

## Child Protection Committee

### Confidentiality

#### Summary:

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. Federal law gives the states the flexibility to determine state policies with respect to open courts, so long as such policies ensure the safety and well-being of the child, parents and families. Vermont law requires that records of abuse and neglect remain confidential, except in certain limited circumstances. Vermont juvenile court proceedings are presumptively closed, though courts retain the discretion to open proceedings to those parties with a "proper interest in the case or work of the court."

#### Current 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)

#### Case Records Disclosure

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 child protective services agency, so recipients must only use the information for activities related to 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.

CAPTA provides federal funding to states in support of prevention, assessment, investigation, prosecution, and treatment activities and also provides grants to public agencies and nonprofit organizations for demonstration programs and projects. CAPTA prevents disclosure of child abuse cases when they do not involve a fatality or near fatality. However, the state may share confidential reports and records with:

1. Individuals who are the subject of a report. § 106(b)(2)(B)(viii)(I)
2. Grand jury or court when necessary to determine an issue. § 106(b)(2)(B)(viii)(V)

3. Other individuals who are authorized by statute to receive information pursuant to a legitimate state purpose. § 106(b)(2)(B)(viii)(VI).

CAPTA also provides that states must provide otherwise confidential information to:

1. Any federal, state, or local government entity that has a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect. § 103(b)(2)(B)(ix).
2. Child abuse citizen review panels. § 106(c)(5)(A).
3. The public, when a case of child abuse/neglect results in a child fatality or near fatality. Findings about the case must be publicly disclosed. § 103(b)(2)(B)(x).
4. Child fatality review panels. § 103(b)(2)(B)(x).

Records maintained under title IV-B are to be safeguarded against unauthorized disclosure. The regulation at 45 C.F.R. 205.50 states that the release or use of information concerning individuals applying for or receiving financial assistance is restricted to certain persons or agencies that require it for specified purposes. Such recipients of information are in turn subject to standards of confidentiality comparable to those of the agency administering the financial assistance programs. There may be instances where CPS information is subject both to disclosure requirements under CAPTA and to the confidentiality requirements under 45 C.F.R. 205.50. To the extent that the CAPTA provisions require disclosure (such as in § 106 (b)(2)(B)(ix)), the CAPTA disclosure provision would prevail in the event of a conflict since the CAPTA confidentiality provisions were most recently enacted.

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.

The Health Insurance Portability and Accountability Act 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. 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).

In Vermont, under 33 V.S.A. § 4919, Child Protection Registry records must be kept confidential except they may be disclosed to the following:

1. State's Attorney or AG.
2. 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.
3. Employer if such information is used to determine whether to hire an individual providing some type of care to children or vulnerable adults.

4. Commissioners of Disabilities, Aging, and Independent Living, and of Mental Health for purposes related to the licensing or registration of facilities regulated by those departments, or for purposes related to oversight and monitoring of persons served by or compensated with funds provided by those Departments.
5. To other states' adult protective services offices and child protection agencies, upon request.
6. Person substantiated for child abuse and neglect who is the subject of the record.
7. Commissioner of Corrections.
8. Board of Medical Practice for the purpose of evaluating an applicant.

Under 33 V.S.A. § 4921, upon request, a redacted investigation file shall be disclosed to:

1. Child's parents or guardian provided that person is not the subject of the investigation.
2. Person alleged to have abused/neglected the child.

Upon request, Department records shall be disclosed to:

1. The court, parties to the juvenile proceedings, the child's GAL.
2. Commissioner or person designated by Commissioner.
3. Persons assigned by the Commissioner to conduct investigations.
4. Law enforcement officers engaged in joint investigation with the department, assistant AG, or State's Attorney.
5. Other state agencies conducting related inquiries.
6. Probate division of Superior Court involved in guardianship proceedings (copy of the record should be provided to any individual determined by the Court to have a strong interest in the welfare of the respondent).

Upon request, relevant (relevancy determinations made by DCF) DCF records may be disclosed to:

1. Service providers working with the child subject to the report
2. Other governmental entities for purposes of child protection.

Under 33 V.S.A. § 306, the Commissioner may publicly disclose the findings or information about any case of child abuse or neglect that has resulted in the fatality or near fatality of a child, 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.

### DCF Confidentiality Policies

Generally, DCF policy regarding release of records aligns with 33 V.S.A. § 4921. Apart from information on case determination, the policy appears to be silent on redacted investigation file information going to parents and perpetrator. Policy 56 states that upon request, records shall be disclosed to the court, parties to the proceeding, the GAL, Commissioner or designee, investigator, laws enforcement, AAG, State's Attorney, other State agencies, probate courts. The policy further states that the 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.

DCF policy states that mandated reporters who make requests for notification of case determination shall be notified and documented in case record. Policy is silent on case determination notification for non-mandated reporters.

### Juvenile Court Proceedings

CAPTA does not prohibit open court proceedings, as long as it does not jeopardize the safety and well-being of the child and family. The 2003 amendments to CAPTA specifically give states the flexibility to determine state policies with respect to open courts, so long as such policies ensure the safety and well-being of the child, parents and families (last paragraph of section 106(b)(2)).

Neither Title IV-B or E prevents states from open proceedings. Section 471(c) of the Social Security Act allows Title IV-E agencies to set their own policies relating to public access to court proceedings to determine child abuse and neglect or other court hearings held pursuant to Titles IV-B or IV-E. Such policies must, at a minimum, ensure the safety and well-being of the child, his or her parents, and family.

In Vermont, hearings under the juvenile judicial proceedings chapters shall be conducted by the Court without a jury and shall be confidential. 33 V.S.A. § 5110 states that:

“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. There shall be no publicity given by any person to any proceedings under the authority of the juvenile judicial proceedings chapters except with the consent of the child, the child's guardian ad litem, and the child's parent, guardian, or custodian. A person who violates this provision may be subject to contempt proceedings pursuant to Rule 16 of the Vermont Rules for Family Proceedings.”

### Other States' Confidentiality Rules

Most states allow some information disclosure in cases in which abuse or neglect of the child has resulted in a fatality or near fatality. Fourteen states allow disclosure of information for the purpose of clarifying or correcting the record when information has already been made public through another source, such as disclosure by the subject of the report, a law enforcement agency, or the court. Six states allow public disclosure when a suspected perpetrator of any act of abuse or neglect has been arrested or criminally charged. Nineteen states, including FL, MI, MN, NC, NY, NJ, CO, OR, and WA presumptively open abuse and neglect proceedings to the general public. Many of these states retain judicial discretion to close proceedings. Other states, including Connecticut, keep their juvenile court proceedings presumptively closed, but leave courts broad discretion to open the proceeding to any party with a legitimate interest.

### Issues and Potential Committee Options:

The Committee heard testimony that despite Vermont statutes requiring disclosure of records to the parties in a CHINS proceeding, not all parties receive the records when requested from DCF. The Committee could broaden its confidentiality requirements to allow disclosure of confidential records in certain additional circumstances.

Additionally, the Committee heard testimony that because juvenile proceedings are presumptively closed, some parties are not allowed to testify or be present for proceedings in which they have a legitimate interest. Vermont could change its juvenile court proceedings statute to allow judges broader discretion to open proceedings or allow certain parties access to the proceedings.