

DHS Records: Confidentiality Issues

Through the Eyes of a Child

August 7, 2017

1. Confidentiality of Child Welfare Records

A. Federal Law. 42 USC §671(a)(8); 45 CFR § 1355.21(a) and 1355.30.

- I. Safeguards required for IV-E funding: State must provide safeguards that restrict the use or disclosure of information concerning applicants or recipients of services to purposes directly connected with the administration of the program. 42 USC § 671(a)(8). However, the state may disclose information about known or suspected child abuse or neglect to appropriate authorities. 42 USC §§ 671(a)(9)(A) & (B).
- II. State must have legal sanctions for improper disclosure: Requires the State to have a statute that imposes legal sanctions on the use or disclosure of information concerning applicants or recipients except for enumerated purposes directly connected with administration of the program. Safeguards information such as names, addresses, social and economic conditions and medical information.

B. State law. ORS 409.225; OAR 413-010-0000 to 413-010-0075

- I. Basic rule: DHS shall not disclose or use contents of any records, files, papers or communications concerning an individual child, family, or other recipient of DHS services for purposes other than those directly connected with the administration of child welfare laws or unless required or authorized by ORS 419A.255 or ORS 419B.035. ORS 409.225(1).
- II. Required disclosure: Unless public records law exemption applies, requires disclosure of certain records to certain persons in specified circumstances including the juvenile court and parents of children receiving services on a voluntary basis. In addition, if in the best interests of the child, DHS may disclose to: (a) treatment providers, foster or adoptive parents and school officials or other persons providing services to the child and (b) a person designated as a member of a sensitive review committee. ORS 409.225(2) & (3). Finally, Requires DHS disclose information related to its activities/responsibilities in cases where child abuse has resulted in a fatality, near fatality or an adult has been charged with crime related to child abuse or neglect. ORS 409.225(6).
- III. Prohibits re-disclosure: Requires that all records disclosed must be kept confidential by the person to whom the records were disclosed and used only for the purpose for which disclosure was made. ORS 409.225(4).

2. Child Abuse Reports and Records

- A. Federal Law: Child Abuse and Neglect Prevention and Treatment Act (CAPTA). 42 USC § 5101 – 5116(i); 45 CFR part 1340. (Federal Regulations implementing CAPTA were removed on June 29, 2015.)
- I. Confidentiality required. Requires States to preserve the confidentiality of all records "in order to protect the rights of the child and the child's parents or guardians." 42 USC § 5106a(b)(2)(B)(viii).
 - II. Limited disclosure allowed in the following circumstances:
 - a. Child abuse programs: State must ensure that disclosure of information concerning child abuse or neglect of a specific person is made only to persons the State determines has a need to know the information directly related to the purposes of child abuse program. 42 USC § 5106a(b)(2)(B)(viii)(I-VI). Includes disclosure to grand jury or court, upon finding that information in the record is necessary for the determination of an issue before the court or grand jury. 42 USC § 5106a(b)(2)(B)(viii)(V).
 - b. Governmental entities with duty to protect children. Allows disclosure to government entity with need to know information to carry out duty to protect children. 42 USC § 5106a(b)(2)(B)(ix).
 - c. Child fatalities. Authorizes public disclosure of findings or information about a case of child abuse or neglect that resulted in a child fatality or near fatality. 42 USC §§ 5106a(b)(2)(B)(vii) & (x).
- B. State law. ORS 419B.035; OAR 413-010-0035(10)(disclosure of CPS records)
- I. Confidentiality required. Records compiled under ORS 419B.010 to 419B.050 considered confidential and are exempted from the Public Records Law, except as provided below. ORS 419B.035(1). The name, address and other identifying information about the person who made the report may not be disclosed. ORS 419B.035(3).
 - II. Required disclosures. Requires disclosure to certain persons including physicians for the child, law enforcement, attorneys for the child and parent in the juvenile court proceeding, citizen review board, court appointed special advocate, Office of Child Care for purpose of certifying, registering or otherwise regulating child care facilities or for purposes of ORS 329A.030(8)(g), Office of Children's Advocate, Teacher Standards and Practices Commission, any person if "the reports or records requested regard an incident in which a child, as the result of abuse, died or suffered serious physical injury as defined in ORS 161.015." 419B.035(1)(a) – (j).
 - III. Permitted disclosures. Permits disclosures based on certain findings including: 1) disclosure is in the best interests of the affected child AND necessary for the department to administer its child welfare service; or 2) disclosure is necessary to investigate, prevent or treat child abuse/neglect or to protect children from child

abuse/neglect. ORS 419B.035(3). Law enforcement may disclose reports it receives under ORS 419B.035(4), (5) and (6).

- IV. Redisclosure prohibited. Requires that all records disclosed by DHS must remain confidential in the hands of the recipient subject to criminal penalty for unauthorized redisclosure. ORS 419B.035(7) & (9).

3. **Medical Records.**

- A. Federal Law: Health Insurance Portability and Accountability Act (HIPAA) 42 USC §§ 1320d; 45 CFR Parts 160 & 164.
 - I. Protected Health Information (PHI). Prohibits use or disclosure of PHI, which includes information related to the past, present or future physical or mental conditions of an individual that identifies the individual directly or indirectly, except in compliance with HIPAA or state law. Preempts state law to the extent HIPAA is more protective than state law.
 - II. Disclosure. Permits use or disclosure of PHI with proper authorization, if required by law, pursuant to court order in response to proper subpoena. Extensive federal regulations describe requirements for authorization and subpoenas and other exceptions to restricted use and disclosure of PHI.
- B. State law.
 - I. Health care provider use and disclosure. ORS 192.553 to 192.581.
 - II. Public health care services providers. Disclosure restricted absent specified exceptions including consent or court order. ORS 179.505.

4. **Substance Abuse Treatment Records.**

- A. Federal Law. 42 USC § 290dd-2 (substance abuse education, prevention, treatment, rehabilitation or research records). 42 CFR Part 2 (revised January 18, 2017)
 - I. Confidential records: Makes confidential records regarding identity, diagnosis, or treatment of patient except in enumerated circumstances.
 - II. Consent to disclosure: Disclosure of patient records is permitted with consent of the patient. The person receiving records pursuant to a consent meeting the requirements may not disclose without the express consent of the patient. 42 CFR § 2.31-2.33.
 - a. Minors. Minor patient acting alone has legal capacity under applicable state law to apply and obtain alcohol or drug abuse treatment and any written consent for disclosure may be given only by the minor patient. 42 CFR § 2.14; See ORS 109.675. Where a state requires consent of a parent, guardian or other person for a minor to obtain alcohol or drug abuse treatment, any written consent for disclosure must be given by both the minor and his/her parent, guardian, or other person authorized to act on minor's behalf. Fact relevant to reducing threat to life or physical well being of individual may be disclosed to parent, guardian or other person authorized to act on minor's behalf if the minor applicant lacks capacity due to extreme youth or mental or

physical condition, or if situation poses threat which may be reduced by communicating facts to person of authority.

- III. Court order: Absent consent, generally a court order is required. The court must find that other ways of obtaining the information are not available or would not be effective and public interest and need for disclosure outweigh potential injury to the patient, the physician-patient relationship and the need for treatment services. 42 CFR § 2.64. See *State ex rel Juv. Dept v. West*, 164 Or App 369 (1999).

5. DHS Adoption Records.

- A. State Law. ORS 109.319; OAR 413-010-0000(2) and (23); OAR 413-010-0035(8); OAR 413-120-0246(3)
- I. The “Department adoption record” means “all documents, writings, and information required to be retained in the Department’s Central Office adoption file including, but not limited to:
- (a) Adoption records, papers, and files [records in the court’s record of an adoption case];
 - (b) Records and information created, generated, produced, or submitted for purposes of selecting the *adoptive family* for the *child*;
 - (c) Documents, writings and information obtained, created, or submitted by the Department Child Permanency Program staff for the purposes of finalizing the child’s adoption;
 - (d) Records and information obtained or created by the Department for the purposes of determining eligibility or making payment for *adoption assistance*;
 - (e) Any medical, psychiatric, or psychological records of the *child* received by the Child Permanency Program staff for retention as part of the Child Permanency Program adoption file of the *child*;
 - (f) The names, address, or other identifying information of the *adoptive family* of the *child*; and
 - (g) The birth certificate of the *child*.” (OAR 413-010-0000(23))
- II. Confidential records: Department adoption records must be sealed and DHS cannot access, use or disclose such records except as allowed in ORS 109.319. OAR 413-010-0035(8).
- B. Adoption home studies
- I. Confidential records: Adoption applicants must sign a release authorizing disclosure of information for purposes of the adoption selection process. OAR 413-120-0016(2); OAR 413-120-0220(3)(b).
- II. Authorized disclosure: DHS may release copy of an adoption home study to specified individuals including but not limited to adoption applicant who is subject of the study, individuals involved in the adoption selection process, the court for purposes of finalizing an adoption. OAR 413-120-0246(3)(a).
- III. DHS must redact or summarize information, when necessary, to prevent the identification of individuals, other than the applicants, who provided information for the adoption home study. OAR 413-120-0246(3)(d).
- IV. Prohibits re-disclosure: Individual receiving copy of an adoption home study must keep it confidential. OAR 413-120-0246(3)(c).