
SUBJECT: PERSONAL REPRESENTATIVES

GENERAL STANDARD (PRIVACY RULE SECTION 164.502(g)):

AHS health care providers and health plans must treat a personal representative of a patient/beneficiary as the “individual” for purposes of the Privacy Rule, unless the Privacy Rule provides an exception to this requirement (e.g., if AHS reasonably believes that treating such person as the personal representative could endanger the individual).

PRIVACY RULE:

- I. **Adults/Emancipated Minors.** A CE must treat a person who is authorized under applicable law to make decisions relating to health care on behalf of an individual who is an adult or an emancipated minor, as a personal representative of the individual, with respect to the PHI relevant to such personal representation.
- II. **Unemancipated Minors.** A CE must treat a parent, guardian or other person acting *in loco parentis* as a personal representative of an individual who is an unemancipated minor, with respect to PHI relevant to such personal representation, if the parent, guardian or other person acting *in loco parentis* has authority under applicable law to act on behalf of such unemancipated minor in making decisions related to health care.
- III. **Exceptions for Unemancipated Minors.** Notwithstanding Paragraph II, an unemancipated minor has the authority to act as an individual under the Privacy Rule, with respect to PHI pertaining to a health care service, if:
 - A. Circumstance A
 1. The minor consents to such health care service;
 2. No other consent for such health care service is required by law (regardless of whether the consent of another person has also been obtained); and
 3. The minor has not requested that a parent, guardian or other person acting *in loco parentis* be treated as the personal representative.
 - B. Circumstance B
 1. The minor may lawfully obtain such health care service without the consent of a parent, guardian or other person acting *in loco parentis*; and

2. The minor, a court or other person authorized by law consents to such service.

C. Circumstance C

1. A parent, guardian or other person acting *in loco parentis* assents to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service.

IV. **Other Laws.** Notwithstanding Paragraph III above:

- A. A CE may disclose, or provide access to, in accordance with Section 164.524 of the Privacy Rule, PHI about an unemancipated minor to a parent, guardian, or other person acting *in loco parentis* if, and to the extent that, an applicable provision of state or other law, including applicable case law, permits or requires such disclosure or access.
- B. A CE may not disclose, or provide access to, in accordance with Section 164.524 of the Privacy Rule, PHI about an unemancipated minor to a parent, guardian, or other person acting *in loco parentis* if, and to the extent that, an applicable provision of state or other law, including applicable case law, prohibits such disclosure or access.
- C. Where the parent, guardian, or other person acting *in loco parentis*, is not the personal representative under Paragraph III above, and where there is no applicable access provision under state or other law, including case law, a CE may provide or deny access to a parent, guardian, or other person acting *in loco parentis*, if such action is consistent with state or other applicable law, provided that such decision must be made by a licensed health care professional, in the exercise of professional judgment.

V. **Deceased Individuals.** A CE must treat an executor, administrator, or other person as a personal representative, with respect to PHI relevant to such personal representation, if such person has, under applicable law, the authority to act on behalf of a deceased individual or of the individual's estate.

VI. **Abuse, Neglect and Endangerment Situations.** Notwithstanding a state law or any other Privacy Rule provision to the contrary, a CE may elect not to treat a person as the personal representative of an individual if:

- A. The CE has a reasonable belief that:
 1. The individual has been or may be subjected to domestic violence, abuse or neglect by such person; or
 2. Treating such person as the personal representative could endanger the individual; and

- B. The CE, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat such person as the individual's personal representative.

GUIDELINES:

1. A personal representative generally has the right to act as an "individual" under the Privacy Rule, with respect to the PHI relevant to that representation. In other words, the personal representative has the authority to exercise all of the rights and benefits that are made available under the Privacy Rule and the AHS Standards and Guidelines, in those situations where the representative has the authority to act on behalf of the patient/beneficiary with respect to a health care issue. For example, the personal representative could:
 - A. request access to PHI;
 - B. request amendment to PHI;
 - C. request an accounting of disclosures of PHI;
 - D. request restrictions on the use and disclosure of PHI;
 - E. request confidential communications of PHI;
 - F. receive a Notice of Privacy Practices; and
 - G. sign (or not sign) an authorization.
2. The authority of a personal representative is limited: the representative must be treated as the individual only to the extent that PHI is relevant to the matters on which the personal representative is authorized to represent the individual. For example, if a person's authority to make health care decisions for an individual is limited to decisions regarding treatment for cancer, such person is a personal representative and must be treated as the "individual" under the Privacy Rule with respect to PHI related to the cancer treatment. Such a person is not the personal representative of the individual with respect to all PHI about the individual.
3. AHS will treat a person authorized by applicable law to make health care decisions on behalf of a patient/beneficiary who is an adult or emancipated minor, as the individual's personal representative. In this context, a guardian or a person with a durable power of attorney for health care could be such a personal representative. In the event a patient/beneficiary who is less than 18 years of age asserts that he/she is "emancipated", the issue will be reviewed with the Assistant Attorney General or other counsel providing services to the AHS health care provider or health plan at issue. In Vermont, certain requirements must be satisfied before such emancipation exists (See, 12 VSA 7151).

4. AHS will treat a person authorized by applicable law to make health care decisions on behalf of a patient/beneficiary who is an un-emancipated minor, as the personal representative. In this context, a parent will typically be the person who has such authority, though a guardian or other person acting in *loco parentis* may have such authority.
5. There are situations where an un-emancipated minor can exercise the rights of an “individual” under the Privacy Rule and the AHS Standards and Guidelines. These situations generally arise where some law (state, federal or case law) permits the minor to consent to a health care service, without parental permission. Some examples of such laws are:
 - A. 18 VSA 4226, *Minors; consent; treatment*, which permits minors age 12 or older to consent to treatment for drug or alcohol dependency, or venereal disease, without parental permission.
 - B. 18 VSA 7503, *Application for Voluntary Admission*, which permits minors age 14 or older to apply for admission to a designated hospital for mental health examination or treatment.
 - C. Minors have a constitutional right to confidential abortion services. See, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979).
 - D. Minors have a constitutional right to privacy, including the right to make reproductive health care decisions. See, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). This right includes the right to non-prescription contraceptives. See, *Carey v. Population Services Int’l*, 431 US 678 (1977) and may include the right to consent to prescription contraceptives. See, *Planned Parenthood v. Matheson*, 582 F. Supp. 1001 (D. Utah 1983).
 - E. Courts have interpreted the Public Health Service Act and the Medicaid law to require the provision of confidential contraceptive services to teens. See, 42 USC §300(a); 42 USC §1396d (a)(4)(C). Thus, when providers offer contraceptives to Medicaid patients or through programs funded by the Public Service Act, they may not require parental consent or notification. See, e.g., *PPFA v. Heckler*, 712 F. 2d 650 (2d Cir. 1983); *Planned Parenthood of Utah v. Dandoy*, 810 F2d 984 (10th Cir. 1987).
6. The advice and counsel of the Assistant Attorney General or other counsel providing services to a health care provider or health plan should be sought in the event:
 - A. A minor seeks to exercise any of the rights made available by the Privacy Rule (e.g., seeks to obtain a copy of his/her PHI);
 - B. There are any questions on whether a minor should be provided with a Notice of Privacy Practices; or

- C. A parent seeks to obtain access to a minor child's PHI, in any situation where the minor was permitted to act as the "individual" under the Privacy Rule and this Standard and Guidelines (e.g., with respect to mental health treatment resulting from a voluntary admission, as set forth in 18 VSA 7503).
- 7. AHS will treat an executor or administrator or other such person with authority to make decisions regarding the estate of a patient/beneficiary, as a personal representative.
- 8. In accordance with the requirements of the Privacy Rule regarding abuse, neglect, and endangerment situations, AHS workforce will be instructed to review any situation of suspected abuse, neglect or endangerment with the Privacy Officer, who will coordinate a review with the Assistant Attorney General or other counsel providing services to the workforce member. These situations arise when a person who would otherwise be a personal representative seeks to exercise the rights of an individual under the Privacy Rule, but there is a suspicion that this person may be abusing, neglecting, or endangering the patient/beneficiary.