Medical Privacy Rights of Minors

by Jeffery P. Drummond, JD

Do minor patients have the same medical privacy rights as adults?

Other than the Children's Online Privacy Protection Act, which imposes certain obligations on websites that cater to or are likely to attract child viewers, most major privacy statutes do not distinguish between children and adults. The primary medical record privacy statute — the Health Insurance Portability and Accountability Act of 1996 — and the regulations promulgated thereunder, simply addresses the rights of “individuals” with regard to the privacy and security of their health information. By contrast, the Family Educational Rights and Privacy Act (FERPA) draws the line at 18, giving parents the right to control privacy of educational records until the student turns 18, at which time the student assumes the same rights. The privacy rights granted are the same, regardless of the age of the student.

HIPAA provides rules for the use and disclosure of medical records by covered entities and their business associates, rights of individuals with respect to their own medical records and information, and responsibilities of covered entities and business associates to establish procedures and safeguards to make sure those rules are followed and those rights respected. Those rules, rights and responsibilities are the same, whether the patient (the individual who is the subject of the information) is an adult or a minor. In other words, the rules are intended to be universal; their application in differing circumstances depends on other legal requirements.

HIPAA prohibits “covered entities” (health plans, healthcare providers and healthcare clearinghouses) from using or disclosing an individual’s medical information (referred to in HIPAA as “protected health information” or PHI) except for permitted purposes, such as treatment, payment and healthcare operations. Covered entities may no more use or disclose a minor’s PHI than they may use or disclose an adult’s.

Additionally, minors have the same rights with respect to their PHI as adults have. HIPAA specifically gives individuals, regardless of age, the right to receive a Notice of Privacy Practices from providers and health plans describing how and when their PHI may be used or disclosed; the right to access their PHI; and the right to request amendments to their PHI, request special protections and request an accounting of disclosures.

It may be difficult for a minor patient to effectively exercise one of these rights, or for a plan or provider to know how to obtain permission or consent from the minor patient. A pediatrician is not going to give a baby a Notice of Privacy Practices or ask a 5-year-old to fill out an authorization. One of the few areas where HIPAA specifically (if indirectly) addresses the issue of minors is in the rules relating to “personal representatives.”

“Personal Representative”

Under HIPAA, a covered entity must treat the “personal representative” as the individual when abiding by the HIPAA rules and respecting the patient’s rights. HIPAA defines a personal representative as someone who “has authority to act on behalf of an individual ... in making decisions related to health care....” If someone has the authority to make healthcare decisions for the individual, that person is by definition the “personal representative,” and any health plan or provider must treat that personal representative just as they would the patient. For example, if the provider would be required to give the individual a copy of his or her medical record upon request, the provider also would have to give the record to the personal representative upon request. Under Texas law, the parent of an unemancipated minor generally has the authority to make healthcare decisions for the child; therefore, the parent is the personal representative.

This issue often arises in divorce situations where parents have different ideas about who should have access to the information. In most divorces, both parents retain parental rights, so both retain the authority under Texas law to make healthcare decisions for the child. In that case, absent an exception, both parents should be treated as the personal representative and should have access to the child’s medical records. In some divorce situations, the divorce decree will specify medical record access, or actually remove the parental rights of the father or mother, in which case the specific court orders should be followed.

Thus, while the minor patient has privacy and security rights under HIPAA, the minor generally does not have privacy rights against his or her own parent. Similarly, any minor who is a ward of Child Protective Services or some other state agency that has the authority to make healthcare decisions on behalf of the child would not have privacy rights against the state agency.
Some Restrictions on Parents

Still, there are some restrictions on the rights of a parent to obtain his or her child’s medical information. Specifically, while HIPAA generally gives a parent the right to be personal representative and stand in the shoes of the minor, if the minor consents to receipt of a health service (and no other consent is required) and the minor does not request that the parent be involved, the health provider need not treat the parent as personal representative. Likewise, if the law allows the minor to receive a service without parental consent (such as certain pregnancy-related services in Texas), the provider need not treat the parent as a personal representative. Finally, if the parent agrees to provider-patient confidentiality with respect to the minor, the provider may keep the information from the parent.

These HIPAA provisions are supplemented by three general principles:

• If a state law specifically requires or allows it, a provider may disclose a minor’s medical information to the parent.

• If a state law specifically prohibits it, a provider may NOT disclose a minor’s medical information to the parent.

• Where no state law is applicable, the provider may use his or her own discretion in deciding whether to allow the parent access to the minor’s medical information.

A few other exceptions allow a provider to refuse to provide a minor’s medical information to a parent, guardian or other person who usually would be considered a personal representative. If the provider believes that the child lives in a home with domestic violence, neglect or abuse; determines that the disclosure would endanger the minor; or otherwise in the exercise of professional judgment determines that disclosure to the parent would be inappropriate, the provider may refuse to disclose to the parent or guardian.

Certain other restrictions and other laws may apply. For example, psychotherapy notes need not be disclosed to the individual; therefore, they need not be disclosed to the parent. An individual does not have the right to access his or her information if it was compiled specifically for a civil, criminal or administrative proceeding; therefore, a parent would not have the right to access the same information about his or her child. Outside of the realm of HIPAA, certain providers have different privacy restrictions. For example, federally supported substance abuse treatment centers are subject to the Part 2 rules of Title 42 of the Code of Federal Regulations, which prohibit most disclosures of medical information even to parents or other personal representatives, unless the patient (including a minor patient) personally authorizes the disclosure.

Beyond HIPAA

Although HIPAA is the primary law covering medical record privacy, other sources of law may come into play. As noted above, FERPA addresses the privacy of educational records (which may contain healthcare information, such as immunization records). Further, two Texas statutes directly impact medical records: (1) the Texas Medical Records Privacy statute (Chapter 181 of the Health & Safety Code), which allows the Texas Health & Human Services commissioner to establish rules consistent with HIPAA regarding the use and disclosure of medical information, and (2) the Texas Identity Theft Enforcement and Protection Act (Chapter 521 of the Business & Commerce Code), the state data breach notification statute. These Texas statutes differ from HIPAA in that they apply to a broader range of entities and generally impose different restrictions and obligations on such entities, but, like HIPAA, these statutes do not differentiate between adults and minors. Minors retain the same rights as adults under these statutes (the right to have personal data protected and the right to receive notice of any breach of the privacy of the data) as apply to adults.

In sum, minor patients generally have the same medical privacy rights as adults under HIPAA, FERPA, the Texas Medical Records Privacy statute, and the Texas Identity Theft Enforcement and Protection Act. While these laws may give a minor’s parent or other personal representative access to or control over certain parts of the minor’s information, such access or control may be conditioned upon the facts and circumstances of the situation.

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