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Office of The Attorney General
State of Connecticut

June 1, 2007

Honorable Jeanne Milstein
Child Advocate
18-20 Trinity Street
Hartford, CT 06106

Dear Ms. Milstein:

This letter responds to your request for a formal opinion on whether the Department of Children and Families (DCF) is prohibited by the federal Public Health Service Act, 42 U.S.C. § 290dd-2 (the Federal Act) from disclosing to the Office of the Child Advocate (OCA) certain substance abuse treatment records that you requested pursuant to your authority under Conn. Gen. Stat. § 46a-13m. In particular, you ask whether DCF is barred by the Federal Act from disclosing (1) a list of children, provided to DCF by the Department of Mental Heath and Addiction Services (DHMAS), that identifies all children referred to DHMAS by DCF over a three year period (the "DHMAS List"), and (2) certain records in its possession related to six particular children (both sets of records are collectively referred to as the "Records"). For the reasons that follow, we conclude that the Federal Act expressly permits disclosure of these records to oversight agencies conducting program evaluations. Because the OCA properly seeks the Records from DCF in its statutory oversight capacity to evaluate the delivery of services to children, disclosure is expressly allowed by the Federal Act and its corresponding regulations.

As to the first request for the DHMAS List, sometime prior to April 20, 2007, DHMAS provided DCF with a list of children that had been referred to DHMAS by DCF over a period of three years. The DHMAS List identifies the names of the children but does not specify any information concerning their treatment or diagnosis at DCF or DHMAS. DHMAS prepared the list of names from information it received from DCF. The DHMAS List is necessary for the OCA to evaluate the experiences of children who transition from DCF to DHMAS as they approach the time at which they will "age out" of DCF jurisdiction. As to the second request, on May 2, 2007, the OCA sought information from DCF pertaining to records of six specific children who received care and services from DCF. While DCF has provided your office with a number of records related to this request, it has withheld certain other records relating to substance abuse treatment. To date, DCF has refused to provide you either the

DHMAS List or the children's substance abuse records, claiming they may be barred from doing so under the Federal Act.

As an initial matter, we determine that the DHMAS List is not subject to the Federal Act because it does not disclose any protected patient information. In order for 42 C.F.R. § 2.1 to bar the disclosure of a "record," it must "relate to" a "patient" and be "maintained in connection with the performance of any program." 42 C.F.R. § 2.1, 2.11. The List is not such a document. Rather, it is instead a distillation of names created by DHMAS, from information it received from DCF, which pertains to children who may or may not have been "patients" in a "program," and does not in any way identify any child as receiving drug or alcohol treatment. *See Moore v. City of New York*, 2001 U.S. Dist. LEXIS 2191 (2001) (Court held that disclosure of the fact that a person acknowledged treatment at a federally assisted substance abuse program was not barred by 42 C.F.R. § 2.1 as the information was not "received or acquired" by any covered program and was not connected to the individual's actual treatment.) Thus, because the DHMAS List merely identifies the names of children that have transitioned from DCF to DHMAS, and does not identify any child as a participant in a federal drug or alcohol program run by DHMAS, the Federal Act does not apply to prohibit disclosure.

Even if the Act did apply to the DMHAS List, both the List and the specific information about the six individuals in your second request should be disclosed to you because your request falls within an exception to the general proscriptions of the Act.

In general, the Federal Act prohibits disclosure of certain patient records "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 . . ."[1] 42 U.S.C. § 290dd-2. However, the Federal Act expressly acknowledges the need to disclose records to oversight agencies and permits disclosure to:

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[1] DCF does not consider itself a program subject to this Federal Act, but asserts that it receives documents from service providers that are subject to the Federal Act. Redisclosure of covered records is prohibited under the Federal Act in certain circumstances. 42 C.F.R. § 2.12(d)(2). However, because we conclude that the exception for disclosure for audit and evaluation activities under the Federal Act applies here, it is not necessary for us to determine if the redisclosure of the records would violate the Federal Act.

> Qualified personnel for the purpose of conducting scientific research, *management audits*, financial audits, or *program evaluation*, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation or otherwise disclose patient identities in any manner.

42 U.S.C. § 290dd-2 (b)(2)(B) (emphasis added).[2]

The federal regulations, promulgated under the Federal Act, clarify that the Federal Act is not intended to prohibit authorized state oversight agencies access to records of substance abuse programs but rather is intended to encourage drug and alcohol patients to seek treatment without fear of unnecessary and harmful disclosures. In particular, the regulations explain that:

> These regulations are not intended to direct the manner in which substantive functions such as research, treatment, and evaluation are carried out. They are intended to insure that an alcohol or drug abuse patient in a federally assisted alcohol or drug abuse program is not made more vulnerable by reason of the availability of his or her patient record than an individual who has an alcohol or drug problem and who does not seek treatment.

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[2] Consistent with the Federal Act and its intended purposes, the federal regulations provide that patient records subject to the Federal Act may be disclosed to any person who performs "the audit or evaluation activity" on behalf of "[a]ny Federal, State, or local governmental agency which provides financial assistance to the program or is authorized by law to regulate its activities." 42 C.F.R. § 2.53(b)(2). A regulation must be read consistent with its statute and cannot "alter the clearly expressed intent of Congress." *Progressive Corp. & Subsidiaries v. United States*, 970 F.2d 188, 192 (6th Cir. 1992) (internal citation omitted). The revisions to 42 C.F.R. § 2.52 and § 2.53 in 1987 "simplif[ied] and shorten[ed]" the audits and evaluation provisions but did not limit the access of states to records. *See generally* Final Rule, 52 Fed. Reg. 21796 (June 9, 1987) (to be codified at 42 C.F.R. Part 2). "The proposed rule permits governmental agencies to conduct audit and evaluation activities in both categories." *Id.* The commentary to the 1987 revisions indicates that the changes were intended to expand access to records to private parties with the intent that private organizations have access to records "to the same extent and under the same conditions as a governmental agency." *Id.*

42 C.F.R. § 2.3(b)(2).

In an earlier opinion addressing the Federal Act, this Office explained the statutory purpose more fully:

> The provisions for the confidentiality of drug and alcohol patient records, . . . reflect the intent of Congress that drug and alcohol abusers be encouraged to seek treatment without fear of criminal charges or investigations. Implicit in the provisions is the recognition that effective treatment of the patient is dependent upon the open disclosure of information from patient to physician. The relevant legislation embodies a conscious decision by [Congress] to avoid law enforcement actions which otherwise might stem from information disclosed in the treatment setting. The concern of [Congress] is for the well-being of the patients and their treatment and recovery.

87 Op. Atty. Gen. p. 329 (July 30, 1987) (footnote omitted).

Consistent with this purpose, the plain language of the Federal Act permits disclosure of confidential patient records to "qualified persons" conducting "management audits and program evaluations." The issue, therefore, is whether the OCA is a qualified person conducting a management audit or program evaluation. We determine that it is.

The OCA was created in 1995 precisely to oversee and evaluate programs and services in this State related to children, as well as to advocate on their behalf. *See generally*, Conn. Gen. Stat. § 46a-13k *et. seq.* In particular, among the OCA's numerous statutory responsibilities, it is required to: (1) "Evaluate the delivery of services to children by state agencies and those entities that provide services to children through funds provided by the state" (§ 46a-13*l*(1)); (2) Review complaints of state or local agencies, or any entity receiving state funds, that provides services to children and investigate those complaints where the OCA determines that the children or family may be in need of assistance (§ 46a-

13*l*(3)); (3) "Periodically review the facilities and procedures of any and all institutions or residences, public or private, where a juvenile has been placed by any agency or department" (§ 46a-13*l*(5)); and (4) "Recommend changes in state policies concerning children including changes in the system of providing juvenile justice, child care, foster care and treatment." (§ 46a-13*l*(6)) In addition, the Child Advocate serves on the Child Fatality Review Panel, which is charged with reviewing the circumstances of child deaths "due to unexpected or unexplained causes to facilitate development of prevention strategies to address identified trends and patterns of risk and to improve coordination of services for children and families in this state." Conn. Gen. Stat. § 46a-13*l*(b).

In order for the OCA to conduct these substantial responsibilities, the Legislature determined that it was necessary for it to have broad and unfettered access to records of all state agencies.[4] Accordingly, under Conn. Gen. Stat. § 46a-13m(a), the OCA has broad access to records and information in the possession of other state agencies that are necessary to carry out the OCA's responsibilities. Such access "shall" be provided to the OCA "[n]otwithstanding any provision of the general statutes concerning the confidentiality of records and information." Any information so obtained by the OCA is deemed confidential by law and may only be disclosed under limited circumstances. Conn. Gen. Stat. § 46a-13n.

It is clear that the OCA's purpose in seeking the Records at issue here is within its statutory responsibility to evaluate the care and services provided to children by DCF. It is not intended to be used in law enforcement actions against these children based on the information acquired, which was the focus of the Federal Act's confidentiality provisions. 87 Op. Atty Gen. p. 329, supra. On the contrary, OCA's intent and statutory purpose are to ensure adequate and effective treatment of these children. As such, the OCA is a "qualified person" performing a management audit or program evaluation under the Federal Act, and is therefore permitted full access to any substance abuse records in the possession of DCF.[5]

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[4] The OCA may also obtain records from municipalities or any entity that provides services to children through funds provided by the State. *See* Conn. Gen. Stat. §§ 46a-13m, 46a-13*l*.

[5] The OCA's evaluation of DCF here clearly falls within 42 C.F.R. §2.53(b)(2) as well. DCF and its providers receive funding from the State, through appropriations of the General Assembly. The General Assembly has designated the OCA to evaluate all programs DCF or its providers provide to children. The OCA is required to report its activities to the General Assembly and the Governor. Conn. Gen. Stat. § 46a-13k(f). Thus, the OCA is performing its evaluation activity on

Our conclusion that the Federal Act permits disclosure to the OCA is consistent with several opinions of this Office finding that the Federal Act does not bar disclosure of patient records to state oversight agencies evaluating program services.[6] In 1984, we advised the former Department of Mental Health that the audit and evaluation exemption under the Federal Act allowed it access to patient psychiatric records because the records were sought to ascertain the effectiveness of a "program" and to determine whether the "program" had adhered to applicable legal and professional standards. 84 Op. Atty. Gen. p. 339 (July 18, 1984). We found that the audit and evaluation exception under the Federal Act "applies to any examination of the records of a treatment program which is carried out for the purpose of or as an aid to ascertaining the accuracy or adequacy of its financial or other records, or the efficiency or effectiveness of its financial, administrative or medical management, or its adherence to financial, legal, medical, administrative, or other standards, regardless of whether such examination is called an audit, an evaluation, an inspection, or by any other name." *Id.* We concluded that "these regulations clearly contemplate the evaluation of patient records as part of an examination of the program and authorize such disclosure without the patient's consent. These sections apply to *any agency,* public or private, which legitimately needs to evaluate the program." *Id.* (Emphasis added.)

This analysis applies with equal force here. The evaluation of the Records requested is essential to fulfill the OCA's statutory mandate to audit and evaluate the programs and services provided by DCF, and to ensure the effective and efficient care and protection of children.

Similarly, in a 1987 opinion to the Connecticut Alcohol and Drug Commission (CADAC), we concluded that the Connecticut Peer Review Organization (CPRO) was a qualified person conducting "program evaluation" sufficient to allow nonconsensual disclosure of patient records under the Federal Act's exemption. 87 Op. Atty. Gen. p. 329 (July 30, 1987). In reaching this conclusion, we determined that the CPRO employed persons "appropriately trained and experienced to perform" its statutory oversight functions, and provided "adequate safeguards against unauthorized disclosures of information." *Id. See also* 87 Op. Atty. Gen. p. 325 (July 16, 1987) (the Federal Act permitted

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behalf of the State which provides DCF and its providers with funding, and as such is allowed access to all substance abuse records in DCF's possession.

[6] Since these opinions were issued, the federal regulations were simplified and shortened, but these changes did not restrict the State's ability to gain access to substance abuse records for program evaluation purposes. Thus, these opinions remain instructive as to how this regulation should be applied

the Connecticut Alcohol and Drug Abuse Commission to require methadone treatment facilities to report confidential patient information for research and evaluation purposes).

The OCA easily meets the definition of "qualified personnel" conducting "program evaluations" within the meaning of the Federal Act. The OCA is comprised of trained professionals authorized by law to review and evaluate programs and services designed to treat and safeguard children, and provides "adequate administrative safeguards against unauthorized disclosure" of confidential information obtained from the requested records. Conn. Gen. Stat. § 46a-13n.

Finally, the federal regulations require that the entity receiving the substance abuse records, here the OCA, agree in writing to: "(i) Maintain the patient identifying information in accordance with the security requirements provided in § 2.16 of these regulations (or more stringent requirements); (ii) Destroy all the patient identifying information upon completion of the audit or evaluation; and (iii) Comply with the limitations on disclosure and use in paragraph (d) of this section." 42 C.F.R. § 2.53(b)(1). Thus, prior to receiving the substance abuse records, you should send a letter to DCF stating that your office agrees to these regulatory requirements.[7]

Accordingly, the Federal Act does not bar disclosure of confidential drug and alcohol abuse treatment records to the OCA in conducting management audits or program evaluations to fulfill its oversight function. Because the OCA is properly evaluating DCF's services to children, it is authorized by state and federal law to obtain all of the Records it has requested from DCF.

I trust this letter responds to your concerns.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

[7] If the OCA's evaluation is completed prior to the expiration of the state document retention period applicable to your Office, destruction of the documents is permissible because it is required by federal law. *See* Conn. Gen. Stat. § 11-8b.