose mental health care information for treatment purposes without a signed authorization. (45 C.F.R. § 164.502(a)(1) (2009).)
- Covered entities may disclose mental health care information to individuals, parents, and other representatives, including persons who are acting in loco parentis (persons having the authority to act on behalf of the child in making health care decisions), without a signed authorization. HIPAA defers to state law in defining who is an appropriate representative for a minor. (45 C.F.R. §164.502(g)(3) (2009).)
- Disclosures concerning mental health care are permitted for court proceedings when there is a subpoena or court order. (45 C.F.R. § 164.512(e) (2009).)
- HIPAA usually preempts any contrary state law; however, HIPAA defers to state law when state law is more protective of a patient's privacy. (45 C.F.R. § 160.203(b) (2009).)

California Law

The Confidentiality of Medical Information Act (CMIA) provides for the confidentiality and privacy of individual medical and mental health records in California.

- CMIA protects the privacy of "medical information." Medical information is defined as "individually identifiable information . . . in possession of or derived from a provider of health care . . . regarding a patient's medical history, mental or physical condition, or treatment." (Civ. Code, § 56.05(g).)

- A parent or a guardian of a minor generally has access to information on the minor patient's condition and care. (Civ. Code, § 56.10(b)(7); Health & Saf. Code, § 123110.)

  Exception: Representatives are not entitled to inspect or obtain copies of a minor patient's medical records if the minor has a right to consent to the medical care or where the health care provider determines that access to the records would have a detrimental effect on the provider's professional relationship with the minor or the minor's physical safety or psychological well-being. (Health & Saf. Code, § 123115.)

- A health care provider must disclose medical information pursuant to a signed authorization. (Civ. Code, § 56.10(a).) The authorization must include the elements required under HIPAA as well as CMIA. (Civ. Code, § 56.11.)

- A health care provider may disclose health information to another health care provider for diagnosis and treatment purposes without a signed authorization. (Civ. Code, § 56.10(c)(1).)

- A health care provider may, without a signed authorization, disclose medical information related to the diagnosis or treatment of a minor's mental health condition to a county social worker or probation officer or any other person who is legally authorized to have custody or care of a minor if the health care provider determines that disclosure is reasonably necessary for the purpose of coordinating the treatment and care of the minor. (Civ. Code, §§ 56.10(c)(20), 56.103(e)(1).)

  Exception: A health care provider may not disclose to a social worker or probation officer either psychotherapy notes or information related to treatment to which the minor consented or could have consented on his or her own behalf under this exception. (Civ. Code, § 56.103(e)(2) & (h).)

- A minor's mental health information that is disclosed to a county social worker, probation officer, or other legally authorized person under Civil Code section 56.103 may not be further disclosed unless the disclosure is for the purpose of coordinating health care services and the disclosure is authorized by law. (Civ. Code, §§ 56.103(e)(1), 56.13.)

- A health care provider must disclose health information if the disclosure is required by a court order or a subpoena, (Civ. Code, § 56.10(b)(1), (3).)

- Counsel for a dependent child has a right to access the child's medical records. (Welf. & Inst. Code, § 317(f).)

The Lanterman-Petris-Short (LPS) Act also provides for the confidentiality of mental health information and records.

- Information and records obtained by the Department of Mental Health, the Department of Developmental Services, community mental health clinics, mental health hospitals, and other institutions during the course of providing certain services to voluntary and involuntary patients, as described in Welfare and Institutions Code section 5328, is confidential and may be disclosed only with the written authorization of the patient except in a few limited situations. (Welf. & Inst. Code, § 5328.)

- If the patient is a minor, disclosure of confidential information may be authorized by the patient's parent, guardian, guardian ad litem, or conservator. (Welf. & Inst. Code, § 5328(d).) However, while a parent or a guardian of a minor generally has access to information on the minor patient's condition and care (Welf. & Inst. Code, § 5328(d); Health & Saf. Code, § 123110), these legal representatives are not entitled to inspect or obtain copies of a minor patient's medical or mental health records if the minor has a right to consent to the care or where the health care provider determines that access to the records would have a detrimental effect on the provider's professional relationship with the minor or the minor's physical safety or psychological well-being. (Health & Saf. Code, § 123115.)

- Mental health information may be disclosed without written authorization "in communications between qualified professional persons in the provision of services or referrals." However, a signed release is required when disclosing mental health information from a hospital or inpatient facility to professionals who are not employed by the facility and are not currently treating the patient. (Welf. & Inst. Code, § 5328(a).)

- Providers may disclose medical and mental health information protected by the LPS Act, without obtaining a signed authorization, to a county social worker or probation officer or any other person who is legally authorized to have custody or care of a minor for the purpose of coordinating the minor's health care services and medical treatment, mental health services, or services for developmental disabilities. (Welf. & Inst. Code, § 5328.04; see Civ. Code, § 56.103.)

  Exception: A provider may not disclose to a social worker or probation officer either psychotherapy notes or information related to treatment to which the minor consented or could have consented on his or her own behalf under this exception. (Welf. & Inst. Code, § 5328.04(f), (h).)

  Exception: Physicians and mental health professionals may not be compelled to reveal information, including notes, that is given to them in confidence by the minor or members of the minor's family. (Welf. & Inst. Code, § 5328.04(d).)

- A minor's mental health information that is disclosed to a social worker or probation officer under Welfare and Institutions Code section 5328.04 may not be further disclosed unless the disclosure is for the purpose of coordinating health care services and the disclosure is authorized by law. (Welf. & Inst. Code, § 5328.04(b).)

- Mental health information may be disclosed without the patient's written authorization "to the courts as necessary for the administration of justice." (Welf. & Inst. Code, § 5328(f).)

The child welfare agency may share certain mental health information with the court, but disclosure is limited by the child's doctor-patient and therapist-patient privilege.

- California law requires the child welfare agency to maintain a health summary for children in foster care and to include this summary in court reports. (Welf. & Inst. Code, §§ 16010(a), 16501.1(f)(14).)

- However, summary health information provided in court reports cannot include privileged communications unless the child or child's attorney waives the privilege. Communications between a patient and a doctor or therapist in a confidential setting are privileged and cannot be disclosed in court or in court reports unless the patient waives the privilege. (Evid. Code, §§ 990 et seq. and 1010 et seq.) In dependency cases, privilege may be waived by the child if he or she is 12 years old or older or by the child's attorney if the child is under 12 years old. Neither the court, nor a health care provider,

nor a parent may waive privilege for a child. (Welf. & Inst. Code, § 317(f).) Case law concerning the application of psychotherapist-patient privilege in the dependency court context has carved out a limited exception to the privilege for information that is reasonably necessary for a dependency court to make decisions regarding custody, visitation, services, and other aspects of the case plan.

- Thus, a social worker may have access to information for other purposes that the social worker cannot disclose in court reports because the information constitutes a privileged communication between the child and a doctor or therapist. The interplay between evidentiary privilege and the Welfare and Institutions Code section 16501.1(f)(14) requirement that summary health information be provided in court reports is not entirely clear.

Courts may order psychological evaluations and review the results.

- The court may order a psychological evaluation of either the parents or the minor or both. (Evid. Code, § 730.)
- The results of the evaluation are not confidential and not protected by privilege. (Evid. Code, § 1017.)

Federal law encourages automated data exchanges of mental health care information between the Medicaid agency, the child welfare agency, and the courts.

- Federal law encourages states to develop child welfare automated systems that have the capability for automated data exchanges between the child welfare agency, the Medicaid agency, the courts, and other entities. (45 C.F.R. § 1355.53 (2009).)
- The child welfare agency is authorized to disclose information to the Medicaid (Medi-Cal) agency for purposes directly related to the administration of either program. (42 U.S.C. § 671(a)(8)(A).)
- Medi-Cal is authorized to disclose information to the child welfare agency for purposes directly related to the administration of the Medi-Cal program. "Directly related" includes determining the amount of medical assistance and providing services for recipients. (42 U.S.C. § 1396(a)(7); 42 C.F.R. § 421.302 (2009).)

The recent adoption of the federal Fostering Connections to Success and Increasing Adoptions Act gives California the opportunity to develop a comprehensive plan for the sharing of medical information about children in foster care.

Recent changes to federal law require the states to develop a plan for the ongoing oversight and coordination of health care services for any child in foster care. The plan must include provisions for how medical information for children in foster care will be updated and appropriately shared between interested agencies and individuals and steps to ensure continuation of health care services, such as establishment of a medical home for every child in care. (42 U.S.C. § 622(b)(15)(A)(iii), (iv).)

CONCLUSION

The internal policies and procedures of both governmental agencies and mental health care providers frequently prevent the exchange of information about children in foster care. This occurs at both state and local levels. However, the legal framework to allow the exchange of at least some information about these children currently exists. While stakeholders need a clear understanding of the protections of mental health information required by law, certain mental health care information concerning children in foster care can be shared among the mental health providers and the child welfare agency. The child welfare agency is required to include this information in reports filed with the juvenile court.

Legislation, regulations, or rules of court may be needed to clarify what mental health information may be provided to the court without a waiver of the doctor-patient or psychotherapist-patient privilege. Any clarification needs to balance the right to privacy with the court's need to have information to make appropriate orders for care and treatment, including important decisions about whether to order the use of psychotropic medication.

Recent federal law requires California to develop a comprehensive plan for the sharing of medical, including mental health, information of children in foster care. The completion of this plan may require that any outstanding legal impediments to appropriate information sharing be identified and removed through legislation, regulations, or rule of court as appropriate.

This document is based on laws in effect at the time of publication (August 2010). Federal and state laws and regulations can change at any time.

Thank you to the following state agencies and organizations for their contribution to this paper:

American Bar Association
California Blue Ribbon Commission on Children in Foster Care
California Department of Mental Health
California Department of Social Services
California Health and Human Services Agency
California Child Welfare Council
California County Counsel
Disability Rights of California
East Bay Children's Law Offices
Mental Health Advocacy Project
Mental Health Advocacy Services
National Center for Youth Law

Special thanks to Chantal Sampogna, former staff attorney, Center for Families, Children & the Courts.

SHARING INFORMATION ABOUT CHILDREN IN FOSTER CARE

Four briefing papers addressing confidentiality and information sharing about children in foster care

- Health Care Information
- Mental Health Care Information
- Substance Abuse Treatment Information
- Education Information

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS

455 Golden Gate Avenue
San Francisco, California 94102-3688
www.courts.ca.gov