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Legal Protections & Information Sharing

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Overview



- 1. Information Sharing – The Interplay of State and Federal Law**
- 2. Hypotheticals**
- 3. Legal Protections – The Role of Legal Counsel**
- 4. Vision Statements and Action Plans**



Information Sharing

Why Share Information?

- In diversion programs, you may want to share information in order to:
 - ▣ Guide screening and assessment to determine eligibility for diversion
 - ▣ Improve inter-organizational coordination around the provision of services
 - ▣ Inform decision-making regarding whether a youth should be exited from diversion and/or moved to formal processing in the juvenile justice system
 - ▣ Inform consequences for the youth, once formally processed, based on statements made by the youth when they were in a diversion program

Information Sharing Basics

- Confidentiality laws protect **personally identifiable information** about which individuals (and their families) have an **expectation of privacy**
- Federal and state statutes establish:
 - ▣ When and what information **must not** be disclosed
 - ▣ When, what and how **may** be disclosed
 - ▣ When, what and how **must** be disclosed

**MUST NOT
Disclose**

**MAY Disclose or Keep
Confidential**

MUST Disclose



This is a spectrum. Much of our work falls in the middle category, where discretion exists.

“Personally Identifiable Information”

- Information that would allow someone to identify an individual with reasonable certainty, i.e. name, biometric data, address, names of family members, etc.
- HIPAA, FERPA have specific definitions

Information Sharing: The Analytical Framework

- ▣ Who holds the information?
- ▣ Who will receive the information?
- ▣ What specific information is included?
- ▣ What will be done with the shared information?

Based on the answers to the above framework, **plus the applicability of state/federal laws**, build policies to facilitate the information sharing your jurisdiction needs.

Which Law Applies?

- Look to both federal and state law, plus applicable ethical/professional codes



Note...



- This presentation does not constitute legal advice
- Always consult your agency counsel about information sharing matters



Major Types of Information We Share



1. Education
2. Health/Mental Health
3. Substance Abuse/Treatment
4. Child Welfare/Juvenile Justice Records

Education Records

- Relevant laws:
 - ▣ Family Education Rights and Privacy Act (FERPA)
 - ▣ Individuals with Disabilities Education Act (IDEA)
 - ▣ State education code
- Tip: FERPA trumps state law if there is a conflict between the two.

Education Records

- Family Education Rights and Privacy Act (FERPA)
 - Ensures parents can access their children's education records
 - Requires parental consent for personally identifiable information (PII) in records to be released to non-parents
 - Provides exceptions for PII to be released in certain situations (i.e. juvenile justice exception, Uninterrupted Scholars Act, judicial order exception)

Education Records

- Individuals with Disabilities Education Act (IDEA)
 - Separate but related protections from FERPA
 - Parents have the right to inspect and review special education records
 - When FERPA doesn't apply, parents (or youth 18+/in post-secondary school) must consent to the release of PII

Education Records

- State law example: Arizona
 - ▣ ARS 15-141(D) – Juvenile court can require education agency to provide education records to court regarding youth who is **pre-adjudication**. Includes records compiled pursuant to IDEA and Section 504. Presiding judge determines procedures as to how records should be transferred from school to court.

Health Records

- Relevant laws:
 - ▣ Health Insurance Portability and Accountability Act (HIPAA)
 - ▣ State law
 - ▣ Providers' professional ethical guidelines (depending on type of treatment/service)
- Tip: HIPAA defers to state law if state law is more protective.

Health Records

- Health Insurance Portability and Accountability Act (HIPAA)
 - Providers must protect confidential patient health information
 - Individuals must consent to release of information by signing a written authorization
 - Minors sometimes control the release of information!
 - Exceptions exist (e.g. court orders and subpoenas)

Health Records

□ State law example: California

- Provider may disclose medical/mental health information to a county social worker, a probation officer, or any other person who is legally authorized to have custody or care of a minor for the purpose of coordinating health care services and medical treatment provided to the minor.
- Exceptions exist
- Civil Code 56.103; WIC 5328.04

Substance Abuse Testing & Treatment Records

- Relevant laws:
 - ▣ Confidentiality of Alcohol and Drug Abuse Patient Records (federal)
 - ▣ State law
- Tip: Federal law trumps state law when there is a conflict.

Substance Abuse Testing & Treatment Records

- Confidentiality of Alcohol and Drug Abuse Patient Records
 - Additional protections over HIPAA for individuals in alcohol and drug treatment programs that receive federal assistance or are otherwise subject to federal compliance
 - Minor always must provide signature to authorize release of information (though parent signature may be required, depending on state law)
 - Exceptions (i.e. court order/subpoena, rational choice, medical emergencies)

Substance Abuse Testing & Treatment Records

- State law example: Nevada
 - ▣ NRS 129.050 – Minor can explicitly consent to substance abuse treatment. Parent's consent is not necessary, **but doctor providing care shall make every reasonable effort to report the fact of treatment to the parent within a reasonable time after treatment was provided**

Child Welfare and Juvenile Justice Records

- Relevant laws:
 - ▣ Child Abuse Prevention and Treatment Act (CAPTA)
 - ▣ Indian Child Welfare Act (ICWA)
 - ▣ Juvenile Justice and Delinquency Prevention Act (JJDPA)
 - ▣ State law

Information Sharing About Diversion

- Non-disclosure
 - ▣ States represented here with statutes: none
- Admissibility of incriminating statements
 - ▣ States represented here in which statements are inadmissible:
 - ND (but can be used during juvenile disposition hearing)
 - IL

Information Sharing About Diversion



- Non-disclosure and inadmissibility of statements can be addressed through law, court rules and MOUs
- Consider if you want/need to fill in the gaps!

Hypothetical 1

- Daniel is in a probation diversion program and is 15 years old. His probation officer would like to collect monthly reports from Daniel's school that include attendance, discipline reports, notes from the school-based psychologist's meetings with Daniel, and any reports made by the school resource officer related to Daniel's behavior.

Hypothetical 1

- What questions do you have in order to determine whether the diversion probation officer can receive this information?
- Absent state law, what information can the probation officer receive out of that list?
- Applying Arizona law, what information could the probation officer receive from that list, and how could the officer receive it?

Hypothetical 2

- Carmen is in a probation diversion program and also in the child welfare system, due to her experience as a commercially sexually exploited child. Her probation officer wants to obtain her substance use treatment records to determine whether she's in compliance. Her social worker wants to access her medical records to determine whether she was diagnosed with a sexually transmitted disease.

Hypothetical 2

- What questions do you have in order to determine whether the PO and social worker can receive this information?
- Absent state law, what does each person need to do to access those pieces of information?
 - ▣ Probation officer (substance abuse info)
 - ▣ Social worker (medical info)

Hypothetical 2

- Carmen is refusing to sign a consent such that the probation officer can receive information from the substance use treatment program.
 - ▣ Can the probation officer get this information with Carmen's parent's consent?
 - ▣ If the social worker has this information, can she share it with the probation officer?



Role of Legal Counsel

Why Might We Need Legal Counsel?

- To help youth understand how to make the decision to enter a diversion program
- To advise youth in programs in which diversion communications, documents, reports, etc. are not considered confidential

Options for the Role of Counsel

- Appoint counsel at time of diversion participation decision
- Appoint counsel throughout entire diversion process
- No counsel provided, but youth can retain private counsel

Back to Hypothetical 2...



- How could the diversion program utilize the services of an attorney to get information from/about Carmen?

RECAP:

Legal Protections & Information

Sharing

- Use the analytical framework to determine what, why and how information can be shared.
- Formulate written policies and procedures, MOUs
- Get lawyer sign-off
- Identify staff that should be trained
- Identify whether legal counsel would be helpful in any part of your diversion process

Team Vision Statements

- Your statements address:
 - ▣ What information you want to share in your jurisdiction in regards to youth on diversion
 - ▣ Who will be sharing and receiving that information
 - ▣ Why that information is important
 - ▣ How that information will ideally be shared (i.e. in writing, verbally, over email, by photocopy, etc.)



TEAM DISCUSSIONS



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