



Committee on Child Protection

September 25, 2014

Issue Briefing: Confidentiality

Federal and State Provisions
Regulating Confidentiality in the
Child Protection System

Stages of child abuse/neglect cases impacted by confidentiality regulations

- Records sharing at reporting stage
- Records sharing at investigative stage
- Disclosing records to the public in certain situations
- Juvenile court proceedings

Roadmap

- Overview of laws
- Federal confidentiality regulations
- What is Vermont doing?
- What are other states doing?

Overview of law

In general, federal law requires states to preserve the confidentiality of all child abuse and neglect reports and records to protect the privacy rights of the child and of the child's parents or guardians, except in certain limited circumstances.

Authorized recipients of confidential child abuse and neglect information are bound by the same confidentiality restrictions as the DCF, so recipients must only use the information for the prevention and treatment of child abuse and neglect, and may not disclose identifying information about any specific child protection case to any person or government official, and may not make public any other information unless authorized to do so under state statute.

Overview of source law

- Federal Statutes:
 - Child Abuse Prevention and Treatment Act (CAPTA)
 - Social Security Act Titles IV-B and IV-E
 - 45 C.F.R. 205.50
 - Health Insurance Portability and Accountability Act (HIPAA)
- Vermont Statutes
 - 33 V.S.A. Chapter 49 (Child Welfare Services) §§ 4916 - 4921
 - 33 V.S.A. Chapters 51-53 (Juvenile Proceedings)
- Vermont Court Rules Annotated
- DCF Policy

Confidentiality requirements
dictated by federal regulation

CAPTA (P.L. 111-320)

- Child Abuse Prevention and Treatment Act (CAPTA) is the federal law governing and providing funding to child abuse prevention programs across the country.
- Among the requirements for receiving federal funding under CAPTA, states must preserve the confidentiality of all child abuse and neglect reports.

CAPTA confidentiality requirements and allowed exceptions

- In general, CAPTA requires that states preserve confidentiality of all abuse/neglect reports to protect the child and the child's parents/guardians.
- There are exceptions. States may share confidential records with:
 - Individuals who are the subject of an abuse/neglect report. § 106(b)(2)(B)(viii)(I).
 - Grand jury or court when necessary to determine an issue. § 106(b)(2)(B)(viii)(V).
 - Other individuals who are authorized by statute to receive information pursuant to a legitimate state purpose. § 106(b)(2)(B)(viii)(VI).

CAPTA mandated exceptions to confidentiality rule

- CAPTA also provides that in certain situations states must turn over confidential records.
- States must disclose otherwise confidential information to:
 - Any federal, state, or local government entity that needs the information to carry out its responsibilities under law to protect children from abuse and neglect. § 103(b)(2)(B)(ix)
 - Child abuse citizen review panels. § 106(c)(5)(A)
 - The public, when a case of child abuse/neglect results in a child fatality or near fatality. § 103(b)(2)(B)(x)
 - Child fatality review panels. § 103(b)(2)(B)(x)

Social Security Act: Title IV-B

- Records maintained under Title IV-B are to be safeguarded against unauthorized disclosure in accordance with 45 C.F.R. 205.50.
- 45 C.F.R. 205.50 restricts the release or use of information concerning individuals receiving financial assistance under certain programs governed by Title IV-B.
- Title IV-B programs subject to these requirements:
 - Family support child care
 - Protective services child care
 - Child and family support contracts
 - Intensive family based services
 - Sexual abuse victim and offender treatment services program
 - District specific services (after-school and mentoring programs)
 - Post-adoption supports and services
 - Adoption promotion services

Social Security Act: Title IV-E

Requires that states provide safeguards restricting the use or disclosure of information regarding children served by Title IV-E foster care. Records maintained under Title IV-E are also subject to the Department's confidentiality provisions in 45 C.F.R. 205.50.

C.F.R. 205.50

- Safeguards information for the financial assistance programs under Title IV-B and Title IV-E.
- The use or disclosure of information concerning applicants and recipients will be limited to purposes directly connected with:
 - Administration of programs, investigations, prosecutions, audits...,
 - *Reporting to the appropriate agency or official of information on known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child receiving aid under circumstances which indicate that the child's health or welfare is threatened*

HIPAA

- Provides for the confidentiality and privacy 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)

- Under HIPAA, child abuse or neglect may be reported to any law enforcement official authorized by law to receive such reports and the agreement of the individual is not required.

45 C.F.R. § 164.512(b)(1)(ii)

How do these federal laws interact?

- At times, child protective services information is subject both to disclosure requirements under CAPTA and non-disclosure requirements under 45 C.F.R. 205.50.
- Where CAPTA requires disclosure, CAPTA prevails in the event of a conflict, since CAPTA most recently enacted.

Juvenile court proceedings

- Under First Amendment to U.S. Constitution, the public has been guaranteed access to most criminal proceedings; however, the public has not been given same constitutional guarantee for juvenile proceedings.
- In *Richmond Newspapers, Inc. v. Virginia* (1980), the Supreme Court held in that the right of the public and the press to attend criminal trials was protected by the First Amendment.

Juvenile proceedings: federal law

- CAPTA specifically gives states the flexibility to determine state policy on public access to court proceedings that determine child abuse and neglect cases, so long as the state, at a minimum, can ensure the safety and well-being of the child, parents, and families. § 106(b)(2).
- Title IV-B and E do not prevent states from opening proceedings.

What is Vermont doing?

Records sharing
Medical records sharing
Drug and alcohol records sharing
Public disclosure
Juvenile court proceedings

Records sharing: Vermont

Child Protection Registry records must be kept confidential except to the following:

- State's Attorney or AG.
- Owner or operator of a facility regulated by DCF for purpose of informing them that employment of a specific person could result in the loss of the facilities' license, registration, or certification.
- Employer if information is used to determine whether to hire an individual providing some type of care to children or vulnerable adults.
- Commissioners of Disabilities, Aging, and Independent Living, and of Mental Health for purposes related to the licensing, registration, oversight, or monitoring.
- Other states' adult protective services offices and child protection agencies, upon request.
- Person substantiated for child abuse and neglect who is the subject of the record.
- Commissioner of Corrections.
- Board of Medical Practice for the purpose of evaluating an applicant.

33 V.S.A. § 4919

Records sharing: Vermont, cont.

- Upon request, a redacted investigation file shall be disclosed to:
 - Child's parents or guardian
 - Person alleged to have abused/neglected the child
- Upon request, DCF records shall be disclosed to:
 - The court, parties to the juvenile proceedings, the child's GAL
 - Commissioner or person designated by Commissioner
 - Persons assigned by the Commissioner to conduct investigations
 - Law enforcement officers engaged in joint investigation with the department, assistant AG, or State's Attorney
 - Other state agencies conducting related inquiries
 - Probate division of Superior Court involved in guardianship proceedings
- Upon request, relevant (relevancy determinations made by DCF) DCF records may be disclosed to:
 - Service providers working with the child subject to the report
 - Other governmental entities for purposes of child protection

DCF confidentiality policies

Generally, DCF policy regarding release of records aligns with 33 V.S.A. § 4921.

- Policy 56 states that upon request, records shall be disclosed to the court, parties to the proceeding, the GAL, commissioner or designee, investigator, law enforcement, AAG, State's Attorney, other state agencies, and probate courts.
- Department shall disclose absent good cause shown by the department. Good cause may exist where the records are sought in connection with a legal proceeding. Policy states that in such situations, legal discovery process should be utilized for disclosure.

Law v. policy v. practice

Law	Policy	Practice
<p>Upon request, DCF records shall be disclosed to: parties to the proceeding, the GAL, commissioner or designee, investigator, law enforcement, AAG, State's Attorney, other state agencies, and the Probate Courts.</p> <p>Upon request, relevant records may be disclosed to service providers and other governmental entities for purposes of child protection.</p>	<p>Upon request, records shall be disclosed to the court, parties to the proceeding, the GAL, the commissioner or designee, investigator, law enforcement, AAG, State's Attorney, other state agencies, and Probate Courts <u>absent good cause shown. Good cause may exist where records are sought in connection with a legal proceeding.</u></p>	<p>Variation.</p> <p>Testimony: not all parties statutorily authorized to receive the full files do, even when requested.</p>

Medical records sharing: Vermont

Vermont has a statutory patient privilege and an evidentiary privilege. The patient's privilege statute protects from disclosure information acquired by professionals in attending a patient in a professional capacity. 16 V.S.A. § 1612.

V.R.E. 503 protects confidential communications made for the purpose of treatment or diagnosis. Exception: if there is risk of harm to a child, and the underlying proceeding is a divorce or juvenile proceeding, no privilege exists where lack of disclosure of communication would pose risk of harm to child or if in a TPR proceeding the communication would be relevant. V.R.E. 503(d)(7)

Drug and alcohol records sharing: Vermont

- Sometimes, the parties agree to full disclosure of drug and alcohol assessments and urine analysis, and the client sign limited releases as to their sessions with treatment providers to verify that the client is attending therapy.
- Records relating to drug or alcohol treatment funded through federal programs are confidential. Disclosure of such records without patient consent may only be made in extremely limited circumstances. 42 C.F.R. § 2.64.

Public disclosure: Vermont

Public disclosure of findings or information about any case of child abuse or neglect that has resulted in the fatality or near fatality of a child is allowed unless the State's Attorney or Attorney General who is investigating or prosecuting any matter involving the fatality requests the Commissioner to withhold disclosure, in which case the Commissioner shall not disclose any information until completion of any criminal proceedings involving the fatality or the State's Attorney or Attorney General consents to disclosure, whichever occurs earlier.

33 V.S.A. § 306.

Juvenile court proceedings: Vermont

- Hearings under the juvenile judicial proceedings chapters shall be conducted by the Court without a jury and shall be confidential.
- The general public shall be excluded from hearings under the juvenile judicial proceedings chapters, and only the parties, their counsel, witnesses, persons accompanying a party for his or her assistance, and such other persons as the Court finds to have a proper interest in the case or in the work of the Court, including a foster parent or a representative of a residential program where the child resides, may be admitted by the Court. 33 V.S.A. § 5110.

What are other states doing?

Records sharing

Public disclosure

Employment screening

Juvenile court proceedings

Record sharing: what are other states doing?

- ~ 28 states allow records to be shared with placing agencies or treatment providers as needed to provide care for child.
- ~ 21 states allow the reporter to receive summary information about the outcome of the investigation.
- ~ 21 states allow prospective foster or adoptive parents to review information to help parents meet the needs of the child.
- ~ 28 states permit public agencies to access information related to their child protection duty.

Public disclosure: what are other states doing?

- ~ 33 states allow public disclosure when abuse/neglect has resulted in a fatality or near fatality.
- 2 states require public disclosure when a child in state custody has died.
- ~ 14 states allow disclosure for purposes of clarifying or correcting the record when information has already been made public.
- 6 states allow public disclosure when alleged perpetrator of any act of abuse/neglect has been arrested or criminally charged.

Employment screening: what are states doing?

- ~ 30 states allow or require a check of child abuse registry records for individuals applying to be child care, youth, or vulnerable adult care providers.
- 4 states allow parents to check the child abuse and neglect registry for child care providers.

Juvenile proceedings: what are other states doing?

- ~ 19 states presumptively open abuse and neglect proceedings to the general public.
- Of these, many states specifically retain judicial discretion to close proceedings.
- Judicial discretion to close is based on:
 - best interest of the child (7 states)
 - necessary to protect privacy of parents (1 state)
 - upon request of a party (2 states)
 - under exceptional circumstances (1 state)
- No state that has opened its juvenile court has since repealed its statute providing public access

State Example: CT

- In 2009, the CT legislature developed an advisory board charged with investigating the efficacy of opening juvenile courts in CT.
- Advisory board collected data in a year-long pilot project and completed a report.
- Recommendation: “Recognizing that there is some benefit to limited expanded access, the Board recommends amending the statute to permit the court to grant access to individuals or entities with an established legitimate interest in the proceedings.”



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