



National Association of Public
Child Welfare Administrators

an affiliate of the American Public Human Services Association

Confidentiality in Public Child Welfare: Frequently Asked Questions

1. What are the CAPTA confidentiality requirements?

In general, CAPTA requires States to preserve the confidentiality of all child abuse and neglect reports, but there are some exceptions:

-State **must** provide otherwise confidential child abuse and neglect information to:

- a. Any Federal, State, or local government entity, or agent of such, that has a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect
- b. Child abuse citizen review panels
- c. The public, in cases where child abuse or neglect resulted in a child fatality or near fatality
- d. Child fatality review panels

-State **may** provide otherwise confidential child abuse and neglect information to:

- a. The subjects of the report
- b. A grand jury or court, when necessary to determine an issue
- c. Other entities or classes of individuals who are authorized by statute to receive information pursuant to a legitimate State purpose
- d. State's have the option of allowing public access to court proceedings that determine child abuse and neglect cases, so long as the State can ensure the safety and well-being of the child, parents, and families

(Child Welfare Policy Manual)

2. What are the title IV-E and title IV-B confidentiality requirements?

Records maintained under title IV-B are subject to the confidentiality provisions in 45 CFR 205.50 *(Child Welfare Policy Manual)*. This means that the release or use of information concerning individuals receiving financial assistance under the programs governed by this provision is restricted 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

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(AABD), XIX, XX, or the Supplemental Security Income (SSI) program established by title XVI.

(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 (cash or services) directly to individuals on the basis of need.

(D) The verification to the Employment Security Agency, or other certifying agency that an individual has been an AFDC recipient for at least 90 days or is a WIN or WIN Demonstration participant.

(E) Any audit or similar activity, e.g., review of expenditure reports or financial review, conducted in connection with the administration of any such plan or program by any governmental entity which is authorized by law to conduct such audit or activity.

(F) The administration of a State unemployment compensation program.

(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.

(Code of Federal Regulations 45 CFR 205.50)

3. Will States compromise compliance with titles IV-B and IV-E of the Social Security Act if they comply with the confidentiality requirements of CAPTA?

There may be instances where CPS information is subject both to disclosure requirements under CAPTA and confidentiality requirements under title IV-E. In the event of a conflict, the CAPTA disclosure provisions would prevail since the CAPTA confidentiality provisions were most recently enacted.

However, where the CAPTA provision is permissive, it allows States to disclose such information, but it does not make such disclosure permissible in other programs if it is not otherwise allowed under the other program's governing statute or regulations.

(Child Welfare Policy Manual)

4. What are the HIPAA confidentiality requirements?

Protected Health Information (PHI) *must* be disclosed:

- a. To individuals who want to have access to or know about any disclosures of their own PHI
- b. To HHS during a compliance investigation or review or enforcement action

Protected Health Information *may* be disclosed:

- a. To the individual who is the subject of the information

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- b. For the covered entity's own treatment, payment and health care operations activities
- c. With informal consent or in circumstances that clearly give the individual the opportunity to agree, acquiesce or object
- d. Incidental use and disclosure to the minimum necessary
- e. For public interest and benefit activities
- f. For research and other public health purposes with any identifying information removed

*Reporting of abuse or neglect and disclosing information regarding victims of abuse, neglect or domestic violence *are* considered "public interest and benefit activities" and therefore some information may be shared in these instances without authorization or permission. It protects child health information but allows disclosures with victim consent or when necessary to prevent harm to the victim or others.

(Klain, "Confidentiality and Dependency Courts.")

*Covered entities may disclose protected health information to law enforcement officials for law enforcement purposes where there is a court order, court-ordered warrant, or subpoena or summons issued by a judicial officer. They may also disclose to law enforcement in response to a request for information about a victim or suspected victim of a crime. When the parent is not considered the child's representative, HIPAA leaves it to state law to determine the rights of the parents with regard to the child's health information. If the court authorizes someone else to make treatment decisions for the child, that person can give consent for disclosure of records.

(Legal Analysis Subcommittee Report)

5. What are the confidentiality requirements protecting information gathered by drug and alcohol programs?

The law requires that records can only be disclosed based on:

- a. Written consent requirements
- b. A court order based on "good cause"

The regulations require consent forms to be specifically designed for drug records and they should indicate the type and substance of the information to be released and the period of time covered by the release. A consent is not required with a court order, but the court orders are not always easy to obtain and to get one there must be evidence that there is no other effective means available to get the information. For confidential information, it must also be shown that the information is necessary either to protect against a threat to life or bodily injury or in connection with a prosecution or serious crime.

(Hardin, "Privacy and Information Sharing in Child Abuse and Neglect Cases.")

6. What are the FERPA confidentiality requirements?

Generally, FERPA requires that a release be signed by a student's parents in order for the student's records to be shared. However, there are exceptions. Records can be disclosed:

- a. In response to a court order
- b. For students in the juvenile justice agency, if:
 - i. If the disclosure is made to a state or local juvenile justice agency
 - ii. If the disclosure is based on a state statute authorizing disclosure

- iii. If the release of records is necessary to effectively serve, prior to adjudication, the needs of the juvenile
- iv. If state or local officials certify, in writing, that the institution or individual receiving the information agrees not to disclose it to a third party other than the juvenile justice agency

(Legal Analysis Subcommittee Report)

CAPTA allows the state to share information with any government entity if the entity needs such information to carry out responsibilities to protect children from abuse and neglect. This could be interpreted to allow the release of education records to other state or local agencies, such as child welfare agencies. *(McNaught, "Mythbusting.")*

According to the US Department of Education website, when CAPTA and FERPA conflict CAPTA supersedes FERPA. *(U.S. Department of Education)*

According to FERPA, parents must have access to their children's education records, but to others, parental consent is required. It is not clear whether or not the child protection agency or foster parent qualifies as a "parent" entitled to the records. There is an exception concerning an emergency involving a student's health or safety. Generally, if you argue on the definition of the parent or on the exception, you can generally be entitled to the education records. *(Hardin, "Privacy and Information Sharing in Child Abuse and Neglect Cases.")*

References

1. U.S. Department of Health and Human Services Administration for Children and Families. Child Welfare Policy Manual. <http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/index.jsp?idFlag=0>.
2. U.S. Department of Health and Human Services Administration for Children and Families. Code of Federal Regulations 45 CFR 205.50. 1998. <<http://www.acf.dhhs.gov/programs/cse/stsys/cfr/45cfr95.txt>>.
3. Klain, Eva. "Confidentiality and Dependency Courts: An Overview of HIPAA and Other Federal Confidentiality Provisions." American Bar Association Center on Children and the Law.
4. King County Systems Integration Project. "Legal Analysis Subcommittee Report." September 22, 2004.
5. Hardin, Mark. "Privacy and Information Sharing in Child Abuse and Neglect Cases." National Child Welfare Resource Center on Legal and Judicial Issues. 2001.
6. McNaught, Kathleen. "Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care." American Bar Association.
7. U.S. Department of Education. "Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements." November 29, 2004.

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