Sharing Substance Abuse Treatment Information for Children in Foster Care

JUDICIAL COUNCIL BRIEFING ON INFORMATION SHARING

DECEMBER 2019

JUDICIAL COUNCIL OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Judicial Council Briefing

Judicial Council of California
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 Center for Families, Children & the Courts

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The Judicial Council Center for Families, Children, & the Courts would like to thank and acknowledge Ms. Rebecca Gudeman, Senior Director of Adolescent Health and attorney at the National Center for Youth Law for authoring this briefing.

I. INTRODUCTION

Individuals responsible for children in foster care, including placing agencies and the courts, sometimes need information about the parents' or child's substance use treatment. Access to this information can help ensure the youth and family are receiving appropriate and effective services. Yet, these records are protected by confidentiality laws. Confidentiality is a central legal and ethical tenet of substance use care, helping ensure patients receive appropriate treatment. While the laws do allow for information to be shared, confusion about the application of confidentiality law can prevent appropriate disclosures.

A priority for the Judicial Council is to identify and remove barriers that prevent foster children and their families from getting the care and services they deserve and that prevent child welfare services and the juvenile courts from obtaining the information they need to address needs and make informed decisions for children in foster care. One such barrier is confusion regarding applicable confidentiality law. The Judicial Council has prepared this overview of laws related to sharing substance use treatment information to address this concern. The overview is **not an exhaustive analysis of all legal issues** related to sharing substance use treatment information. Rather, it is intended to provide the basis and catalyst for further discussions between agencies, professionals, legal counsel, and patients about supporting access to care, collaborating across agencies, and identifying ways to ensure child welfare services and the juvenile courts obtain the information they need to meet their obligations and make informed decisions, while still honoring the core principle of confidentiality. The information in this brief applies to both dependent and juvenile justice involved children who are placed in foster or group care settings.

II. FEDERAL AND STATE LAW

THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

- Substance use treatment providers are generally subject to HIPAA. For a summary of HIPAA requirements, see the Judicial Council Briefing *Sharing Health Information for Children in Foster Care*.

THE COMPREHENSIVE ALCOHOL ABUSE AND ALCOHOLISM PREVENTION, TREATMENT, AND REHABILITATION ACT (CAAAPTR)

- The CAAAPTR Act provides for the confidentiality of treatment records. (42 U.S.C. § 290dd-2.)

- Treatment records include the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to education, prevention, training, treatment, rehabilitation, or research related to substance use disorders, which is conducted, regulated, or directly or indirectly assisted by

any department or agency of the United States. They include information, recorded or not, which would identify a patient as having had a substance use disorder either directly or through verification by another person, including acknowledging a person as a patient of a facility publicly identified as a place for SUD services. (42 U.S.C. § 290dd-2(a); 42 C.F.R. § 2.12(a) & (e), 2.13(c).)

- Direct and indirect assistance by any department or agency of the United States is broadly defined to include the receipt of any federal funding from any department or agency of the United States including funds that are not used for SUD programs; the receipt of any license, certification, registration or other authorization granted by any department or agency of the United States; and assistance from the IRS through the granting of tax exempt status. (42 C.F.R. § 2.12(b).)

- The CAAAPTR Act applies to treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs, and private practitioners who provide SUD diagnosis, treatment, or referral for treatment. (42 C.F.R. § 2.12(e).)

- The purpose of the CAAAPTR regulations is to ensure that a patient in an applicable federally assisted program is not made more vulnerable by reason of the availability of his or her patient record than an individual who has an alcohol or drug problem and does not seek treatment. (42 C.F.R. § 2.2(b)(2).) This encourages patients to seek treatment for an SUD without fear that their privacy will be compromised. (*Mosier v. American Home Patient, Inc.* (N.D.Fla. 2001) 170 F.Supp.2d 1211.)

- The prohibition against disclosure does not apply to the reporting of suspected child maltreatment and neglect to the appropriate authorities. (42 C.F.R. § 2.12(c)(6).) However, the restrictions on disclosure continue to apply to the original SUD patient records maintained by a treatment program including their disclosure or use in civil and criminal proceedings which may arise out of the report of suspected child maltreatment and neglect. (42 C.F.R. § 2.12(c)(6).)

- There are additional limited exceptions to CAAAPTR for disclosures of patient identifying information necessary to meet a bonda fide medical emergency in which the patient's prior informed consent cannot be obtained, for certain types of scientific research, and for certain audits and evaluations. (42 C.F.R. §§ 2.51–2.53.)

- When CAAAPTR and state law conflict, the law that best protects confidentiality applies. (42 C.F.R. § 2.20.)

HEALTH AND SAFETY CODE

- California law protects the identity and records of the identity, diagnosis, prognosis, or treatment of any patient maintained in connection with the performance of any substance use disorder (SUD) treatment or prevention effort or function conducted, regulated, or

directly or indirectly assisted by the department are confidential. (Health & Saf. Code, § 11845.5.) Programs may include residential programs, drop-in centers, crisis lines, free clinics, and other treatment programs that provide or offer to provide for counseling, therapy, referral, advice, care, treatment or rehabilitation as a service to those persons suffering addiction related problems that are physiological or psychological in nature. (Health & Saf. Code, § 118425.) Each county's board of supervisors designates a health-related county agency or department to administer county alcohol and drug programs. (Health & Saf. Code, § 11800.)

III. RELEASE OF INFORMATION TO THE CHILD WELFARE AGENCY, PROBATION, HEALTH PROVIDERS, AND THE JUVENILE COURT

- Under CAAAPTR and state law, records may be released with the patient's written consent, but only to the extent, under the circumstances, and for the purposes as clearly stated in the release of information signed by the patient. (42 U.S.C. § 290dd-2(b)(1); 42 C.F.R. §§ 2.2(b)(1), 2.13(a), 2.33; Health & Saf. Code, § 11845.5(b).)

- The authorization must include the core elements required by CAAAPTR, HIPAA, and state law to be valid. (*See* 42 C.F.R. § 2.31 for CAAAPTR requirements.)

- If the patient is a minor, CAAAPTR states that the minor must give written consent for the release. Both the minor and the minor's parent provide written consent if state law required parental consent for the minor's treatment. The minor alone provides consent if state law allowed the minor to give consent for his or her own treatment. (42 C.F.R. § 2.14.) In California, minors age 12 and older may consent to medical care and counseling related to an alcohol or drug related problem. However, state law also says that it is the intent of the legislature to respect the right of a parent to seek care for their minor child when the child does not consent to such care. (Fam. Code, § 6929.)

- Under CAAAPTR, records also may be released if the release is authorized by an appropriate order of a court of competent jurisdiction, granted after application and a showing of good cause. The application must provide notice to the patient and the person holding the records, an opportunity to object and the availability of a private hearing. To find good cause, the court must find that other ways of obtaining the information are not available or would not be effective and the public interest and need for the disclosure outweigh the potential injury to the patient, physician-patient relationship and the treatment services. The court order must limit disclosure to those parts of the records essential to fulfill the order's objective and to those persons who need the information and must limit further disclosure for protection of the patient, patient-physician relationship and the treatment services. (42 U.S.C. § 290dd-2 (b)(2)(C); 42 C.F.R. §§ 2.2(b), 2.13, 2.61, 2.64; *see* 42 C.F.R. §§ 2.65 (orders authorizing disclosure and use to criminally investigate or prosecute a patient), 2.63 (disclosure of confidential communications).) An order authorizes, but does not compel, disclosure. An order, accompanied by a subpoena or other legal mandate, compels disclosure. (42 C.F.R. § 2.61.)

- The recipient of information disclosed pursuant to a written release or court order is restricted from re-disclosing the information unless there is an authorization or court order in place, and SUD facilities must include a written notice to this effect with any disclosure. (42 C.F.R. § 2.32.)

- Records subject exclusively to state law may be disclosed by court order if the order is authorized by a court of competent jurisdiction after application showing probable cause as provided in subdivision (c) of section 1524 of the Penal Code. (Health & Saf. Code, § 11845.5(c)(5).)

IV. CONCLUSION

State and federal law create important privacy protections for people who participate in substance use treatment programs. However, it is critical that child welfare placing agencies and the courts receive necessary information about parent's and children's SUD treatment, recovery, monitoring and continuing sobriety in order to make informed decisions about a child's case.

Child welfare, probation, and the courts can obtain SUD treatment information when there is either a written consent or a court order that complies with the requirements of federal law. Although these exceptions to the general right of privacy give agencies and the courts a way to receive the information they need to make critical decisions about foster children, the need for consent or a court order, and the limitations on re-disclosure and re-use of information once disclosed can present practical obstacles. It is important that courts, agencies, professionals, and families consider these requirements when ordering or recommending treatment programs.

VIII. ADDITIONAL RESOURCES

From the U.S. Department of Health and Human Services, Admin. For Children and Families:

- Children's Bureau, Parental Substance Use and the Child Welfare System (Oct. 2014) https://www.childwelfare.gov/pubPDFs/parentalsubabuse.pdf

From Other Sources:

- National Center for Youth Law, *Consent to Treatment for Probation Youth – By Custody and Placement* (Oct. 2018),
- *http://teenhealthlaw.org/wp-content/uploads/2015/11/Del-ConsentbyCustodychart10-2018.pdf*

- National Center for Youth Law, *Consent to Treatment for Foster Youth – By Custody and Placement* (Jul. 2017),
  http://teenhealthlaw.org/wp-content/uploads/2017/07/FosterConsentTreatmentChart5-5-16.pdf