



AOC Briefing

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SHARING SUBSTANCE ABUSE TREATMENT 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 a substance use disorder in one or both parents. Children may enter the foster care system at birth because they are born to mothers who used alcohol or drugs during pregnancy, and some foster children will have difficulty maintaining placements because of additional challenges such as Fetal Alcohol Spectrum Disorder (FASD) or attachment disorders. Information about progress in treatment and continuing care monitoring for a parent with a substance use disorder, and an evaluation of his or her ability to provide a safe home environment is necessary before child welfare agencies can recommend, and a court can order, that a child return home. For foster children who themselves have a substance use disorder, the child welfare agency and the juvenile court need information to ensure that they are receiving appropriate and effective services.

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

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

- Helps child welfare agencies and the juvenile court determine when parents have made satisfactory progress in their treatment programs and agree to continued monitoring. This may be the best indicator that a child may be safely returned home with supportive monitoring.
- Assists child welfare agencies and the juvenile court in making sure that foster children with drug and alcohol problems are receiving appropriate treatment.

State and federal law creates privacy protections for parents and foster children who receive treatment services for their substance use disorder (SUD).

- a) The Health Insurance and Portability and Accountability Act (HIPAA) applies to SUD treatment providers.

Treatment providers are generally covered under HIPAA. Please see the AOC *Briefing on Sharing Health Information for Children in Foster Care* for a summary of HIPAA requirements. In general HIPAA does not prohibit covered entities from disclosing information to child welfare agencies and the courts.

b) The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act (CAAAPTR) provides for confidentiality of SUD treatment records.

- The CAAAPTR Act provides for the confidentiality of records. 42 U.S.C. § 290dd-2.
- These 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. 42 U.S.C. § 290dd-2, 42 C.F.R. § 2.12(b).
- 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.
- The purpose of the CAAAPTR regulations is to insure 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. §§ 2.3(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.* (2001) 170 F.Supp.2d 1211 (Florida.)
- The prohibition against disclosure does not apply to the reporting of suspected child maltreatment and neglect to the appropriate authorities. 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. §§ 2.1(e), 2.2(e), 2.12(c)(6).

c) State law provides for confidentiality of SUD treatment records.

- California law similarly provides the identity and records of the identity, diagnosis, prognosis, or treatment of any patient maintained in connection with the performance of any SUD treatment or prevention effort or function conducted, regulated, or directly or indirectly assisted by the department are confidential. Health and Safety Code § 11845.4.

Under federal and state law, SUD treatment information can be released to the child welfare agency and the juvenile court if the patient consents or a court issues an order

a) There are special rules regarding SUD treatment records of adolescents.

Federal and state laws generally provide that a minor's records may be disclosed if the minor consents to the release or if a court issues an order.

State law provides that if the recipient of services is a minor, ward or conservatee, his or her parent, guardian or conservator may designate in writing someone to whom information can be disclosed, when the parent has consented to the SUD treatment on behalf of the minor. Health and Safety Code § 11845.5.

If state law allows a minor to give consent for his or her own treatment, federal law generally prohibits providers from disclosing any information related to that treatment without the minor's written consent.

If state law requires parental consent for a minor's treatment, both the minor and the minor's parent must provide written authorization to access the related treatment records.

- Under CAAAPTR, records may be released with the patient's 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 C.F.R. §§2.1(b) (1), 2.2(b) (1).
- Records may also be released if authorized by an appropriate order of a court 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 in chambers. 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. §290-dd-2 (b) (2) (C), 42 C.F.R. §§ 2.1(b) (2) (C), 2.2(b) (2) (C), 2.64.

Conclusion

State and federal law create important privacy protections for people who participate in drug and alcohol treatment programs. Unfortunately, the right to privacy can interfere with child welfare agencies and the courts receiving information that is necessary to make important decisions about child safety and whether it is safe for a child to return to his or her family. It is critical that child welfare agencies and the courts receive information about parent's and children's SUD treatment, recovery, monitoring and continuing sobriety in order to make informed decisions about a child's placement.

Fortunately child welfare agencies and the courts can obtain SUD treatment information when there is either a patient's written consent or a court order. Although these exceptions to the general right of privacy give child welfare 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 presents practical obstacles to designing an automated exchange of information between SUD treatment providers, child welfare agencies, and the courts.