

HIPAA Privacy Rule Provisions on Personal Representatives

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Part 1. Introduction and Summary

The HIPAA Privacy Rule gives certain rights and the authority to take certain actions to individuals whose health information is subject to the rule. For example:

- An individual has the right to access his or her own PHI. 45 CFR 164.524.
- An individual may authorize disclosure of his or her PHI to another person by completing a HIPAA-compliant authorization form. 45 CFR 164.508.

Sometimes an individual may be unable to personally exercise rights or take actions under HIPAA. To account for such situations, HIPAA allows a “personal representative” to act on the individual’s behalf. 45 CFR 164.502(g).

Definitions

“Individual” means the person who is the subject of protected health information.

A “personal representative” is a person with legal authority to act on behalf of an individual in making decisions related to health care. Some examples from North Carolina law include a health care agent (also known as a person with health care power of attorney), a person who makes health care decisions for an incapacitated individual in accordance with a state law (G.S. 90-21.13), or a parent of an unemancipated minor. Please note that this is not a comprehensive list, and there may be exceptions or limitations to a person’s personal representative role.

General Rule

A covered entity must treat a personal representative as if that person were the individual for purposes of the rights and requirements of the privacy rule.

Limitation

A person may be treated as a personal representative only with respect to PHI that is relevant to the personal representation. But what PHI is relevant? The privacy rule does not answer this question. However, the scope of the personal representation and the PHI that is relevant to that personal representation often can be inferred from the law defining the scope of the personal representative’s authority, or explaining how that scope of authority is defined. For example, in North Carolina, an individual can create a limited health care power of attorney that permits the person with health care power of attorney to make some health care decisions, but not others.

Exceptions

- In some cases, a parent, guardian, or person standing in loco parentis of an unemancipated minor child is not the child's personal representative. See Part 3, Unemancipated Minors.
- In some cases involving abuse, neglect, or endangerment of the individual, a covered entity may choose not to treat a person as a personal representative, even though the person satisfies the definition of "personal representative." Certain conditions must be met for this exception to apply. See Part 6, Exception for Abuse, Neglect, and Endangerment Situations.

Part 2. Adults and Emancipated Minors

If a person has authority to make health care decisions on behalf of an individual who is an adult or emancipated minor, a covered entity must treat that person as a personal representative with respect to PHI that is relevant to the personal representation, unless the exception for abuse, neglect, or endangerment applies (see Part 6).

Persons who may qualify as the personal representative of an adult or emancipated minor under North Carolina law include:

- A health care agent—that is, a person granted health care power of attorney by the individual.
- A legal guardian who has been appointed by the clerk of court and authorized to make health care decisions for the individual.
- A person who makes health care decisions for an incapacitated individual pursuant to a state law, GS 90-21.13. Depending on the circumstances, this could be a health care agent, a legal guardian, or the following persons or categories of persons in this order:
 - The individual's spouse
 - A majority of the individual's reasonably available parents and children who are 18 or older
 - A majority of the individual's reasonably available siblings who are 18 or older
 - A person who has an established relationship with the individual, who is acting in good faith on the individual's behalf, and who can reliably convey the individual's wishes¹

Part 3. Unemancipated Minors

The application of HIPAA privacy rule provisions to the PHI of unemancipated minors is complex, especially when it comes to questions of personal representatives exercising the right of access to an unemancipated minor's PHI, or authorizing disclosure of an

¹ Before concluding that a person is a personal representative under GS 90-21.13, read the statute carefully and consult an attorney if necessary.

unemancipated minor's PHI. This handout summarizes HIPAA's general rule and exceptions, and provides a few examples. For more information about how to apply those rules in North Carolina, see *Responding to Requests for Minors' Protected Health Information: Guidelines for N.C. Local Health Departments* (Jill Moore, May 2013).

General rule

When applicable law gives a parent, guardian, or person acting in loco parentis (PILP) the authority to make health care decisions on behalf of an unemancipated minor, a covered entity must treat the parent, guardian, or PILP as a personal representative for purposes of the privacy rule.

Exceptions

Under the following circumstances, the parent, guardian, or PILP may not be treated as a personal representative, and the minor must be treated as the individual for purposes of the privacy rule.

- If the minor consents to the health care service and no other consent is *required* by law (regardless of whether such consent has actually been obtained), the parent, guardian, or PILP may not be treated as the personal representative, unless the minor requests that they be treated as such.
 - Example: In North Carolina, a minor with decisional capacity may consent to services under the minors' consent law and no other consent is required. The parent/guardian/PILP is not the personal representative with respect to care provided under that law.
- If the minor may lawfully obtain care without the consent of a parent, guardian, or PILP, and the minor, a court, or another person authorized by law consents to the service, the parent, guardian, or PILP may not be treated as the personal representative.
 - Example: Like many states, North Carolina has a law requiring a parent or specified other adult to consent to an unemancipated minor's abortion. The persons who may consent are a parent, a legal custodian, a legal guardian, or a grandparent with whom the minor has lived for at least six months (who would not necessarily be a legal custodian, guardian, or PILP). The law also permits a court to waive the requirement that the consent of a parent or other person be obtained. The parent or guardian may not be treated as the personal representative with respect to information about the abortion if consent was given by another authorized person, or if the consent requirement was waived by the court.
- If the minor's parent, guardian, or PILP assents to an agreement of confidentiality between a health care provider and the minor regarding a health care service, the minor's parent, guardian, or PILP may not be treated as the minor's personal representative with respect to PHI pertaining to that service.
 - Example: A health care provider may ask a parent for permission to examine and/or consult with an adolescent patient confidentially. If the

parent assents, the parent may not be treated as the minor's personal representative with respect to PHI pertaining to the confidential examination or consultation.

HIPAA Defers to State Law

HIPAA gives us the above general rule and exceptions, but it also specifies that a covered entity should look to state laws to determine whether and when to disclose an unemancipated minor's PHI to a parent, guardian, or PILP. Specifically:

- A covered entity may not disclose an unemancipated minor's PHI to a parent, guardian, or PILP if an applicable provision of state law prohibits it.
 - Example: In North Carolina, unemancipated minors may consent to some health care services on their own under G.S. 90-21.5(a), also known as the minors' consent law. When a minor receives care under this law, the covered entity is generally prohibited from disclosing PHI about the care to the minor's parent, guardian, or PILP. G.S. 90-21.4(b).
- A covered entity may disclose an unemancipated minor's PHI to a parent, guardian, or PILP if an applicable provision of state law permits or requires disclosure.
 - Example: There is an exception to the general rule described in the previous example. The same statute that generally prohibits disclosures about services under the minors' consent law expressly *permits* a covered entity to disclose PHI about care received under that law to the minor's parent, guardian, or PILP, if the treating physician determines that disclosure is essential to the life or health of the minor. G.S. 90-21.4(b).
- If there is no applicable law relating to a parent, guardian, or PILP's access to the unemancipated minor's PHI, the covered entity may choose whether to provide or deny such access. The decision to provide or deny access must be made by a licensed health care professional in the exercise of professional judgment, and must be consistent with state or other applicable law.

Part 5. Deceased Individuals

Under HIPAA, a person who is legally authorized to act on behalf of a deceased individual or the individual's estate must be treated as a personal representative of the deceased person. A North Carolina law, G.S. 8-53, states that a deceased person's medical information may be disclosed upon the authorization of the person's executor or administrator, or if there is no executor or administrator, the next of kin. A covered entity must therefore treat a person's executor or administrator—or in their absence, the person's next of kin—as a personal representative with respect to disclosures of PHI.

If an individual has been deceased for more than 50 years, the individual's health information is no longer protected by the HIPAA privacy rule. However, the North Carolina statute does not address whether or when the state law protections terminate.

Part 6. Exception for Abuse, Neglect and Endangerment Situations

A covered entity may elect not to treat a person as a personal representative if:

1. The covered entity has a reasonable belief that:
 - the individual has been or may be subjected to domestic violence, abuse, or neglect by the person who would be the personal representative, or
 - treating the person as the personal representative could endanger the individual, and
2. The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

There is a related provision governing a personal representative's right to access PHI about the individual in § 164.524(a)(3)(iii). A covered entity may deny a personal representative's request for access if "a licensed health care professional has determined, in the exercise of professional judgment, that the provision of access to such personal representative is reasonably likely to cause substantial harm to the individual or another person." While the person would retain the personal representative status, access to PHI may be denied to the person under this provision.