



Memorandum

To: Ming Wang, Program Administrator, Utah Department of Human Services
From: PATH Team at CLASP
Date: December 6, 2019
Re: HIPAA and Minor Consent

SUMMARY

As the Utah PATH team develops a blueprint for integrating physical and behavioral health for transition-aged-youth, they identified a lack of knowledge among providers and young people about confidentiality and consent requirements as a key barrier to care. Ensuring young people understand requirements around confidentiality and consent is an integral component of providing adolescent-focused healthcare. This memo overviews the federal and Utah state laws governing minor consent and confidentiality and recommends several practice and policy changes.

What is HIPAA?

HIPAA establishes the confidentiality of medical information and the mechanisms through which that information can be shared.

Passed in 1996, The Health Insurance Portability and Accountability Act (HIPAA) mandates industry-wide standards for health care information, requiring the protection and confidential handling of protected health information.¹ The HIPAA Privacy Rule protects medical records and other health information by establishing limits and conditions on how medical information can be disclosed without patient authorization. Patients have the right to examine and obtain their health records and to request corrections.² Health information can be shared with other healthcare providers for treatment and care coordination, and can be shared with family, relatives, and friends who are involved in a patient's health care.³ However, the patient can determine who information can be shared with.⁴

What are minor consent laws?^{5,6}

Minor consent laws determine when a minor can consent to their own care

Minor consent laws determine if/when a minor can consent to their own care. Generally, a parent or legal guardian must consent before a minor receives care. However, exceptions have been made largely at the state level so minors can consent to their own care. There are primarily two categories of exceptions: 1) exceptions based on the status of the minor and 2) exceptions based on the kind of care provided. Exceptions are also made in emergency medical situations. During an emergency, providers can treat a minor without parental consent, but they must contact a legal parent or guardian as soon as possible.

The Mature Minor Doctrine

The “Mature Minor” doctrine establishes the right of health care providers to treat older adolescents without seeking parental consent so long as the adolescent can and does give informed consent. While only a few states have formally incorporated the doctrine, the Supreme Court has acknowledged the doctrine without specifying a precise definition. State statutes and judicial decisions formalizing the doctrine differ in their definition of mature minor and in the scope of care to which minors can consent.⁷

Consent based on Status

Most states have enacted one or more statutes giving minors the right to consent by on their status. Generally, the following categories of minors can consent to their own care:

- Emancipated minors,
- Married minors, and
- Minors in the military.

Other common status categories are:

- Minors living apart from their parents, including minors who are homeless;
- Minors who are pregnant;
- Minors who are incarcerated.

Consent based on Care

Every state has enacted one or more statutes allowing minors to consent for specific types of health care. Common types of care include:

- Emergency care.
- General medical care.
- Family planning services or contraceptive care:
 - Even in states without a specific statute, there is a basis for minor consent. Minors seeking services at a site that receives Title X Family Planning Program funding or minors using Medicaid to pay for care can consent based on federal laws. Further, if there is no valid statute prohibiting minors from consenting to reproductive health care, it can reasonably be concluded that a minor can consent.
- Abortion services:
 - A 1976 Supreme Court ruling states that a state may not grant an arbitrary veto to parents over abortion decisions. States that require parental consent must also create alternative mechanisms for a mature minor to obtain an abortion without receiving parental consent.
- Care related to sexually transmitted diseases or venereal disease:
 - In every state, minors can consent to care related to sexually transmitted diseases or venereal disease;
 - In at least twenty-one states, minors can consent to care related to reportable diseases;
 - In at least forty-six states, minors can consent to care relate to treatment for HIV/AIDS.
- Drug/Alcohol Treatment:
 - In forty-nine states, minors can consent to care related to drug/alcohol use.⁸
- Mental health care:
 - In thirty-four states, minors can consent to care for outpatient mental health services without needing parental consent.⁹

What are minor confidentiality requirements?

Minor confidentiality requirements determine whether personal health information can be disclosed to a parent or guardian. They are based on both the HIPAA privacy rule and state minor consent laws

If a state has not passed a specific statute regarding minor confidentiality and consent, they defer to the HIPAA privacy rule. Under this rule, in general, if a minor consents to their own health care, receives health care without parental consent, or if a parent has agreed to confidentiality between the minor and the health care provider, the parent does not have the right to access the minor's health information.¹⁰ In absence of state laws on minor confidentiality, health care professionals have the right to determine whether to grant parental access to a minor's health information. If a provider believes granting access will cause harm to the patient or to someone else, they do not have to grant access. However, this provision primarily relates to situations of domestic violence, abuse, or neglect.¹¹

Confidentiality based on Care:

Certain kinds of care have specific confidentiality requirements, based on either federal law or state statute.

- **Reproductive Health Care:** The Supreme Court held that the constitutional right to privacy extends to minors. In any state that receives Title X Family Planning Program funding, minors can legally obtain confidential family planning services and contraceptive care without parental consent. Medicaid also requires confidential family planning services be available to adolescents who are eligible for Medicaid.
- **Drug/Alcohol Treatment:** In forty-eight states, minors can obtain confidential treatment for substance abuse.¹² The age at which minors can seek confidential care varies state-by-state, with the average age being 14.¹³
- **Mental Health:**
 - Forty-eight states have laws expressly allowing minors to receive confidential treatment for mental illness, including addiction.¹⁴
 - The HIPAA Privacy Rule distinguishes between mental health information stored in a medical chart and a mental health provider's private notes. While a medical chart containing diagnoses, symptoms, and treatment plans may be disclosed, a mental health provider does not have to disclose psychotherapy notes to either the patient or their legal guardian.¹⁵

Release Forms

Parents/guardians can sign a release form granting their minor the right to consent to medical care and/or providing advance consent for a broad array of care.¹⁶ Parents/guardians can likewise agree to a confidential relationship between a minor and a health care provider.¹⁷

Minor Consent in Utah¹⁸

Emancipated minors and married minors may consent to all healthcare. Pregnant minors can consent to care related to pregnancy and childbirth. Minors who are parents can consent to healthcare for their minor children. Minors can consent to pregnancy-related care, STD care, and HIV/AIDS care. Parental consent is required to obtain an abortion. State and local funds cannot be used for contraceptive services without parental consent, but federal law requires contraceptive care to be provided to minors in sites that receive Title X Family Planning Program funding or to minors who are eligible for Medicaid. Utah does not have specific statutes regarding confidentiality nor has Utah formalized the mature minor doctrine.

Consent based on Status

Specific provisions grant consent to:	There are not specific provisions for:
Emancipated minors	Minors living apart
Married minors	Incarcerated minors
Pregnant minors	
Parents who are minors	
Minors who are homeless	

Specific Statutes:

- The age of majority is 18.
- Emancipated minors can consent to their own health care.
 - Under Utah state law, minors can obtain their majority through marriage. Therefore, married minors can consent to their own health care.
- Pregnant minors may consent to any healthcare not prohibited by law related to pregnancy and childbirth.
- Minor parents can consent to any healthcare not prohibited by law for their minor child.
- As of 2017, unaccompanied homeless minors who are 15 years or older may consent to health care not prohibited by law.^{19, 20}

Consent based on Care

Minors provide consent	Parents provide consent	No specific provisions exist
Pregnancy-related care	Abortion	Emergency care
STD care	State or locally funded contraceptive care	General medical care
Title X or Medicaid funded contraceptive care	Drug/Alcohol treatment	Outpatient mental health services

Statutes allowing minor consent:

- Pregnancy-Related Care: Pregnant minors may consent to pregnancy-related care.
- STD Care: Minors can consent to care relating to STD, including seeking HIV testing without parental consent.
- Contraceptive care: Under federal law, minors can consent to their own care when sites are using Title X Family Planning Program funding or if the minor is eligible for Medicaid.

Statutes disallowing minor consent:

- Abortion: Minors may not consent to abortion services. Parents must be notified at least 24 hours prior to the care being provided and at least one parent or guardian must provide written consent. However, there is a judicial bypass, a medical emergency exception, and provisions for abuse and incest.
- Contraceptive care: No state or local funds can be used for contraceptive services without written consent from a parent or legal guardian. Utah prohibited the use of state funds for contraceptive services provided to unmarried, unemancipated minors who are not in the military; however, a court found this statute to violate a minor's constitutional right to privacy.
- Drug/Alcohol Treatment: Parents provide consent for both inpatient and outpatient drug/alcohol treatment. Utah is the only state where parents must consent for outpatient drug/alcohol treatment by statute. Parents can consent even if the minor does not consent to care. A non-consenting minor can be submitted for care if a neutral factfinder determines the minor requires treatment. The minor cannot request to be discharged from care if they continue to meet the admission criteria.²¹

No statutes exist:

- Emergency Care: Generally, emergency care can be provided without parental consent so long as the health care provider attempts to contact a legal parent or guardian as soon as possible
- General Medical Care: No specific provisions authorize minors to consent for general medical care. In 2004, the governor of Utah vetoed²² HB-140²³ which proposed the creation of a "mature minor." However, the governor recommended additional study on the issue.²⁴ Passing a mature minor doctrine could allow minors to provide consent for general medical care.
- Drug/Alcohol Treatment: Utah is the only state that has not enacted a statute expressly allowing minors to consent to care related to the use of drugs and/or alcohol.²⁵
- Mental Health Services: Utah does not have any specific legal provisions related to minor or parental consent for inpatient or outpatient mental health services.

Minor Confidentiality

Utah does not have any specific laws regarding minor confidentiality and therefore defers to the HIPAA Privacy Rule and provider discretion. Utah passed a law requiring parents to be notified if contraceptives were given to a minor; however, this law was deemed invalid for violating the minor's right to privacy. Utah is one of two states that does not expressly allow minors to receive confidential care relating to mental illness, including addiction.²⁶

Recommendations

To better integrate physical and behavioral health in Utah for transition-aged-youth, we recommend that the team explore the following practice and policy changes:

1. Develop a set of comprehensive release forms for broad parental consent and confidential minor-provider relationships to be distributed to adolescent-serving providers. Encourage providers to discuss benefits of confidential care with parents and minors.
2. Develop a list of sites that ensure confidentiality of care relating to contraceptive and reproductive healthcare. These are sites that receive Title X Family Planning Program Funding, accept Medicaid, and do not receive any state or local funds.
3. Ensure minors receiving care are aware of and understand what information will remain confidential and what services they can receive without parental consent.

4. Develop guidance for providers around confidentiality for transition-aged-youth.
5. Reintroduce legislation to create a “mature minor,” either by reintroducing HB-140 (sponsored by former Rep. LaVar Christensen) which created a “mature minor” to exempt health care decisions made by a mature minor from the definition of medical neglect, or by introducing a new piece of legislation focused primarily on formalizing the mature minor doctrine.
6. Pass a statute allowing for minor consent to inpatient and outpatient mental health services and for confidentiality of care relating to mental illness, including addiction. Forty-eight states have passed such a statute.
7. Introduce legislation to allow minors to provide consent for care related to drug/alcohol use. Utah is the only state to not allow minors to consent to care and is the only state to expressly give only parents the right to consent. Other states have statutes permitting only minor consent, requiring both parent and minor consent, or accepting either minor or parental consent for care.

¹ <https://www.dhcs.ca.gov/formsandpubs/laws/hipaa/Pages/1.00WhatisHIPAA.aspx>

² <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html>

³ <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html>

⁴ <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/sharing-family-friends.pdf>

⁵ <https://www.freelists.org/archives/hilac/02-2014/pdftRo8tw89mb.pdf>

⁶ Unless otherwise sourced, all the following information comes from the above source

⁷ <https://pdfs.semanticscholar.org/1caf/65c110f65f6e0b91c74956043da9cbac0dbb.pdf>

⁸ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4393016/>

⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4393016/>

¹⁰ <https://www.hhs.gov/hipaa/for-professionals/faq/227/can-i-access-medical-record-if-i-have-power-of-attorney/index.html>

¹¹ <https://www.guttmacher.org/journals/psrh/2004/hipaa-privacy-rule-and-adolescents-legal-questions-and-clinical-challenges>

¹² <https://pdfs.semanticscholar.org/31e5/7705492cc76b054787363c3dae217e33a5e2.pdf>

¹³ <https://pdfs.semanticscholar.org/31e5/7705492cc76b054787363c3dae217e33a5e2.pdf>

¹⁴ <https://pdfs.semanticscholar.org/31e5/7705492cc76b054787363c3dae217e33a5e2.pdf>

¹⁵ <https://www.hhs.gov/sites/default/files/hipaa-privacy-rule-and-sharing-info-related-to-mental-health.pdf>

¹⁶ <https://health.dixie.edu/wp-content/uploads/sites/44/2017/10/Parent-Guardian-consent-form2017.pdf>

¹⁷ <https://www.hhs.gov/hipaa/for-professionals/faq/227/can-i-access-medical-record-if-i-have-power-of-attorney/index.html>

¹⁸ Unless otherwise sourced, information is from 2010

¹⁹ <https://www.schoolhouseconnection.org/state-laws-on-minor-consent-for-routine-medical-care/>

²⁰ <https://le.utah.gov/xcode/Title78B/Chapter3/78B-3-S406.html>

²¹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4393016/>

²² <https://le.utah.gov/session/2004/pdfdoc/digest2004.pdf>

²³ <https://le.utah.gov/~2004/bills/hbillint/HB0140.htm>

²⁴ <https://le.utah.gov/interim/2004/pdf/00001200.pdf>

²⁵ <https://pdfs.semanticscholar.org/31e5/7705492cc76b054787363c3dae217e33a5e2.pdf>

²⁶ <https://pdfs.semanticscholar.org/31e5/7705492cc76b054787363c3dae217e33a5e2.pdf>