Navigating Parent Consents: whose signature do you need, when do you need it, and tips on how to get it

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Consent

- Treatment
- Release of Information
- Reimbursement
- Other
Consent

- Who?
- What?
- How?
- How long?
- Where?
Today’s Agenda

1. Review Types of Consent
   • Treatment
   • Release Information
   • Reimbursement
     • Basic legal requirements, common questions, strategies

2. Discussion: What are strategies we can employ at the state and local level to increase consents?
Consent to Treatment
Consent to Treatment

Who Consents for a Minor’s Care?
CONSENT: Adult representative

What does your state law say?

- Parent
- Legal Guardian
- Caregiver?
- Relative?
- Foster parent or caregiver?
- State actor?
- Authorizing letter or affidavit?
CONSENT: Adult representative

Nevada Example:

“Notwithstanding any other provision of law, in cases of emergency in which a minor is in need of immediate hospitalization, medical attention or surgery and, after reasonable efforts made under the circumstances, the parents of such minor cannot be located for the purpose of consenting thereto, consent for such emergency attention may be given by any person standing in loco parentis to such minor.”
CONSENT: Minor Consent - comparing status exceptions

Illinois examples:

- Married
- Parent
- Pregnant minor
- 14 or older, living separate and apart from parents and managing own personal affairs, seeking primary care services and understands benefits and risks of this care
- Emancipated by a court
- Mature minor? (case law)
CONSENT: Minor Consent – comparing status exceptions

Maryland:

- Married
- Parent
- Living separate and apart from parents and self-supporting
Illinois example:

- Health care and counseling related to diagnosis or treatment of sexually transmitted disease if minor is 12 or older and may have come into contact with STD
Colorado example:

- A health care provider or facility, if consulted by a patient who is a minor, shall perform, at the minor's request, a diagnostic examination for a sexually transmitted infection. The health care provider or facility shall treat the minor for a sexually transmitted infection, if necessary; discuss prevention measures, where applicable; and include appropriate therapies and prescriptions.
Consent to Treatment

Common questions:

- Who can consent?
- What must consent look like?
  - Does it need to be written?
  - What information must it include?
- Duration?
- Law, Policy, Risk Management, Ethics?

Strategies and resources to facilitate consent:

- Quick guides
- Model forms and/or policy (e.g. Caregiver affidavit)
- Legislation, AG opinions, guidance
- Other
<table>
<thead>
<tr>
<th>MINORS OF ANY AGE MAY CONSENT</th>
<th>LAW/DETAILS</th>
<th>MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?</th>
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<tbody>
<tr>
<td>PREGNANCY</td>
<td>“A minor may consent to medical care related to the prevention or treatment of pregnancy,” except sterilization. (Cal. Family Code § 6925).</td>
<td>The health care provider is not permitted to inform a parent or legal guardian without the minor’s consent. The provider can only share the minor’s medical information with them with a signed authorization from the minor. (Cal. Health &amp; Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11).</td>
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<tr>
<td>CONTRACEPTION</td>
<td>A minor may receive birth control without parental consent. (Cal. Family Code § 6925).</td>
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<td>ABORTION</td>
<td>A minor may consent to an abortion without parental consent. (Cal. Family Code § 6925; American Academy of Pediatrics v. Lungren, 16 Cal.4th 307 (1997)).</td>
<td>The health care provider is not permitted to inform a parent or legal guardian without the minor’s consent. The provider can only share the minor’s medical information with them with a signed authorization from the minor. (American Academy of Pediatrics v. Lungren, 16 Cal.4th 307 (1997); Cal. Health &amp; Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11).</td>
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<tr>
<td>SEXUAL ASSAULT(^1) SERVICES</td>
<td>“A minor who [may] have been sexually assaulted may consent to medical care related to the diagnosis, treatment and the collection of medical evidence with regard to the ...assault.” (Cal. Family Code § 6928).</td>
<td>The health care provider must attempt to contact the minor’s parent/guardian and note in the minor’s record the day and time of the attempted contact and whether it was successful. This provision does not apply if the treating professional reasonably believes that the parent/guardian committed the assault. (Cal. Family Code § 6928).</td>
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<td>RAPE(^2) SERVICES FOR MINORS UNDER 12 YRS(^3)</td>
<td>A minor under 12 years of age who may have been raped “may consent to medical care related to the diagnosis, treatment and the collection of medical evidence with regard” to the rape. (Cal. Family Code § 6928).</td>
<td>Both rape and sexual assault of a minor are considered child abuse under California law and must be reported as such to the appropriate authorities by mandated reporters. The child abuse authorities investigating a child abuse report legally may disclose to parents that a report was made. (See Cal. Penal § 11167 and 11167.5.)</td>
</tr>
</tbody>
</table>

\(^1\) For the purposes of minor consent health care alone, sexual assault includes acts of oral copulation, sodomy, and other crimes of a sexual nature.

\(^2\) Rape is defined in Cal. Penal Code § 261.

\(^3\) See also “Rape Services for Minors 12 and Over” on page 3 of this chart.
Minor Consent, Confidentiality, and Reporting Child Abuse:
A Guide for Title X Family Planning Providers in Nevada

Rebecca Gudeman
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Third Edition

Consent to Release Information
Confidentiality Laws

- Health Insurance Portability and Accountability Act (HIPAA)
- Family Educational Rights and Privacy Act (FERPA)
- State Law
- Other
HIPAA

- **Federal**: HIPAA protects the confidentiality of health information held by covered providers.

- **State**: State statutes also may protect the confidentiality of medical information held by providers.

- **Federal**: Other laws and regulations may apply in addition to or in lieu of HIPAA and state medical confidentiality law based on funding, type of service, service location.
Who must comply with HIPAA?

• HIPAA Rules apply to covered entities and business associates

• Covered entities include:
  o Health plans
  o Health care clearinghouses
  o Health care providers who conduct certain financial and administrative transactions electronically.

• Business associates include:
  o Subcontractors that receive or transmit protected health information on behalf of the business associate
What is the rule?

General Rule in HIPAA:

• Health care providers must protect the confidentiality of personal health information.
• Providers must have a signed “authorization” in order to share protected health information.

Exceptions allow or require disclosure of records absent signed release in some cases:
• e.g. to other providers for treatment purposes, child abuse reporting, reporting certain violence.
Remember

- Providers subject to HIPAA can always share information if there is a valid written authorization to release.

- Otherwise, they only may share if there is an exception that allows or requires disclosure.
HIPAA: What must an authorization look like?

To comply with HIPAA, an authorization to release information must include:

- Expiration Date or Event
- Generally no compound document
- Describes info to be disclosed in meaningful way
- Description of purpose for release
- The name or other specific identification of the person(s), or class of persons, to whom the information will be disclosed
- Signature
HIPAA: What must an authorization look like?

HIPAA requires several notices, including:

- Right to revoke and how to revoke.
- No conditioning treatment on release.
- Right to refuse to sign form.
- The potential for information disclosed pursuant to the authorization to be subject to re-disclosure by the recipient and no longer be protected by HIPAA.

THIS IS NOT A COMPLETE LIST OF REQUIREMENTS!
Clewless High School
SCHOOL BASED HEALTH CLINIC
Nowhereyouknow, CA

Student Name: ___________________________ DOB: ____________

Notice of Privacy Practice Acknowledgement
By signing below, I acknowledge that I received a copy of SBHC’s Notice of Privacy Practices.

Notice of Patients Rights Acknowledgement
By signing below, I acknowledge that I received a copy of SBHC’s Notice of Patient Rights

Consent to Treatment
By signing below, I authorize the above named student to receive any services as deemed necessary by staff of Clewless SBHC.

Release of Information
I authorize SBHC to release all necessary information to Clewless school staff, insurance companies, and other medical and mental health providers.

Signature: ______________________________________
(If patient is under 18, parent or guardian must sign)

Name of Signee: ______________________________________
(If signed by other than patient, print name and relationship to patient)
HIPAA: Authorizations

Who signs the authorization?

Generally, a parent, guardian or other person with authority under the law to make health decisions for an unemancipated minor, but minor signs in some circumstances.
HIPAA: Authorizations

When does a minor sign? HIPAA says:

1. the minor consented to the underlying health care,

2. the minor lawfully may obtain care without the consent of a parent or person acting in loco parentis, and the minor, a court, or another person authorized by law consented for the care, or

3. a parent, guardian or person acting in loco parentis assents to an agreement of confidentiality.
HIPAA: Exceptions that allow disclosure absent signed authorization

Exceptions to confidentiality allow or require providers to release medical information even in absence of signed release.

Examples:

- for treatment purposes
- to avert a serious and imminent threat
- for research
- for payment purposes
- for health care operations
- to public health authorities as required by law
- to report child abuse as required by law
- when requested by the individual
- other
Releasing information protected by HIPAA

Questions to consider:

- What kinds of disclosure require an authorization for release?
  - What does state law say?
- What must authorization look like?
  - Does it need to be written?
  - What information must it include?
  - Does state law add additional requirements for forms?
- Who signs the authorization?
- Duration and scope?

Strategies and resources:

- Quick guides, Model forms
- Agency guidance, Other
If state law conflicts with FERPA, FERPA usually preempts state law.
Who must comply with FERPA?

- FERPA Rules apply to *educational agencies* and *employees*.

**Educational agencies include:**
- Any public or private agency or institution which is the recipient of funds administered by the Sec. of Education under any applicable program if the agency provides educational services or instruction to students, or the agency is authorized to direct and control schools.

**Employees include:**
- Can include organizations that contract with or consult with an educational agency.
- Any person acting for or employed by such agency.
What is protected?

“Education Record”:

Records, files, recordings, other documents, which:

- Contain information directly related to a student; and
- Are maintained by an educational agency or institution or by a person acting for such agency or institution

May include some health information. Examples:

- Immunization records
- IEP, including testing and evaluation records
What is the rule?

General Rule in FERPA:

- Generally, FERPA prohibits educational agencies from releasing any personally identifiable information (PII) in the education record without written consent. A written consent must include certain elements to be valid.

- There are some exceptions.
Remember

- You can always share information if there is a valid written authorization to release.

- Otherwise, you only may share if there is an exception that allows or requires disclosure.
FERPA: What must a release look like?

FERPA says a release must:

- Specify the records that may be disclosed
- State the purpose of the disclosure
- Identify the party or class of parties to whom the disclosure may be made, and
- Be signed and dated.
Who must sign a release for PII?

- “Parent” for students under 18 years old
- “Student” if student is 18 or older

Who is a parent for this purpose?

Parent “includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” (See local policy for definitions).
FERPA: Exceptions that allow disclosure absent signed authorization

Some exceptions in FERPA allow or require education agencies to release PII without need of signed release.

Examples:
- Legitimate educational interests
- Parents exception
- Juvenile Justice exception
- Research exception
- Child Abuse Reporting exception
- Court Order
- Others
Case Example:

Ninth grade student in foster care with an Individualized Education Plan (IEP) would benefit from mental health therapy. Services are going to be provided by a school therapist as well as a therapist in a community organization. The family hopes the therapists can coordinate care and share information.

- Who may consent to the therapy services?
- Is a signed release necessary to share information?
- Who may sign an authorization to release information subject to HIPAA?
- Who may sign a release of education records?
School Health Services:
HIPAA, FERPA, Both or Neither?
Is it possible to operate under FERPA and HIPAA at the same time?

HIPAA explicitly states that its rules do not apply to health information held in an education record subject to FERPA. Thus,

If FERPA applies, HIPAA does not.
Why does it matter?

Case Example 2:

As part of IEP, school based therapist is providing counseling services to student. School wishes to seek insurance reimbursement for counseling.

Does it matter if the service records are subject to HIPAA of FERPA?
Medicaid and FERPA:

Districts seeking reimbursement for eligible services provided under IDEA. In Iowa, a statewide computer system stores IEP service information and generates Medicaid Service forms that include name, DOB, Medicaid ID, school, IEP, etc. The state education agency then uses this form to submit a claim to the state Medicaid agency. Claim documentation is kept separate from the IEP records in the state files.

Is Medicaid claim documentation used by the agency and school districts considered an education record under FERPA?
Medicaid and FERPA:

Family Policy Compliance Office response:

“There is no exception to the definition of “education record” for records used to submit reimbursement claims to Medicaid...nor is there any exception to the written consent requirement in FERPA.” Therefore, the claim form can only be shared with Medicaid with prior parent consent.

The educational agency ”may disclose education records if a parent has provided prior written consent to a third party authorized to received the records, such as the designated Medicaid fiscal agent. The agency must have a reasonable basis for concluding that the parent has in fact provided the necessary written consent to the third party...”
Medicaid and HIPAA:

Exceptions in HIPAA:

May disclose for treatment, payment and health care operations. According to the U.S. DHHS, this can include:

- Determining eligibility or coverage under a plan and adjudicating claims;
- Risk adjustments;
- Billing and collection activities;
- Reviewing health care services for medical necessity, coverage, justification of charges, and the like.
Consent for Insurance Billing

When is a “consent” necessary?
What is the individual “consenting” to?
Who must “consent?”
Strategies:

Where a written “consent” is necessary in order to provide services, disclose information, or seek reimbursement,

what are some strategies we can employ at the state, district, and/or school level to increase consents?
Speaker Information

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