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New Limits on Minor Consents in Idaho

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Effective July 1, 2024, Idaho healthcare providers must obtain parental consent to treat unemancipated minors or face civil liability except in emergency cases. In addition, parents will have a right to access the medical records of their minor children subject to very limited exceptions. This is a significant change in the current law and will require healthcare providers to adjust their current policies and practices. The statute must be read and applied in conjunction with Idaho's general consent statutes, I.C. § 39-4501 *et seq.*

MINOR CONSENT FOR TREATMENT.

1. **General Rule: Parental Consent Required.** The Parents' Rights in Medical Decision-Making Act (the "Act"), I.C. § 32-1015, reaffirms that "[p]arents have the fundamental right and duty to make decisions concerning the furnishing of health care services to the minor child."[1] The Act states,

> Except as otherwise provided by court order, an individual shall not furnish a health care service or solicit to furnish a health care service to a minor child without obtaining the prior consent of the minor child's parent.[2]

"Minor child" is defined as "an individual under eighteen (18) years of age but does not include an individual who is an emancipated minor."[3] "Parent" is defined as "a biological parent of a child, an adoptive parent of a child, or an individual who has been granted exclusive right and authority over the welfare of a child under state law."[4] The Act applies broadly to any kind of medical or behavioral healthcare: "Health care service" is defined as "a service for the diagnosis, screening, examination, prevention, treatment, cure, care, or relief of any physical or mental health condition, illness, injury, defect, or disease."[5]

2. **Exceptions: Care Absent Parental Consent.** The Act identifies several limitations or exceptions:

    a. **Emancipated Minors.** The Act only applies to unemancipated minors; it does not apply to emancipated minors.[6] The Act does not define "emancipated minors," but based on other statutes or case law, minors will likely be deemed to be emancipated and competent to consent to their own healthcare if:

        - A court has entered an order that declares the minor to be emancipated.[7]
        - The minor is married or has been married.[8]
        - The minor is serving in the active military.[9]
        - The minor has rejected the parent-child relationship, is living on their own, and is self-supporting.[10]

    Contrary to common belief, pregnancy is not an emancipating event under Idaho law. The Idaho legislature has declared that "[t]he capacity to become pregnant and the capacity for mature judgment concerning the wisdom of bearing a child or of having an abortion are not necessarily related…."[11] Thus, Idaho's abortion statute generally requires parental consent before a legal abortion may be performed on a minor unless certain emergency or judicial bypass conditions are satisfied.[12] Consent would not be necessary if pregnancy were an emancipating event. Also, I.C. § 18-609A specifically refers to a "pregnant unemancipated minor" which would not exist if pregnancy were an emancipating event.

    b. **Parental Blanket Consent.** The Act does not apply if a parent has given a "blanket consent authorizing the health care provider to furnish the health care service."[13] The statute is not clear as to the scope of such a blanket consent: on the one hand, the statute indicates that the "blanket consent" must relate to "**the** health care service" furnished, which suggests some degree of specificity; on the other hand, requiring a specific consent for each type of treatment would seem to negate the concept of a "blanket" consent. In any event, the consent must be sufficiently informed to be effective; a parent may claim the consent is not sufficiently informed if they have not been given facts relevant to "the need for, the nature of, and the significant risks ordinarily attendant upon such a person receiving such services, as to permit the giving or withholding of such consent to be a reasonably informed decision."[14] Providers must be careful to ensure that any so-called blanket consent is still sufficiently informed to be effective.

    c. **Emergency.** The Act does not apply and a healthcare

provider may render care to a minor if he or she reasonably determines that:

> a medical emergency exists and:
> (i) Furnishing the health care service is necessary in order to prevent death or imminent, irreparable physical injury to the minor child; or
> (ii) After a reasonably diligent effort, the health care provider cannot locate or contact a parent of the minor child and the minor child's life or health would be seriously endangered by further delay in the furnishing of health care services.[15]

This is consistent with other Idaho statutes that allow providers to render care in emergency situations when a parent or personal representative is not available.[16] CMS Interpretive Guidelines to EMTALA also allow minors to consent to their own emergency medical screening examination and, if an emergency condition is detected, stabilizing treatment by hospitals, at least until parents or guardians may be contacted.[17]

d. **Court-Ordered Treatment.** The Act contemplates that a court may order a minor's treatment.[18] In addition to other situations in which a court order may be appropriate, I.C. § 16-1627 establishes a process whereby a physician may seek a court order authorizing needed care if “the life of the child would be greatly endangered without certain

treatment."

3. **Effect of Other Laws.** According to the Act's Statement of Purpose, "the Act is intended to supersede any current provisions of Idaho law that may otherwise conflict with the Act."[19] Absent further guidance or case law to the contrary, it appears that state laws or regulations that for years have allowed minors to consent to their own healthcare—or permitted healthcare providers to safely rely on minor consent—will be void effective July 1, 2024, including the following:

   - Examinations, prescriptions, devices, or counseling concerning contraceptives that were otherwise permitted by I.C. § 18-604.
   - Treatment for infectious, contagious, or communicable diseases that were otherwise permitted by I.C. § 39-3801 and IDAPA 16.02.10.050.
   - Admission or treatment for mental illness as otherwise permitted by I.C. § 66-318(b).
   - Treatment for drug abuse as otherwise permitted by I.C. § 37-3102 and IDAPA 16.05.01.250.02.
   - Blood donations as otherwise permitted by I.C. § 39-3701.

   The status of family planning services under federal Title X programs is unclear. The Department of Health and Human Services (HHS) has taken the position that minors may receive family planning services from Title X projects without parental consent.[20] Such services may include patient education and counseling concerning family planning, contraception, basic infertility services, pregnancy diagnosis and counseling, cervical and breast cancer screening, and sexually transmitted disease (STD) and HIV prevention education, testing and referral, but not abortion.[21] According to the federal Office of Population Affairs, Title X program staff may not notify parents or guardians before or after the minor has requested and/or received Title X family planning services.[22] However, in December 2022, a federal court in Texas held that HHS's Title X exception does not preempt contrary state laws requiring parental consent and notification.[23] On March 12, 2024, the Fifth Circuit affirmed the District Court decision.[24] As of the date of this health law update, HHS has not responded; it is unclear whether it will appeal. Of course, the Fifth Circuit decision is not necessarily binding in Idaho; however, until we receive further guidance, Idaho providers relying on HHS's policy for Title X services do so at their own risk.

   Unlike Title X services, other federal statutes may preempt or affect application of the Act. For example, federal rules governing the diagnosis or treatment of substance use disorder specifically state:

   > Where state law requires parental

> consent to treatment, the fact of a minor's application for treatment may be communicated to the minor's parent, guardian, or other individual authorized under state law to act in the minor's behalf only if:
>
> > (i) The minor has given written consent to the disclosure in accordance with subpart C of this part; or
> >
> > (ii) The minor lacks the capacity to make a rational choice regarding such consent as judged by the part 2 program director under paragraph (c) of this section.[25]

4. **Child Neglect.** The Act "does not make legal and in no way condones any abuse, abandonment, or neglect, including any act or omission described in section 16-1602, Idaho Code."[26] Providers are still required to report situations in which parents fail or refuse to provide or consent to medical or other care

necessary for the child's well-being.[27]

PARENTAL ACCESS TO RECORDS.

1. **General Rule: Parental Access Required.** The Act also ensures that parents may access a minor child's healthcare records:

> No health care provider or governmental entity shall deny a minor child's parent access to health information that is:
> (a) In such health care provider's or governmental entity's control; and
> (b) Requested by the minor child's parent.[28]

"Health information" is defined broadly as

> information or data, collected or recorded in any form or medium, and personal facts of information about events or relationships that relates to:
> (i) The past, present, or future physical, mental, or behavioral health or condition of an individual or member of the individual's family
> (ii) The provision of health care services to an individual; or
> (iii) Payment for the provision of health care services to an individual.[29]

2. **Exceptions to Parental Access.** Providers may deny parental access under limited circumstances.

    a. **Emancipated Minor.** The Act does not require parental access if the minor is emancipated.[30]

b. **Court Order.** Parental access may be denied if such access "is prohibited by a court order."[31]

c. **Parent Subject to Investigation.** The provider may deny parental access if "[t]he parent is a subject of an investigation related to a crime committed against the child, and a law enforcement officer requests that the information not be released to the parent."[32] However, the scope of this exception may be affected by HIPAA as discussed below.

3. **Effect of Other Laws.** The Act's Statement of Purpose confirms that it was intended to supersede contrary state laws, including those that would have prohibited disclosure to parents. However, certain federal laws may preempt the Idaho Act. For example:

a. **HIPAA.** HIPAA generally defers to state law when it comes to parental access. The HIPAA privacy rule states:

> If, and to the extent, permitted or required by an applicable provision of State or other law … a covered entity may disclose, or provide access in accordance with [45 C.F.R.] § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in loco parentis.[33]

In contrast to the Idaho Act, however, HIPAA does allow healthcare providers to refuse to disclose information to individuals and their parents in limited circumstances,

including but not limited to those set forth in 45 C.F.R. § 164.524(a)(1)-(3), *e.g.*,

- Information that is not contained in a patient's designated record set;
- Psychotherapy notes;
- Information that was obtained from someone other than a health care provider under a promise of confidentiality and the access requested would be reasonably likely to reveal the source of the information;
- A licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person;
- The information references another person and a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to cause substantial harm to such other person; or
- The request for access is made by the individual's personal representative and 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.

The HIPAA section specific to parental access confirms that a healthcare provider may decline to treat a parent as a personal representative and, ergo, may deny the parent access to information concerning a minor if:

> (i) The covered entity has a reasonable belief that:
>
> > (A) The individual

has been or may be subjected to domestic violence, abuse, or neglect by such person; or (B) Treating

such person as the personal representative could disclose to the individual; and

(ii) 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.[34]

As discussed in our separate health law update, it is likely that HIPAA preempts the Idaho Act in these limited situations and allows a provider to deny parental access; nevertheless, because of the threat of lawsuits under the Act, providers should apply and document the exceptions carefully. There is no guarantee how a court will rule on the preemption issue.

b. **Substance Use Disorder Records.** Regulations governing the confidentiality of substance use disorder (SUD) information originating from a federally assisted SUD program confirm that "no state law may either authorize or compel any disclosure prohibited by the regulations in this part."[35] As noted above, the part 2 regulations prohibit disclosure of the minor's application for care to a parent or guardian unless:

> (i) The minor has given written consent to the disclosure in accordance with subpart C of this part; or
> (ii) The minor lacks the capacity to make a rational choice regarding such consent as judged by the part 2 program director under paragraph (c) of this

section.[36]

PRIVATE LAWSUITS. Alarmingly, the Act allows parents to sue providers for a violation of the consent or access requirements under the Act:

> (a) [A]any parent who is deprived of a right as a result of a violation of this section shall have a private right of action against the individual, health care provider, or governmental entity.
>
> …
>
> (c) A parent who successfully asserts a claim or defense under this section may recover declaratory relief, injunctive relief, compensatory damages, reasonable attorney's fees, and any other relief available under law.[37]

Such lawsuits have a two-year statute of limitations, *i.e.*, they must "be initiated within two (2) years after the harm occurred."[38] The Idaho Tort Claims Act applies to any such claims brought against governmental entities.[39]

WHAT PROVIDERS MUST DO. Providers should take prompt action to:

- Update consent forms, policies, and practices to ensure compliance, including any statements on websites. Among other things, providers may need to educate minor patients concerning the restrictions under the new Act.
- Update medical record forms, policies, and practices to ensure compliance, including HIPAA policies concerning parental access.
- Review and, if necessary, update their HIPAA Notice of Privacy Practices to reflect the Act's requirements, including the Notice published on websites.[40]
- Update patient portal policies and/or access rights.
- Train personnel concerning the new rules, policies, and practices.
- Discuss the potential for lawsuits with your insurance broker to ensure that they have adequate insurance coverage for claims brought under the Act.

[1] I.C. § 32-1015(2).

[2] *Id.* at § 32-1015(3).

[3] *Id*. at § 32-1015(1)(e).

[4] *Id*. at § 32-1015(1)(f).

[5] *Id*. at § 32-1015(1)(c).

[6] *Id* at § 32-1015.

[7] I.C. § 16-2403(1).

[8] *See* I.C. §§ 16-2403(1), 18-604(3), and 66 402(6); *see also id*. at §§ 32-101(3) and 15-1-201(15).

[9] *See* I.C. § 18-604(3).

[10] *See* I.C. §§ 66-402(6) and 32-104; see also Ireland v. Ireland, 123 Idaho 955, 855 P.2d 40 (1993), and Embree v. Embree, 85 Idaho 443, 380 P.2d 216 (1963).

[11] I.C. § 18-602(d).

[12] I.C. § 18-609A.

[13] I.C. § 32-1015(4)(a).

[14] I.C. § 39-4506.

[15] I.C. § 32-1015(4)(b).

[16] *See, e.*g., I.C. §§ 39-4504(1)(i), 56-1015, and 16-2422(1).

[17] CMS State Operations Manual App. V—Interpretive Guidelines—Responsibilities of Medicare Participating Hospitals in Emergency Cases (Rev. 07-19-19) at Tag A2406.

[18] I.C. § 32-1015(3).

[19] https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2024/legislation/S1329SOP.pdf.

[20] 42 U.S.C. § 300 *et seq*.; 42 C.F.R § 59.5.

[21] 42 C.F.R § 59.5(a); *see also* Program Requirements for Title X Funded Family Planning Projects, available at https://www.hhs.gov/opa/sites/default/files/ogc-cleared-final-april.pdf.

[22] 42 C.F.R § 59.11; OPA Program Policy Notice 2014-01, available at https://www.hhs.gov/opa/sites/default/files/

ppn2014-01-001.pdf.

[23] *Deandra v. Becerra*, No. 2:2020cv00092 (N.D. Tex. 2022); *see* Cong. Res. Serv., *Title X Parental Consent for Contraceptive Services*

Litigation: Overview and Initial Observations, available at https://crsreports.congress.gov/product/pdf/LSB/LSB10916#.

[24] *Deandra v. Becerra,* No. 23-10159, 2024 U.S. App. LEXIS 5896, 2024 WL 1059721 (5th Cir. 2024).

[25] 42 C.F.R. § 2.14(b).

[26] I.C. § 32-1015(8).

[27] I.C. § 16-1605.

[28] I.C. § 32-1015(5).

[29] *Id.* at § 32-1015(1)(d).

[30] I.C. § 32-1015(1)(e).

[31] *Id*. at § 32-1015(6)(a).

[32] *Id*. at § 32-1015(6)(b).

[33] 45 C.F.R. § 164.502(g)(3)(ii)(A).

[34] 45 C.F.R. § 164.502(g)(5).

[35] 42 C.F.R. § 2.20.

[36] *Id.* at § 2.14(b)(2).

[37] I.C. § 32-1015(12).

[38] *Id*. at § 32-1015(12)(d).

[39] *Id*. at § 32-1015(12)(a).

[40] *See* 45 C.F.R. § 164.520 for requirements relating to the Notice of Privacy Practices.

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seek the advice of your legal counsel.