

Responding to Requests for Minors' Protected Health Information: Guidelines for N.C. Local Health Departments

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Part 1. Introduction

Requests for release of a minor's protected health information (PHI) are similar in some respects to requests for an adult's PHI. As with adults, the general rule is that PHI may be released with written authorization, and there are some circumstances in which PHI may be released without authorization. However, minors often must rely on an adult—usually a parent—to make their health care decisions, or to exercise their rights to access PHI or authorize disclosure of PHI. As a result, two frequently asked questions about disclosing minors' PHI are:

- If a disclosure of a minor's PHI requires authorization, who signs the authorization form?
- Are parents allowed to have access to a minor's PHI?

This document focuses on those two questions, which have answers that can be quite complicated. As a starting point, it is useful to know who gave consent for the minor's medical treatment, because the person who consented to the treatment is often the person who may have access to the minor's PHI or sign an authorization to disclose the minor's PHI. However, that is not always the correct answer, so it is wise to discuss complex situations with the department's HIPAA privacy officer or an attorney.

Consent is different for emancipated minors and unemancipated minors, so it is important to know which minors are emancipated. ***Most of the minors seen by North Carolina local health departments are unemancipated.***

Emancipated and Unemancipated Minors

A minor is a person under the age of 18. By law, minors are subject to the supervision and control of their parents, unless they are emancipated. This generally means that parents make minors' medical treatment decisions, but there are some cases in which consent to treatment may be given by another person or even the minor him or herself.

An *emancipated minor* is a minor who may be treated as an adult for most legal purposes, including giving consent to medical treatment. Under North Carolina law, the *only* emancipated minors are those who:

- are married,
- have been granted an order of emancipation by a court, or
- are serving in the armed forces.

Legal emancipation of a minor is relatively rare. A minor who claims to be emancipated should be able to prove it with documents—a marriage certificate, a court order of emancipation, or military identification.

Any person under 18 who is not emancipated by one of the means described above is an *unemancipated minor*.

Part 2. Emancipated Minors

Summary

Emancipated minors are treated the same as adults for purposes of consent to treatment, and for purposes of allowing access to PHI or authorizing disclosure of PHI.

Consent to treatment

Emancipated minors usually give consent for their own health care services. However, like adults, emancipated minors may become incapacitated or incompetent to make their own health care decisions. If that happens, the minor needs a substitute decision-maker. As with adults, if there is a substitute decision-maker that person likely also serves as the *personal representative* who may access PHI or authorize its release.

Authorizing disclosure or obtaining access to PHI

General rules

For emancipated minors, the general rules are:

- The minor must sign authorizations for disclosure.
- The minor's parents are not allowed access to the minor's PHI.

Exception

If the emancipated minor is incapacitated or incompetent to make health care decisions, the minor's personal representative may access PHI or authorize its disclosure in accordance with the usual rules for personal representatives.

Part 3. Unemancipated Minors

Summary

When a minor is unemancipated, the laws regarding who may consent to health care are more complex. This in turn leads to more complexity in the rules for accessing or disclosing PHI.

The general rule under HIPAA is that a parent, guardian, or person acting in loco parentis (PILP)¹ should be treated as a *personal representative* when the parent/guardian/PILP has the legal

¹ *In loco parentis* means "in the place of the parent." A PILP is a person who has informally taken on the rights and duties of a parent with respect to a child, without going through formal legal processes such as adoption or guardianship.

authority to make health care decisions on behalf of an unemancipated minor.² A person who is a personal representative for HIPAA purposes may sign authorization forms or obtain access to PHI, but only within the scope of his or her personal representation.

However, HIPAA defers to state law on the question of when and to what extent a parent may make health care decisions on behalf of an unemancipated minor. In North Carolina, the general rule is that a parent, guardian, or PILP is the person with the legal authority to make a minor's health care decisions, but there are some significant exceptions to this rule. As a result, the general rule that parents/guardians/PILP are the personal representatives for unemancipated minor children does not always apply.

When HIPAA and state law are considered together to answer our basic questions about who may sign an authorization for disclosure of an unemancipated minor's PHI, and who may have access to the PHI, the general conclusions are:

- Sometimes the person who must sign an authorization is the minor's *personal representative* (usually the parent, guardian, or PILP), but sometimes it is the minor. Sometimes it is both.
- Sometimes a parent/guardian/PILP is allowed access to an unemancipated minor's PHI, but sometimes they are not.

As the word "sometimes" suggests, the answer to an access or disclosure question varies depending on the particular facts and circumstances, which makes it difficult to articulate a general rule for unemancipated minors. Instead consider this "rule of thumb":

Often, the person who consented to the minor's treatment is the person who may authorize disclosure of PHI about the treatment, and/or obtain access to PHI about the treatment.

This is a rule of thumb, not a rule of law. In other words, it is a guideline that often provides the correct answer to disclosure questions. However, there are times when this guideline will *not* lead to the correct answer.

The remainder of this document reviews the law of consent to treatment for unemancipated minors in North Carolina, and then addresses who may authorize disclosure of PHI and who may access PHI in several common scenarios. The conclusions in each scenario reflect an analysis that considers both HIPAA and current North Carolina law. They may not reflect the

² HIPAA creates an exception to this general rule: If the parent/guardian/PILP consents to the treatment but then also assents to confidential care of the minor, the parent/guardian/PILP may *not* be treated as the personal representative. This exception is discussed in greater detail on page 7.

conclusions that would be reached under other states' laws, or if North Carolina law were changed.³

Consent to treatment

General rule

In most circumstances, an unemancipated minor may not receive medical treatment without the consent of the minor's parent, legal guardian, or a person acting *in loco parentis* (PILP). The remainder of this document uses the shorthand term "parental consent" to mean the consent of a parent, legal guardian, or PILP.

Exceptions

North Carolina law sets out several circumstances in which health care providers may treat unemancipated minors without obtaining parental consent:

1. *Parent authorizes another adult to give consent (GS 32A-28 through 32A-34)*. A custodial parent or legal guardian may authorize another adult to consent to the minor's care during a period in which the parent or guardian is unavailable. This is a type of health care power of attorney that applies only to minors.
2. *Emergencies and other urgent circumstances (GS 90-21.1)*. Physicians may treat⁴ a minor without the consent of the parent, legal guardian, or PILP under any of the following emergency or urgent circumstances:
 - The parent or other authorized person cannot be located or contacted with reasonable diligence during the time within which the minor needs the treatment.
 - The minor's identity is unknown.
 - The need for immediate treatment is so apparent that any effort to secure approval would delay the treatment so long as to endanger the minor's life.
 - An effort to contact the parent or other authorized person would result in a delay that would seriously worsen the minor's physical condition.
 - The parent refuses to consent, and the need for immediate treatment is so apparent that the delay required to obtain a court order would endanger the minor's life or seriously worsen the minor's physical condition, and two licensed

³ In the recent past, the North Carolina legislature has considered changes to North Carolina's minor's consent law. To date, no changes have been adopted, but if that law were to change, the conclusions about minor's consent scenarios in this document would likely change as well.

⁴ If the treatment that is needed is surgery, ordinarily two surgeons must agree that the surgery is necessary before it is performed. However, there is an exception for rural communities or other areas in which it is impossible to get the opinion of a second surgeon in a timely manner. G.S. 90-21.3. If the emergency treatment is an abortion, the circumstances are more limited. See G.S. 90-21.9.

physicians agree that the treatment is necessary to prevent immediate harm to the minor.

3. Immunizations (GS 130A-153(d)). A physician or local health department may immunize a minor who is presented for immunization by an adult who signs a statement that he or she has been authorized by the parent, guardian, or PILP to obtain the immunization for the minor.⁵
4. Minors' consent law (GS 90-21.5(a)). This law allows physicians to accept an unemancipated minor's own consent for medical health services for the prevention, diagnosis, or treatment of any of the following conditions:
 - venereal diseases and other reportable communicable diseases,
 - pregnancy,
 - abuse of controlled substances or alcohol, or
 - emotional disturbance.

However, a physician may not provide any of the following services to an unemancipated minor solely upon the minor's consent: sterilization, abortion,⁶ or nonemergency admission to a 24-hour mental health or substance abuse facility.

More on minors' consent law (G.S. 90-21.5(a))

How old must a minor be to give effective consent under the minors' consent law? This is probably the most frequently asked question about this law, but the statute does not answer it – it states that “any” minor may consent to medical health services for the conditions listed. Of course, “any” must not be taken literally. Clearly, an infant may not give consent. On the other hand, many adolescents may. To determine whether a minor may give effective consent, a health care provider needs to understand two concepts: legal capacity to consent, and decisional capacity (or competence) to consent.

A health care provider must not accept a person's consent to treatment unless the person has both *legal capacity* to consent to the treatment, and *decisional capacity*—that is, the ability to understand health care treatment options and make informed decisions. Ordinarily, minors lack

⁵ Strictly speaking, an adult who presents a child for immunization on behalf of the parent, guardian, or PILP has not “consented” to the immunization. Rather, the parent, guardian, or PILP has consented to the immunization and has simply authorized the other adult to act on behalf of the parent, guardian, or PILP. Thus, this special rule for immunizations is not an exception to the general rule that parental consent is required; it is an exception to usual *practice*, since health care providers ordinarily do not accept another adult's word that the parent has consented to the treatment. This semantic point is important when it comes to determining whether the adult may act as the child's personal representative for purposes of accessing PHI or authorizing its release.

⁶The state laws addressing abortions for unemancipated minors are G.S. 90-21.6 through 90-21.10.

the legal capacity to consent to their own treatment. The principle effect of the minors' consent law is to give unemancipated minors the *legal* capacity to consent to treatment for certain conditions. However, the health care provider may not accept the minor's consent unless the minor also has *decisional* capacity. Like other developmental issues, children acquire capacity at different times—some sooner and some later. Whether a minor has decisional capacity is something that must be determined on a case-by-case basis.

Authorizing disclosure or obtaining access to PHI

Rule of thumb

Often, the person who consented to an unemancipated minor's treatment is the person who may authorize disclosure of PHI about the treatment, and obtain access to PHI about the treatment. Many disclosure or access questions involve one of the following circumstances, in which the rule of thumb will usually lead to the correct result:

1. *Parent (or parent equivalent) consented to treatment.* In most circumstances, an unemancipated minor may not receive medical treatment without the consent of the minor's parent, legal guardian, or a person acting *in loco parentis* (PILP). In these cases, the parent, guardian, or PILP is the child's personal representative under HIPAA. As personal representative:
 - The parent, guardian, or PILP is the person who must sign authorizations for disclosure of PHI.
 - The parent, guardian, or PILP may have access to the minor's PHI.

2. *Minor consented to treatment under the minors' consent law.* If the unemancipated minor was treated upon his or her own consent pursuant to North Carolina's minors' consent law:
 - The minor must sign authorizations for disclosure of PHI.
 - The parent, guardian, or PILP ordinarily may not have access to the minor's PHI without the minor's permission. There is an important exception to this general rule: if the health care provider determines that notifying the parent is *essential to the life or health of the minor*, then information about the minor's health condition or treatment may be provided to the parent without the minor's permission.⁷

⁷ G.S. 90-21.4(b). This law also permits (but does not require) a health care provider to disclose information if the parent contacts the health care provider and inquires about care provided under the minor's consent law. However, this provision is often overridden by other laws. For example, if the minor received care through a Title X-funded family planning clinic, a federal confidentiality regulation prohibits this particular disclosure. 42 CFR 59.11. Also, if the minor asked the health care provider not to discuss the treatment with his or her parent and the health care provider agreed, the provider must not disclose information to the parent under this provision. This amounts to a request for restriction on disclosures under HIPAA, and while a health care provider is not required to agree to a restriction, if the provider does agree the provider must abide by the restriction. 45 CFR 164.522.

Circumstances that are too complicated for the rule of thumb

Unfortunately, some circumstances are not easily resolved by applying the rule of thumb. Some of the most common circumstances in which the rule of thumb does not lead to a clear answer are described below. In each case, the ultimate question is who should be treated as the minor's personal representative for HIPAA purposes. Keep in mind that:

- A person who is a personal representative for HIPAA purposes may sign authorization forms or obtain access to PHI, but only within the scope of his or her personal representation.
- The general rule under HIPAA is that a parent, guardian, or PILP should be treated as a personal representative when the parent/guardian/PILP has the legal authority to make health care decisions on behalf of an unemancipated minor.

This is not an exhaustive list. Consult with your HIPAA privacy officer or an attorney if you have questions about how to manage a particular situation.

1. *Health care provided with parental consent, but parent agreed to confidential relationship between minor and provider.* If an unemancipated minor's parent, guardian, or PILP consents to the minor's treatment, but then also assents to an agreement of confidentiality between the health care provider and the minor, the parent/guardian/PILP may not be treated as the minor's personal representative with respect to PHI pertaining to any service covered by the agreement of confidentiality.⁸
2. *Health care provided without parental consent in urgent or emergency circumstances as defined in G.S. 90-21.1.* The child's parent, guardian, or PILP should be treated as the child's personal representative in these circumstances. In the urgent or emergency circumstances covered by this statute, the parent, guardian, or PILP is the person with the legal authority to make health care decisions on behalf of the minor, and the statute does not change that by permitting treatment without *first* obtaining parental consent. Rather, the statute allows a physician to imply or assume parental consent in circumstances where a delay caused by trying to obtain consent would endanger the minor or worsen his or her condition.
3. *Health care provided with consent of a person authorized to consent during parent's temporary absence.* In this circumstance, an unemancipated minor receives health care that the parent presumably would consent to, but the parent has delegated the authority to consent to another adult during the parent's temporary absence. There are thus two people who may be treated as the minor's personal representatives under HIPAA: both the parent, and the adult the parent has authorized to consent to the minor's treatment. However, the non-parent should be treated as the personal representative *only* with respect to the care to which the non-parent has consented.

⁸ 45 CFR 164.502(g). This is the HIPAA provision mentioned in footnote 2. It is an exception to HIPAA's general rule that a parent/guardian/PILP who has legal authority to make health care decisions for an unemancipated minor is that minor's personal representative.

Also, if the parent has limited the non-parent's authority to consent to a specified period of time, the non-parent should be treated as a personal representative only during that period of time.

4. Immunizations provided to child presented by an adult who signed statement that he or she was authorized by the parent to obtain the immunizations. When a parent, guardian, or PILP authorizes another adult to obtain an immunization for a child under GS 130A-153(d), the child's parent, guardian, or PILP is the child's personal representative with respect to information about the immunization. The adult who obtains the immunization for the child does not qualify as the child's personal representative for purposes of the Privacy Rule, because the adult does not have legal authority to consent to the child's care in this case.⁹ The adult therefore may not authorize disclosure of the child's PHI. However, the adult does have legal access to a limited amount of PHI: the immunization certificate. This is because a North Carolina law (GS 130A-154) requires a local health department to give a certificate of immunization to the person who presented the child for immunization.

⁹ See footnote 5.