



AOC Briefing

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SHARING MENTAL HEALTH CARE INFORMATION FOR CHILDREN IN FOSTER CARE



ADMINISTRATIVE OFFICE
OF THE COURTS

CENTER FOR FAMILIES, CHILDREN
& THE COURTS

Introduction

Children in foster care are frequently victims of abuse and neglect due to one or both of their parents having mental health issues. Many children of parents who have mental health issues suffer from mental health issues themselves. Information related to a parent's ability to provide a safe home in the face of mental health issues is necessary before child welfare agencies can recommend, and a court can order, that a child return home. The child welfare agency and the juvenile court also need information about mental health treatment that foster children receive to ensure that foster children with mental health problems are receiving appropriate services.

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

- Children continue to receive any mental health services that they need when they are removed from their homes.
- Children continue to take any necessary medication.
- Mental health care providers have access to a child's health history 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 determine when parents have completed court ordered treatment programs and when it is safe for children to be returned to their parents.
- Child welfare agencies and the juvenile court can make sure that foster children with mental health problems are receiving appropriate treatment.
- Child welfare agencies and the juvenile courts can know whether parents and foster children need maintenance medication or follow up services after the completion of treatment.

State and federal law require 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 get appropriate treatment. When a child is removed from his or her home due to 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 states to 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), 42 U.S.C. §675(1)(C);

- State law requires that mental health information be included in the case plan. (Welfare and Institutions Code § 16010(a).)
- State law requires the child welfare agency to include the case plan with the court report, which must be filed with the court at the initial hearing and all review hearings. (Welfare and Institutions Code §16501.1(f)(14).

Mental health information can be shared between agencies and between mental health care providers and the child welfare agency for the purpose of coordinating health care services and treatment for foster children without violating federal and state confidentiality laws.

Federal Law

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

- HIPAA regulates the disclosure of personal health information which includes both physical and mental health information (42 U.S.C. § 1320d(4)(b).)
- Entities covered by HIPAA (“covered entities”) include public and private health care providers. Covered entities may disclose most personal health information if required by law (45 C.F.R. §164.512(a).) Disclosure to the child welfare agency and the courts is required by law. (42 U.S.C. §671(a)(16), 42 U.S.C. §675(1)(C); Welfare and Institutions Code §§ 16010(a); 16501.1(f)(14).)
- Covered entities may disclose 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). HIPAA defers to state law to define who is an appropriate representative for a minor. (45 C.F.R. §164.502(g)(3))
- Disclosures concerning health care are permitted for court proceedings when there is a subpoena or court order (45 C.F.R. §164.512(e).)

California Law

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

- Every person who has the ultimate responsibility for decisions respecting his or her own health care or the health care of others has a right to information about his or her own medical care or the medical care of those for whom they have the responsibility of making medical decisions. (Health & Safety Code §123100.)
- A parent or a guardian of a minor generally has access to information on the minor patient's condition and care. (Health and Safety 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 and Safety Code § 123115.)

- A minor's mental health information except for psychotherapy notes may be disclosed to a 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 health care services and medical treatment. (Civil Code § 56.103.)
- A minor's mental health information that is disclosed to an authorized representative may not be further disclosed unless the disclosure is for the purpose of coordinating health care services and the disclosure is authorized by law. (Civil Code §§56.103, 56.13)

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

- Information and records obtained during the course of providing services to voluntary and involuntary patients by the Department of Mental Health, the Department of Developmental Services, community mental health clinics, mental health hospitals and other institutions is confidential and may be disclosed only with the written authorization of the patient. (Welfare and Institutions 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. (Welfare and Institutions Code § 5328(d).)
- Mental health information may be disclosed without the patient's written authorization "in communications between qualified professional persons in the provision of services or referrals" However, mental health information in a hospital or inpatient facility cannot be shared with professionals not employed by the facility who are not currently treating the patients. (Welfare and Institutions Code § 5328(a).)
- A minor's mental health information may be disclosed to a 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 health care services and medical treatment. (Welfare and Institutions Code § 5328.04.)

- A minor’s mental health information that is disclosed to a social worker or probation officer may not be further disclosed unless the disclosure is for the purpose of coordinating health care services and the disclosure is authorized by law. (Welfare and Institutions Code § 5328.04(b).)
- Physicians and mental health professionals may not be compelled to reveal information, including notes, that is given to him or her in confidence by the minor or members of the minor’s family. (Welfare and Institutions Code § 5328.04(d).)
- Mental health information may be disclosed without the patient’s written authorization “to the courts as necessary for the administration of justice.” (Welfare and Institutions Code § 5328(f).)

State law requires the child welfare agency to include certain medical information, including mental health information, in the case plan and include the case plan in all court reports

- California law requires the child welfare agency to maintain a health summary, which includes a mental health summary for foster children and to include this summary in court reports (Welfare and Institutions Code §§ 16010(a); 16501.1(f)(14).)
- California law also provides for a doctor – patient privilege and a psycho-therapist - patient privilege, which prohibits the disclosure of confidential information in court unless the privilege is waived by the holder of the privilege. (Evidence Code §§ 990 et seq, 1010 et seq; Welfare and Institutions Code § 317(f))
- The interplay between the Welfare and Institutions Code §16501.1(f)(14) mandate that summary mental health information be provided in court reports, the Welfare and Institutions Code § 5328(f) exception to confidentiality that allows disclosure to the courts “as necessary for the administration of justice” and the Evidence Code privilege statutes is not clear. 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.

Courts may order psychological evaluations under Evidence Code Section 730

- The court may order an evaluation of either the parents or the minor or both.
- The results of the evaluation are not confidential and not protected by privilege.

The recent adoption of the federal Fostering Connections Act gives California the opportunity to set forth a comprehensive plan for the sharing of foster

children's medical information, including mental health, to ensure that foster children receive continuous health care services.

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. (42 U.S.C. 622 (b)(15).)

Conclusion

While the internal policies and procedures of both governmental agencies and mental health care providers frequently prevent the exchange of information about foster children at the state and local level, the legal framework to allow the exchange of at least some information about foster children currently exists. While stakeholders need a clear understanding of the protections of mental health information required by law, certain mental health care information for foster children 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.

The disclosure of most mental health information of parents is prohibited without the parent authorizing disclosure or the court ordering a psychological exam under Evidence Code section 730.

An extensive analysis of exactly which information can be shared with child welfare agencies and in turn the courts under existing law should be undertaken with representatives of all stakeholders. 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 foster children's medical, including mental health, information. 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.