Privacy and Information Sharing in Child Welfare

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on Legal and Judicial Issues
ABA Center on Children and the Law

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Introduction and Definition of Topic

Topic: Information sharing and privacy in *child welfare* cases.

- Access to information by child welfare agencies.
- Disclosure of information by child welfare agencies.
- Privacy protections in child welfare cases.

4 Key Policy Goals

1. Protect the privacy and dignity of the individual.
   - Protect child and family from needless embarrassment and invasion of privacy.
2. Get information to protect the child.
   - Get information to evaluate what danger, if any, a parent or other adult poses to a child.
   - Get information to help determine the placement, set visitation, and provide other protections.

4 Key Policy Goals

3. Get information to provide services for family and child.
   - Get information to identify the child's special needs for care, treatment, and education.
   - Get information to determine what services parents and other household members need.
4. Share information to protect the child and provide services.
   - Provide information to others who will collect and share further information with the child welfare agency.
   - Provide information needed by others to provide services to child and family.

Key Legal Issues Affecting for Privacy in Child Welfare

- Access to information (threshold for incursions on privacy)
  - Issue 1 – for investigation
  - Issue 2 – after maltreatment has been legally established
- Redisclosure based on need to know
- Circle of confidentiality (restrictions on those who have received private information)

Conflicting Agency Agendas Regarding Privacy

- Other agencies feel that giving information to child protection agencies makes it harder for them to achieve *their* goals.
  - Substance abuse providers concerns:
    - Possibility of disclosure to agency limits clients' willingness to share information necessary to treatment
    - Risk of disclosure to agency may take away motivation to stay in treatment

Conflicting Agency Agendas

- Domestic violence providers concerns:
  - Disclosure to child welfare agency will disempower the victim by transferring control to child protection agency
  - Disclosure to child protection welfare agency compounds victimization from domestic violence – with the loss of child

Privileges, Confidentiality, and Professional Ethics

- ✓Privileges in Child Welfare – especially Medical and Mental Heath
- ✓Confidentiality Laws – and How they Apply to Child Welfare Cases
- ✓Professional Ethics Concerning Privacy

Privileges Distinguished from Confidentiality Laws and Professional Privacy Ethics

- Privileges in Health and Mental Health Cases
  - Appear in statutes and rules of evidence
  - Prevent disclosure in court only

Privileges Distinguished from Confidentiality Laws and Professional Privacy Ethics

- Professional Ethics on Privacy
  - Enforceable like lawyers' ethics
  - Can cover disclosure in and out of court
- Confidentiality Laws
  - Appear in statutes and regulations
  - Mostly deal with making information public
  - Sometimes also apply in court
  - Exceptions regarding court proceedings

When medical and mental health privileges apply:

- Communications to medical professional:
  - Generally applies only to communications for purposes of diagnosis or treatment.
- May not apply to physical observations or tests.

Exceptions to Privileges

- Key exceptions relevant to child welfare are as follows:
  - Some states have categorical exceptions for child welfare cases (of for any cases where child custody is at issue).
  - Other states have exceptions for refer to legal proceedings resulting from a report of child abuse or neglect.
- Some other exceptions – if privileges do otherwise apply to child welfare cases:
  - Disclosure in the presence of third parties.
  - Waiver of the privilege, including but not limited to signed consent.

Where to find privileges

- Rules of evidence
- Reporting acts – child welfare exceptions
- Juvenile court acts – child welfare or juvenile court exceptions
- Wrinkles – in caselaw

Privileges and Professional Ethics

- Some state codes of professional ethics bar disclosure of any information that would be covered by statutory privileges.

Financial liability

- There may be a risk of financial liability for violations of professional privacy ethics, privileges, *or* confidentiality.

Some Confidentiality Laws Important to Child Welfare Cases

- CAPTA
- Titles IV-B & IV-E of the Social Security Act
- Substance Abuse Treatment Information
- Criminal Records
- Educational Records – FERPA & IDEA
- Medical Records -- HIPAA

CAPTA
(Child Abuse Prevention and Treatment Act, 42 U.S.C. §5106a(b))

- Requires many types of employees and professionals to share information with agencies -- by *reporting* child abuse and neglect.
  - More specifically, CAPTA requires states to pass laws that impose such requirements, 42 U.S.C. §5106a(b)(2)

CAPTA

42 U.S.C. §5106a(b)(2)(viii)

CAPTA restricts access to "records" related to child abuse and neglect, but allows disclosure of information to:

- Persons reported for abuse or neglect (but not the identities of confidential informants);
- Child abuse and child fatality review panels;
- A grand jury or court that find they need the information

CAPTA

- Allows expansion of the list – but only through state legislation.

  42 U.S.C. §5106a(b)(2)(viii)(VI)

- Allow courts to be open to the public, but only if that doesn't harm the "safety and well being of children, families,and parents."

  42 U.S.C. §5106a(b)(2)(D) (paragraph following (D)

CAPTA

Requires:

- Disclosure to government agencies (and their agents) that need the information to protect children from abuse or neglect;

  42 USC §5106a(b)(2)(ix)

- Public disclosures concerning fatalities and near fatalities (an act, that, as certified by a physician, places the child in serious or critical condition).

  42 USC §§5106a(b)(2)(x); 5106a(b)(4)

AACWA and ASFA

- Additional rules:
  - While information generally is confidential, disclosure is permitted, e.g., for:
    - ✓Purposes related to the administration of Titles IV-B and IV-E
    - ✓"Any investigation, prosecution, or criminal or civil proceeding" related to the administration of Titles IV-B and IV-E or [certain other federal programs].

CAPTA, AACWA and ASFA
(Titles IV-B and IV-E)

- Children's Bureau Policy: The same confidentiality rules – both CAPTA and IV-E – may apply to the same cases.

- Confidentiality restrictions apply to all forms of information, written or verbal, 42 §671(a)(8).

Substance Abuse Treatment Records

- Law: 42 U.S.C. §290dd-2; 42 C.F.R. Part 2
- Regulations are complex and strict.
- Must have either consent or court order to have access to information.

Substance Abuse Treatment Records

- Special consent requirements in 42 C.F.R. §2.31:
  - Detailed written consent – content of information, form of information, specific sources of records, time period of consent
  - Therefore, unique forms required
  - Retroactive revocation of consent is permitted

Substance Abuse Treatment Records

- Strict grounds for court orders. 42 U.S.C. §290dd-2(b)(2)(C).
  - Good cause is required – balancing test.
  - Plus there are no other effective means to get the information
  - Plus, to obtain records of communications, an existing threat to life or bodily injury (including child abuse or neglect) or the records are needed for prosecution. 42 C.F.R. §2.63.

Substance Abuse Treatment Records

- Special procedures for court orders:
  - Special “unique” court procedures are detailed in 42 C.F.R. §§2.61, 2.64.
  - Therefore, need to develop separate set of forms and procedures specifically for substance abuse treatment information.

Need for criminal records

- Assure safe caretakers for children, such as foster and adoptive parents, natural parents, and others' living in the household
- Learn important information about parents that will affect the case plan
  - Past court ordered services and how parent did
  - Current involvement with criminal justice system including court ordered services
  - Past severe maltreatment of child or children (in some cases)

Mandatory Criminal Records Checks

- Mandatory criminal records checks, 42 U.S.C. §§ 671(a)(20), 5106a(b)(2)(A)(xxii).
  - For potential foster and adoptive parents—and now for other adult members of their households.
  - But records checks not required for biological parents or people in their households.
  - Must do FBI criminal records checks (*should* also do state checks)

Access to Criminal Records Databases

- Additional permissive access to criminal records databases:
  - Federal FBI database of "child abuse crimes" available to check persons and entities working with or caring for children.

    20 U.S.C. §§5119c(3), (8), (9), (10)
  - And full access to state criminal records databases is legal *if* permitted by state law.

    38 CFR §§20.21(b)(2); 20.21(c)(3)

Access to Criminal Records Databases

Federal database also available to child protection agency to get information on parents – if:

- Consent
- State statutory authorization
- Request made through Interstate Compact

  42 U.S.C. §14616

Some other important confidentiality laws

- Family Violence Services and Prevention Act, 42 U.S.C. §§ l0401-10402
- Violence Against Women Act, 42 U.S.C. §13942

Child Welfare Agencies' Needs for School Records

- Records provide valuable information about child's past
- Access to records helps determine if child's educational needs were being met while in parent's care
- Access allows agency to ensures that current placement and services are appropriate

Child welfare workers need to be able to communicate with:

- Teachers
- Principals
- School counselors
- School psychologists
- School nurses
- Etc.

Family Education Rights and Privacy Act (FERPA)

- 20 U.S.C. §1233g; 34 C.F.R. Part 99

- Purposes:
  - to provide access to parents and students regarding the students' education records
  - To protect privacy interests of parents and students regarding the records being shared with third parties without parental consent

FERPA Requirements

- **Parent's** have right to:
  - Inspect and review child's records
  - A hearing to challenge content record
  - Keep records confidential unless consent to release
  - Special requirements concerning consent forms -- records requested, reasons for release, and to whom released. 20 U.S.C. §1232g(b)(2)

FERPA and Foster Care

- Defines parent as -- “a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” 34 CFR §99.3.
- For children in foster care:
  - First way for child welfare to access education records is to get explicit consent from the parent
  - Second option is for child welfare agency representative or foster parent to be viewed as the parent, per the above definition.
- Rights of parent under FERPA transfer to student at age 18.

FERPA exceptions to needing parental consent

Some key exceptions include:

- Court order requiring release.
- Emergencies: to protect the health or safety of the student or other persons.
- Other school officials, including teachers with a legitimate education interest in the student.
- Officials of other schools or school systems in which the student is seeking to enroll.

Child welfare agency' need for information about special education

- Information from schools about educational disabilities and special education services
- Information provided by schools to:
  - Child welfare agency,
  - Foster parents,
  - Agency's service providers
  - Advocates, and
  - Court
- Information to the schools about relevant circumstances of child

IDEA

Individuals with Disabilities Education Act (IDEA)

- Cross references to FERPA regulations re release of records.

  20 U.S.C. §§1412, 1417(c).

- But defines "parent" to include:
  - A natural, adoptive, or foster parent
  - A guardian (but not the agency if the child is a ward of the state)
  - An individual acting in place of natural or adoptive parent (including a relative) with whom child lives, or individual legally responsible for child's welfare
  - An individual assigned as "surrogate parent" under IDEA

  20 U.S.C. §1401(23)

IDEA regulations' definition of parent:

- A foster parent can be a "parent," unless State law, regulations or contractual obligations prohibit it.
- A "surrogate parent" who has been appointed under certain sections of the Act can be a "parent".
- When more than one party is a "parent," the natural or adoptive parent(s) is presumed to be the only "parent" unless he or she has lost legal authority to decide educational matters for the child, OR a surrogate has been appointed, OR there has been judicial decree or order specifying someone else to be the parent.
- If a judicial decree or order specifies that an individual(s) is to act as the ''parent'' of a child (to make educational decisions for a child), that individual(s) will be the ''parent(s)''

HIPAA (Health Insurance Portability and Accountability Act of 1996) regulations:

- Are child welfare agencies governed by HIPAA regulations?
  - Are they “covered entities”?
  - Are they “business associates”?
- Assuming child welfare agencies are governed by HIPAA, what are the implications?

ARE CHILD WELFARE AGENCIES COVERED ENTITIES?

- Health Plans
- Health Care Clearinghouses
- Health Care Providers that electronically transmit “protected health information” in connection with certain transactions

PROTECTED HEALTH INFORMATION (PHI)

- Protected health information is all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral.

INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION

"Individually identifiable health information includes:

1. The individual's past, present or future physical or mental health or condition;
2. The provision of health care to the individual; **OR**
3. The past, present, or future payment for the provision of health care to the individual.

   AND that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual.

If a child welfare agency *is* a covered entity, then what?

Covered entities must comply with the “privacy rule,” which:

- Governs “protected health information”.
- Permits certain “uses and disclosures”.
- Requires “authorization” for certain “uses and disclosures”
- Specifies that covered entities may use or disclose only “minimum necessary” health information.
- Allows certain exceptions to “minimum necessary” rule.
- Provides administrative requirements for covered entities.

PERMITTED USES AND DISCLOSURES

- To the Individual
- Treatment, Payment, and Health Care Operations
- Public Interest and Benefit Activities

PUBLIC INTEREST AND BENEFIT ACTIVITIES

- Required by Law
- Public Health Activities
- Victims of abuse, neglect, or domestic violence
- Judicial and Administrative Proceedings
- Serious Threat to Health or Safety

AUTHORIZATION

- A covered entity must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations.
- An authorization must be written in plain language and contain specific information.

MINIMUM NECESSARY

- A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.

“MINIMUM NECESSARY” NOT REQUIRED IF:

- Disclosure is to a health care provider for treatment.
- Disclosure to an individual or the individual’s personal representative.
- Disclosure is to HHS to investigate complaint or review compliance or is for enforcement.
- Use or disclosure is required by law.

Special administrative burdens for covered entities.

Covered entities must, *e.g.*:

- Create a handout ("notice") that provides a detailed explanation of privacy policies and procedures.
- Train workforce on their privacy policies and procedures.

More burdens:

Covered entities must also:

- Ensure security of its protected health information.
- Meet certain data requirements in the preservation of protected health information.
- Procedures to take complaints.
- Adopt special safeguards for their data.

BUSINESS ASSOCIATE

- A person or organization, other than a member of a covered entity's workforce (employee), that performs certain functions or activities on behalf of, or provides certain services to, a covered entity that involves the use or disclosure of individually identifiable health information.

Is a child welfare agency a business associate?

- Arguably yes, if they are disclosing or receiving protected health information to or from a “covered entity.”

If a child welfare agency *is* a business associate, then what?

- The child welfare agency must enter into a contract with every covered entity that provides protected health information.
  - The contract must ensure that the child welfare agency will itself apply the privacy rule regarding information exchanged with the covered entity.
  - This includes the administrative requirements that apply to covered entities.

PERSONAL REPRESENTATIVE

- A person legally authorized to make health care decisions on an individual's behalf or to act for a deceased individual or the estate.
- Except if the covered entity has a reasonable belief that the personal representative may be abusing or neglecting the individual, or that treating the person as the personal representative could otherwise endanger the individual.

WHAT WE KNOW

- HIPAA does not inhibit reporting of child abuse and neglect.
- HIPAA supports disclosures of health information for public health prevention, surveillance, investigation, and intervention activities.
- HIPAA provides protections for child victim health information, but disclosures can still be made with victim consent or where necessary to prevent serious harm to them or other potential child victims.
- HIPAA gives courts, law enforcement agencies, and those determining the cause of child deaths the ability to access relevant health information.

WHAT WE DON'T KNOW

- Some apparent ambiguities and conflicts within HIPAA's privacy exception rules that will require clarification.
- More questions are raised than answered about how these exceptions will be applied in practice.

OFFICE FOR CIVIL RIGHTS (OCR)

- Within the Department of Health and Human Services, the Office for Civil Rights has responsibility for implementing and enforcing the Privacy Rule.
- www.hhs.gov/ocr/hipaa

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