Public Health Law Update: FAQs

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October 2016

FAQ Topics

• Update on legal issues with treating children & adolescents
• Confidentiality and electronic health information
• NC communicable disease law update
• Nondiscrimination in health care
CHILDREN & ADOLESCENTS: CONSENT TO TREATMENT

Who may consent to health care for a child or adolescent? What’s changed for minors in DSS custody?
Who may consent for minor?

• General rule: Parent (or parent substitute) consents

• Exceptions:
  – Emancipated minors
  – Parent authorizes another adult to consent
  – Emergencies and other urgent circumstances
  – Minor’s consent law

Minor in DSS custody (G.S. 7B-505.1)

<table>
<thead>
<tr>
<th>DSS director may consent</th>
<th>Minor may consent (G.S. 90-21.5)</th>
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<tbody>
<tr>
<td>• Routine medical and dental care or treatment</td>
<td>• A minor in DSS custody may consent to treatments covered under NC minor’s consent law, the same as a minor who is not in DSS custody</td>
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<td>• Emergency medical, surgical, psychiatric, psychological, or mental health care or treatment</td>
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<td>• Testing &amp; evaluation in exigent circumstances</td>
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<tr>
<td>DSS must obtain parent’s authorization for DSS to consent (unless court authorizes director to consent)</td>
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NC minors’ consent law (GS 90-21.5)

• Minor may consent to services for the prevention, diagnosis, or treatment of:
  – Sexually transmitted infections or other reportable communicable diseases
  – Pregnancy (but minors may not receive abortions or medical sterilization on their own consent)
  – Emotional disturbance (but minors may not consent to admission to a 24-hour facility, except in emergencies)
  – Abuse of controlled substances or alcohol (with the same restriction on admission to 24-hour facilities)

What about consent for immunizations?
Consent for Immunizations

- Consent from parent, guardian, person in loco parentis
- Consent from another adult authorized by the parent:
  - May immunize a minor who is presented by an adult who signs a statement that s/he has been authorized by the parent to obtain the immunization.
  - Note: Statement must be signed by the adult who presents the child. No requirement for a written consent from parent.
- Consent from the minor:
  - Some immunizations covered by minor’s consent law: prevention of venereal disease or reportable communicable disease

Consent for Immunizations: Child in DSS Custody

- If parent is known to have a religious objection, DSS must obtain parent’s consent for immunization
  - G.S. 7B-505.1(c)
Let’s go back to children who are **not** in DSS custody. How can a parent authorize another adult to consent to the child’s health care when the parent is unavailable?

**Form for parent to authorize another adult to consent to child’s health care**

- Statutory form available but not required
  - G.S. 32A-34
  - Can get the form by going to www.ncleg.net, click on General Statutes, enter 32A-34 in the search box
- Not needed if only treatment is immunization – see earlier slide
CONFIDENTIALITY IN ADOLESCENT HEALTH CARE

Why have confidentiality for adolescents?

• Avoid negative health outcomes (individual & public health)
• Encourage adolescents to seek needed care
• Research shows that concerns about privacy influence:
  – Whether adolescents seek care
  – When and where they seek care
  – How open they are with health care provider
### How does law affect confidentiality?

#### Federal
- HIPAA
- FERPA
- Others specific to particular settings or clients:
  - Title X
  - Substance abuse (applies to federally assisted substance abuse programs, not to all substance abuse info in medical records)

#### State
- Confidentiality for minor’s consent services (G.S. 90-21.4)
- Other laws specific to particular conditions or treatments:
  - Communicable disease
  - Mental health

### HIPAA terms

#### Protected health information (PHI)
- Information that identifies an individual and relates to
  - Health status or condition, or
  - Provision of health care, or
  - Payment for the provision of health care

#### Individual
- A person who is the subject of PHI

#### Personal representative
- A person with legal authority to act on behalf of an individual in making decisions related to health care
Who controls disclosure of information?

• General rule: Individual
• But if individual can’t make own health care decisions, then personal representative

• How does this apply to minors?

HIPAA & Minors

<table>
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<tr>
<th>Minor is treated as “individual” if:</th>
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<tbody>
<tr>
<td>Minor consents to health care service and no other consent is required by law</td>
<td>Minor’s consent law (G.S. 90-21.5)</td>
</tr>
<tr>
<td>Minor may lawfully obtain care without parental consent and the minor, a court, or another person gives the consent</td>
<td>Ex: NC law allows certain adults other than parents to consent to minor’s abortion, or court may waive parental consent</td>
</tr>
<tr>
<td>Minor’s parent agrees to confidentiality between minor and HCP for a health care service</td>
<td>Ex: Pediatrician may ask a parent for permission to examine and/or consult with an adolescent privately</td>
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</table>
What does it mean for the minor to be treated as the “individual”?

- Minor is the person who exercises HIPAA rights regarding information about the health care service:
  - Signing authorizations for disclosure (when authorization is required)
  - Right of access to the information
  - Right to request additional confidentiality protections for the information

What about disclosure to parents?

HIPAA defers to state or “other applicable” law

- State/other law requires disclosure: HCP must disclose
- State/other law prohibits disclosure: HCP may not disclose
- State/other law permits disclosure: HCP has discretion
- State/other law is silent on issue: HCP has discretion
What do NC & other laws say about disclosing minor’s consent info to parents?

<table>
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<tr>
<th>NC law (G.S. 90-21.4(b))</th>
<th>Other laws</th>
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<tbody>
<tr>
<td>• General rule: No disclosure to parent without minor’s permission</td>
<td>• May prohibit or inhibit disclosure to parents about minor’s consent services for:</td>
</tr>
<tr>
<td>• Exception: HCP may disclose to parent if:</td>
<td>– Family planning (Title X, Medicaid)</td>
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<tr>
<td>– Essential to life or health of the minor, or</td>
<td>– Communicable diseases (G.S. 130A-43)</td>
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<tr>
<td>– Parent contacts HCP and inquires about the treatment</td>
<td>– Mental health (G.S. Ch. 122C)</td>
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<td></td>
<td>– Substance abuse (42 CFR Part 2)</td>
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How do you put those laws together to get to the bottom line?

**General Rule**
- Need **the minor's permission** to disclose information about treatment received under minor’s consent law to anyone, including parents

**Exceptions**
- May disclose to parent if essential to minor’s life or health
- May make other disclosures without minor’s permission when disclosure is required by other laws (e.g., to report child abuse or neglect)
Resources: Children & Adolescents


• Sara DePasquale, Childhood Immunizations and the Role of a County Department of Social Services, Juvenile Law Bulletin No. 2015/01 (January 2015), at http://sogpubs.unc.edu/electronicversions/pdfs/jvlb1501.pdf

CONFIDENTIALITY & ELECTRONIC HEALTH INFORMATION
How should we manage patient portals for adolescent clients?

Patient portals & adolescents

• Issue: Who may have access to minor’s PHI?
• Law:
  – Sometimes parent/guardian has right of access
  – Sometimes minor has right of access and information must be kept confidential from parent
  – Sometimes both have right of access
• Practice:
  – Still evolving
What to do?

Recommended

Not recommended

Resources: Portals & Minors

• General information about patient portals: https://www.healthit.gov/providers-professionals/faqs/what-patient-portal

• Article outlining issues for adolescents:
What is a breach? How should a public health agency respond to a breach?

“Mistakes were made ...”

• Consider whether it’s a breach requiring notification

• Might not be – don’t reach conclusion too quickly.

• Three questions:
  – Was the information secured?
  – Does an exception apply?
  – Is there a low probability the PHI was compromised?
Steps for assessing a potential breach

1. Did the situation involve protected health information (PHI) as that term is defined in HIPAA?

2. Was PHI acquired, accessed, used, or disclosed in a manner that is not authorized by the HIPAA Privacy Rule?

3. Was the PHI encrypted or disposed in accordance with HIPAA standards?

PHI – Information that identifies an individual (or that can be used to identify an individual) and relates to:
- Health status or condition
- Provision of health care
- Payment for provision of health care

Safe harbor: information secured

- Don’t have to notify if:
  - PHI was encrypted, or
  - PHI was disposed in keeping with HHS guidance on secure disposal
Steps for assessing breach (cont.)

4. Does one of the exceptions to the breach notification rule apply?

Exceptions

- PHI could not reasonably be retained
- PHI access is unintentional and by a workforce member or business associate acting in good faith
- Inadvertent disclosure is made to another person within the CE or BA who is authorized to access PHI

Steps for assessing breach (cont.)

5. What is the probability that the unauthorized acquisition, access, use or disclosure compromised the privacy or security of the PHI? To answer this question, conduct a breach risk assessment.

Breach risk assessment

- Nature and extent of PHI, including types of identifiers & likelihood of re-identification
- Unauthorized person who received disclosure or used PHI
- Whether PHI was actually acquired and viewed
- Extent to which any risk to PHI has been mitigated
Was it encrypted or disposed per rules (safe harbor)?:

- Yes: STOP
- No: Notification required

Notification required:

- Yes
- No

Low probability of compromise per risk assessment:

- Yes: STOP
- No: Yes Yes

Notification prep: date check:

- If required to notify, must do so “without unreasonable delay” – no later than 60 days after breach discovered.
- Breach deemed discovered even if no actual knowledge, if reasonable diligence would have revealed it.
Recipients & timing

- Affected individuals – within 60 days
- US DHHS
  - ≥ 500 individuals – contemporaneous
  - < 500 - annual report
  - Media if > 500 – within 60 days.

Content

- Description of incident
- PHI involved
- Advice to individuals to minimize harm
- Actions taken to investigate and mitigate
- Contact information for more info

Method

- Written letter (standard)
- Email if prior agreement to email notification obtained
- Telephone if urgent (also send written)

Breach resources


- HIPAA regulations: 45 CFR 164, subpart D (sections 164.400 – 164.414)

HIPAA Security Rule

- Applies if texts contain protected health information
- All ePHI must be protected by technical, physical, and administrative safeguards
- Cannot address this issue with an authorization form – need a policy that satisfies security rule’s requirements
Template policy

- Conduct a security risk analysis before adopting policy
- Customize policy to your agency
- Train workforce before implementing policy

Text message resources

  - Includes link to draft template policy

What is the health department’s role in bloodborne pathogen exposures?
How do bloodborne pathogen exposures occur?

Occupational exposure
- A health care worker experiences a needlestick.
- A law enforcement officer is bitten by a person who is under arrest.

Non-occupational (community) exposure
- A child finds a used syringe & needle in a public park and pricks her finger.
- There is an altercation that ends up with one person exposed to the another’s blood.

Which laws apply to bloodborne pathogen exposures?

Source of law depends on type of exposure
- Occupational: OSHA bloodborne pathogen standards
- Non-occupational (community): NC control measure rules for HIV, hepatitis B, hepatitis C

Common threads in OSHA standards & NC rules
- Exposure: needlestick or contact between blood/body fluid and mucous membrane or nonintact skin
- Post-exposure evaluation and follow-up: may include testing, prophylaxis, disclosures of information
- Universal application
“Significant risk of transmission”

• When does an exposure create a significant risk of transmission?
  – Individualized and science-based decision
  – State rules identify some factors to consider

• Who makes that determination?
  – Rules do not specify but appear to reflect expectation that decision will be made by a health care provider or public health professional

What is the 24-hour hold for criminal defendants?

• State law authorizes magistrate to order defendant held for up to 24-hours if there is probable cause that someone had a nonsexual exposure to defendant that poses significant risk of transmission.

• Purpose of hold is for investigation by public health officials, and for testing if public health officials decide it’s necessary.
Resources: Communicable Disease

Bloodborne Pathogens


Communicable Disease Law, Generally


Resources: Communicable Disease

Isolation & Quarantine


Immunizations

North Carolina Communicable Disease Law
by Jill D. Moore, Associate Professor of Public Law and Government

An introduction to the law of communicable disease control in North Carolina

https://www.sog.unc.edu/publications/books/north-carolina-communicable-disease-law

NONDISCRIMINATION IN HEALTH PROGRAMS AND ACTIVITIES
What are the ACA section 1557 standards?

New Non-Discrimination Rule

- Prohibits health care programs and activities from discriminating based on race, color, national origin, age, disability, and sex

What’s new about this?
Language assistance

- Taglines
  - Short statements in non-English languages
  - Put in prominent locations and on website to notify individuals about language assistance

- Quality standards for interpreters
  - No use of minors, except in life-threatening emergency when no other interpreter available
  - Don’t rely on unqualified bilingual staff
  - Don’t permit use of family/friend when there are concerns about competency or confidentiality

Disability accommodation

- Make reasonable changes to policies, procedures, and practices to provide equal access to persons with disabilities
  - Ex: Service animal accommodation

- Ensure that programs or activities provided electronically are accessible
  - Ex: If use online appointments, information kiosks, etc., make sure alternate methods are available for those who can’t use due to disability

- Provide effective communication
  - Auxiliary aids and services, such as sign language interpretation, large print materials, etc.
Sex discrimination

- Provide equal access to health care without discrimination based on sex, including gender identity or sex stereotypes
  - Gender identity means individual’s internal sense of gender
  - Sex stereotypes means stereotypical notions of masculinity or femininity
- Treat individuals consistent with their gender identity, including with respect to facilities such as bathrooms
- Don’t deny needed health care services if gender doesn’t align with biological sex-specific service
Resources: Nondiscrimination Rule

• Final rule: Nondiscrimination in Health Programs and Activities, 81 Federal Register 31375 (May 18 2016).

• U.S. DHHS resources, including a summary, fact sheets, frequently asked questions, and training materials, are available at http://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html

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