

Confidentiality and Kids

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Physicians treating minors have added responsibility to protect their patients' confidentiality. For physicians who treat the children of friends or colleagues, there are special precautions that should be taken.

A person who has the mental capacity to give informed consent to medical care or treatment generally also has the right to control access to information connected to the care. Under state law, if a minor can legally consent to a particular health care treatment, then the minor also has a right to privacy concerning the medical records for that care.¹ In such cases, the treating physician cannot disclose information about the care, even to the parents, without the minor's consent. Federal law also recognizes this right. Under the Health Insurance Portability and Accountability Act (HIPAA), a minor controls access to his or her personal health information (PHI) when:

1. The minor consents to the health care service, no other consent is required by law, and the minor has not requested the parent, guardian or other person to be treated as his or her personal representative;
2. The minor lawfully may obtain such health care service without the consent of a parent or guardian, and the minor, a court or other person authorized by law consents to the health care services; or
3. A parent, guardian, or other appropriate person assents to an agreement of confidentiality between the physician and the minor.²

Physicians have a legal duty to obtain informed consent. Knowing when a minor has the right to consent to care is important because physicians must ensure that they have effective consent before providing the care. Not only does obtaining consent help shield physicians from potential lawsuits claiming a breach of fiduciary duty, it is important to establishing open communication and trust with patients about their care.

In general, minor patients (those under the age of 18) are not considered competent to consent to medical care or treatment in Washington State, with certain specific exceptions under the law. Broadly described, and except in limited circumstances, minors have the right at:

- ◆ 14 and older to seek diagnosis and treatment of sexually transmitted diseases (STDs)³
- ◆ 13 and older to consent to outpatient chemical dependency treatment in some circumstances⁴
- ◆ 13 and older to consent for either inpatient or outpatient mental health treatment under certain circumstances⁵
- ◆ Any age to seek and obtain reproductive health services, including abortion⁶

HIPAA provides federal protection for patients' PHI. Where state law and HIPAA differ with regard to the disclosure of a minor patient's health information, physicians should look to state law if it provides greater privacy protection; if state law does not permit a disclosure, a provider should not make the disclosure, whether or not HIPAA would permit it.

Both HIPAA and state law recognize that physicians may justifiably break confidentiality (regardless of the patient's age) when there is a significant risk of imminent harm to the patient or someone else. The physician must reasonably believe that disclosure would avoid or minimize the harm.⁷ Unlike a physician's duty to report suspected child abuse or neglect,⁸ breaking patient confidentiality due to concerns of imminent harm is discretionary and reporting should be consistent with other laws and ethical obligations.

Violations of patient confidentiality are not justifiable simply because the physician considers that the patient would be better off if others knew about the information gleaned from a medical encounter. For patients distressed enough to profess to their physician a serious risk of self-harm, that physician's decision to violate medical confidentiality may increase feelings of depression and loss of control. It is possible that, if a confidence is broken, a patient may never fully trust medical providers again.

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1 Revised Code of Washington (RCW) 70.02.130.

2 45 C.F.R. § 164.502(g).

3 RCW 70.24.110

4 RCW 70.96A.095 and RCW 70.96A.097

5 RCW 71.34.530. RCW 71.34.500; note: a parent may request a determination as to whether a minor has a mental disorder and a minor's consent is not required for admission, evaluation, and treatment if the parent brings the minor to the facility. RCW 71.34.600.

6 RCW 9.02.110.

7 RCW 70.02.050(1)(d) and 45 CFR § 164.512(j).

8 RCW 26.44.030.

Averting harm in this situation may include urging the patient to seek mental health services, perhaps as an inpatient. A physician practice should have policies and procedures in place that reflect the legal parameters of how and when it is appropriate to disclose such information.

With regard to a minor patient's parents, there are two main ways that confidentiality may be breached: by the provider or provider's staff, and by the insurance company.

When parents bring their child to a physician for care, parents may expect to be informed of their child's conditions and treatment, and may wish to accompany their child into the examination room. While these expectations may be reasonable, they are not always legally-grounded, as the exceptions outlined above indicate. In order to determine whether any of those exceptions apply, it is likely necessary for the physician to talk privately with patients 13 years and older to determine the nature of the patient's concerns, prior to medical assessment and treatment. Parents may be put at ease if they realize that this initial private discussion is customary, and not particular to their child.

Even when a minor patient is accompanied to the appointment with a parent, physicians must keep in mind the legal privacy rights of minors over specific aspects of their care. This means that, for example, if a parent brings her 14 year old child in for STD testing, the physician must still seek consent from the minor patient to conduct the testing and maintain patient confidentiality with regard to the results of that testing. Unless the minor has requested that the parent be treated as the minor's personal representative,⁹ the physician cannot disclose the test results to the parent without the patient's consent.

Another area where a minor patient's confidentiality may be breached is

medical billing. While physicians have some control over access to the medical encounter and medical records, they have much less control over the information contained in billing records, which often reveal the types of tests and treatments ordered. Here, again, physicians may avoid difficulties by instituting a practice of discussing confidentiality issues with teenage patients as well as with the patients' parents. It is possible for parents to authorize health insurance payment for the care of their children without seeing detailed information, if arranged in advance with their insurance carrier. Knowing that their child is receiving appropriate care from a trusted physician can help parents relinquish their right to see detailed health information on billing statements.

As outlined above, Washington State recognizes minors' rights over many aspects of their reproductive health. Minor patients who are uninsured or who do not wish to make use of their family's medical insurance may seek such care at non-profit community health clinics or Planned Parenthood, which provide services on a sliding fee scale.

Due to cost, it is much less common for minors to seek care from a physician in private practice without the knowledge of their parents. Physicians treating minor patients in circumstances where the patient has the legal right to confidentiality should bear in mind who will receive the medical bills for any tests and procedures. Physicians in private practice may consider referring a minor patient to clinics such as Planned Parenthood, if the patient expresses concern about bills revealing medical information being sent to their parents.

In addition to community health clinics and Planned Parenthood, Seattle teens have another resource for free and confidential health care: teen health clinics, thanks to the Families and Education Levy, which provides partial funding for health centers in all Seattle public high schools and some middle

schools. Ballard High School's Teen Health Center has a partnership with King County Public Health and Swedish Medical Center to provide free health care—including mental health services, primary care, and sexual health services—to students, regardless of their health insurance status. Other high schools have similar agreements with Group Health and Children's Hospital.

These clinics have received strong praise from students, patients, parents, public health officials, and others, but they are on occasion controversial. Last year, for example, the mother of a Ballard high school student complained to the media that her daughter had obtained an abortion with the assistance of the teen health center. Her complaint drew attention to the discord that can exist between teenagers and their parents, and highlighted the legal right of her daughter to make use of the services conscientiously provided by the teen health center and its staff.

As in many situations, potential problems may be preempted by proper policies instituted beforehand. These policies include: explaining to parents in advance that providing their children with appropriate care entails recognition of the minor patient's legal privacy in some circumstances. Including the patient in this discussion respectfully recognizes the patient's growing autonomy while simultaneously informing both the patient and parents of the physician's duties and responsibilities. Creating a professional environment in which teenage patients and their parents are able to talk openly about health issues will foster trust and better communication among all parties, likely averting future complaints and problems.

As always, the physician's primary duty is to the patient. When caring for minor patients, appropriate care entails respecting the autonomy and confidentiality granted by law. If in doubt, physicians should consider calling their malpractice carrier for advice. ■

9 45 C.F.R. 164.502(g)(3)(i)