AOC Briefing

August 2010

SHARING INFORMATION ABOUT CHILDREN IN FOSTER CARE

Health Care Information

A summary of issues faced by child welfare agencies, juvenile courts, and health care providers

ADMINISTRATIVE OFFICE OF THE COURTS

CENTER FOR FAMILIES, CHILDREN & THE COURTS

AOC Briefing

Judicial Council of California
Administrative Office of the Courts
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 AOC Center for Families, Children & the Courts (CFCC)

All AOC Briefings are available on the California Courts website at *www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm*.

This document is based on laws in effect at the time of publication (August 2010). Federal and state laws and regulations can change at any time.


Printed on recycled and recyclable paper

Judicial Council of California
Administrative Office of the Courts

Chief Justice Ronald M. George
Chair of the Judicial Council

William C. Vickrey
Administrative Director of the Courts

Ronald G. Overholt
Chief Deputy Director

Blue Ribbon Commission on Children in Foster Care

Justice Carlos R. Moreno, Chair
Associate Justice, Supreme Court of California

Center for Families, Children & the Courts

Diane Nunn
Director

Charlene Depner
Assistant Director

Don Will
Manager

Christopher Wu
Supervising Attorney

Sidney Hollar
Attorney

Lee Morhar
Consultant

Carolynn Bernabe
Senior Administrative Coordinator

Alma Balmes
Administrative Coordinator

Rebecca Gudeman
Consultant, National Center for Youth Law

INTRODUCTION

Children in foster care often have their health care interrupted or delayed because their health care information is not available to child welfare agencies or the juvenile courts. As a result, health care decisions made for children in foster care are frequently based on incomplete information.

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

This brief addresses disclosure of health information held by health providers. It does not address disclosure of health records held in court or child welfare agency files.

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

- Children continue to receive any health care that they need when they are removed from their homes.
- Children continue to take any necessary medications.
- Health care providers have access to children's health histories when determining appropriate treatment.
- Foster parents and other caregivers understand all the health needs of the children in their care.
- Child welfare agencies and juvenile courts can monitor the health and well-being outcomes of children under their jurisdiction.

State and federal law requires that child welfare agencies maintain health information in each child's case plan.

Sharing health information about children in foster care helps ensure that they get appropriate health care. When a child is removed from his or her home because of abuse or neglect, it is critical that social workers, caregivers, and judges have access to the child's medical records.

- Title IV-E of the Social Security Act requires that states 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), 675(1)(C).) State law also requires that a child's case plan include a summary of the child's health information. (Welf. & Inst. Code, § 16010(a).)
- State law requires the child welfare agency to include the case plan in the court report, which must be filed with the court at the initial hearing and considered at all review hearings. (Welf. & Inst. Code, § 16501.1(f)(14).)
- Federal law requires states to exchange information electronically through the state's automated child welfare and Medicaid systems to the extent it is feasible (45 C.F.R. § 1355.53(b)(2) (2009)) and encourages automated data exchange between child welfare and the courts. (45 C.F.R. § 1355.53(d) (2009).)

Health care providers may share health information with the child welfare agency and other health care providers for the purpose of coordinating health care services and medical treatment for children in foster care without violating federal and state confidentiality laws.

Federal Law

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides for the confidentiality and privacy of individual medical records.

- HIPAA protects the confidentiality 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).)
- The entities that must comply with HIPAA ("covered entities") include public and private health care providers. Covered entities may disclose most health information if required by law. (45 C.F.R. § 164.512(a) (2009).)
- Covered entities may disclose health care information pursuant to a signed authorization. (45 C.F.R. § 164.502(a)(1)(iv) (2009).) To be valid, the authorization must include certain required elements. (45 C.F.R. § 164.508(b) (2009).)
- Covered entities may disclose health care information for treatment purposes without a signed authorization. (45 C.F.R. § 164.502(a)(1)) (2009).)
- 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), without a signed authorization. HIPAA defers to state law in defining who is an appropriate representative for a minor. (45 C.F.R. § 164.502(g)(3) (2009).)
- Disclosures concerning health care are permitted for court proceedings when there is a subpoena or court order. (45 C.F.R. § 164.512(e) (2009).)
- HIPAA usually preempts any contrary state law; however, HIPAA defers to state law when state law is more protective of a patient's privacy. (45 C.F.R. § 160.203(b) (2009).)

California Law

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

- CMIA protects the privacy of "medical information." Medical information is defined as "individually identifiable information . . . in possession of or derived from a provider of health care . . . regarding a patient's medical history, mental or physical condition, or treatment." (Civ. Code, § 56.05(g).)

- A parent or a guardian of a minor generally has access to information on the minor patient's condition and care. (Civ. Code, § 56.10(b)(7); Health & Saf. 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 & Saf. Code, § 123115.)

- A health care provider must disclose medical information pursuant to a signed authorization. (Civ. Code, § 56.10(a).) The authorization must include the elements required under HIPAA as well as CMIA. (Civ. Code, § 56.11.)

- A health care provider may disclose health information to another health care provider for diagnosis and treatment purposes without a signed authorization. (Civ. Code, § 56.10(c)(1).)

- Without obtaining a signed authorization, a health care provider may disclose medical information to a county 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. (Civ. Code, §§ 56.10(c)(20), 56.103.)

  Exception: A health care provider may not disclose to a social worker or probation officer either psychotherapy notes or information related to treatment to which the minor consented to or could have consented on his or her own behalf under this exception. (Civ. Code, § 56.103(e)(2) & (h).)

- A minor's medical information that is disclosed to a social worker or probation officer under section 56.103 may not be further disclosed unless the disclosure is for the purpose of coordinating health care services and the disclosure is authorized by law. (Civ. Code, §§ 56.103(d), 56.13.)

- A health care provider must disclose health information if the disclosure is required by a court order or a valid subpoena. (Civ. Code, § 56.10(b)(1), (3).)

- Counsel for a dependent child has a right to access the child's medical records. (Welf. & Inst. Code, § 317(f).)

The child welfare agency may share certain health information with the court, but disclosure is limited by the child's doctor-patient and therapist-patient privilege.

- California law requires the child welfare agency to maintain a health summary for children in foster care and to include this summary in court reports. (Welf. & Inst. Code, §§ 16010(a), 16501.1(f)(14).)

- However, summary health information provided in court reports cannot include privileged communications unless the child or child's attorney waives the privilege. Communications between a patient and a doctor or therapist in a confidential setting are privileged and cannot be disclosed in court or in court reports unless the patient waives the privilege. (Evid. Code, §§ 990 et seq. and 1010 et seq.) In dependency cases, privilege may be waived by the child if he or she is 12 years old or older or by the child's attorney if the child is under 12 years old. Neither the court, nor a health care provider, nor a parent may waive privilege for a child. (Welf. & Inst. Code, § 317(f).)

- Thus, a social worker may have access to information for other purposes that the social worker cannot disclose in court reports because the information constitutes a privileged communication between the child and a doctor or therapist. The interplay between evidentiary privilege and the mandate of Welfare and Institutions Code section 16501.1(f)(14), that summary health information be provided in court reports, is not entirely clear.

Federal law encourages automated data exchanges of health care information between the Medicaid agency, the child welfare agency, and the courts.

- Federal law encourages states to develop child welfare automated systems that have the capability for automated data exchanges between the child welfare agency, the Medicaid agency, the courts, and other entities. (45 C.F.R. § 1355.53 (2009).)
- Child welfare is authorized to disclose information to the Medicaid (Medi-Cal) agency for purposes directly related to the administration of either program. (42 U.S.C. § 671(a)(8)(A).)
- Medi-Cal is authorized to disclose information to child welfare for purposes directly related to the administration of the Medi-Cal program. "Directly related" includes determining the amount of medical assistance and providing services for recipients. (42 U.S.C. § 1396(a)(7); 42 C.F.R. § 431.302 (2009).)

The recent adoption of the federal Fostering Connections Act gives California the opportunity to set forth a comprehensive plan for the sharing of medical information for children in foster care.

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. This information sharing plan may include the development and implementation of an electronic health record. The plan must include steps to ensure continuity of health care services, which may include the establishment of a medical home for every child in care. (42 U.S.C. § 622(b)(15)(A)(iii), (iv).)

This document is based on laws in effect at the time of publication (August 2010). Federal and state laws and regulations can change at any time.

CONCLUSION

The internal policies and procedures of both governmental agencies and health care providers frequently prevent the exchange of health information about children in foster care. This occurs at both the state and local levels. However, the legal framework to allow some exchange currently exists. While stakeholders need a clear understanding of the privacy protections in the law, the law does allow health care providers to share much health information regarding children in foster care with other health care providers and with the child welfare agency. The child welfare agency is required to include a summary of health information in reports filed with the juvenile court.

Legislation, regulations, or rules of court may be needed to clarify what health information may be provided to the court without a waiver of the doctor-patient or psychotherapist-patient privilege. Legislation or regulations may also be needed to clarify the extent to which Medi-Cal information may be provided to child welfare services.

Recent federal law requires California to develop a comprehensive plan for the sharing of medical information of children in foster care. The completion of this plan requires that any unnecessary legal impediments to appropriate information sharing be identified and removed through legislation, regulations, or rule of court as appropriate.

Thank you to the following state agencies and organizations for their contribution to this paper:

American Bar Association
California Department of Alcohol and Drug Programs
California Department of Health Care Services
California Department of Social Services
California Blue Ribbon Commission on Children in Foster Care
California Health and Human Services Agency
California Child Welfare Council
California County Counsel
East Bay Children's Law Offices
National Center for Youth Law

Special thanks to Chantal Sampogna, former staff attorney, Center for Families, Children & the Courts.

SHARING INFORMATION ABOUT CHILDREN IN FOSTER CARE

Four briefing papers addressing confidentiality and information sharing about children in foster care

- Health Care Information
- Mental Health Care Information
- Substance Abuse Treatment Information
- Education Information

JUDICIAL COUNCIL
OF CALIFORNIA
ADMINISTRATIVE OFFICE
OF THE COURTS

455 Golden Gate Avenue
San Francisco, California 94102-3688
www.courts.ca.gov