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Adolescent Patients: Safeguards Protect Rights and Help Minimize Liability

Most healthcare business owners and providers are well-versed in the requirements for consent, privacy and confidentiality in the care of adult patients/clients. However, when caring for minors, many can find themselves in unfamiliar territory with respect to these important patient rights. Due to the developmental age and legal status of adolescents in society, they present a challenging range of clinical, operational, legal and ethical concerns. In order to shield business owners, entities and staff members from unwanted liabilities, it is imperative to understand the legal and regulatory framework related to the care of younger patients, and implement clinical safeguards to ensure their rights are protected.

This edition of *Healthcare Perspectives* examines some of the more common issues relative to adolescent care, including parent/guardian consent requirements and exceptions, privacy rights of minors and confidentiality protections when transferring their healthcare information records. A self-assessment tool on page 4 is designed to help business owners and staff examine their practices and identify areas of possible improvement.

MINORS AND PARENT/GUARDIAN CONSENT

As defined by statutory law, a minor is a person under the age of legal consent, typically younger than 18 years of age. Healthcare providers, including nurse practitioners, physician assistants, physical therapists and/or counselors, are required to obtain consent to treat a minor from either a parent, legal guardian, or other person acting in *loco parentis* (i.e., a person legally authorized to make healthcare decisions on a minor's behalf).

A healthcare practice is responsible for ensuring that legal authorization to treat a minor is obtained from the proper individual and documented in the patient/client healthcare information record. In situations of parental divorce, blended families, or where a minor is not living with his/her parents – such as foster care arrangements – it can be difficult to discern who is authorized to make healthcare decisions for a minor. In that event, the following actions can assist providers in confirming custodial arrangements, as well as designating the person(s) with legal authority to consent:

- *Require a parent, guardian, or other person acting in loco parentis attend the initial appointment with the minor patient/client*, and document both their presence and relationship to the patient/client in the healthcare information record.
- *Request a copy of the guardianship decree from divorced parents or a legal guardian prior to initiating treatment*, and place a copy of that document in the minor's healthcare information record.
- *Contact a parent, guardian, or other person acting in loco parentis prior to making any change in the plan of care* when minors present for care without a parent/guardian.

In all cases, conduct due diligence in order to ensure that the person signing the consent is authorized to do so. For example, if the minor's parents are separated or divorced, the provider should ask for a copy of the custody agreement, as parents may have joint legal custody – and therefore equal rights regarding healthcare decision-making – even though one parent has residential custody of the minor. A copy of the court order should also be obtained in cases of a legal guardian or guardian ad litem.

Strictly follow the basic principles of obtaining consent, including a verbal discussion of the proposed treatment, associated risks and alternative therapies, if available. Clinical information should be presented in the consenter's preferred language and at an appropriate literacy level. Prepare a written narrative of the discussion in the patient/client healthcare information record, making sure to note both minor and parental/guardian presence.

EXCEPTIONS TO PARENT/GUARDIAN CONSENT

Healthcare practitioners must remain vigilant to the following situations where a parent, guardian, or other person acting in *loco parentis* would *not* be considered the minor's personal representative, despite legal authority otherwise:

- When the consent of the parent or other person is not required under state or other applicable law, such as when seeking care for sexual health needs, counseling for mental health disorders or treatment for substance abuse.
- When a court authorizes someone other than the parent, guardian, or person acting in *loco parentis* to make treatment decisions on behalf of the minor.
- When the parent, guardian, or person acting in *loco parentis* agrees in writing that the minor and the healthcare provider may have a confidential relationship.

An emancipated minor represents an exception to the parent/guardian consent rule. State courts may grant emancipation, or emancipation may be situational, such as the case of minors who are or have been married, are parents, attend college away from home, or are members of the military. The fact that a minor is living apart from the parent/guardian is not in and of itself grounds for emancipation. State laws indicate when and under what conditions minors may become independent of their parents for legal purposes. Consult legal counsel for a full review of emancipation rights.

A healthcare professional also may treat a minor without parental/guardian consent in the event of a life- or limb-threatening emergency. Reasonable attempts to contact a minor's parent or legal guardian must be made and documented in the patient/client healthcare information record. In addition, documentation must thoroughly reflect proof of the clinical emergency.

Where state law is silent regarding the right of access to protected health information, licensed healthcare practitioners can exercise their professional judgment, to the extent permitted by law, to grant or deny parental access to a minor's medical information.

PRIVACY RIGHTS OF MINORS

The right of minors to determine who has access to their protected health information (PHI) can vary from state to state. Consult legal counsel regarding respective statutory rights before implementing written policy directing the management of PHI in adolescent care. In most instances, minors cannot exercise their privacy rights under HIPAA and the regulations promulgated thereunder, including the HIPAA Privacy Rule, until they are 18 years old. Up to age 18, a parent, guardian, or other person acting in *loco parentis* is deemed the personal representative of the minor, and thus is permitted access to the minor's healthcare information record. In addition, a personal representative can authorize sharing information electronically and in print with other healthcare providers. (See "Transferring Healthcare Information Records" on page 3 for additional requirements in this area.)

In the situations noted above – i.e., where a parent, guardian, or other person acting in *loco parentis* would not be considered the minor's personal representative – a parent may have access to PHI when state or other applicable law requires or permits parental access. If, however, statutory law prohibits parental/guardian access, and providers permit it irrespective of the prohibition, a healthcare business may incur financial penalties. Fines and penalties under HIPAA can range from $100 to $50,000 or more for each violation (capped at $1.5 million per calendar year). Criminal penalties, including imprisonment, also apply when a person knowingly obtains or discloses individually identifiable PHI. State laws and regulations may differ in their imposition of civil monetary penalties and criminal violations, and legal counsel should be consulted regarding penalties for such violations.

Where state law is silent regarding the right of access to PHI, licensed healthcare practitioners can exercise their professional judgment, to the extent permitted by law, to grant or deny parental access to a minor's medical information. For example, if child abuse or neglect is suspected, and granting the parent/guardian access to PHI will place the child at further risk of harm, clinicians can choose not to provide the information.

TRANSFERRING HEALTHCARE INFORMATION RECORDS

When sharing PHI with a designated and authorized personal representative or other healthcare provider, be aware of the following requirements:

- *Provide electronic health records in at least one readable electronic format*. If the personal representative declines an electronic copy, offer a hard copy instead.
- *Comply with a personal representative's written request to send an electronic copy of the healthcare information record to a third person*, but verify the identity of the third person according to written protocol before sending the record.
- *Decline to use a personal representative's own flash drive or other device to transfer records if there is a security concern*. If requested to send files by unencrypted e-mail, have the personal representative sign a form acknowledging the inherent security risk of doing so.
- *Charge a personal representative a reasonable fee for labor costs incurred in copying records*, in accordance with state law requirements.

STAFF EDUCATION

To further protect a healthcare business that is engaged in adolescent care, develop policies and procedures specific to obtaining consent and sharing healthcare information records. Ensure that staff are aware of the requirements and provisions upon hire, as well as thereafter through annual educational updates. Document participation in educational sessions and ask all staff to sign a statement attesting that they have read the contents of policies and procedures.

RESOURCES

- Adler, E.L. "Practices Must Comply with New Medical Record Transfer Rules." *Physicians Practice*, posted online February 20, 2013.
- "American Academy of Pediatrics: Consent for Emergency Medical Services for Children and Adolescents." *Pediatrics*, August 2011, volume 128:2, pages 427-433.
- Code of Medical Ethics, Opinion 5.055 – Confidential Care of Minors. American Medical Association, November 2013.
- "Confidentiality in Health Care: Adolescent and Young Adult Clinical Care Resources." Society for Adolescent Health and Medicine, updated August 2015.
- "Does the HIPAA Privacy Rule Allow Parents the Right to See Their Children's Medical Records?" from the HHS.gov website, December 19, 2002.
- Emancipation of Minors. Legal Information Institute, Cornell University Law School.
- Ford, C. et al. "Confidential Health Care for Adolescents: Position Paper of the Society for Adolescent Medicine." *Journal of Adolescent Health*, August 2004, volume 35:1, pages 160-167.
- "Health Care and Homelessness." National Coalition for the Homeless, updated February 21, 2012.
- Minor Consent to Treatment Laws. National District Attorneys Association, updated January 2013.
- State-by-State Review Regarding Ability of Minors to Consent to Routine Medical Care. National Association for the Education of Homeless Children and Youth, March 1, 2015.

In order to meet the needs of adolescent patients and minimize liability exposure, healthcare businesses and professionals must be sensitive to developmental issues and aware of adolescent patients' rights. Understanding that minors can pose unique risk management challenges is the first step toward the delivery of appropriate and legally sound care. In the event of uncertainty, contact legal counsel for guidance on how to proceed in the clinical setting.

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Self-assessment Tool: Liability Safeguards for Adolescent Care

The following self-assessment tool is designed to serve as a starting point for healthcare business owners seeking to assess and enhance their risk control practices regarding care of adolescents. For additional risk control tools and information, visit www.cna.com/healthcare, www.nso.com and www.hpso.com.

LIABILITY SAFEGUARDS	HAS ISSUE BEEN REVIEWED?	COMMENTS
GENERAL POLICY CONSIDERATIONS		
Does written policy define the period of adolescence in conformity with state law, especially in relation to the state statutory definition of a minor (e.g., 13 to 17 years of age)?		
Is emancipated minor *defined in accordance with state law*, e.g., a youth who is:		
- Emancipated by court order?		
- Legally married?		
- Independent of parental financial support and/or living apart from parents?		
- Pregnant or seeking treatment for possible pregnancy?		
- A parent of a minor?		
Are unemancipated minor patients/clients and their parents/guardians informed in writing about basic healthcare provider-patient/clients issues, including:		
- The limits of confidentiality between providers, patients/clients and their parents/guardians?		
- The limits of informed consent requirements?		
- Care compliance expectations?		
Do only designated staff members have access to patient histories and other sensitive information?		
Does the employee orientation program cover minor-related issues and policies, including confidentiality, parental notification, consent and patient/client education?		
Are minor patients/clients who legally have the right to consent to their healthcare informed in the same manner as adult patients/clients of payment requirements, including the offering of options other than insurance billing?		
Does written policy address treatment provisions for the unaccompanied homeless minor, including consent to routine medical care and any state-imposed reporting requirements?		

LIABILITY SAFEGUARDS	HAS ISSUE BEEN REVIEWED?	COMMENTS
CONFIDENTIALITY		
Are minor patients'/clients' privacy rights reflected in written policy, especially regarding the sharing of information with family and staff members?		
During the initial visit, do providers help promote minors' emerging autonomy by:		
- Reviewing the confidentiality policy of the practice with all minor patients/clients and parents?		
- Acknowledging that minor patients/clients may have specified legal rights regarding consent and confidentiality?		
- Fostering an appropriate level of choice, responsibility, compliance and self-reliance?		
Are sensitive healthcare services routinely treated in a confidential manner when provided to minor patients/clients, e.g., birth control, substance abuse, abuse by others?		
Is written informed consent optimally obtained from minor patients/clients prior to the sharing of sensitive medical information – such as diagnosis, prescribed medications or prognosis – with a parent or guardian?		
Do patient/client portals meet state and HIPAA confidentiality standards for minors whose parents or guardians may have proxy access to their healthcare information records?		
Are minor patients/clients informed that certain billing situations may affect confidentiality, e.g., billing statements or Explanation of Benefits notices sent by a third party to a parent/guarantor?		
Do policies address other minor patient/client documentation issues, such as authorization to release records and access to electronic health records via patient/client portals?		
PRIVACY		
Are minor patients/clients presented with a HIPAA privacy notice statement, which is reviewed with them when they give their informed consent to treatment?		
Are minor patients/clients offered a private space away from parents/guardians for interviews, physical examinations and medical procedures?		
Are minor patients/clients permitted to invite a family member, peer or other chaperone to be present during discussions and examinations, as well as to consult with others when making healthcare decisions?		
Is a chaperone required to be present during discussions and examinations of minor patients/clients, in order to ensure appropriate professional interaction, whenever a family member or guardian is not present?		
Are minor patients/clients apprised of the information that will be shared with parents or guardians, as well as the rationale for such information sharing – e.g., a clear and specific intent to cause harm to self or others, an instance of reportable abuse (physical, sexual or emotional) or the presence of a communicable disease?		
Are minor patients/clients asked if they may be contacted at the provided telephone number and/or email, and if messages may be left at the telephone number?		

LIABILITY SAFEGUARDS	HAS ISSUE BEEN REVIEWED?	COMMENTS
INFORMED CONSENT		
Is there a policy regarding when verbal consent from a parent/guardian suffices, and does this policy comply with state informed consent laws and regulations?		
In those states where verbal parental consent is permitted or required, is the process documented comprehensively – i.e., do providers note in the healthcare information record that the parent giving consent understands the benefits, risks and consequences of the proposed treatment or procedure, as well as alternative treatments?		
Is there a written policy addressing informed consent by "mature minors," if the practice is located in a state that has enacted a mature minor statute?		
Does written policy stipulate when minor patients/clients may give consent to treatment without parental consent, such as in the following situations:		
- Forensic examinations for sexual assault?		
- Treatment for sexually transmitted diseases?		
- Treatment for alcohol or drug abuse?		
- Psychological services associated with the abuse of drugs or alcohol?		
- Contraceptive and reproductive services?		
When obtaining consent from a minor patient/client, do providers routinely:		
- Assess the patient's/client's decision-making ability and degree of autonomy?		
- Discuss risks and benefits of the proposed treatment in an age-appropriate manner?		
- Evaluate and document the patient's/client's health literacy level and understanding of the information given?		
Is the information provided by parents or guardians authorizing treatment of an minor examined for authenticity, and does the verification process confirm that:		
- The author/signatory is, in fact, a parent or legal guardian?		
- The author is legally able to give permission to treat, i.e., that parental rights are intact?		
- The document has been notarized?		
Is the decision-maker's name prominently noted in the healthcare information record, whether it is the patient/client, a parent or a legal guardian?		
Is there a protocol established and implemented for settling disputes between parents/legal guardians and the minor patient?		
Is there a protocol established and implemented for settling disputes between parents about a proposed treatment or procedure for their minor child?		
Does written policy address parental consent for divorced parents, and are safeguards in place to ensure that court orders regarding legal custody and shared rights are followed?		
Is a policy in effect concerning the rights of step-parents and foster parents, including a process to verify their legal authority to grant consent for medical treatment?		
Are backup measures established and implemented if a provider is morally or ethically opposed to treating minor patients/clients without parental consent, e.g., a mechanism for referring the patient/client to another practitioner?		

LIABILITY SAFEGUARDS	HAS ISSUE BEEN REVIEWED?	COMMENTS
HISTORY AND PHYSICAL EXAMINATION		
Are staff members trained to communicate with minor patients/clients during an examination, with an emphasis on younger patients'/clients' emotions, sensitivities, thought processes and degree of autonomy?		
Are medical histories of minor patients/clients taken in a private location and also discussed in such a setting?		
When examining minors, do providers inquire about the patient's/client's possible risk factors, such as:		
- Physical and emotional home environment?		
- Relationship with parents, siblings and others living in the home?		
- Dietary concerns and self-image?		
- Alcohol and drug use?		
- Depression?		
- Bullying?		
- Time spent on social media sites?		
- Lack of exercise?		
- Excessive intake of junk food?		
- Unsafe sexual practices?		
- Suicidal and violent ideation?		
Do providers use mnemonic devices to ensure thorough evaluation of minor patients/clients, such as: **HEADS** (**H**ome, **E**ducation, **A**ccidents, **D**rugs and alcohol, and **S**ex and suicide) or **SAFE TEENS** (**S**exuality, **A**ccidents and abuse, **F**irearms, **E**motions, **T**oxins, **E**nvironment, **E**xercise, **N**utrition, and **S**hots)?		
Is the medical office equipped to perform a pelvic examination on sexually active young women, if applicable to the profession?		
Are medical staff members trained to act as chaperons during pelvic examinations, if applicable to the profession?		
Do history and patient/client intake forms inquire about personal wellness, including exercise intervals, eating habits, stress levels, peer relationships, etc.?		

LIABILITY SAFEGUARDS	HAS ISSUE BEEN REVIEWED?	COMMENTS
PATIENT/CLIENT EDUCATION		
Are minor patients/clients offered current information on relevant health issues, including:		
▪ Nutrition and exercise?		
▪ Patterns of growth and development?		
▪ Peer relationships?		
▪ Contraception and sexually transmitted diseases?		
▪ Tobacco, alcohol and drug use/abuse issues?		
Is health-related information offered in a variety of convenient and engaging formats, including age-appropriate brochures, videos, websites and online tutorials?		
Are sensitive healthcare issues discussed in a private area where minors can feel comfortable?		
When indicated, are minor patients/clients offered social service support to help them understand and accept the potential impact and consequences of their medical condition?		

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