



POSITION PAPER No. 10/214th Legislature (2010-11)

ISSUE:

Sets confidentiality standards for public employee assistance program records, prohibits employer actions against program participant.

BILL NO.

S-2562 (Greenstein)

S-1068 (Gusciora)

NCADD-NJ POSITION:

NCADD-New Jersey supports this bill but believes the following amendment is necessary to protect employees who voluntarily seek assistance from an EAP. The current bill may penalize employees who voluntarily seek assistance from an EAP and later chose not to continue or chose to go elsewhere for assistance. It is also unclear who makes the determination and how the determination will be made as to “good faith”. The bill as written will dissuade individuals from seeking assistance. NCADD-NJ seeks the following amendment:

3. No public employer shall take any action against an employee of the employer, including termination, because the employee or a dependent of the employee has obtained counseling, referrals or other services from an employee assistance program or has obtained treatment or other services from any program to which the employee assistance program refers the employee or dependent, unless the employee was referred to participate in the EAP due to issues related to job performance and fails to comply with the recommendations made by the EAP [fails to make a good faith effort to utilize treatment or services made available under the employee assistance program]. The provisions of this section shall not be construed as preventing the public employer

from taking any action which the employer is otherwise authorized to take for workplace misconduct of the employee or poor work performance, even if the misconduct or poor performance is related to a problem for which the employee is obtaining services provided by an employee assistance program or other program to which the employee assistance program refers the employee.

It is extremely important to maintain confidentiality and eliminate the fear of employees that their employer will take action against them if they seek or participate in an EAP for drug/alcohol use and problems. People will more likely seek and succeed in treatment if it is confidential and there is no risk that such participation can be used against them in their employment.

Confidentiality and a clear law that participation in an EAP program for drugs or alcohol problems will not be used against the participant is particularly important in cases involving drugs and alcohol because of the stigma associated with seeking treatment and the potential for criminal repercussions or disclosure of a violation of drug/alcohol free workplace regulations. Such treatment often can be successful only if the individual discloses material that is intensely personal. However, the current legal framework for protecting confidentiality in employee assistance programs has not been clear.

The need for confidentiality in cases involving drugs or alcohol has long been empirically recognized. A number of studies show that the relative strength of confidentiality protections play an important role in individual decisions to seek or forgo mental health and substance abuse treatment. In particular, the willingness of a person to make the self-disclosures necessary to such mental health and substance abuse treatment may decrease as the perceived negative consequences of a breach of confidentiality increase. Recognizing the importance of confidentiality regarding drug and alcohol use, Congress, concluded



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that the lack of confidentiality made it less likely that people would enter treatment, enacted a strong confidentiality law to strictly limit disclosure of information that could identify an individual as receiving drug or alcohol treatment.

Confidentiality is a cornerstone of the clinical relationship. Few relationships depend as much on an individual's willingness to sacrifice privacy as the relationship between an addiction professional and patient. Because the forced intimacy of the treatment relationship often requires the disclosure of information that many people would prefer to keep private, keeping the relationship and details of it confidential have been a matter of long-standing concern for employees seeking assistance. S-2562/A-1068 addresses these concerns.

Endnotes

- 1) McGuire JM, Toal P, Blau B: The adult client's conception of confidentiality in the therapeutic relationship. *Prof Psychol Res & Pract* 16:375-384, 1985; Jensen JA, McNamara JR, Gustafson KE: Parents' and clinicians' attitudes toward the risks and benefits of child psychotherapy: A study of informed-consent content. *Prof Psychol Res & Pract* 22:161-170, 1991; Howland R: The treatment of persons with dual diagnoses in a rural community. *Psychiatr Q* 66:33-49, 1995; Sujak DA, Villanova P, Daly JP: The effects of drug-testing program characteristics on applicants' attitudes toward potential employment. *J Psychol* 129:401-416, 1995.
- 2) Taube DO, Elwork A: Researching the effects of confidentiality law on patients' self-disclosures. *Prof Psychol Res & Pract* 21:72-75, 1990; Roback HB, Shelton M: Effects of confidentiality limitations on the psychotherapeutic process. *J Psychother Pract & Res* 4:185-193, 1995.
- 3) 42 USC 290dd-2; 42 CFR 2.1 et seq; Center for Substance Abuse Treatment: Confidentiality of patient records for alcohol and other drug treatment. Technical Assistance Publication Series, No. 13. United States Department of Health and Human Services, Washington DC, 1994.
- 4) Dierks A: Medical confidentiality and data protection as influenced by modern technology. *Med & Law* 12:547-551, 1993.

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