

## **PRIVACY AND INFORMATION SHARING IN CHILD ABUSE AND NEGLECT CASES<sup>1</sup>**

### I. DEFINING THE ISSUE FOR DISCUSSION

This paper is about federal law governing parents' and children's right to privacy. We will look at legal barriers to child protection agencies obtaining and sharing information in child abuse and neglect cases. We will also look at legal barriers to *obtaining* information for dependency court proceedings.

### II. POLICY AND PRACTICE ISSUES CONCERNING INFORMATION SHARING

#### A. Needs for Quick and Complete Information

Agencies, courts, and attorneys need quick and complete information so they can do their jobs. Let's consider some of the reasons:

1. Agencies need quick, complete information when investigating child abuse and neglect.

That includes being able to talk to witnesses and professionals. That includes getting records from professionals, agencies, and law enforcement to find out whether the child is endangered.

2. Attorneys need complete information to help the court *decide* whether a child is endangered and must be placed.
3. Agencies, attorneys, and parties need complete information to develop good case plans for families.
4. Agencies, attorneys, and courts parties need *quick* access to full background information about parents and children to decide whether to provide reunification services.

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<sup>1</sup> The opinions in this paper are those only of the author and do not reflect official policies of the American Bar Association. ABA policies are established only by the ABA House of Delegates and Board of Governors.

When they lack treatment history, child protection agencies sometimes waste great amounts of money and staff time providing services. Here are two examples:

An abusive parent has been receiving mental health treatment for years and has repeatedly been in and out of mental health facilities. The parent is psychotic and the prognosis is poor. However, the child protection agency doesn't get access to the parent's full mental health records and develops a plan to provide therapy for the parent so the child can be returned home. If the agency *had* obtained a complete set of mental health records, perhaps it could have obtained judicial permission not to provide family reunification services. It might have sought the early termination of parental rights or permanent guardianship.

A second example:

A parent has been involved in drug related criminal activities for years. Several times, as a condition of probation or parole, the parent has been ordered into drug treatment. Each time, the parent failed to successfully complete the treatment. The child protection agency, not knowing about the history of criminal involvement or the court ordered drug treatment, develops a case plan calling for additional similar drug treatment. Perhaps if the agency *had* had the full criminal and treatment records, it could have moved more quickly for a new permanent home for the child. Or possibly it might have identified a different treatment approach with a greater chance of success.

In these examples -- both of which I believe are *common* -- there are two points:

One: We need to evaluate barriers to interagency information sharing.

Two: We also need to establish *appropriate procedures* to make sure the parties really get vital information from all agencies in child abuse and neglect cases.

#### B. Ensuring Quick and Complete Access

So, how can we ensure that our child protection agency gets full and complete treatment records and criminal justice records early in each case?

1. We need to provide for early compliance with any federal confidentiality requirements.
2. We need to change state law to eliminate inappropriate confidentiality requirements.

I recommend omnibus state confidentiality legislation that comprehensively eliminates state confidentiality barriers blocking child welfare agency access to information.

3. We need to set up good *interagency communications and information sharing protocols*.
4. The child protection agency needs standard procedures and forms that *require* caseworkers to get very complete records at the beginning of each case and to share them with the parties.
5. The child protection agency needs good legal help when parents or other agencies do *not* agree to provide information.

There should be a *routine and swift process* for agency attorneys to go to court to get information. At the earliest court hearings, there *routinely* should be motions and orders concerning relevant records concerning the child and family – educational records, medical records, criminal records, mental health records, and – as I will discuss – substance abuse treatment records. This should be built into routine form motions and court orders.

### C. Dealing With Conflicting Agendas in Information Sharing

Let's turn to a critical but largely not discussed policy issue: Different types of agencies often have conflicting goals concerning information sharing.

What do I mean? Sometimes other agencies feel that giving information to child protection agencies makes it harder for them to achieve *their* goals.

An important example involves substance abuse treatment records. The goal of substance abuse treatment programs is to help clients, including parents, to overcome their addiction. Success to the substance abuse treatment counselor is to get clients to stay in treatment and off drugs or alcohol.

Put yourself in the place of the substance abuse treatment counselor. What is a key motivation for parents with children in foster care to stay in substance abuse treatment? To get their children back. Termination of the parent's rights can remove that motivation. So the treatment program may want to deny or fudge information that might support the termination of parental rights. Add to that the fact that the counselor has a relationship with the parent and may never have even met the children.

It is often most comfortable to side with one's clients and focus only one's own narrow institutional goal of ending addiction. It is also easy right now in the U.S. to demonize child protection agencies.

Of course, this attitude can be a problem with *all* types of treatment agencies. It can be a problem with mental health providers, parent educators, and persons dealing with developmentally disabled parents. All may resist sharing information or present information about parents in an overly positive light – in order to reinforce their own work with the parent.

My larger point is this. When it comes to interagency confidentiality issues for abused and neglected children, we need to help other agencies see beyond their own institutional goals and agendas. We need to try to get them to be concerned with the *overall* interests of these children and of society in general.

We can help broaden the focus by convening interagency meetings and starting projects to focus on these interagency information-sharing issues. We can broaden the focus by bringing the issues to the top level of state and local government – to the cabinet level in states.

#### D. Child Welfare Agencies' Need to *Share* Information

Here is another policy issue. From the perspective of the child protection agency, what would it *want* to be able to share and *with whom*?

1. The child protection agency wants to be able to share information that *will allow it to collect information* -- like giving enough information to the police to enable them to check their records.
2. It wants to be able to share enough information to arrange for the *best diagnosis and treatment*, for example by giving background information to its mental health evaluator.
3. It wants to be able to share information to help other *agencies take steps* to protect children or society -- such as law enforcement.

Here are two basic principles regarding information sharing: the need to know and protection against redisclosure. First, sensitive information should be shared on a need-to-know basis only, but with everyone who has a need to know.

Second, those to whom information is disclosed should be barred from public redisclosure. To put it another way, they should fall within a circle of confidentiality. Incidentally, there is a federal policy interpretation question, ACF PIQ 97-03, Question #2. The PIQ makes it clear that limits on redisclosure is required under the federal Child Abuse Prevention and Treatment Act (CAPTA).

### III. KEY FEDERAL LAWS AND REGULATIONS THAT GOVERN INFORMATION SHARING BY CHILD PROTECTION AGENCIES

The following is an overview of some of the relevant federal law governing confidentiality.

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

The 1996 Amendments in the federal Child Abuse Prevention and Treatment Act (CAPTA) changed the law concerning sharing of treatment records. For the text of 42 U.S.C. §§5106a(b)(2)(a)(v), see page 15 of this paper.

States are supposed to maintain confidentiality to protect the rights of children and their parents or guardians. What about verbally sharing information? There are federal policy statements interpreting the law, but not yet federal regulations. A federal “Policy Interpretation

Question,” ACYF-CB-PIQ 98-01, says that verbally revealing information *from* records and reports violates the law.

What if the worker knows some very private information without looking at records. Can the caseworker reveal the information? What if what the worker knows is the result of reading records before? What if what the worker knows came from leads, based on information in the records? Pending further federal clarification I would say revealing any private information is risky.

CAPTA says that confidential records and reports "shall only be made available to" a list set forth in CAPTA. As interpreted by the federal government, these words mean that agencies may disclose to those on the list, but at the option of the child protection agency. According to the federal government, the state is free to *choose* when to reveal information to those on the list, but can't reveal information to anyone else. This is clearly stated in another federal policy statement, Question #1, in ACYF-NCCAN-PIQ 97-03.

What if a state wants to *require* the agency to disclose certain information to certain individuals? The legislature *can* do that by enacting a law.

Here is an example: What if law enforcement wants routinely to receive information to prosecute child abuse cases? Could the state pass a law *requiring* the child protection agency to provide information about child abuse cases to law enforcement agency? Yes. Or the legislature might specify that child protection agencies must disclose the information to law enforcement *under particular circumstances*.

Suppose that the legislature prefers to allow the child protection agency to have full discretion whether to share information with law enforcement. Must it pass legislation to that effect? The answer is no, *if* law enforcement is already included in the statutory list. appearing in 42 U.S.C. § 5106a(b)(2)(a)(v), on page 15 of this paper. That list includes persons accused of abuse, government agencies and their agents, citizen review and child fatality review panels, grand juries and courts. Since law enforcement is a government agency, no legislative action to give discretion to the child protection agency to share the information.

But what if you need to release information to some organization or class of individuals *not* on this CAPTA list? The answer is that it is only possible if your state legislature has passed a law expanding the list. The child protection agency needs this legal authority, for example, to be able to release information to private agencies and professionals providing services but not under contract to the agency.

There is a particular provision when it comes to *parents* getting records. Remember, I said that when you look at this list of persons to whom the state "shall only" disclose, the state has discretion. The state can choose whether or when to require disclosure. But the special twist is that parents have the right to appeal official findings of abuse or neglect.

See page 16 of this paper, near the bottom of the page. 42 U.S.C. § 5106a(b)(2)(A)(xi)(II) requires that if parents are to have the right to appeal, it follows that they must be informed of the findings. Furthermore, in order to effectively appeal, they need to know the results of the investigation and the evidence upon which it was based. So when it comes to officially substantiated cases (where the agency itself concluded that it is likely that the child was abused or neglected), there must be disclosure to parents -- except of course for the identity of a confidential informant.

What if the report is *not* substantiated? Must the agency reveal the information? I would say that the general rule applies. That is, the state legislature has the *choice* whether to make disclosure by the child protection agency mandatory or discretionary.

Now assuming that states have that choice to decide, for basic fairness, I would recommend that states choose to require the agency to make the records available to parents *after* the investigation is over. I would require this even in non-substantiated cases. Of course, names of confidential reporters should *not* be shared.

So child protection agencies can disclose records to groups not on the federal list, but only if state laws are passed to allow it. Here is an example:

A public agency convinces a private charitable mental health agency to work with an abusive parent without charging the agency. The mental health agency needs to know about the history of abuse, that the children are in foster care, etc.  
Can the agency tell them about it?

To answer this question, look at the CAPTA list on page 15 of this paper. The private agency isn't on the list. It's not a government entity under Roman Numeral II. It's not a citizen review panel, under III. It's not a child fatality review panel, under IV. It's not a court, under V. It's not on the list.

In another federal policy statement, ACYF-NCCAN-PIQ 97-01, the answer to Question #9 said that agencies are free to disclose information to entities with whom they contract, referred to as "agents." But in our hypothetical, the private mental health provider is not a contractor of the public agency. So for the child protection agency to share the information with that particular private mental health provider, the state legislature would have to have enacted an authorizing statute.

What about public disclosure regarding child fatalities and "near fatalities?" Agencies must disclose information to the public about fatalities and near fatalities. Must the agency share records with the public in *all* fatalities and near fatalities? Federal policy, PIQ 97-01, questions 10 and 11, make it clear that disclosure is *required*.

Here is another question: The law says that there is to be release of the "findings or information" about a case involving a child fatality or near fatality. Can the agency prepare findings and release only its findings without background information? The answer is that both findings and general information must be released.

Must the files simply be opened up? Criminal investigations need not be compromised. There may be other reasons where a state might choose not to reveal particular information -- especially whether privacy concerns of survivors can be taken into account in deciding what details to release.

Now let's look at another provision of CAPTA confidentiality requirements: This is (viii) about expungement of central registry information available to the public or used for employment or background checks. See the excerpts from CAPTA appearing on page 16 of this paper. If the report is unsubstantiated or false, it needs to be expunged from the record.

The existence of the report and investigation *may*, however, be kept in casework files. This is clear from the answer to another federal policy interpretation question, PIQ 97-01, question 5.

But what if your agency receives a report and wants to use the computer to check for prior unsubstantiated reports. Will that no longer be possible? Yes, states can maintain a computerized and accessible record of unsubstantiated reports. BUT only if their computerized records cannot be accessed for the general public, for purposes of employment, or for background checks (e.g., for licensing). I believe that this clearly follows from the answer to PIQ 97-01, question 5.

- B. Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 671(a)(8), 675(1), 675(5)(D), 45 CFR 1355.21(a), 1356.20(a), 1355.30, 205.10

You might be wondering what the Adoption Assistance and Child Welfare Act (AACWA) – the other major federal child welfare law -- says about confidentiality. You can find the relevant language from AACWA on page 17 of this paper. Under AACWA, any state requesting federal funds must demonstrate that it restricts the use of or disclosure of information to purposes directly connected with:

- (A) the administration of its state plan . . . [or]
- (B) in regard to any investigation, prosecution, or criminal or civil proceeding . . .

This is very flexible language. "Purposes of the plan" include accomplishing all virtually all of the legitimate purposes of the child protection agency. This includes, for example, sharing information to:

- meet children's needs for services,
- preventing needless foster care placement,
- safely reunifying families after placement,
- etc., etc.

By the way, AACWA talks about information, not records, so it is clear that you cannot verbally share confidential information. You can't share *any* private or confidential information except when needed to accomplish the effective administration of the state plan.

There are federal regulations governing confidentiality under the Adoption Assistance and Child Welfare Act. Frankly, they mostly repeat the federal statutory language. As you can see, they cross reference to confidentiality regulations under the former AFDC program. The regulations make it clear that information can be shared when needed for an investigation or court proceeding. The federal regulations appear on pages 18-20 of this paper.

There are other noteworthy details. For example, the person is to be informed when information is released -- including to another agency. Look at 45 CFR § 205.50(a)(2)(iii). For example, the court is to be notified of laws and regulations governing the re-release of the information. See 45 CFR § 205.50(a)(2)(iv).

There is *another* requirement of the Adoption Assistance and Child Welfare Act that you should know about. Available medical and educational information about the child and that

medical and educational information *must* be shared with foster parents and child caring facilities. Relevant statutory language from 42 U.S.C. §§ 675(1), (5)(D) appears on page 21 of this paper. Agencies are supposed to obtain and update specific types of medical and educational information. Plus they are to provide it to foster parents or foster care facilities.

A final point about CAPTA and the AACWA. Agencies must obey both CAPTA and AACWA confidentiality requirements. If the laws seem to conflict, here is how you are supposed to resolve the conflict. If CAPTA *requires* disclosure, as in the case of fatalities or near fatalities, it prevails. This appears in the answer to question #3 in of the federal policy interpretation question ACYF-NCCAN-PIQ 97-03. If CAPTA gives the state discretion and AACWA requires confidentiality, then the matter must be confidential.

### C. Alcohol and Drug Abuse Programs,

What about alcohol and drug treatment programs? I can only offer a few words about this law and its regulations. Congress developed extremely strict privacy requirements concerning case information gathered by drug and alcohol programs that receive federal benefits. The law requires that records of the diagnosis, prognosis, or treatment can be disclosed only under specified circumstances.

The relevant exceptions are:

- Written consent requirements, and
- A court order based upon "good cause."

The statute regarding consent is fairly general. See 42 U.S.C. §290dd-2(b)(1) on page 22-23 of this paper.

As I said, the federal regulations are very complex and strict. The relevant regulations appear on pages 24-49 of this paper.

Turning to the topic of consent to access to substance abuse treatment records, federal *regulations* are very strict. In a nutshell, by specifying exactly what the consent must say, the regulations require consent forms that are specifically designed for drug records. Other consent forms won't work – for example, if they specify “all types of records” or even if they specify “records concerning diagnosis and treatment concerning alcohol and drugs. Consent forms literally have to be designed around the federal regulations.

The consent form should specify *what information* is being released. For example, the consent form should specify the *type of information* to be released, such as records, confidential communications, or charts. For example, the consent form should indicate the *substance* of the information to be released, such as information about program attendance and test results.

The consent form should specify the *period of time* covered by the release. For example, the form might say that records are being released specifically for the last year of treatment. The consent should specify how long the consent will remain valid, such as the consent will remain valid for 18 months. All of this is set forth in 42 CFR §2.31.

Consent is not required, however, if there is a court order. See 42 U.S.C. §§290dd-2(b)(2); §290dd-2(c)) on page 22-23 of this paper. A court order based on good cause requires a showing that the public interest and need for disclosure outweighs any damage to the physician patient relationship and the treatment services. 42 U.S.C. §290dd-2(b)(2)(C).

A statutory example of good cause is the need to avert a substantial risk of death or serious bodily harm. What you need to know is this:

- It isn't always easy to get these court orders.
- A special and unique court process is required.

Federal regulations interpreting these requirements add further requirements. There must also be a showing that there is *no other effective means* available to get the information. If you want *confidential communications* to a service program, the regulations require still another showing. Disclosure is necessary to protect against an "existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect...." OR "the disclosure is necessary in connection with investigation or prosecution of a serious crime, such as . . . child abuse and neglect[.]" See 42 CFR §§ 2.61, 2.63, 2.64.

Perhaps you can get a court order in all cases of suspected child abuse and neglect -- but this is not clear in the when there is no criminal investigation *or* threat of death or serious bodily injury. By the way, the regulations set out specific procedures to get the court order, including notice to the parent and notice to the treatment provider and giving them an opportunity to file a written response before the order is issued.

How can a state effectively deal with this law and regulations? Enact a law or adopt a court rule to build into your court process that, unless the parent consents to disclosure of drug or alcohol treatment records, this issue will *automatically* come up at an early court hearing. Put this issue into your legal form motions and orders, so it more or less automatically comes up. Obviously, meet many times with your state and local substance abuse treatment providers.

C. Education -- "Family Educational Rights and Privacy Act" (FERPA), 20 U.S.C. §1232g; 34 CFR Part 99; "Individuals with Disabilities Education Act" (IDEA), 20 U.S.C. §§1412, 1417(c); 34 C.F.R. 300.560 et seq. and 303.460

As for educational records, requirements are also rather complicated. Under the Family Education Rights and Privacy Act (FERPA), parents must have access to their children's educational records. 20 U.S.C. §1232g(a)(1)(A)). See page 50-52 of this paper. But to others, parental consent is required. 20 U.S.C. §1232g(b)(1).

But, in a child abuse case, doesn't the agency legally become the child's "parent" who gets access to educational records? The bad news is that the statute doesn't define the term "parent." Rather, the statute says that a parent who claims the child as a dependent has access -- but that seems to be in *addition* to anyone else who is considered to be a parent. The good news is that the *regulations* do define "parent." The bad news is that the regulations' definition of parent doesn't clearly answer our question. Therefore, the child protection agency or a foster parent may or may not qualify as a "parent" entitled to the records.

The regulations define “parent” as “A natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” See 34 CFR § 99.3, appearing on page 53 of this paper. What if you lose on the argument that the agency is now the parent? There are exceptions that might be *argued* to apply to child protection agencies in at least some instances. One exception is for juvenile justice cases. 20 U.S.C. § 1232G(b)(1)(E)). This provides little help.

Another exception concerns an emergency involving a student’s health or safety. 20 U.S.C. §1232g(b)(1)(I)). This is helpful in emergency removal situations, of course, but it is unclear whether it applies otherwise. Another exception involves a subpoena in a “law enforcement” case. 20 U.S.C. §1232g(b)(1)(J)(ii)). Does this include a dependency case?

I think that if you argue both the definition of parent and each of several exceptions, you probably will win on something and be entitled to educational records under FERPA.

What about *consent* to educational records? As with substance abuse records, there are special requirements. The point is that you have to design your consent forms around these requirements. The consent form must specify the records requested *and* indicate the reasons for the consent. 20 U.S.C. §1232g(b)(2)(A).

There is another education related confidentiality law, the Individuals with Disabilities Education Act (IDEA). That’s the federal law that requires Individual Education Plans for handicapped students and other rights. The Act cross references to the confidentiality requirements of FERPA. The IDEA confidentiality regulations cross reference to FERPA as well, but also include more details.

For our purposes, one key difference between FERPA and IDEA regulations concerns how the term “parent” is defined. It is a different, more limited definition compared to the FERPA regulations.

We can still come up with some good – but not surefire – arguments to get around it. Under IDEA, Besides the parent or a legal guardian, only a “surrogate parent” may consent. What is a surrogate parent? When a child has no available biological parent capable of supervising the child’s education, the schools will arrange for a “surrogate parent” who will have access to the records. The child protection agency cannot be a surrogate parent. A foster parent can be, *if* there is found to be no conflict of interests.

#### D. Access to Information from Criminal Justice Agencies

With regard to child protection agency access to information from criminal justice agencies, federal foster care law *requires* criminal record checks for prospective foster and adoptive parents. 42 U.S.C. § 671(a)(20)(A)). It bars agencies from approving a foster or adoptive parent if they have been convicted of certain crimes. 42 U.S.C. § 671(a)(20)(A)(i) and (ii). While this requirement can be waived by an act of a state’s governor or legislature. 42 U.S.C. § 671(a)(20)(B), few governors and legislatures have one so.

This law does not, however, require criminal record checks of other adults living in the homes of foster or adoptive parents. Further, it does not require or authorize criminal record checks of parents of abused and neglected children or of other adults living in the households of such children.

Another federal law also authorizes using the FBI database for record checks concerning a wide range of *service providers* for children. 42 U.S.C. § 5119(a). Background checks from the FBI database are authorized for child abuse related crimes. 20 U.S.C. §§ 5119c(3), (8), (9), (10). Unfortunately, however, these FBI records checks are not available to the child welfare agency to check records of parents and others living in the home with the child.

Keys to interpreting this statute are in the definitions, specifically those of “providers” and “qualified entities.” Please refer to page 59 of this paper. The records can be disclosed only to “providers” working for “qualified entities.” If you look at the definitions on page 59, “qualified entities” basically include businesses and organizations providing placement and care of children.

“Providers” for “qualified entities” include the entities’ owners, volunteers, employees, and others with access to the children. The term “providers” apparently does not include biological parents.

In my opinion, however, there should be automatic and routine record checks of parents whose children are placed in foster care or who are placed under juvenile court supervision due to abuse or neglect. I include both mother *and* father, and this information should be available to state child welfare agencies. I say that because I believe that a significant percentage of such parents have criminal involvement. Criminal record information is important when preparing a case plan and deciding whether to work toward reunification. There should be access to both state and federal criminal records databases.

For example, what if police inform a child protection agency that an abusive parent has been convicted of crimes involving the use or sale of drugs or the use of alcohol? Then the agency will be alerted that the parent may *currently* be using drugs or alcohol and that drug or alcohol use may have contributed to the abuse. The agency then will also have reason to find out whether, as a condition of probation or parole, the parent has been required to participate in drug or alcohol treatment.

A criminal record check may also reveal prior crimes against children. It may reveal criminal convictions that excuse the agency from providing reunification services under the federal Adoption and Safe Families Act. So, criminal record checks should be made even when there will be no criminal charges arising from the most recent abuse or neglect.

On the other hand, of course criminal justice agencies should not necessarily be required to reveal investigative information from ongoing investigations. They shouldn’t have to do this where they are concerned that a child welfare worker might compromise the investigation. An example might be a situation where a caseworker learns that a search is contemplated and agency policy requires that such case record information must be revealed to the criminal suspect.

This is a problem that can be dealt with successfully. Once the investigation has begun, there is no reason to require the caseworker to reveal information concerning a criminal investigation.

Now let’s return to our problem. FBI records information apparently can’t be accessed by child protection agencies. But are state child protection agencies entirely stuck concerning getting *state* criminal records information concerning parents? No. Federal law doesn’t bar access to *state* criminal records. See 38 CFR 20.21(b)(2); 38 CFR 20.21(c)(3), reprinted on page 60 of this paper.

#### IV. QUESTIONS FOR DISCUSSION

Finally, here are some very general questions for group discussion.

1. Do you have problems getting complete records and information quickly enough?
2. What, if anything are your solutions to these problems?
3. Do you have concerns about sharing information with others?
4. How have you dealt with these concerns?
5. Do you have any general strategies for dealing with confidentiality and privacy issues?
6. Are there other specific or technical questions, especially to those areas included in the description of this session?

## **CONFIDENTIALITY LANGUAGE FROM THE CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA)**

### **42 U.S.C. §5106a(b), as Amended By Pub. L. 104-235 (1996)**

The Child Abuse Prevention and Treatment Act (CAPTA) requires states to adopt a plan that sets forth:

- (2)(a) (v) methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including requirements ensuring that reports and records made and maintained pursuant to the purposes of this Act shall only be made available to--
  - (I) individuals who are the subject of the report;
  - (II) Federal, State, or local government entities; or any agent of such entities, having a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect;
  - (III) child abuse citizen review panels;
  - (IV) child fatality review panels;
  - (V) a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury; and
  - (VI) other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose;
- (vi) provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality;
- (vii) the cooperation of State law enforcement officials, court of competent jurisdiction, and appropriate State agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse or neglect;
- (viii) provisions requiring, and procedures in place that facilitate the prompt expungement of any records that are accessible to the general public or are

used for purposes of employment or other background checks in cases determined to be unsubstantiated or false, except that nothing in this section shall prevent State child protective services agencies from keeping information on unsubstantiated reports in their casework files to assist in future risk and safety assessment;...

(ix) provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who may be an attorney or a court appointed special advocate (or both), shall be appointed to represent the child in such proceedings--

(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and

(II) to make recommendations to the court concerning the best interests of the child;

\* \* \*

(xi) provisions, procedures, and mechanisms to be effective not later than 2 years after the date of the enactment of this section--

\* \* \*

(II) by which individuals who disagree with an official finding of abuse or neglect can appeal such finding;

\* \* \*

(4) Definitions.--For purposes of this subsection--

(A) the term 'near fatality' means an act that, as certified by a physician, places the child in serious or critical condition;...

**CONFIDENTIALITY PROVISION OF TITLE IV-E  
OF THE SOCIAL SECURITY ACT  
42 USCA □ 671(a)(8)**

(a) In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which--

\* \* \*

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, or D of this subchapter (including activities under part F of this subchapter) or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient, and (E) reporting and providing information pursuant to paragraph (9) to appropriate authorities with respect to known or suspected child abuse or neglect; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

\* \* \*

# **FEDERAL REGULATIONS GOVERNING DISCLOSURE OF INFORMATION COVERED BY TITLE IV-E'S STATUTORY CONFIDENTIALITY PROVISION**

## **45 CFR 1355.21 State plan requirements for titles IV-E and IV-B.**

(a) The State plans for titles IV-E and IV-B must provide for safeguards on the use and disclosure of information which meet the requirements contained in section 471(a)(8) of the Act.

(b) The State plans for titles IV-E and IV-B must provide for compliance with the Department's regulations listed in 45 CFR 1355.30.

\* \* \*

## **45 CFR 1355.30**

Except as specified, the following regulations are applicable to all programs funded under titles IV-B and IV-E of the Act.

\* \* \*

(p) 45 CFR Part 205--General Administration--Public Assistance Programs. Only the following sections are applicable:

- (1) ' 205.5--Plan amendments.
- (2) ' 205.10--Hearings.
- (3) ' 205.50--Safeguarding information for the financial assistance programs.
- (4) ' 205.100--Single State agency.

## **45 CFR 205.50**

(a) State plan requirements. A State plan for financial assistance under title IV-A of the Social Security Act, must provide that:

- (1) Pursuant to State statute which imposes legal sanctions:
  - (i) The use or disclosure of information concerning applicants and recipients will be limited to purposes directly connected with:

(A) The administration of the plan of the State approved under title IV-A, the plan or program of the State under title IV-B, IV-D, IV-E, or IV-F or under title I, X, XIV, XVI(AABD), XIX, XX, or the Supplemental Security Income (SSI) program established by title XVI. Such purposes include establishing eligibility, determining the amount of assistance, and providing services for applicants and recipients.

(B) Any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such plans or programs.

(C) The administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need.

\* \* \*

(G) The 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.

(ii) The State agency has authority to implement and enforce the provisions for safeguarding information about applicants and recipients.

(iii) Disclosure of any information that identifies by name or address any applicant or recipient to any Federal, State, or local committee or legislative body other than in connection with any activity under paragraph (a)(1)(i)(E) of this section is prohibited.

\* \* \*

(v) The State or local agency responsible for the administration of the State plan has authority to disclose the current address of a recipient to a State or local law enforcement officer at his or her request. Such information is disclosed only to law enforcement officers who provide the name and Social Security number of the recipient and satisfactorily demonstrate that:

(A) The recipient is a fugitive felon (as defined by the State);

(B) The location or apprehension of such felon is within the law officer's official duties; and

(C) The request is made in the proper exercise of those duties.

(2) The agency will have clearly defined criteria which govern the types of information that are safeguarded and the conditions under which such information may be released or used. Under this requirement:

(i) Types of information to be safeguarded include but are not limited to:

(A) The names and addresses of applicants and recipients and amounts of assistance provided (unless excepted under paragraph (a)(1)(iv) of this section);

(B) Information related to the social and economic conditions or circumstances of a particular individual including information obtained from any agency pursuant to s 205.55; information obtained from the Internal Revenue Service (IRS) and the Social Security Administration (SSA) must be safeguarded in accordance with procedures set forth by those agencies;

(C) Agency evaluation of information about a particular individual;

(D) Medical data, including diagnosis and past history of disease or disability, concerning a particular individual.

\* \* \*

(iii) Except in the case of information requested pursuant to sections 205.55 and 205.56, or in the case of an emergency situation when the individual's prior consent for the release of information cannot be obtained, the family or individual is informed whenever possible of a request for information from an outside source, and permission is obtained to meet the request. In an emergency situation when the individual's consent for the release of information cannot be obtained, the individual will be notified immediately.

(iv) In the event of the issuance of a subpoena for the case record or for any agency representative to testify concerning an applicant or recipient, the court's attention is called, through proper channels to the statutory provisions and the policies or rules and regulations against disclosure of information.

(v) The same policies are applied to requests for information from a governmental authority, the courts, or a law enforcement officer (except as provided for under paragraph (a)(1)(v) with respect to fugitive felons) as from any other outside source.

## **OBLIGATION TO SHARE MEDICAL AND EDUCATIONAL INFORMATION WITH FOSTER PARENTS**

**Note:** *Federal child welfare legislation requires a written case plan and case review system for all children in foster care. The following excerpts from the definitions of “case plan” and “case review system” require states to share medical and educational information with foster parents.*

42 U.S.C. □ § 675(1) The term “case plan” means a written document which includes at least the following:

\* \* \*

(C) To the extent available and accessible, the health and education records of the child, [are to include]--

- (i) the names and addresses of the child's health and educational providers;
- (ii) the child's grade level performance;
- (iii) the child's school record;
- (iv) assurances that the child's placement in foster care takes into account proximity to the school in which the child is enrolled at the time of placement;
- (v) a record of the child's immunizations;
- (vi) the child's known medical problems;
- (vii) the child's medications; and
- (viii) any other relevant health and education information concerning the child determined to be appropriate by the State agency.

42 U.S.C. □ § 675(5) The term "case review system" means a procedure for assuring that—

\* \* \*

(D) a child's health and education record ... is [to be] reviewed and updated, and supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care.

## **EXCERPTS FROM FEDERAL CONFIDENTIALITY STATUTE GOVERNING SUBSTANCE ABUSE**

42 U.S.C. § 290dd-2:

(a) Requirement

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) Permitted disclosure

(1) Consent

The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

(2) Method for disclosure

Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives written consent, the content of such record may be disclosed as follows:

\* \* \*

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good

cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(c) Use of records in criminal proceedings

Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

(d) Application

The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when such individual ceases to be a patient.

(e) Nonapplicability

\* \* \*

The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.

**PORTIONS OF FEDERAL REGULATIONS  
CONCERNING CONFIDENTIALITY OF  
ALCOHOL AND DRUG ABUSE  
PATIENT RECORDS**

**42 CFR PART 2, §§2.1 to 2.67:**

\* \* \*

§ 2.4 Criminal penalty for violation.

Under 42 U.S.C. 290ee-3(f) and 42 U.S.C. 290dd-3(f), any person who violates any provision of those statutes or these regulations shall be fined not more than \$500 in the case of a first offense, and not more than \$5,000 in the case of each subsequent offense.

\* \* \*

§ 2.11 Definitions.

For purposes of these regulations:

Alcohol abuse means the use of an alcoholic beverage which impairs the physical, mental, emotional, or social well-being of the user.

Drug abuse means the use of a psychoactive substance for other than medicinal purposes which impairs the physical, mental, emotional, or social well-being of the user.

Diagnosis means any reference to an individual's alcohol or drug abuse or to a condition which is identified as having been caused by that abuse which is made for the purpose of treatment or referral for treatment.

Disclose or disclosure means a communication of patient identifying information,

the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

Informant means an individual:

(a) Who is a patient or employee of a program or who becomes a patient or employee of a program at the request of a law enforcement agency or official: and

(b) Who at the request of a law enforcement agency or official observes one or more patients or employees of the program for the purpose of reporting the information obtained to the law enforcement agency or official.

Patient means any individual who has applied for or been given diagnosis or treatment for alcohol or drug abuse at a federally assisted program and includes any individual who, after arrest on a criminal charge, is identified as an alcohol or drug abuser in order to determine that individual's eligibility to participate in a program.

Patient identifying information means the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a program, if that number does not consist of, or contain numbers (such as a social security, or driver's license number) which could be used to identify a patient with reasonable accuracy and speed from sources external to the program.

Person means an individual, partnership, corporation, Federal, State or local government agency, or any other legal entity.

Program means:

(a) An individual or entity (other than a general medical care facility) who holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; or

(b) An identified unit within a general medical facility which holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for

treatment; or

(c) Medical personnel or other staff in a general medical care facility whose primary function is the provision of alcohol or drug abuse diagnosis, treatment or referral for treatment and who are identified as such providers. (See § 2.12(e)(1) for examples.)

Program director means:

(a) In the case of a program which is an individual, that individual:

(b) In the case of a program which is an organization, the individual designated as director, managing director, or otherwise vested with authority to act as chief executive of the organization.

Qualified service organization means a person which:

(a) Provides services to a program, such as data processing, bill collecting, dosage preparation, laboratory analyses, or legal, medical, accounting, or other professional services, or services to prevent or treat child abuse or neglect, including training on nutrition and child care and individual and group therapy, and

(b) Has entered into a written agreement with a program under which that person:

(1) Acknowledges that in receiving, storing, processing or otherwise dealing with any patient records from the programs, it is fully bound by these regulations; and

(2) If necessary, will resist in judicial proceedings any efforts to obtain access to patient records except as permitted by these regulations.

Records means any information, whether recorded or not, relating to a patient received or acquired by a federally assisted alcohol or drug program.

Third party payer means a person who pays, or agrees to pay, for diagnosis or treatment furnished to a patient on the basis of a contractual relationship with the patient or a member of his family or on the basis of the patient's eligibility for Federal, State, or local governmental benefits.

Treatment means the management and care of a patient suffering from alcohol or drug abuse, a condition which is identified as having been caused by that abuse, or both, in order to reduce or eliminate the adverse effects upon the patient.

Undercover agent means an officer of any Federal, State, or local law enforcement agency who enrolls in or becomes an employee of a program for the purpose of investigating a suspected violation of law or who pursues that purpose after enrolling or becoming employed for other purposes.

[60 FR 22297, May 5, 1995]

## § 2.12 Applicability.

### (a) General--

(1) Restrictions on disclosure. The restrictions on disclosure in these regulations apply to any information, whether or not recorded, which:

(i) Would identify a patient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification of such an identification by another person; and

(ii) Is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972, or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (or if obtained before the pertinent date, is maintained by a federally assisted alcohol or drug abuse program after that date as part of an ongoing treatment episode which extends past that date) for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

(2) Restriction on use. The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290ee-3(c), 42 U.S.C. 290dd-3(c)) applies to any information, whether or not recorded which is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972, or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (or if obtained before the pertinent date, is maintained by a federally

assisted alcohol or drug abuse program after that date as part of an ongoing treatment episode which extends past that date), for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment.

(b) Federal assistance. An alcohol abuse or drug abuse program is considered to be federally assisted if:

(1) It is conducted in whole or in part, whether directly or by contract or otherwise by any department or agency of the United States (but see paragraphs (c)(1) and (c)(2) of this section relating to the Veterans' Administration and the Armed Forces);

(2) It is being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States including but not limited to:

(i) Certification of provider status under the Medicare program;

(ii) Authorization to conduct methadone maintenance treatment (see 21 CFR 291.505); or

(iii) Registration to dispense a substance under the Controlled Substances Act to the extent the controlled substance is used in the treatment of alcohol or drug abuse;

(3) It is supported by funds provided by any department or agency of the United States by being:

(i) A recipient of Federal financial assistance in any form, including financial assistance which does not directly pay for the alcohol or drug abuse diagnosis, treatment, or referral activities; or

(ii) Conducted by a State or local government unit which, through general or special revenue sharing or other forms of assistance, receives Federal funds which could be (but are not necessarily) spent for the alcohol or drug abuse program; or

(4) It is assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program or

through the granting of tax exempt status to the program.

(c) Exceptions--

(1) Veterans' Administration. These regulations do not apply to information on alcohol and drug abuse patients maintained in connection with the Veterans' Administration provisions of hospital care, nursing home care, domiciliary care, and medical services under Title 38, United States Code. Those records are governed by 38 U.S.C. 4132 and regulations issued under that authority by the Administrator of Veterans' Affairs.

(2) Armed Forces. These regulations apply to any information described in paragraph (a) of this section which was obtained by any component of the Armed Forces during a period when the patient was subject to the Uniform Code of Military Justice except:

(i) Any interchange of that information within the Armed Forces; and

(ii) Any interchange of that information between the Armed Forces and those components of the Veterans Administration furnishing health care to veterans.

(3) Communication within a program or between a program and an entity having direct administrative control over that program. The restrictions on disclosure in these regulations do not apply to communications of information between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of alcohol or drug abuse if the communications are

(i) within a program or

(ii) between a program and an entity that has direct administrative control over the program.

(4) Qualified Service Organizations. The restrictions on disclosure in these regulations do not apply to communications between a program and a qualified service organization of information needed by the organization to provide services to the program.

(5) Crimes on program premises or against program personnel. The restrictions on disclosure and use in these regulations do not apply to communications from program personnel to law enforcement officers which--

(i) Are directly related to a patient's commission of a crime on the premises of the program or against program personnel or to a threat to commit such a crime; and

(ii) Are limited to the circumstances of the incident, including the patient status of the individual committing or threatening to commit the crime, that individual's name and address, and that individual's last known whereabouts.

(6) Reports of suspected child abuse and neglect. The restrictions on disclosure and use in these regulations do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities. However, the restrictions continue to apply to the original alcohol or drug abuse patient records maintained by the program including their disclosure and use for civil or criminal proceedings which may arise out of the report of suspected child abuse and neglect.

(d) Applicability to recipients of information--

(1) Restriction on use of information. The restriction on the use of any information subject to these regulations to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to any person who obtains that information from a federally assisted alcohol or drug abuse program, regardless of the status of the person obtaining the information or of whether the information was obtained in accordance with these regulations. This restriction on use bars, among other things, the introduction of that information as evidence in a criminal proceeding and any other use of the information to investigate or prosecute a patient with respect to a suspected crime. Information obtained by undercover agents or informants (see § 2.17) or through patient access (see § 2.23) is subject to the restriction on use.

(2) Restrictions on disclosures -- Third party payers, administrative entities, and others. The restrictions on disclosure in these regulations apply to:

(i) Third party payers with regard to records disclosed to them by federally assisted alcohol or drug abuse programs;

(ii) Entities having direct administrative control over programs with regard to information communicated to them by the program under § 2.12(c)(3); and

(iii) Persons who receive patient records directly from a federally assisted alcohol or drug abuse program and who are notified of the restrictions on redisclosure of the records in accordance with § 2.32 of these regulations.

(e) Explanation of applicability--

(1) Coverage. These regulations cover any information (including information on referral and intake) about alcohol and drug abuse patients obtained by a program (as the terms "patient" and "program" are defined in § 2.11) if the program is federally assisted in any manner described in § 2.12(b). Coverage includes, but is not limited to, those treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs, and private practitioners who hold themselves out as providing, and provide alcohol or drug abuse diagnosis, treatment, or referral for treatment. However, these regulations would not apply, for example, to emergency room personnel who refer a patient to the intensive care unit for an apparent overdose, unless the primary function of such personnel is the provision of alcohol or drug abuse diagnosis, treatment or referral and they are identified as providing such services or the emergency room has promoted itself to the community as a provider of such services.

(2) Federal assistance to program required. If a patient's alcohol or drug abuse diagnosis, treatment, or referral for treatment is not provided by a program which is federally conducted, regulated or supported in a manner which constitutes Federal assistance under § 2.12(b), that patient's record is not covered by these regulations. Thus, it is possible for an individual patient to benefit from Federal support and not be covered by the confidentiality regulations because the program in which the patient is enrolled is not federally assisted as defined in § 2.12(b). For example, if a Federal court placed an individual in a private for-profit program and made a payment to the program on behalf of that individual, that patient's record would not be covered by these regulations unless the program itself received Federal assistance as defined by § 2.12(b).

(3) Information to which restrictions are applicable. Whether a restriction is on use or disclosure affects the type of information which may be available. The

restrictions on disclosure apply to any information which would identify a patient as an alcohol or drug abuser. The restriction on use of information to bring criminal charges against a patient for a crime applies to any information obtained by the program for the purpose of diagnosis, treatment, or referral for treatment of alcohol or drug abuse. (Note that restrictions on use and disclosure apply to recipients of information under § 2.12(d).)

(4) How type of diagnosis affects coverage. These regulations cover any record of a diagnosis identifying a patient as an alcohol or drug abuser which is prepared in connection with the treatment or referral for treatment of alcohol or drug abuse. A diagnosis prepared for the purpose of treatment or referral for treatment but which is not so used is covered by these regulations. The following are not covered by these regulations:

(i) diagnosis which is made solely for the purpose of providing evidence for use by law enforcement authorities; or

(ii) A diagnosis of drug overdose or alcohol intoxication which clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

### § 2.13 Confidentiality restrictions.

(a) General. The patient records to which these regulations apply may be disclosed or used only as permitted by these regulations and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority. Any disclosure made under these regulations must be limited to that information which is necessary to carry out the purpose of the disclosure.

(b) Unconditional compliance required. The restrictions on disclosure and use in these regulations apply whether the holder of the information believes that the person seeking the information already has it, has other means of obtaining it, is a law enforcement or other official, has obtained a subpoena, or asserts any other justification for a disclosure or use which is not permitted by these regulations.

(c) Acknowledging the presence of patients: Responding to requests.

(1) The presence of an identified patient in a facility or component of a facility which is publicly identified as a place where only alcohol or drug abuse diagnosis, treatment, or referral is provided may be acknowledged only if the patient's written consent is obtained in accordance with subpart C of these regulations or if an authorizing court order is entered in accordance with Subpart E of these regulations. The regulations permit acknowledgement of the presence of an identified patient in a facility or part of a facility if the facility is not publicly identified as only an alcohol or drug abuse diagnosis, treatment or referral facility, and if the acknowledgement does not reveal that the patient is an alcohol or drug abuser.

(2) Any answer to a request for a disclosure of patient records which is not permissible under these regulations must be made in a way that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse. An inquiring party may be given a copy of these regulations and advised that they restrict the disclosure of alcohol or drug abuse patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient. The regulations do not restrict a disclosure that an identified individual is not and never has been a patient.

#### § 2.14 Minor patients.

(a) Definition of minor. As used in these regulations the term "minor" means a person who has not attained the age of majority specified in the applicable State law, or if no age of majority is specified in the applicable State law, the age of eighteen years.

(b) State law not requiring parental consent to treatment. If a minor patient acting alone has the legal capacity under the applicable State law to apply for and obtain alcohol or drug abuse treatment, any written consent for disclosure authorized under Subpart C of these regulations may be given only by the minor patient. This restriction includes, but is not limited to, any disclosure of patient identifying information to the parent or guardian of a minor patient for the purpose of obtaining financial reimbursement. These regulations do not prohibit a program from refusing to provide treatment until the minor patient consents to the disclosure necessary to obtain reimbursement, but refusal to provide treatment may be prohibited under a State or local law requiring the program to furnish the service

irrespective of ability to pay.

(c) State law requiring parental consent to treatment.

(1) Where State law requires consent of a parent, guardian, or other person for a minor to obtain alcohol or drug abuse treatment, any written consent for disclosure authorized under Subpart C of these regulations must be given by both the minor and his or her parent, guardian, or other person authorized under State law to act in the minor's behalf.

(2) Where State law requires parental consent to treatment the fact of a minor's application for treatment may be communicated to the minor's parent, guardian, or other person authorized under State law to act in the minor's behalf only if:

(i) The minor has given written consent to the disclosure in accordance with Subpart C of these regulations or

(ii) The minor lacks the capacity to make a rational choice regarding such consent as judged by the program director under paragraph (d) of this section.

(d) Minor applicant for services lacks capacity for rational choice. Facts relevant to reducing a threat to the life or physical well being of the applicant or any other individual may be disclosed to the parent, guardian, or other person authorized under State law to act in the minor's behalf if the program director judges that:

(1) A minor applicant for services lacks capacity because of extreme youth or mental or physical condition to make a rational decision on whether to consent to a disclosure under Subpart C of these regulations to his or her parent, guardian, or other person authorized under State law to act in the minor's behalf, and

(2) The applicant's situation poses a substantial threat to the life or physical well being of the applicant or any other individual which may be reduced by communicating relevant facts to the minor's parent, guardian, or other person authorized under State law to act in the minor's behalf.

§ 2.15 Incompetent and deceased patients.

(a) Incompetent patients other than minors--

(1) Adjudication of incompetence. In the case of a patient who has been adjudicated as lacking the capacity, for any reason other than insufficient age, to manage his or her own affairs, any consent which is required under these regulations may be given by the guardian or other person authorized under State law to act in the patient's behalf.

(2) No adjudication of incompetency. For any period for which the program director determines that a patient, other than a minor or one who has been adjudicated incompetent, suffers from a medical condition that prevents knowing or effective action on his or her own behalf, the program director may exercise the right of the patient to consent to a disclosure under Subpart C of these regulations for the sole purpose of obtaining payment for services from a third party payer.

(b) Deceased patients--

(1) Vital statistics. These regulations do not restrict the disclosure of patient identifying information relating to the cause of death of a patient under laws requiring the collection of death or other vital statistics or permitting inquiry into the cause of death.

(2) Consent by personal representative. Any other disclosure of information identifying a deceased patient as an alcohol or drug abuser is subject to these regulations. If a written consent to the disclosure is required, that consent may be given by an executor, administrator, or other personal representative appointed under applicable State law. If there is no such appointment the consent may be given by the patient's spouse or, if none, by any responsible member of the patient's family.

§ 2.16 Security for written records.

(a) Written records which are subject to these regulations must be maintained in a secure room, locked file cabinet, safe or other similar container when not in use; and

(b) Each program shall adopt in writing procedures which regulate and control

access to and use of written records which are subject to these regulations.

\* \* \*

#### § 2.20 Relationship to State laws.

The statutes authorizing these regulations (42 U.S.C. 290ee-3 and 42 U.S.C. 290dd-3) do not preempt the field of law which they cover to the exclusion of all State laws in that field. If a disclosure permitted under these regulations is prohibited under State law, neither these regulations nor the authorizing statutes may be construed to authorize any violation of that State law. However, no State law may either authorize or compel any disclosure prohibited by these regulations.

\* \* \*

#### § 2.22 Notice to patients of Federal confidentiality requirements.

(a) Notice required. At the time of admission or as soon thereafter as the patient is capable of rational communication, each program shall:

(1) Communicate to the patient that Federal law and regulations protect the confidentiality of alcohol and drug abuse patient records; and

(2) Give to the patient a summary in writing of the Federal law and regulations.

(b) Required elements of written summary. The written summary of the Federal law and regulations must include:

(1) A general description of the limited circumstances under which a program may acknowledge that an individual is present at a facility or disclose outside the program information identifying a patient as an alcohol or drug abuser.

(2) A statement that violation of the Federal law and regulations by a program is a crime and that suspected violations may be reported to appropriate authorities in accordance with these regulations.

(3) A statement that information related to a patient's commission of a crime on the premises of the program or against personnel of the program is not protected.

(4) A statement that reports of suspected child abuse and neglect made under State law to appropriate State or local authorities are not protected.

(5) A citation to the Federal law and regulations.

(c) Program options. The program may devise its own notice or may use the sample notice in paragraph (d) to comply with the requirement to provide the patient with a summary in writing of the Federal law and regulations. In addition, the program may include in the written summary information concerning State law and any program policy not inconsistent with State and Federal law on the subject of confidentiality of alcohol and drug abuse patient records.

(d) Sample notice.

#### Confidentiality of Alcohol and Drug Abuse Patient Records

The confidentiality of alcohol and drug abuse patient records maintained by this program is protected by Federal law and regulations. Generally, the program may not say to a person outside the program that a patient attends the program, or disclose any information identifying a patient as an alcohol or drug abuser Unless:

(1) The patient consents in writing;

(2) The disclosure is allowed by a court order; or

(3) The disclosure is made to medical personnel in a medical emergency or to qualified personnel for research, audit, or program evaluation.

Violation of the Federal law and regulations by a program is a crime. Suspected violations may be reported to appropriate authorities in accordance with Federal regulations.

Federal law and regulations do not protect any information about a crime committed by a patient either at the program or against any person who works for the program or about any threat to commit such a crime.

Federal laws and regulations do not protect any information about suspected child

abuse or neglect from being reported under State law to appropriate State or local authorities.

(See 42 U.S.C. 290dd-3 and 42 U.S.C. 290ee-3 for Federal laws and 42 CFR Part 2 for Federal regulations.)

#### § 2.23 Patient access and restrictions on use.

(a) Patient access not prohibited. These regulations do not prohibit a program from giving a patient access to his or her own records, including the opportunity to inspect and copy any records that the program maintains about the patient. The program is not required to obtain a patient's written consent or other authorization under these regulations in order to provide such access to the patient.

(b) Restriction on use of information. Information obtained by patient access to his or her patient record is subject to the restriction on use of his information to initiate or substantiate any criminal charges against the patient or to conduct any criminal investigation of the patient as provided for under § 2.12(d)(1).

#### § 2.31 Form of written consent.

(a) Required elements. A written consent to a disclosure under these regulations must include:

(1) The specific name or general designation of the program or person permitted to make the disclosure.

(2) The name or title of the individual or the name of the organization to which disclosure is to be made.

(3) The name of the patient.

(4) The purpose of the disclosure.

(5) How much and what kind of information is to be disclosed.

(6) The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under § 2.15 in lieu of the patient.

(7) The date on which the consent is signed.

(8) A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

(9) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

(b) Sample consent form. The following form complies with paragraph (a) of this section, but other elements may be added.

1. I (name of patient) "( )" Request "( )" Authorize:

2. (name or general designation of program which is to make the disclosure)

---

3. To disclose: (kind and amount of information to be disclosed)

---

4. To: (name or title of the person or organization to which disclosure is to be made)

---

5. For (purpose of the disclosure)

---

6. Date (on which this consent is signed)

---

7. Signature of patient

---

8. Signature of parent or guardian (where required)

---

9. Signature of person authorized to sign in lieu of the patient (where required)

---

10. This consent is subject to revocation at any time except to the extent that the program which is to make the disclosure has already taken action in reliance on it. If not previously revoked, this consent will terminate upon: (specific date, event, or condition)

(c) Expired, deficient, or false consent. A disclosure may not be made on the basis of a consent which:

(1) Has expired:

(2) On its face substantially fails to conform to any of the requirements set forth in paragraph (a) of this section;

(3) Is known to have been revoked; or

(4) Is known, or through a reasonable effort could be known, by the person holding the records to be materially false.

#### § 2.32 Prohibition on redisclosure.

Notice to accompany disclosure. Each disclosure made with the patient's written consent must be accompanied by the following written statement:

This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any

use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

#### § 2.33 Disclosures permitted with written consent.

If a patient consents to a disclosure of his or her records under § 2.31, a program may disclose those records in accordance with that consent to any individual or organization named in the consent, except that disclosures to central registries and in connection with criminal justice referrals must meet the requirements of §§ 2.34 and 2.35, respectively.

#### § 2.34 Disclosures to prevent multiple enrollments in detoxification and maintenance treatment programs.

(a) Definitions. For purposes of this section:

Central registry means an organization which obtains from two or more member programs patient identifying information about individuals applying for maintenance treatment or detoxification treatment for the purpose of avoiding an individual's concurrent enrollment in more than one program.

Detoxification treatment means the dispensing of a narcotic drug in decreasing doses to an individual in order to reduce or eliminate adverse physiological or psychological effects incident to withdrawal from the sustained use of a narcotic drug.

Maintenance treatment means the dispensing of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs.

Member program means a detoxification treatment or maintenance treatment program which reports patient identifying information to a central registry and which is in the same State as that central registry or is not more than 125 miles from any border of the State in which the central registry is located.

(b) Restrictions on disclosure. A program may disclose patient records to a central registry or to any detoxification or maintenance treatment program not more than

200 miles away for the purpose of preventing the multiple enrollment of a patient only if:

(1) The disclosure is made when:

- (i) The patient is accepted for treatment;
- (ii) The type or dosage of the drug is changed; or
- (iii) The treatment is interrupted, resumed or terminated.

(2) The disclosure is limited to:

- (i) Patient identifying information;
- (ii) Type and dosage of the drug; and
- (iii) Relevant dates.

(3) The disclosure is made with the patient's written consent meeting the requirements of § 2.31, except that:

(i) The consent must list the name and address of each central registry and each known detoxification or maintenance treatment program to which a disclosure will be made; and

(ii) The consent may authorize a disclosure to any detoxification or maintenance treatment program established within 200 miles of the program after the consent is given without naming any such program.

(c) Use of information limited to prevention of multiple enrollments. A central registry and any detoxification or maintenance treatment program to which information is disclosed to prevent multiple enrollments may not redisclose or use patient identifying information for any purpose other than the prevention of multiple enrollments unless authorized by a court order under Subpart E of these regulations.

(d) Permitted disclosure by a central registry to prevent a multiple enrollment.

When a member program asks a central registry if an identified patient is enrolled in another member program and the registry determines that the patient is so enrolled, the registry may disclose--

(1) The name, address, and telephone number of the member program(s) in which the patient is already enrolled to the inquiring member program; and

(2) The name, address, and telephone number of the inquiring member program to the member program(s) in which the patient is already enrolled. The member programs may communicate as necessary to verify that no error has been made and to prevent or eliminate any multiple enrollment.

(e) Permitted disclosure by a detoxification or maintenance treatment program to prevent a multiple enrollment. A detoxification or maintenance treatment program which has received a disclosure under this section and has determined that the patient is already enrolled may communicate as necessary with the program making the disclosure to verify that no error has been made and to prevent or eliminate any multiple enrollment.

§ 2.35 Disclosures to elements of the criminal justice system which have referred patients.

(a) A program may disclose information about a patient to those persons within the criminal justice system which have made participation in the program a condition of the disposition of any criminal proceedings against the patient or of the patient's parole or other release from custody if:

(1) The disclosure is made only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress (e.g., a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or posttrial release, probation or parole officers responsible for supervision of the patient); and

(2) The patient has signed a written consent meeting the requirements of § 2.31 (except paragraph (a)(8) which is inconsistent with the revocation provisions of paragraph (c) of this section) and the requirements of paragraphs (b) and (c) of this section.

(b) Duration of consent. The written consent must state the period during which it remains in effect. This period must be reasonable, taking into account:

(1) The anticipated length of the treatment;

(2) The type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur; and

(3) Such other factors as the program, the patient, and the person(s) who will receive the disclosure consider pertinent.

(c) Revocation of consent. The written consent must state that it is revocable upon the passage of a specified amount of time or the occurrence of a specified, ascertainable event. The time or occurrence upon which consent becomes revocable may be no later than the final disposition of the conditional release or other action in connection with which consent was given.

(d) Restrictions on redisclosure and use. A person who receives patient information under this section may redisclose and use it only to carry out that person's official duties with regard to the patient's conditional release or other action in connection with which the consent was given.

## § 2.51 Medical emergencies.

(a) General Rule. Under the procedures required by paragraph (c) of this section, patient identifying information may be disclosed to medical personnel who have a need for information about a patient for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention.

(b) Special Rule. Patient identifying information may be disclosed to medical personnel of the Food and Drug Administration (FDA) who assert a reason to believe that the health of any individual may be threatened by an error in the manufacture, labeling, or sale of a product under FDA jurisdiction, and that the information will be used for the exclusive purpose of notifying patients or their physicians of potential dangers.

(c) Procedures. Immediately following disclosure, the program shall document the disclosure in the patient's records, setting forth in writing:

(1) The name of the medical personnel to whom disclosure was made and their affiliation with any health care facility;

(2) The name of the individual making the disclosure;

(3) The date and time of the disclosure; and

(4) The nature of the emergency (or error, if the report was to FDA).

\* \* \*

#### § 2.52 Research activities.

(a) Patient identifying information may be disclosed for the purpose of conducting scientific research if the program director makes a determination that the recipient of the patient identifying information:

(1) Is qualified to conduct the research;

(2) Has a research protocol under which the patient identifying information:

(i) Will be maintained in accordance with the security requirements of § 2.16 of these regulations (or more stringent requirements); and

(ii) Will not be redisclosed except as permitted under paragraph (b) of this section; and

(3) Has provided a satisfactory written statement that a group of three or more individuals who are independent of the research project has reviewed the protocol and determined that:

(i) The rights and welfare of patients will be adequately protected; and

(ii) The risks in disclosing patient identifying information are outweighed by the

potential benefits of the research.

(b) A person conducting research may disclose patient identifying information obtained under paragraph (a) of this section only back to the program from which that information was obtained and may not identify any individual patient in any report of that research or otherwise disclose patient identities.

[52 FR 41997, Nov. 2, 1987]

\* \* \*

## § 2.61 Legal effect of order.

(a) Effect. An order of a court of competent jurisdiction entered under this subpart is a unique kind of court order. Its only purpose is to authorize a disclosure or use of patient information which would otherwise be prohibited by 42 U.S.C. 290ee-3, 42 U.S.C. 290dd-3 and these regulations. Such an order does not compel disclosure. A subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order entered under these regulations.

### (b) Examples.

(1) A person holding records subject to these regulations receives a subpoena for those records: a response to the subpoena is not permitted under the regulations unless an authorizing court order is entered. The person may not disclose the records in response to the subpoena unless a court of competent jurisdiction enters an authorizing order under these regulations.

(2) An authorizing court order is entered under these regulations, but the person authorized does not want to make the disclosure. If there is no subpoena or other compulsory process or a subpoena for the records has expired or been quashed, that person may refuse to make the disclosure. Upon the entry of a valid subpoena or other compulsory process the person authorized to disclose must disclose, unless there is a valid legal defense to the process other than the confidentiality restrictions of these regulations.

[52 FR 42061, Nov. 2, 1987]

§ 2.62 Order not applicable to records disclosed without consent to researchers, auditors and evaluators.

A court order under these regulations may not authorize qualified personnel, who have received patient identifying information without consent for the purpose of conducting research, audit or evaluation, to disclose that information or use it to conduct any criminal investigation or prosecution of a patient. However, a court order under § 2.66 may authorize disclosure and use of records to investigate or prosecute qualified personnel holding the records.

§ 2.63 Confidential communications.

(a) A court order under these regulations may authorize disclosure of confidential communications made by a patient to a program in the course of diagnosis, treatment, or referral for treatment only if:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

§ 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

(a) Application. An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The

application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of these regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) Notice. The patient and the person holding the records from whom disclosure is sought must be given:

(1) Adequate notice in a manner which will not disclose patient identifying information to other persons; and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.

(c) Review of evidence; Conduct of hearing. Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of these regulations. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) Content of order. An order authorizing a disclosure must:

- (1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order.
- (2) Limit disclosure to those persons whose need for information is the basis for the order; and
- (3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

\* \* \*

**EXCERPTS FROM THE CONFIDENTIALITY  
PROVISIONS OF THE FAMILY  
EDUCATIONAL RIGHTS AND  
PRIVACY ACT (FERPA)**

**20 U.S.C. § 1232g**

(a)(1) (A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the

specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

\* \* \*

(b) (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following--

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted--

\* \* \*

(ii) after November 19, 1974, if--

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the

information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

\* \* \*

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26 [the internal revenue code];

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)

\* \* \*

(ii) the entity or persons designated in [a] subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless--

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

\* \* \*

# SELECTED FEDERAL REGULATIONS UNDER THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

## 34 CFR, Part 99

### 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

\* \* \*

"Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

\* \* \*

### 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

\* \* \*

(c) Paragraphs (a) and (b) of this section will be strictly construed.

**CONFIDENTIALITY PROVISIONS OF THE  
INDIVIDUALS WITH DISABILITIES  
EDUCATION ACT (IDEA)**

**20 U.S.C. §§ 1412, 1417(c)**

**20 U.S.C. § 1412. State eligibility**

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

\* \* \*

(8) Confidentiality

Agencies in the State comply with section 1417(c) of this title (relating to the confidentiality of records and information).

**20 U.S.C. § 1417. Administration**

(c) Protection of rights and privacy of parents and students

The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

**SELECTED FEDERAL REGULATIONS GOVERNING  
DISCLOSURE OF INFORMATION UNDER THE  
INDIVIDUALS WITH DISABILITIES  
EDUCATION ACT (IDEA)**

**34 C.F.R. 300.560 et seq. and 303.460**

**§ 300.571 Consent.**

(a) Except as to disclosures addressed in § 300.529(b) for which parental consent is not required by Part 99, parental consent must be obtained before personally identifiable information is--

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to 34 CFR part 99 may not release information from education records to participating agencies without parental consent unless authorized to do so under part 99.

(c) The SEA shall provide policies and procedures that are used in the event that a parent refuses to provide consent under this section.

**THE DEFINITION OF “PARENT” IN THE  
INDIVIDUALS WITH DISABILITIES  
EDUCATION ACT (IDEA)**

**20 U.S.C. § 1401**

§ 1401. Definitions

Except as otherwise provided, as used in this chapter:

\* \* \*

(19) Parent

The term "parent"--

(A) includes a legal guardian; and

(B) except as used in sections 1415(b)(2) and 1439(a)(5) of this title, includes an individual assigned under either of those sections to be a **surrogate** parent.

## **CRIMINAL RECORDS CHECK PROVISIONS OF TITLE IV-E OF THE SOCIAL SECURITY ACT**

### **42 USCA □ § 671(a)(20)**

(a) In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which--

\* \* \*

(20) (A) unless an election provided for in subparagraph (B) is made with respect to the State, provides procedures for criminal records checks for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child on whose behalf foster care maintenance payments or adoption assistance payments are to be made under the State plan under this part, including procedures requiring that--

(i) in any case in which a record check reveals a felony conviction for child abuse or neglect, for spousal abuse, for a crime against children (including child pornography), or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery, if a State finds that a court of competent jurisdiction has determined that the felony was committed at any time, such final approval shall not be granted; and

(ii) in any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if a State finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years, such final approval shall not be granted; and

(B) subparagraph (A) shall not apply to a State plan if the Governor of the State has notified the Secretary in writing that the State has elected to make subparagraph (A) inapplicable to the State, or if the State legislature, by law, has elected to make subparagraph (A) inapplicable to the State.

# FEDERAL LAW AUTHORIZING FBI CRIMINAL BACKGROUND CHECKS IN ABUSE CASES

## 42 U.S.C. §§ 5119-5119c

### 42 U.S.C. § 5119

(a) In each State, an authorized criminal justice agency of the State shall report child abuse crime information to, or index child abuse crime information in, the national criminal history background check system. A criminal justice agency may satisfy the requirement of this subsection by reporting or indexing all felony and serious misdemeanor arrests and dispositions.

\* \* \*

### 42 U.S.C. § 5119a

(a) (1) A State may have in effect procedures (established by State statute or regulation) that require qualified entities designated by the State to contact an authorized agency of the State to request a nationwide background check for the purpose of determining whether a provider has been convicted of a crime that bears upon the provider's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.

\* \* \*

### 42 U.S.C. § 5119c. Definitions

For the purposes of this subchapter--

\* \* \*

(3) the term "child abuse crime" means a crime committed under any law of a State that involves the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by any person;

\* \* \*

(8) the term "national criminal history background check system" means the criminal history record system maintained by the Federal Bureau of Investigation based on fingerprint identification or any other method of positive identification;

\* \* \*

(9) the term "provider" means--

(A) a person who--

(i) is employed by or volunteers with a qualified entity;

(ii) who owns or operates a qualified entity; or

(iii) who has or may have unsupervised access to a child to whom the qualified entity provides child care; and

(B) a person who--

(i) seeks to be employed by or volunteer with a qualified entity;

(ii) seeks to own or operate a qualified entity; or

(iii) seeks to have or may have unsupervised access to a child to whom the qualified entity provides child care;

(10) the term "qualified entity" means a business or organization, whether public, private, for-profit, not-for-profit, or voluntary, that provides care or care placement services, including a business or organization that licenses or certifies others to provide care or care placement services; and

\* \* \*

# FEDERAL REGULATIONS GOVERNING STATE CRIMINAL BACKGROUND DISCLOSURES

## 28 CFR §§ 20.1-.38

\* \* \*

### **§ 20.21 Preparation and submission of a Criminal History Record Information Plan.**

A plan shall be submitted to OJARS by each State on March 16, 1976, to set forth all operational procedures, except those portions relating to dissemination and security. . . . The plan shall set forth operational procedures to--

\* \* \*

(b) Insure that dissemination of nonconviction data has been limited, whether directly or through any intermediary only to:

(1) Criminal justice agencies, for purposes of the administration of criminal justice and criminal justice agency employment;

(2) Individuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate State or local officials or agencies;

\* \* \*

(c) (1) Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.

(2) No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.

(3) Subsection (b) does not mandate dissemination of criminal history record information to any agency or individual. States and local governments will determine the purposes for which dissemination of criminal history record information is authorized by State law, executive order, local ordinance, court rule, decision or order.

## SOME REASONS WHY CHILD PROTECTION AGENCIES NEED PRIVATE INFORMATION IN CHILD ABUSE AND NEGLECT CASES

1. Agencies need quick, complete information when investigating child abuse and neglect.
2. Agencies and attorneys need quick, complete information to help the court decide whether a child is endangered and must be placed.
3. Agencies, attorneys, and parties need complete information to develop good case plans for families.
4. Agencies, attorneys, and courts need quick access to full background information about parents and children to help decide whether to require reunification services.
5. Agencies and attorneys need complete information to help the court decide on a permanent placement for the child.

## **ENSURING QUICK AND COMPLETE ACCESS TO PRIVATE INFORMATION IN CHILD ABUSE AND NEGLECT CASES**

1. Develop child protection agency forms and procedures for compliance with the key relevant federal confidentiality requirements.
2. Change state law to eliminate inappropriate confidentiality requirements. Adopt omnibus legislation.
3. Set up strong interagency communications and information sharing protocols.
4. Develop standard procedures and forms that require caseworkers to get very complete records at the beginning of each case and to share them with the parties.
5. Provide strong legal help to the child protection agency when parents or other agencies do not agree to provide information.
6. Develop a routine and swift process for agency attorneys to go to court to get information very early in the case. Develop forms for early routine motions and court orders to obtain information concerning both parents and children. They should include, for example, as educational records, medical records, criminal records, mental health records, and substance abuse treatment records – concerning both parents and children.

## **THE CHILD PROTECTION AGENCY'S NEED TO SHARE PRIVATE INFORMATION IN CHILD ABUSE AND NEGLECT CASES**

1. The child protection agency needs to share information that will allow it to collect information -- like giving enough information to the police to enable them to check their records.
2. The child protection agency needs to be able to share enough information to arrange for the best diagnosis and treatment, for example by giving background information to its mental health evaluator.
3. The agency needs to be able to share information with foster parents to enable them to make an informed decision whether to care for the child, to provide proper care for the child and, in some cases, to protect others from harm.
4. The child protection agency needs to be able to share information to help other agencies take steps to protect children or society -- such as schools and law enforcement.
5. Two basic principles should apply to child protection agencies sharing information: need to know and protection against redisclosure.
  - First, while the agency should share sensitive information only on a need-to-know basis, it should share information with all who need to know in order to care for and protect the child -- and to protect others.
  - Second, those who receive confidential information should be barred from unrestricted redisclosure. To put it another way, the disclosed information should remain within a "legal circle of confidentiality."