



CONFIDENTIALITY LAWS TIP SHEET

Numerous federal and state laws protect the privacy of health care information. In particular, at least 4 types of laws affect the ability of pediatricians and mental health professionals (eg, psychiatrists and psychologists) to share information about a patient in their care.

These laws are:

1. Federal medical privacy rules issued under the federal Health Insurance Portability and Accountability Act (HIPAA)
2. State privacy laws
3. State minor consent laws
4. Family Educational Rights and Privacy Act (FERPA)

In addition, there are specific federal confidentiality rules that govern facilities deemed to be federal alcohol and drug abuse treatment programs.

Confidentiality statutes are complex, subject to federal and/or state oversight and jurisdiction, and typically vary by state depending on the law. It is beyond the scope of this summary to provide an in-depth analysis of these statutes. However, general information, strategies for obtaining state-specific information about the laws, and resources for further information are outlined below.

Health Insurance Portability and Accountability Act Privacy Rules

In 1996, Congress passed HIPAA to establish national standards to protect the privacy of health care data, and to promote more standardization and efficiency in the health care industry. The HIPAA Privacy Rules, which are enforced by the US Department of Health and Human Services, Office for Civil Rights, took effect on April 14, 2003, and represent a uniform, federal floor of privacy protections for consumers.¹

The HIPAA Privacy Rules limit the ways that health plans, pharmacies, hospitals, doctors, and other health care providers can use patients' medical information (eg, information that is in medical records, communicated orally, or on computers). They are designed to govern disclosure of patient protected health information while protecting patient rights. With regard to sharing of health information between providers, the HIPAA Privacy Rule permits a health care provider to disclose protected health information about an individual, without his or her authorization, to another health care provider for that provider's treatment of the individual. Indeed, consulting with another health care provider about a patient is within the HIPAA Privacy Rule's definition of *treatment* and, therefore, is permissible.²

State Privacy Laws

In addition to these federal rules, many states have enacted state privacy laws (informed consent laws) that place further protections on health privacy. The HIPAA standards do not affect state privacy laws that may be more restrictive regarding privacy protections. Any state law providing additional protections would continue to apply.²

Health Insurance Portability and Accountability Act and Minor Consent

While the HIPAA rules permit sharing information between providers, there are unique considerations for minors who have legally consented to care. In general, HIPAA allows a parent to have access to the medical records for his or her *minor* child, when the access is consistent with state or other law.

Three exceptions to the HIPAA Privacy Rule are as follows:

1. When a minor has consented for the care and the consent of the parent is not required by state or other applicable law
2. When a minor obtains care at the direction of a court
3. When a parent agrees that a health care provider and minor may have a confidential relationship²



In the case of consenting minors, parents do not necessarily have the right to access the minor's health information. Whether they can do so is dependent on state laws.³ Health care and mental health professionals need to examine state laws to determine whether they specifically address the confidentiality of a minor's health information and, if not, professionals can typically determine whether or not to grant access.

Health Insurance Portability and Accountability Act and Federal Substance Abuse Confidentiality Requirements

Federal confidentiality regulations for substance abuse treatment programs (42 CFR Part 2 or Part 2) establish confidentiality requirements for patient records that are part of any federally assisted alcohol and drug abuse treatment program. Overall, Part 2 confidentiality requirements parallel the HIPAA Privacy Rule requirements in many areas.⁴ However, the *general rules* established by Part 2 and the Privacy Rule regarding use and disclosure of patient health information are very different. In general, federally subsidized substance abuse treatment programs must abide by Part 2 and cannot disclose information without written consent. This is more restrictive than the HIPAA Privacy Rule, which, as previously mentioned, permits disclosure of health information for treatment, payment, and health care operations without prior written authorization.

Furthermore, with regard to disclosure of health information of a minor, the HIPAA Privacy Rule defers to other applicable state and federal laws. In this case, Part 2 requires that a minor always sign the consent form for a program to release health information, even to his or her parent or legal guardian.⁴

(For further information, see *The Confidentiality of Alcohol and Drug Abuse Patient Records Regulation and the HIPAA Privacy Rule: Implications for Alcohol and Substance Abuse Programs* listed in the References.

State Minor Consent Laws

State minor consent laws govern whether minors can give their own consent for health care (eg, care obtained without the consent of a parent or guardian).

Every state has enacted these laws, which fall into 2 overall categories:

1. Laws that are based on the **status of the minor** (minors who are emancipated, living apart from parents, married, pregnant, and/or parenting)
2. Laws that are based on the **type of care that is sought** (emergency, family planning, drug/alcohol, and mental health)⁴

With regard to mental health services, at least 31 states have enacted laws that allow minors to consent to mental health services but with limitations (eg, age of minor, type of care, health professionals who are covered, and number of visits), depending on the state.⁴ Nearly all states have enacted some type of law that allows minors to consent for care related to drug and alcohol use.

Examples of State Minor Consent Laws for Mental Health Services⁵

- In California, a minor 12 years or older may consent for outpatient mental health treatment or counseling if the minor, according to the attending professional, is mature enough to participate in the outpatient mental health treatment or counseling and the minor either would present a danger of serious physical or mental harm to self or others without the treatment, or is the alleged victim of incest or child abuse.
- In Illinois, any minor 12 years or older (eg, younger than 17 years) may request and receive counseling services or psychotherapy on an outpatient basis without parental consent. These services are limited to 5 sessions with a session not lasting more than 45 minutes.
- In North Carolina, any minor may consent to a physician for medical health services for prevention, diagnosis, and treatment of emotional disturbance.



Family Educational Rights and Privacy Act Privacy Rules

In 1974, Congress passed FERPA in an effort to protect the confidentiality of student education records for those schools receiving US Department of Education funding. The law provides for rights of both parents and students at least 18 years of age to view education records maintained by the school. In general, medical records in a school setting are property of the school district. They usually are considered educational records, and therefore, are subject to FERPA. Additionally, in the school setting, licensed health staff should share confidential medical information only on a need-to-know basis for the purpose of keeping a student safe in the school setting. Licensed health staff should advise all non-licensed persons given confidential health information on a need-to-know basis that the medical information is confidential, should not be re-disclosed, and may be protected by laws of the state or federal governments.

Conclusion

The sharing of health information is complicated and subject to state and federal laws, rules, and regulations. Health care professionals may want to consult with multiple sources to obtain information about the privacy laws and rules specific to their state. These sources include the following:

- **State Minor Consent and Privacy Laws:** State mental health agencies and associations will have information on the privacy and confidentiality laws and rules that apply for mental health services in their state. State-by-state resource lists and contacts in state mental health agencies, state protection and advocacy agencies, and state mental health associations are available on the Web site of the Substance Abuse and Mental Health Services Administration (SAMHSA) at: http://mentalhealth.samhsa.gov/publications/Publications_browse.asp?ID=185&Topic=State%2FTerritory%20Resources
- **State Health Privacy Laws:** State-by-state information on state privacy laws is accessible on the Health Privacy Project's Web site at: http://www.healthprivacy.org/info-url_nocat2304/info-url_nocat.htm
- **HIPAA Privacy Rules:** Further information about the HIPAA Privacy Rules is available from the HHS Office for Civil Rights, SAMHSA, and other federal agencies.
- **FERPA Privacy Rules:** Further information about the FERPA Privacy Rules is available from the US Department of Education at: <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>

In addition, health care professionals may want to determine whether barriers to the sharing of information between health care and mental health professionals are the result of state law, informed consent laws and policies, and/or the culture of mental health practice. The American Psychiatric Association clearly supports the sharing of information between physicians when it is related to a patient's treatment.⁶ Practices could meet with mental health professionals to explore these issues further and to determine strategies for improving information sharing as it relates to children's mental health care.

For more information on state consent and confidentiality laws, please contact the American Academy of Pediatrics Division of State Government Affairs at (800) 433-9016, ext 7799, or stgov@aap.org.

References

- 1 US Dept of Health and Human Services, Office for Civil Rights. *Protecting the Privacy of Patients' Health Information*. 2003. Available at: <http://www.hhs.gov/news/facts/privacy.html>. Accessed March 2, 2007
- 2 US Dept of Health and Human Services, Office for Civil Rights. Health information and privacy rights questions and answers. Available at: www.hhs.gov/ocr/hipaa/. Accessed March 2, 2007
- 3 English A, Kenney K. *State Minor Consent Laws: A Summary*, second edition. Chapel Hill, NC: Center for Adolescent Health and the Law; 2003
- 4 US Dept of Health and Human Services. The confidentiality of alcohol and drug abuse patient records regulation and the HIPAA Privacy Rule: implications for alcohol and substance abuse programs. Rockville, MD: US Dept of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment; 2004
- 5 English A, Kenney K. *State Minor Consent Laws: A Summary*, second edition. Chapel Hill, NC: Center for Adolescent Health and the Law; 2003
- 6 The American Psychiatric Association. *Guidelines on Confidentiality*. Washington, DC: 1987



Resources for Further Information

English A, Kenney K. *State Minor Consent Laws: A Summary*, second edition. Chapel Hill, NC: Center for Adolescent Health and the Law; 2003

The Health Privacy Project, Institute for Health Care Research and Policy, Georgetown University provides health care stakeholders with information and tools related to greater protection of health information through research studies, policy analyses, congressional testimony, extensive work with the media, and a Web site. Available at: <http://www.healthprivacy.org/>. Accessed March 2, 2007

Morreale M, Stinnet A, Dowling E. *Policy Compendium on Confidential Health Services for Adolescents*. Chapel Hill, NC: Center for Adolescent Health and the Law; 2005. Available at: <http://www.cahl.org/PolicyCompendium.htm>. Accessed March 2, 2007

US Dept of Education. Family Educational Rights and Privacy Act. Available at: <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>. Accessed April 7, 2008

US Dept of Health and Human Services. Health insurance portability and accountability act: what it means for mental health and substance abuse services. Rockville, MD: US Dept of Health and Human Services, Substance Abuse and Mental Health Services Administration. Available at: <http://www.hipaa.samhsa.gov/> Accessed March 5, 2007

US Dept of Health and Human Services, Office for Civil Rights. HIPAA: medical privacy — national standards to protect the privacy of personal health information. Available at: <http://www.hhs.gov/ocr/hipaa/>. Accessed March 5, 2007

US Dept of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment. The confidentiality of alcohol and drug abuse patient records regulation and the HIPAA Privacy Rule: implications for alcohol and substance abuse programs. Rockville, MD: 2004. Available at: <http://www.hipaa.samhsa.gov/download2/SAMHSAHIPAAComparisonClearedPDFVersion.pdf>. Accessed March 6, 2007

