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Health Law Diagnosis

CONSENT, ACCESS AND PRIVACY ISSUES RELATED TO MINORS' EMANCIPATED TREATMENT

This edition of Health Law Diagnosis (HLD) presents an overview of the key health information, privacy, and confidentiality laws and regulations governing access to, use and disclosure of minors' health information and records, and the extent to which minors may independently obtain certain health care treatment and services. Under certain circumstances, State laws and regulations grants minors the right to consent to certain medical treatment and services, as well as by extension to subsequent uses and disclosures of their information and records that are maintained by health care providers. Where a minor is authorized to consent to such treatment or use and disclosure of his or her information, the consent of a parent or other legal guardian is generally not required, and disclosure of the minor's health information related to such treatment to a parent or legal guardian would generally not be permitted without the minor's consent or authorization.

Definition of Minor

In New Jersey, a "minor" is an individual under the age of eighteen (18) who is not emancipated (hereafter, referred to as the "Minor") (see N.J.S.A. 9:17B-1.a). An individual under the age of 18 *may* be considered an **emancipated minor** if he or she is:

- **declared by a court** of law as emancipated (N.J.S.A. 9:2-20);
- **married**;
- **financially independent**; or
- serving in the **military**.

(See *generally* N.J.S.A. 9:17A-1.3; N.J.S.A. 55:14L-2.) Absent a court order or other legal documentation clearly indicating that the Minor is emancipated, a hospital should generally treat any individual under the age of 18 as a Minor.

Within this category, the following discussion examines who may consent to medical treatment for the Minor and who may access the Minor's medical records and information, and under what circumstances. Depending on the applicable state law or regulation, specific types of health care services, treatment or information may grant "emancipated" status (hereinafter referred to as "**Emancipated Treatment**") where a Minor seeks or is provided with treatment for which he or she would be granted autonomy. These types of emancipated treatment and related information may also set a minimum age upon which a minor may have such autonomy.

Consent to Treatment

In general, setting aside any Emancipated Treatment that a Minor may be entitled autonomy over as is discussed later, a Minor's parent, guardian, or other person *acting in loco parentis* has the authority to act on behalf of the Minor and to make decisions, including providing any required consent, related to such Minor's healthcare (see N.J.S.A. 9:17B-1). The following categories of caretakers (collectively, hereinafter referred to as the Minor's "Legal Representative") could potentially consent to medical treatment for the Minor:

1. **Married Parents:**

- If parents live together with the Minor, consent from only one parent is required (see N.J.A.C. 8:43G-4.1).
- If parents are separated and divorce is pending, consent from the parent who has been designated by Court Order as the parent with physical custody of the Minor pending divorce is required.

2. **Divorced Parents:**

- If there is joint legal custody of the Minor, consent from the parent who has been designated by Court Order as being the Primary Residential Parent should be sought (see *Brzozowki v. Brzozowki*, 265 N.J.Super. 141 (Ch. Div. 1993)).
- If one parent has sole custody, consent from the parent who has been awarded sole custody of the Minor should be sought.

3. **Single Parent** (other parent unknown): Consent from the known parent is sufficient (see N.J.A.C.8:43G-4.1).

4. **Guardian:** A person who has been appointed as the Legal Guardian of the Minor by way of Court Order may make medical decisions for the Minor consistent with such Court Order; consent from parent not necessary.

5. **Power of Attorney:** A parent (unless a Legal Guardian has been appointed) with the consent of the other parent (if living and not a mental incompetent), or a Guardian of the Minor, by a properly executed Power of Attorney, may delegate to another person, for a period not exceeding six months, any of the powers regarding care, custody, or property of the Minor (see N.J.S.A. 3B:12-39). Therefore, a person presenting an unexpired Power of Attorney executed by the Minor's two parents (or legal Guardian) may make medical decisions for the Minor.

6. **Step-parent:** there are no New Jersey laws vesting in a stepparent (who has not legally adopted the Minor) the authority to make medical decisions for the Minor.

Thus, as a general rule of thumb, if a Minor arrives at a hospital or health care provider, either alone or escorted by an adult, seeking non-emergency (or Emancipated) medical treatment or services, a hospital or health care provider should first obtain consent from the proper Legal Representative of the Minor, as set forth above, before furnishing and medical care to such Minor. There are two exceptions to this general rule: (1) if the Minor can independently consent to treatment (***emancipated treatment***), or (2) if the Minor is experiencing an ***emergency*** and the Legal Representative is not available.

Consent of the Minor (Emancipated Treatment)

In certain situations, where Minors are authorized under applicable law to consent to certain health care services or treatment, a hospital or health care provider is permitted to look solely to the Minor, without involvement of the Minor's Legal Representative, for consent with respect to such services or treatment. Under New Jersey law, for example, a Minor can consent independently to medical or surgical care or services (i.e., without any further consent required from the Legal Representative) provided by a hospital or licensed physician, if the Minor is:

1. **married** (see N.J.S.A. 9:17A-1), on behalf of him or herself or on behalf of his or her children;
2. **pregnant**, and the services requested relate to the pregnancy or to her child (see N.J.S.A. 9:17A-1)¹;
3. **suffering from the use of drugs, alcohol dependency**, or is otherwise a drug dependent person (see N.J.S.A. 9:17A-4);
4. believes that he or she may be afflicted with a **venereal disease** (see N.J.S.A. 9:17A-4);
5. seeking treatment for **sexual assault**, or if the Minor *appears* to have been sexually assaulted (see N.J.S.A. 9:17A-4)²; or
6. at least **13 years old** and is or believes that he or she is or may have been infected with **HIV**, or have acquired immune deficiency syndrome (**AIDS**) (see N.J.S.A. 9:17A-4; *but see* N.J.S.A. 26:5C-5 which defines a minor as under the **age of 12** for purposes of the Aids Assistance Act, further discussed below)).

¹ With respect to **abortion**, it is worth noting that, at one time, the New Jersey legislature enacted the **Parental Notification for Abortion Act**, N.J.S.A. 9:17A-1.1 et seq., which prohibited health care providers from performing an abortion on any unemancipated minor without the prior *notification* of such minor's parent, or unless a court order is obtained, or unless a delay in the performance of the abortion would result in serious risk of substantial and irreversible impairment of the minor's bodily functions. However, this **law was overturned** by the New Jersey Supreme Court in Planned Parenthood of Central New Jersey v. Farmer, 165 N.J. 609 (2000). Thus, the **affirmative** obligation to notify a minor's parent prior to the performance of an abortion is no longer mandatory, but does remain *permissible* in the professional judgment of the physician.

² With respect to cases or suspected of **sexual assault**, even where the minor may consent to treatment, the minor's Legal Representative **must** be notified **immediately**, *unless* the treating physician believes it is in the best interests of the minor patient not to do so (see N.J.S.A. 9:17A-4).

Therefore, if a Minor seeking medical or surgical care from a hospital falls into any of the foregoing categories, a hospital can accept consent from the Minor and a hospital would *not* be required, under such circumstances, to obtain *any additional consent* from the Minor's Legal Representative before beginning to provide services or treatment to the Minor.

However, there is no provision under New Jersey law giving a Minor authority to independently consent to **general** medical or health care services. In addition, New Jersey does not appear to generally authorize a Minor to independently consent to **mental health treatment**, *unless* mental health services have been or are being provided through a program or provider "**licensed**" or "**under contract with**" the Department of Human Services, Division of Mental Health and Addiction Services (see N.J.A.C. 10:37-6.79).

Thus, for mental health and any other *nonemergency* medical services that do not otherwise fall into an above-listed categories, a hospital or health care provider should be obtaining consent from the Minor's Legal Representative. On the other hand, a hospital would be permitted to furnish medical services to a Minor female who came to a hospital's emergency department seeking medical care if the information she provided and symptoms she described indicated that she *is or could be* afflicted with a **venereal disease**. Under these circumstances where the *Minor* consents to the treatment, a hospital would not be *required* to obtain prior consent from the girl's Legal Representative.

Emergency Care

If a Minor arrives or is brought to a hospital's emergency department with a **life-threatening emergency** or an "**Emergency Medical Condition**" (see below), or otherwise requires emergency treatment, a hospital or health care provider may provide all necessary medical care and treatment to the Minor, even without the consent of the Minor's Legal Representative. State law expressly states,

"The inability of the treating physician, hospital or clinic to locate or notify the parents or guardian **shall not** preclude the provision of any *necessary emergency* medical or surgical care to the minor" (emphasis added) (see N.J.S.A. 9:17A-4).

Further, New Jersey Hospital Licensing Standards require that treatment for any life-threatening emergency **must** be initiated immediately (see N.J.A.C. 8:43G-12.7(b)). The Hospital Licensing Standards give a patient at a general hospital the right to give informed, written consent prior to the start of any *nonemergency* procedure or treatment. N.J.A.C. 8:43G-4.1(a)(7).

In addition, any individual who arrives at a hospital's emergency department with an Emergency Medical Condition (defined below) **must** be evaluated by a physician and provided with such medical treatment as is necessary to assure that the condition has been "stabilized"

(defined as to “assure within reasonable medical probability, that no material deterioration of the condition is likely to result” see N.J.A.C. 8:43G-12.6.) and N.J.A.C. 8:43G-12.7(d)).

"Emergency Medical Condition" is defined as:

A medical condition manifesting itself by ***acute symptoms or sufficient severity (including severe pain***, psychiatric disturbances and/or symptoms of substance abuse) such that absence of immediate attention ***could reasonably be expected to result in:*** (i) placing the health of the individual (or, with respect to a pregnant woman the health of the woman or her unborn child) in ***serious jeopardy***; (ii) ***serious impairment*** to bodily functions; or (iii) ***serious dysfunction*** of a bodily organ or part; or with respect to a pregnant woman who is having contractions: (i) that there is inadequate time to effect a safe transfer to another hospital before delivery; or (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child. (see N.J.A.C. 8:43G-12.6) (emphasis added).³

In light of the foregoing, a hospital may administer *necessary* medical treatment to the Minor who appears to be suffering from a medical condition that is manifesting acute symptoms, severe pain, psychiatric disturbances and/or symptoms of substance abuse, or otherwise if the Minor is clearly experiencing a life-threatening emergency. A hospital may do so even if consent has not yet been obtained from the Minor’s Legal Representative. If the life-threatening emergency or Emergency Medical Condition is stabilized or resolved, the hospital will need the consent of the Minor’s Legal Representative prior to providing any general medical services or treatment to the Minor, unless the Minor can independently provide consent as discussed above.

Access to A Minor’s Records and Health Information

HIPAA and 42 CFR Part 2

Under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and its related “Privacy Rule,” a covered entity (e.g., a hospital or health care provider) is permitted to disclose or provide access to an *unemancipated* Minor’s health information (hereinafter, the “**Minor’s Information**”) to a parent, guardian, or other person acting *in loco parentis* IF, and to the extent that, such person is permitted or required to have such access under State or other law (see 45 C.F.R. 164.502(g)(3)(ii)(A)). Conversely, if state law provides that a parent, guardian, or other person acting *in loco parentis* can be denied access to a Minor’s health information, a

³ Note that EMTALA sets forth an almost identical definition in 42 U.S.C. 1395dd (e), which provides that an “emergency medical condition” shall mean: (A) a medical condition manifesting itself by *acute symptoms* of sufficient severity (*including severe pain*) such that the absence of immediate medical attention could reasonably be expected to result in (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in *serious jeopardy*; (ii) *serious impairment* to bodily functions, or (iii) *serious dysfunction* of any bodily organ or part; or (B) with respect to a pregnant woman who is having contractions, (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child. See also 42 C.F.R. 489.24(b).

covered entity may withhold the Minor's information from such person⁴ (see 45 C.F.R. 164.502(g)(3)(ii)(B)). Therefore, whether or not a hospital or health care provider is required or permitted to disclose, or prohibited from disclosing health information regarding a Minor to the parent or other Legal Representative of the Minor is ultimately determined by State law.

State Law

In any situation where the consent of a Legal Representative of the Minor is *required* for medical treatment to be provided to the Minor (e.g., the Minor cannot independently consent), the Legal Representative of the Minor has the right to obtain the Minor's health information relating to such treatment. However, with respect to the medical treatment or services that the Minor can and does consent to **independently**, the Legal Representative does **not** necessarily have automatic access rights to the information relating to the treatment or services consented to by the Minor. In these situations, the ***treating physician*** for the Minor is generally the ultimate decision-maker with respect to the decision of whether to allow or deny the Legal Representative access to the Minor's Information (See N.J.S.A. 9:17A-5).⁵

This means that a hospital's physician treating the Minor **may, but is not required to**, deny the Minor's Legal Representative access to the Minor's Information. The hospital physician may, but is also not required to, disclose the Minor's Information (including information regarding a venereal disease) to the Legal Representative, **even if the Minor objects**. In New Jersey, state law puts that decision in the hands and discretion of the hospital physician or other treating physician. There are **exceptions**, however, to such disclosures.

In cases where treatment is provided for **sexual assault**, if the treating physician determines that disclosure is not in the Minor's best interest (e.g., Legal Representative is suspected as the perpetrator), the Legal Representative may **not** be provided the Minor's Information (see N.J.S.A. 9:17A-4). In addition, under the Aids Assistance Act (see N.J.S.A. 26:5C-1 et seq.), if the Minor is **at least 12 years of age**⁶, the Minor's Information related to

⁴ The federal drug and alcohol confidentiality regulations, 42 C.F.R. Part 2 ("Part 2") has specific provisions which must be followed depending upon whether state law grants a Minor the legal capacity to consent to alcohol or drug treatment, as well as in disclosing any Part 2 protected information. For example, § 2.14 requires **both** the consent of the minor and the parents to a disclosure of Part 2 protected information, even where state law requires parental consent to treatment. Providers who are subject to Part 2 must ensure that they comply with the requirements of Part 2 in obtaining consent to treatment or disclosure of protected information of Minors.

⁵ N.J.S.A. 9:17A-5 states "Upon the advice and direction of a treating physician...a member of the medical staff of a hospital, public clinic, or physician licensed to practice medicine, may, but **shall not be obligated to**, inform the spouse, parent, custodian or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent, custodian or guardian without the consent of the minor patient and **even over the express refusal** of the minor patient to providing of such information." (emphasis added).

⁶ It is noted here that under N.J.S.A. 9:17A-4, the general Emancipated Treatment status, the minimum age for a minor to consent independently to HIV/AIDS treatment is 13, while the AIDS Assistance Act indicates that information regarding HIV/AIDS about a minor cannot be disclosed without consent of the minor if the minor is at least 12. These conflicting provisions force an awkward interpretation and application of the law. One such interpretation may be that a minor cannot obtain treatment for HIV/AIDS **independent** of his/her legal guardian unless he/she is 13; however, if a child arrives for treatment with his/her parent and HIV/AIDS information is learned during the course of that treatment, the AIDS Assistance Act suggests that a 12 year old holds the absolute legal power to prohibit such information from being released to his/her parent, even if he/she did not seek and obtain treatment independent of his/her parent/Legal Representative.

HIV/AIDS cannot be disclosed, including to the Legal Representative, without the Minor's express written authorization (see N.J.S.A. 26:5C-5; N.J.S.A. 26:5C-7; and N.J.S.A. 26:5C-8). However, if the Minor is under the age of 12, the Legal Representative has the authority to access and control the release of the Minor's Information relating to HIV/AIDS (See N.J.S.A. 26:5C-13). Therefore, if the Minor's Information falls into either of these two categories, a treating physician should not disclose Minor's Information to the Legal Representative, unless the foregoing is complied with.

There is no requirement under HIPAA, the Privacy Rule or the New Jersey Hospital Licensing Standards that require a hospital to segregate or otherwise treat differently any of the Minor's Information that cannot be released to the Legal Representative of the Minor. Likewise, there are no New Jersey Board of Medical Examiner provisions requiring segregation of a Minor's Information. However, in order to better assure that such information is not improperly released to the Legal Representative, a hospital or health care provider might want to consider **highlighting** or **earmarking** the Minor's information that should not be released to the Legal Representative unless the treating physician or the Minor, as the case may be, agrees to or authorizes the disclosure. This is of particular importance when a hospital or provider maintains electronic health or medical records ("EHR" or "EMR"), or participates in certain electronic exchanges of health information.

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