

PROPOSED RULE MAKING – July 23, 2013

Section 348.1 of 9 NYCRR is amended to read as follows:

Section 348.1 Definitions.

(a) Case record management is the systematic control over the establishment, accessibility, utilization, content, security, privacy, preservation and timely destruction of case records.

(b) Cumulative case record is a single case file containing all information with respect to a case from its inception through its conclusion. All records developed and/or received by the probation department which are related to [the carrying out of] authorized probation functions and services are considered probation records for the purpose of retention and destruction. The records may be written and/or electronic. Reports and other records material developed by the probation department and transmitted to the courts or other agencies become the responsibility of the court or other agencies [as records] with respect to case record management.

(c) Probation services include intake[/diversion], investigation, supervision, [support/collection,] and any other special [or related service delivery programs] services.

Sections 348.2- 348.4 are renumbered Sections 348.4- 348.6 respectively.

New Section 348.2 is added to read as follows:

§348.2 Objective.

This rule establishes minimum state standards regarding probation case record management.

New Section 348.3 is added to read as follows:

§348.3 Applicability.

This Part is applicable to all probation departments throughout New York State.

Section 348.4 is amended to read as follows:

§348.4 [Rules] Case Records.

(a) The case record shall include information on all probation services rendered and may be maintained in a written and/or electronic format within an automated case management

system.

(b) The contents of the case record shall [be as follows] include information and/or documents of:

(1) Intake[/diversion] services, where applicable.

(2) [Legal documents] Pretrial services, where applicable.

(3)[Pre-sentence investigation report materials] Pre-dispositional services, where applicable.

(4) [ Supervision history] Arrest, complaint, appearance ticket, and any other legal information and/or documents obtained or generated.

(5) Any probation investigation and report and related information and/or documents.

(6) All probation supervision-related information and/or documents, including order and conditions, risk and needs assessment(s), applicable interstate/intrastate transfer records, case plan.

(7) Any victim impact statement and information, where available.

(8) All correspondence received relating to or associated with the case.

(c) The cumulative case record shall include reasons for the [client's] individual's entry into the probation system, reflect actions taken by the [client] individual and probation officer at critical points, and the rationale for all significant decisions made from entry until termination of probation services.

(d) Case records shall be maintained or destroyed in accordance with the Records Retention and Disposition Schedules promulgated by the State Education Department. [Prior to destruction those court records which have been filed in the probation department shall be returned to the court.]

(e) Each probation department shall establish an index filing system for all cases which may be established and maintained in an automated system. The minimum data in any [active] file shall [be] include:

- (1) [Client's] Individual's name and date of birth.
- (2) Identifying case [numbers] information:
  - (i) Probation or interim probation supervision period.
  - (ii) Court Control/Criminal Justice Tracking Number.
  - (iii) New York State Identification (NYSID), where applicable.
  - (iv) Social Security number, where available.
- (3) Type of complaint or conviction/adjudication.
- (4) Court's disposition and date.
- (5) Probation discharge date and type of discharge.
- (f) The security of case records shall be maintained. Appropriate protections shall be instituted to safeguard records, electronic or otherwise prepared, transmitted, and stored.

Section 348.5 is amended to read as follows:

§348.5 Supervision recordkeeping requirements.

(a) Periodic [supervision reports] Reassessments/Case Reviews.

(1) Periodic [supervision reports] Reassessments/Case Reviews shall include the following:

(i) [For Level I, II and III cases:

(a) all home visits and dates, personal contacts and dates, collateral contacts and dates, failure to report dates and follow-up actions and outcomes;

(b) violation of probation synopses, rearrest, and reconviction information, and actions and outcome;

(c) recurring assessment of needs and objectives to be accomplished;

(d) summary analysis of probationer's progress and updates of the supervision plan; and

(e) objectives outstanding.

(ii) For Level IV cases:

(a) name and NYSID number, where applicable;

- (b) date entered into level IV;
- (c) appropriate designation--e.g., Absconder, jurisdiction-retained case, etc.;
- (d) current status; and
- (e) a listing of all contacts and dates]

a copy of the state approved completed risk and needs assessment and any Reassessment/Case Review;

(ii) documentation of compliance or non-compliance with contact requirements during the supervision period;

(iii) progress towards achieving case plan goals, objectives, and action steps during the current supervision period;

(iv) documentation of participation in merit credit activities, where applicable, during the supervision period;

(v) documentation of any substitution credits provided, where applicable, during the supervision period;

(vi) any modification of case plan, conditions of probation or interim probation supervision and reclassification of the supervision level; and

(vii) summary of the use of graduated sanctions, any violation of probation or interim probation supervision, re-arrest/reconviction information, and any other probation and/or court action(s) and outcome(s).

(2) The frequency of [periodic supervision reports, based upon the date the probationer/ respondent is placed in such level supervision,] Reassessments/Case Reviews shall be as follows:

(i) For [Level I, II, and III] active family court juvenile cases, these reports shall be completed at [six] three-month intervals;

(ii) For [Level IV] active criminal court and family court adult supervision cases, these reports

shall be completed at [12-] six-month intervals and [may be represented in a case folder, general departmental computer printout or manual log.] ;

(iii) For administrative cases, which are otherwise unavailable for active supervision, these reports shall be completed at twelve month intervals.

Paragraphs 3-7 of subdivision (c) of section 348.6 are renumbered paragraphs 6-10 respectively and section 348.6 is amended to read as follows:

§348.6 Accessibility of Case Records.

(a) General.

(1) Case records shall be accessible, in whole or in part, only by those authorized by law, court order and/or the Division of [Probation and Correctional Alternatives (DPCA)] Criminal Justice Services (DCJS). [DPCA has] Authorized DCJS personnel shall have access to all case records and probation departments shall provide copies of any case records to [DPCA] DCJS upon request.

(2) Any pre-sentence report or memorandum submitted to the court pursuant to article 390 of the Criminal Procedure Law and any medical, psychiatric or social agency report or other information gathered for the court by a probation department or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court.

(3) Any pre-dispositional reports or memoranda prepared or obtained by a probation department for the purpose of a dispositional hearing shall be deemed confidential information furnished to the court and shall be subject to disclosure solely in accordance with Family Court Act section 351.1 or 750 whichever is applicable or as otherwise provided by law.

(b) Mandatory sharing of case record information.

(1) A probation [director, or his/her designee] department[, ] must make available a copy of its pre-

plea/pre-sentence report and any medical, psychiatric or social agency report submitted in connection with its pre-sentence investigation or its supervision of a defendant, to any court or to the probation department of any court within the State[, ] that subsequently has jurisdiction over such defendant for the purpose of pronouncing or reviewing sentence, and to any State agency[, ] to which the defendant is subsequently committed or certified or under whose care and custody or jurisdiction the defendant subsequently is placed, upon the official written request of the court or agency. In any such case, the court or agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

(2) A probation [director, or his/her designee] department, must provide a copy of a pre-plea/pre-sentence report prepared in the case of an individual, other than a youthful offender, who is known to be licensed pursuant to title 8 of the Education Law to the State Department of Health if the licensee is a physician, a specialist's assistant or a physician assistant and to the State Education Department with respect to all such other licensees. Such reports must be in writing and shall be accumulated and forwarded every [three] 3 months. They may be submitted in hard copy or electronically and shall contain the following information:

- (i) the name of the licensee and the profession in which the license is held,
- (ii) the date of the conviction and the nature thereof,
- (iii) the index or other identifying file number.

In any such case, the State department receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

(3) Upon a determination by a probation director, or his/her designee, that probation records regarding an individual presently under the supervision of the department are relevant to an

investigation of child abuse or maltreatment conducted by a child protective service pursuant to title 6 of article 6 of the Social Services Law, he/she shall provide the records, or portions thereof, determined to be relevant to the child protective service conducting the investigation.

Each probation director, or his/her designee, shall make provisions for the transmission of those required records.

(4) A probation [director, or his/her designee] department, must provide all requisite case record information with respect to interstate or intrastate transfer of any [probationer] individual under probation supervision or former conditional releasee and, upon official written request, forward any additional case record information to the agency to which supervision has been transferred.

(5) A probation department must, upon request of the State Office of Victim Services, provide such assistance and data as will enable such office to carry out its functions and duties in accordance with Executive Law §623(4).

(6) A probation department must, upon request of a state agency authorized to check criminal history information pursuant to Executive Law §845-b(2) or Social Services Law §378-a(2)(d) which has received criminal history information from the Division of Criminal Justice Services, provide information pertaining to any crime identified in such criminal history information for the purposes of determining whether any ground exists relating to such crime/criminal conviction or pending criminal charge, whichever is applicable, for denying an application, renewal, or employment.

In any such case, the court or agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

(c) Discretionary Sharing of Case Record Information and Specific Risk Instrument Sharing.

(1) Public agencies outside this State. A probation director, or his/her designee, may disclose any information in its file as to an adult probationer, including youthful offender information, to any probation, parole, or public institutional agency outside this State, upon official written request.

Any release of information shall be conditioned upon the agreement of the receiving agency to retain it under the same conditions of confidentiality as apply to the probation department that made it available. Public institutional agency shall mean any governmental entity which has the legal authority to detain and/or obtain custody over an individual charged or previously convicted of a criminal offense or adjudicated a youthful offender, or which has the responsibility to make a legal determination with respect to sex offender registration and/or DNA compliance.

(2) Public Safety and/or Case Management Purposes. A probation director, or his/her designee, may disclose relevant case record information, other than the pre-plea/ pre-sentence/pre-dispositional report, not otherwise sealed or specifically restricted in terms of access by State or Federal law, from its files concerning any adult offender [(other than a youthful offender)] or fingerprintable juvenile delinquent currently or previously under probation supervision or formerly under local conditional release supervision, to appropriate law enforcement authorities, school authorities, child protective services, public and/or treatment agencies, the judiciary, and victim(s)/victim(s) family member(s), for public safety and/or case management purposes, including, but not limited to the following:

- (i) national and homeland security;
- (ii) criminal investigations and/or execution of warrants;
- (iii) sex offender registration and/or DNA compliance;
- (iv) victim safety, including matters pertaining to domestic violence, child protection, and sexual offense;
- (v) National Instant Criminal Background Check System (NICS)/weapons permits;
- (vi) military eligibility;
- (vii) professional licensing/certification;



(viii) monitoring of conditions of probation, interim probation supervision, or conditional release;

(ix) risks and needs assessment;

(x) treatment or counseling services to a licensed or certified provider; and

(xi) probation or conditional release investigations;

In all such instances, those to whom access has been granted shall not secondarily redisclose such information without the express written permission of the probation director, or his/her designee, who authorized access.

(3) Risk Assessment Instruments and Information Record Sharing. Notwithstanding any other provision of law or regulation to the contrary: (i) a probation director or his/her designee may disclose data necessary for completion of a detention risk assessment instrument to law enforcement, another probation department, courts, detention administrators, detention providers, and the attorney for the child upon retention or appointment, solely for the purpose of accurate completion of such risk assessment instrument in accordance with Executive Law §530(2)(a); (ii) any information or data necessary for the development, validation or revalidation of the detention risk assessment instrument shall be shared among local probation departments, the Office of Probation and Correctional Alternatives and, where authorized by the Division of Criminal Justice Services, the entity under contract with the Division to provide information technology services related to youth assessment and screening, the Office of Children and Family Services, and any entity under contract with said Office to provide services relating to the development, validation or revalidation of the detention risk assessment instrument. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to Executive Law §

530 or any other law is prohibited;

(iii) data necessary for completion of a pre-dispositional risk assessment instrument may be shared among law enforcement, probation, courts, detention administrations, detention providers, presentment agencies, and the attorney for the child upon retention or appointment solely for the purpose of accurate completion of such risk assessment instrument. A copy of the completed pre-dispositional risk assessment instrument shall be made available to the attorney for the respondent and the applicable court as authorized by Family Court Act §351.1(2-a)(d) and (2-b)(c); and

(iv) where a jurisdiction has a collaborative assessment approach within their juvenile justice system to attempt to divert appropriate youth from family court, a probation department may share limited identifying assessment information on a case-by-case and need-to-know basis to law enforcement and/or community-based organizations who are part of efforts to avoid unnecessary detention and/or placement of such youth.

(4) Youthful Offender case records. (i) A probation department shall not divulge youthful offender information, except where specifically required or permitted by statute or upon specific authorization of the court. (ii) A probation director or his/her designee may authorize limited disclosure of youthful offender information, not otherwise specifically prohibited by state or federal law, to be shared with other law enforcement and/or treatment agencies, as applicable on a case-by-case and need-to-know basis, in carrying out its official duties, including executing a warrant, conducting a search, referring a youthful offender for assessment and/or treatment as a condition of probation or interim probation supervision, performing supervision in conjunction with the assistance of law enforcement, or taking a youthful offender into custody without a warrant. (iii) Limited information may include name, alias, address, phone, height, weight, hair eyes, race, gender, date of birth, driver's license number, photograph, occupation/employer hours worked and location, school location, description of weapons and information as to gun

permits, whether there exists any history of suicide attempts or threats, and additional information related to officer safety issues or underlying information regarding the offense for which the youthful offender is under supervision. (iv) Release of a pre-sentence report of any youthful offender shall only occur with specific authorization of the court or where otherwise specifically authorized or permitted by statute. (v) Redislosure of any youthful offender information shall not occur without the express written consent of the probation director or his/her designee.

(5) Teaching Notification. In accordance with 8 NYCRR §83.1(c), a probation director or his/her designee may authorize release of information in the possession of the probation department indicating that an applicant for a teaching certificate has been convicted of a crime, or has committed an act which raises a reasonable question as to the individual's moral character to the Office of Teaching Initiatives within the State Education Department. Such director or designee may also authorize release of information in the possession of the probation department indicating that an individual holding a teaching certificate has been convicted of a crime, or has committed an act which raises a reasonable question as to the individual's moral character, to the professional conduct officer of the State Education Department.

(6) Potential or existing employee/volunteer. A probation director or his/her designee may disclose to an existing or potential employer that an individual who is or may become an employee or a volunteer has been convicted of a crime or adjudicated a juvenile delinquent for a fingerprintable offense, the nature thereof, the terms and conditions of his/her release, and compliance under supervision, unless the records are otherwise sealed or restricted by federal or state law. In all such instances, those to whom access has been granted shall not secondarily redisclose such information without the express written permission of the probation director or his/her designee who authorized access.

(7) Public information. A probation director, or his/her designee, may disclose relevant case

record information (not including the Division of Criminal Justice Services criminal history record or any portion thereof) relative to an adult probationer (other than a youthful offender), individual under interim probation supervision, or former conditional releasee, not otherwise sealed or restricted by state or federal law, for the purpose of apprehending a wanted person in connection with a crime, a violation of probation, interim probation supervision, or conditional release, a probation, interim probation, or conditional release warrant, a violation of an order of protection, or in response to an incident wherein the department's, or any individual under probation [supervision] supervision's actions, are the subject of a media or news story. A probation director or his/her designee may disclose the name, gender, race, date of birth/age, height, weight, eye color, hair color, conviction offense, [probation] supervisory term, warrant/absconder status, and photograph of [an] any such adult probationer (other than a youthful offender) or individual on interim probation supervision.

(8) Research. Case records may be accessible, in whole or in part, for bona fide research conducted by a governmental entity [or], educational institution, and/or a private entity where the probation director, or his/her designee, has [made a bona fide research determination and] approved of the research project. In such instance, the probation director, or his/her designee, shall enter into a written agreement as to terms and conditions of the research, and keep a log of any research project, its purpose, and dates of research conducted and/or completed. The following confidentiality safeguards shall be observed:

(i) coding is required to ensure that any youth or adult receiving, or previously having received, probation services are not [identified] identifiable by name;

(ii) access is restricted to only those involved in the research whose responsibilities cannot be accomplished without such access and to secure written confidentiality agreements from any research project staff to adhere to all terms and conditions of the research, including confidentiality provisions herein stated;

(iii)[ researchers are not permitted to copy any case records in any manner with identifying information and each probation director shall take such precautionary departmental security measures to guarantee compliance;

(iv)] that any project records copied shall be maintained in secure locked files or otherwise physically or electronically safeguarded;

[(v)] (iv) to retain any data received or copied only so long as necessary to effectuate the purposes of the research project and to return or destroy the data [so not to be in such a way as to] and prevent [their] its unauthorized use;

[(vi)] (v) to guarantee that research performed or information accessed will not result in adverse action against any individuals who may be the subject of the research;

[(vii)] (vi) the probation department [has] is provided advance access to any preliminary findings and/or draft report prior to finalization, publication, or distribution and to furnish the probation director with any final project report or findings in a timely manner; and

[(viii)] (vii) no assignment of research shall occur without the written consent of the probation director or his/her designee.

The probation director, or his/her designee, shall promptly provide the Commissioner of the Division of Criminal Justice Services and the [State] Director of Probation and Correctional Alternatives with a copy of the final project report from any bona fide research project for which a written agreement is entered into.

(9) Data sharing. A probation director, or his/her designee, may voluntarily submit data in its files to the Division of Criminal Justice Services (DCJS).

(10) Freedom of Information Law (FOIL). Probation departments are subject to article 6 of the Public Officers Law. A probation director, or his/her designee, may deny access to case records or portions thereof sought [pursuant to article 6 of the Public Officers Law (The Freedom of Information Law)] under FOIL which meet the enumerated criteria established by subdivision

two of section 87 of the Public Officers Law. Criteria includes:

- (i) records or portions that are specifically exempted by State or Federal statute,
- (ii) if disclosed would constitute an unwarranted invasion of personal privacy,
- (iii) are compiled for law enforcement purposes and which if disclosed would:
  - (a) interfere with law enforcement investigations or judicial proceedings,
  - (b) deprive a person of a right to a fair trial or impartial adjudication,
  - (c) identify a confidential source or disclose confidential information relating to a criminal investigation, or
  - (d) reveal criminal investigative techniques or procedures,
- (iv) are inter-agency or intra-agency materials which are:
  - (a) [which are] not statistical or factual tabulations or data,
  - (b) instructions to staff that affect the public, or
  - (c) final agency policy or determinations.

Case records or portions thereof which are exempt from FOIL disclosure and not accessible include[, but are not limited to] pre-plea/pre-sentence/pre-dispositional reports, medical records, confidential HIV-related information, victim's name and address, youthful offender records, juvenile delinquency adjustment records, certain sex offender registration information, and DCJS criminal history records.

(d) Policies and procedures. A local probation director shall establish written policies and procedures governing release of case records consistent with laws governing access and confidentiality and disseminate such policies and procedures to their agency staff.