

**Responding to Requests for the Release of Minors' Health Information:  
Guidelines for N.C. Local Health Departments**

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**I. Introduction**

- A. Minors: A minor is a person under the age of 18.
- B. Emancipated minors: An emancipated minor is a minor who may be treated as an adult for most legal purposes, including consent to medical treatment.
1. Under North Carolina law, the *only* emancipated minors are those who:
    - a. are married,
    - b. have been granted an order of emancipation by a court, or
    - c. are serving in the armed forces.
  2. Being pregnant or having a baby does *not* emancipate a minor.
- C. Unemancipated minors: Any person under 18 who is not emancipated as described above is an unemancipated minor who, by law, is subject to the supervision and control of his or her parents. Most of the minors seen by N.C. local health departments are unemancipated.
- D. Main issues: Two of the most frequently asked questions about disclosing minors' medical information are:
1. Who may sign an authorization to disclose a minor's PHI?
  2. When are parents allowed to have access to a minor's PHI?

**II. Disclosing Emancipated Minors' Health Information**

- A. General rules: For emancipated minors, the general rules are:
1. The minor must sign authorizations for disclosure.
  2. The minor's parents are not allowed access to the minor's PHI.
- B. Potential for exception: The general rules above are the same general rules that apply to adults. Like adults, emancipated minors may become incapacitated or incompetent to make their own health care decisions. If that happens, the emancipated minor's personal representative<sup>1</sup> would be the person who may authorize disclosure or access PHI.

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<sup>1</sup> The answer to the question of who constitutes an emancipated minor's personal representative is going to vary depending on the minor's particular circumstances. Here are just a few examples illustrating several different options: (1) If the emancipated minor has executed a valid health care power of attorney, the person named as "health care agent" in that document would be the personal representative. (2) If the emancipated minor has not executed a power of attorney but is married, the spouse would be the personal representative. (3) If the emancipated minor has not executed a power of attorney and is not married, his or her parents (if they are living) may be the personal representatives. This is not a complete list of possibilities and there is no one across-the-board answer.

### III. Disclosing Unemancipated Minors' Health Information

- A. General rules vary: When a minor is unemancipated, the rules are more complicated.
1. Sometimes the person who must sign an authorization is the minor's *personal representative* (usually the parent), but sometimes it is the minor. Sometimes it's both.
  2. Sometimes parents are allowed access to the minor's PHI, but sometimes they are not.
- In lieu of a general rule, I offer a "rule of thumb" below. See also section V of this outline for more detailed information about different scenarios.
- B. Rule of thumb: Determine who consented to the minor's treatment. Often, that is the person who may authorize disclosure of PHI about the treatment, and obtain access to PHI about the treatment.
1. *Example of the "rule of thumb" in practice*: Sam is 17. When he was 5, he received well-child care at the health department. His mother consented to the well-child care. When Sam was 16, the health department treated him for gonorrhea. Sam consented to the gonorrhea treatment on his own.
    - a. Sam's mother may authorize disclosure of PHI related to the well-child care. Sam must authorize disclosure of PHI related to the gonorrhea treatment.
    - b. Sam's mother may have access to PHI about the well-child care, but in most cases she may not have access to PHI about the gonorrhea treatment without Sam's permission.
  2. *Notes and cautions about the rule of thumb*:
    - a. To apply the rule of thumb, you must know who may legally consent to a minor's medical treatment. See the handout, "Who May Consent to a Minor's Medical Treatment?"
    - b. The rule of thumb is a guideline that often provides the correct answer to disclosure questions. However, you should not apply this guideline to more complicated disclosure questions, such as:
      - i. Who may authorize disclosure of PHI about care a minor received without parental consent in an emergency?
      - ii. Who may access PHI about care a minor received while in the temporary custody of someone other than a parent?
      - iii. Who may authorize disclosure or access information about a minor's abortion?See the more detailed analyses below for these and other complex disclosure questions.

### IV. Summary of Relevant Laws

- A. HIPAA Privacy Rule (45 CFR 164.502(g))
1. *General rule*: When a parent, guardian, or person acting *in loco parentis* (PILP) has the legal authority to make health care decisions on behalf of an unemancipated minor, the parent, guardian, or PILP is the minor's personal representative for purposes of the Privacy Rule.
  2. *Exceptions*: Under the following circumstances, the parent, guardian, or PILP may not be treated as a personal representative of the minor.
    - a. 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 the personal representative.

- b. 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.
  - c. 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.
3. *Deference to State Law:* HIPAA defers to state law on the issue of whether a minor's PHI may be disclosed to the minor's parent, guardian, or PILP. If there is no applicable state law, a 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 any other applicable laws.

**B. North Carolina Law**

1. *General Rule:* North Carolina law does not explicitly spell out when parents, guardians, or PILPs may have access to their minor children's medical information, or when they are the appropriate persons to authorize disclosure of the information. In the absence of clearly stated law, the custom among NC health care providers has been to follow the general rule that an unemancipated minor's parent, guardian, or PILP is the person who may have access to, or authorize disclosure of, information regarding that treatment.
2. *Exceptions:*
- a. The main exception to the general rule applies to minors who consent to their own care under the minor's consent rule. GS 90-21.4(b) provides that health care providers who treat minors upon their own consent under GS 90-21.5(a) must not disclose information about the treatment to the minor's parent, legal guardian, or PILP, unless:
    - i. The minor gives permission for the disclosure, or
    - ii. Disclosure of the information is essential to protect the life or health of the minor, or
    - iii. The parent or legal guardian contacts the health care provider and asks about the treatment or medical services being provided to the minor.<sup>2</sup>
  - b. Parents, guardians, or PILPs may not have access to information about an unemancipated minor's abortion. This depends on who has provided consent for the abortion, or whether the minor has obtained a judicial waiver of the parental consent requirement. See Part VI of this outline for more information.

**V. Putting the Pieces Together in Practice: HIPAA & NC Law**

**A. Scenario 1: Consent to treatment given by parent, guardian, or PILP**

1. *General rule:* In most cases, a health care provider must have the consent of a parent, guardian, or PILP to treat an unemancipated minor. In these cases, the parent/guardian/PILP is the child's personal representative under HIPAA. As personal representative:
- a. The parent/guardian/PILP may access the child's PHI.
  - b. The parent/guardian/PILP is the person who may authorize disclosure of the child's PHI.

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<sup>2</sup> Title X family planning programs should not release information to parents under this provision, as those programs are subject to a federal confidentiality regulation that does not allow this disclosure without the client's permission. 42 CFR 59.11.

2. *Exception:* If the minor's parent, guardian, or PILP consents to the treatment, but then also assents to an agreement of confidentiality between the health care provider and the minor, the parent, guardian, or PILP may not be treated as the minor's personal representative with respect to PHI pertaining to any service covered by the agreement of confidentiality.
- B. Scenario 2: Consent to treatment given by unemancipated minor (GS 90-21.5)
1. *Look to state law:* HIPAA defers to state laws that specifically permit, require, or prohibit disclosure of information to unemancipated minors' parents. Local health departments should therefore follow the NC law that specifically prohibits health care providers from notifying parents about treatment that was provided to an unemancipated minor upon his or her own consent in most circumstances.
  2. *General rule:* Under GS 90-21.4(b), information about the minor's treatment should not be released to the minor's parent, guardian, or PILP without the minor's permission.
  3. *Exceptions:* Information about the minor's treatment may be released to the parent, guardian, or PILP:
    - a. If release of the information is essential to protect the life or health of the minor
    - b. If the parent or legal guardian contacts the physician and asks about the treatment or about medical services being provided to the minor. (But see footnote 2 on the previous page, regarding Title X family planning services.)
- C. Scenario 3: Consent to treatment is given by someone the parent has authorized to give consent in the parent's temporary absence (GS 32A-28 et seq.)
1. *General rule:* In this circumstance, there are two people who should be treated as personal representatives under HIPAA: the parent and the adult the parent has authorized to consent to the minor's treatment.
  2. *Limitations:*
    - a. The non-parent should be treated as the personal representative *only* with respect to the care to which the non-parent has consented.
    - b. Furthermore, if the parent has limited the non-parent's authority to consent to a specified period of time, the non-parent may only be treated as a personal representative during that period of time.
- D. Scenario 4: A minor is presented for immunizations by a non-parent (GS 130A-153(d))  
*This is a unique situation in North Carolina law.* When a parent, guardian, or PILP authorizes another adult to obtain an immunization for a child under GS 130A-153(d), the child's parent, guardian, or PILP is the child's personal representative with respect to information about the immunization. The adult who obtains the immunization for the child does not qualify as the child's personal representative for purposes of the Privacy Rule, because the adult does not have legal authority to consent to the child's care in this case.<sup>3</sup> The adult therefore may not authorize disclosure of the child's PHI. However, the adult does have legal access to a limited amount of PHI: the immunization certificate. This is because a North Carolina law (GS 130A-154) requires a local health department to give a certificate of immunization to the person who presented the child for immunization.

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<sup>3</sup> It is sometimes said that an adult who presents a child for immunization on behalf of a parent, guardian, or PILP has "consented" to the immunization—but strictly speaking, that isn't correct. The parent, guardian, or PILP has consented to the immunization, and has merely authorized the other adult to obtain it for the child. The adult is simply acting on behalf of the parent, he or she is not exercising the parent's authority to consent.

E. Scenario 5: A minor is treated without consent in an emergency or other urgent circumstance (GS 90-21.1)

The child's parent, guardian, or PILP should be treated as the child's personal representative in these circumstances, under HIPAA's general rule (when a parent, guardian, or PILP has the legal authority to make health care decisions on behalf of an unemancipated minor, a covered entity must treat the parent, guardian, or PILP as the minor's personal representative for purposes of the Privacy Rule). The parent, guardian, or PILP is still the person who had the legal authority to make health care decisions on behalf of the minor, even if a physician treated the minor without first obtaining parental consent in one of the emergency or urgent circumstances described in G.S. 90-21.1.

**VI. Information About an Unemancipated Minor's Abortion (G.S. 90-21.6 et seq.)**

A. Background—Who Must Consent: For an unemancipated minor to obtain an abortion in North Carolina, she must:

1. Consent to the abortion herself, *and*
2. Do one of the following:
  - a. She may obtain the consent of one of the following adults:
    - i. her custodial parent or parent with whom she is living, or
    - ii. her legal guardian, or
    - iii. her legal custodian, or
    - iv. a grandparent with whom she has been living for at least 6 months immediately preceding the date of the minor's consent to abortion.
  - b. Alternatively, she must obtain a waiver of the consent requirement from a district court judge.

The question of who may have access to, or authorize disclosure of, information regarding the abortion depends on which route the minor pursued.

B. Scenario 1: Minor obtained consent for the abortion from a parent

1. *General rule:* The parent who gave consent is the minor's personal representative with respect to information regarding the abortion. In addition, since the law specifically requires the minor to consent to the abortion, the minor herself should be permitted to access the information or authorize disclosure of it (with or without her parent's agreement).
2. *Exception:* If the minor's parent consents to the abortion, but then also assents to an agreement of confidentiality between the health care provider and the minor, the parent may not be treated as the minor's personal representative with respect to PHI pertaining to the abortion.

C. Scenario 2: Minor obtained consent from a non-parent adult allowed by law to give consent (legal guardian, legal custodian, or grandparent)

1. *General rule:* The non-parent is the minor's personal representative with respect to information regarding the abortion, but the minor's parent is not. The non-parent is a personal representative because GS 90-21.7 gives him or her the legal authority to consent to the treatment. The minor's parent may not be treated as the personal representative because of the HIPAA provision that prohibits a covered entity from treating a parent, guardian, or PILP as the minor's personal representative when the minor may lawfully obtain the care without the parent's consent and another person authorized by law consents to the service. In addition, since the law specifically requires the minor to consent to the abortion, the minor herself should be permitted to access the

information or authorize disclosure of it (with or without the agreement of the non-parent who consented to the abortion).

2. *Exception:* If the non-parent consents to the abortion, but then also assents to an agreement of confidentiality between the health care provider and the minor, the non-parent should not be treated as the minor's personal representative with respect to PHI pertaining to the abortion.

D. Scenario 3: A district court waives the parental consent requirement

When a judge waives the parental consent requirement, the minor is legally authorized to consent to the abortion on her own. Thus, the minor herself is the only person who may exercise the right of access to information about the abortion or authorize disclosure of it.

E. Scenario 4: A physician performs the abortion without parental consent in an emergency

It is unclear whether the minor's parent or guardian should be treated as the personal representative in this case, since it is possible that, in the absence of the emergency, the minor would have sought an abortion and either obtained a judicial waiver of the parental consent requirement or obtained consent from a non-parent. Because it is unclear, a health care provider might be justified in concluding that there is no applicable state law and relying on the HIPAA provision that permits health care providers to exercise their professional judgment in deciding whether to deny or provide the parent or guardian access to the PHI. In any case, since the law specifically requires the minor to consent to the abortion, the minor herself should be permitted to access the information or authorize disclosure of it (with or without the agreement of her parent or guardian).