Miller Stratvert P.A. ***MEMORANDUM***

TO: ***Debbie Solove***

FROM: ***Dan A. Akenhead***

DATE: ***March 24, 2015***

RE: ***Minor Consent and Parental Access to a Minor Child's PHI***

This memo discusses the legal consent requirements for minors under the Health Insurance Portability and Accountability Act ("HIPAA") and under New Mexico law. Particular attention is given to whether parents may access their minor child's protected health information. As discussed in more detail below, HIPAA allows a parent to access his or her minor child's protected health information when acting as the minor child's personal representative and when such access is not inconsistent with State or other law. State laws vary on this issue; however, the general rule in New Mexico is that a parent must obtain an authorization from the minor child to obtain confidential medical information. Exceptions to this rule do exist. For example, a minor child's primary caregiver in New Mexico may access the minor child's confidential information if the child is less than 14 years of age and if the disclosure is necessary for the continuity of the child's treatment.

HIPAA

Under HIPAA, "minor" refers to an unemancipated minor and "parent" refers to a parent, guardian, or other person acting in loco parentis. At issue is the disclosure of a minor's health information to a parent and access by a parent to a minor's health information. With regard to both disclosure and access to a minor's health information, HIPAA defers to State or other applicable law. This deference to State or other applicable law includes established case law as well as statutes or regulations that permit, require, or prohibit particular disclosures.

In general, under HIPAA, State and other applicable law governs if such law explicitly requires, permits, or prohibits disclosure of a minor's protected health information to a parent. *See*, 45 CFR 164.502(g)(3)(ii)(A). A covered entity may not disclose protected health information about a minor to a parent if an applicable provision of State or other law prohibits such disclosure. *See*, 45 CFR 164.502(g)(3)(ii)(B). Likewise, a parent's access to the minor's health information is based on what the State law allows. *Id*.

In limited circumstances, when a parent is not a personal representative of a minor and State law is silent, a licensed health care professional has discretion as to whether to allow a parent access to a minor's protected health information. *See*, 45 CFR 164.502(g)(3)(ii)(C). Because HIPAA defers to State and other law in the area of parents and minors, the current practices of health care providers regarding access by parents and confidentiality of minors' records should be consistent with State and other applicable law.

Parents have certain rights under HIPAA with respect to accessing health information about their minor children. The HIPAA Privacy Rule attempts to achieve three goals in this area:

1. Parents should have appropriate access to the health information about their minor children to make important health care decisions about them. However, the Privacy Rule does not interfere with a minor's ability to consent to and obtain health care under State or other applicable law;

2. HIPAA does not want to interfere with State or other applicable laws related to competency or parental rights, or the role of parents in making health care decisions about their minor children; and

3. HIPAA does not want to interfere with the requirements of State medical boards or other ethical codes of health care providers with respect to confidentiality of health information or with the health care practices of adolescent health care providers.

See, Standards for Privacy of Individually Identifiable Health Information; Final Rule Fed. Reg., 53181-53273 (August 14, 2002).

HIPAA allows minors to exercise control over protected health information when a parent has agreed to the minor obtaining confidential treatment. *See,* 45 CFR 164.502(g)(3)(i)(C). HIPAA also allows a covered entity to choose not to treat a parent as a personal representative when the covered entity has a reasonable belief that the minor has been or may be subjected to domestic violence, abuse, or neglect by such person, or when treating such person as the personal representative could endanger the minor. *See,* 45 CFR 164.502(g)(5)(i)(A), (B).

A covered entity may use or disclose a minor's protected health information if the covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. Note, however, under this scenario, the use or disclosure of a minor's protected health information must be to "a person or persons reasonably able to prevent or lessen the threat, including the target of the threat…." *See*, 45 CFR 164.512(j). A covered entity may also use and disclose a minor's protected health information when it is necessary for law enforcement authorities to identify or apprehend an individual, either because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim, or where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody. *See*, 45 CFR 164.512(j).

New Mexico Law

State laws vary as to whether a covered entity must provide a parent access to the medical records of his or her minor child, even when the minor consents to the treatment without the parent. If State law permits, a covered entity must provide a parent access, subject to the limitations in HIPAA at 45 CFR 164.524(a)(2) and (3).

The relevant New Mexico statute is NMSA § 32A-6A-24(A) (2008)—a provision of the Children's Mental Health and Developmental Disabilities Code. Section 32A-6A-24(A) states that, "a person shall not, without the authorization of the child, disclose … confidential information regarding the child." NMSA 1978, § 32A-6A-24(A).[1] An authorization given for the transmission or disclosure of confidential information shall not be effective unless it is in writing and signed; and contains a statement of the child's right to examine and copy the information to be disclosed, the name or title of the proposed recipient of the information and a description of the use that may be made of the information. NMSA 1978, 32A-6A-24(F). Note, however, that authorization from a child less than 14 years of age is not required for the disclosure or transmission of confidential information when the disclosure or transmission is:

1. Necessary for treatment of the child and is made in response to a request from a clinician;

2. Necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the child on him- or herself or another;

3. Is determined by a clinician not to cause substantial harm to the child and a summary of the child's assessment, treatment plan, progress, discharge plan and other information essential to the child's treatment is made to a child's legal custodian or guardian ad litem;

4. Is to the primary caregiver of the child and the information disclosed was necessary for the continuity of the child's treatment in the judgment of the treating clinician who discloses the information;

5. Is to an insurer contractually obligated to pay part or all of the expenses relating to the treatment of the child at the residential facility;[2]

6. Is to a protection and advocacy representative pursuant to the federal Developmental Disabilities Assistance and Bill or Rights Act and the federal Protection and Advocacy for Individuals with Mental Illness Act; or

[1] Although Section 32A-6A-24(A) refers to the disclosure of a child's "confidential information," it is generally understood that the statute applies only to the disclosure of a child's mental health records.

[2] Note that the information disclosed shall be limited to data identifying the child, the facility and treating or supervising physician and the dates and duration of the residential treatment. It shall not be a defense to an insurer's obligation to pay that the information relating to the residential treatment of the child, apart from information disclosed pursuant to this section, has not been disclosed to the insurer.

7. Is pursuant to a court order issued for good cause shown after notice to the child and the child's legal custodian and opportunity to be heard is given.

NMSA 1978, 32A-6A-24(D).

The following chart sets forth the general rules regarding a minor's ability to consent to medical treatment in New Mexico. The chart does not address every scenario that may arise; nor does the chart summarize the entire body of New Mexico law on this topic. If you have specific questions about a minor's ability to consent to medical treatment, please consult with an attorney.

Children 1 – 13 Years Old	**Unemancipated Children 14 – 17 Years Old**	**Emancipated Minor**
• Cannot consent to medical treatment without parent or legal guardian under most situations. • Can consent to initial assessment for verbal therapy. • Can consent to reproductive health services (birth control, pregnancy, STD's, etc.)	• Can consent to medically necessary healthcare if living apart from parents. • Can consent to medically necessary healthcare if the child is a parent of a child. • Can consent to medically necessary healthcare if the child is married. • Can consent to medically necessary healthcare if the child is pregnant (prenatal, delivery, and postnatal care).	• Can consent to all medical treatment.

Summaries of additional New Mexico statutes that govern a minor's ability to consent to medical treatment are set forth below. The summaries are general in nature and are not intended to address every issue that may arise. If you have particular questions about New Mexico law on this topic, please consult with an attorney.

New Mexico Uniform Health-Care Decisions Act

Under the New Mexico Uniform Health-Care Decisions Act, an unemancipated minor 14 years of age or older who has capacity to consent may give consent for medically necessary health care, provided that: (1) the minor is living apart from his or her parents; or (2) the minor is the parent of a child. NMSA 1978, § 24-7A-6.2(A). An unemancipated minor has "capacity to consent" when he or she has an ability to understand and appreciate the nature and consequences of proposed health care. NMSA 1978, § 24-7A-1. "Medically necessary health care" means clinical and rehabilitative, physical, mental, or behavior health services that are:

(1) Essential to prevent, diagnose, or treat medical conditions or that are essential to enable an unemancipated minor to attain, maintain, or regain functional capacity;

(2) Delivered in the amount and setting with the duration and scope that is clinically appropriate to the specific physical, mental, and behavior health-care needs of the minor;

(3) Provided within professional accepted standards of practice and national guidelines; and

(4) Required to meet the physical, mental and behavioral heath needs of the minor, but no primarily required for convenience of the minor, health-care provider or payer.

NMSA 1978, § 24-7A-6.2(B)(1)-(4). Healthcare providers will not be held liable for reasonably relying on statements made by unemancipated minors regarding their eligibility to give consent for treatment. NMSA 1978, § 24-7A-6.2(E).

A parent or legal guardian of an unemancipated minor who receives medically necessary health care is not necessarily required to pay for those services. NMSA 1978, § 24-7A-6.2(D). If, however, a parent or legal guardian consents to the medical treatment of an unemancipated minor, then the parent or legal guardian will be responsible for payment. NMSA 1978, § 24-7A-6.2(D). In situations involving emergency health care provided to an unemancipated minor, a parent or legal guardian will be responsible for payment of those services. NMSA 1978, § 24-7A-6.2(D). The statute is silent regarding whether a parent or legal guardian who pays for an unemancipated minor's medically necessary health care is automatically entitled to access that minor's protected health information.

An emancipated minor or any minor who has contracted a lawful marriage may also give consent to the furnishing of hospital, medical, and surgical care, and such consent is not subject to disaffirmance because of minority. NMSA 1978, § 24-10-1. In the event of a subsequent judgment of annulment of marriage or judgment of divorce, the minor will maintain his or her adult status for purposes consenting to hospital, medical, and surgical care. NMSA 1978, § 24-10-1.

In emergency situations where a minor is in need of immediate hospitalization, medical attention, or surgery, and the parents of the minor cannot be located for purposes of obtaining consent, consent for the emergency attention may be given by any person standing in loco parentis to the minor. NMSA 1978, § 24-10-2. Under this scenario, the law requires the healthcare provider providing the emergency services to make reasonable efforts under the circumstances to locate the minor's parents prior to providing the emergency services. NMSA 1978, § 24-10-2.

New Mexico law treats situations dealing with pregnant minors and postnatal treatment provided to female minors slightly differently. NMSA 1978, § 24-1-13.1. A health care provider shall have the authority, within the limits of his or her license, to provide prenatal, delivery, and postnatal care to a female minor. NMSA 1978, § 24-1-13.1. Under these circumstances, a female minor shall have the capacity to consent to prenatal, delivery, and postnatal care by a licensed health care provider. NMSA 1978, § 24-1-13.1.

Any person in New Mexico, regardless of age, has the capacity to consent to an examination and treatment by a licensed physician for any sexually transmitted disease, including but not limited to the HIV test. NMSA 1978, § 24-1-9 (2015); NMSA 1978, § 24-2B-3 (2015). As a general rule, the identity of any person upon whom such a test is performed, or the result of such a test, shall not be disclosed. NMSA 1978, § 24-1-9.4 (2015). There are, of course, exceptions to the general prohibition against disclosure. Such information may be disclosed to: the subject of the test; the subject's legally authorized representative, guardian, or legal custodian; any person designated in a legally effective release, so long as the release meets certain specifications set forth in Section 24-1-9.4(B); an authorized agent, a credentialed or privileged physician, or an employee of a healthy facility if the facility is authorized to obtain the test results; the department of health and the centers for disease control and prevention; and certain designated health facilities and research laboratories. NMSA 1978, § 24-1-9.4 (2015).

Children's Mental Health and Developmental Disabilities Act

Children under 14 years of age may initiate and consent to an initial assessment with a clinician and for medically necessary early intervention services limited to verbal therapy. NMSA 1978, § 32A-6A-14(B). When this occurs, the clinician may conduct an initial assessment and provide medically necessary early intervention service limited to verbal therapy with or without the consent of the legal custodian if such service will not extend beyond two calendar weeks. NMSA 1978, § 32A-6A-14(B). In most other situations healthcare providers must, however, obtain the informed consent from a child's legal custodian before providing treatment or habilitation, including psychotherapy or psychotropic medications, to a child under 14 years of age. NMSA 1978, § 32A-6A-14(A).

In New Mexico, a child 14 years of age or older is presumed to have the capacity to consent to treatment, including consent for individual psychotherapy, group psychotherapy, guidance counseling, case management, behavioral therapy, family therapy, counseling, substance abuse treatment or other forms of verbal treatment that do not include aversive interventions. NMSA 1978, § 32A-6A-15(A). Psychotropic medications may be administered to a child 14 years of age or older with the informed consent of the child; however, when this occurs, the child's legal guardian shall be notified by the clinician. NMSA 1978, § 32A-6A-15(B).

Children in New Mexico have the right to access their "confidential information" as that phrase is used in the Children's Mental Health and Developmental Disabilities Code. NMSA 1978, § 32A-6A-24(G). They also have the right to make copies of that information and submit clarifying or correcting statements and other documentation of reasonable length for inclusion with the confidential information. NMSA 1978, § 32A-6A-24(G). A physician or other mental health or developmental disabilities professional, may, however deny access to a child's "confidential information" when the professional believes and notes in the child's medical records that the disclosure would not be in the best interests of the child. NMSA 1978, § 32A-6A-24(G).

Genetic Information Privacy Act

The New Mexico Genetic Information Privacy Act requires informed and written consent for genetic testing and analysis. The rights of minors are not specifically defined in the statute so other applicable state law requirements would apply with respect to the rights of minors when genetic testing and analysis are at issue.

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