

Minor's Medical Treatment and Records - Legal Issues.

Most universities provide limited on-campus medical and counseling services for the benefit of their students. The fact that some students will almost certainly be considered minors under state law, and are thus subject to the “disabilities of nonage,” raises questions about such students’ ability to consent to receipt of medical treatment. In Alabama, for example, a person remains a minor until reaching age 19 (§ 26-1-1, *Alabama Code*), except that the marriage of a person who is 18 years of age or the arrival at age 18 of a married person removes the disabilities of minority (§ 30-4-15 and -16). Clearly, some of UAH’s younger students come to the University as minors.

As is true in some other states, Alabama has a statute that deals directly with the issue of whether minors may consent on their own to receive health care. Section 22-8-4 states as follows:

Any minor who is 14 years of age or older, or has graduated from high school, or is married, or having been married is divorced or is pregnant may give effective consent to any legally authorized medical, dental, health or mental health services for himself or herself, and the consent of no other person shall be necessary.

Subsequent provisions in this section deal more specifically with consent for treatment having to do with “pregnancy, venereal disease, drug dependency, alcohol toxicity, or any reportable disease” (§ 22-8-6) and with the protection given to a medical health care provider who reasonably relies on a minor’s assurance that he or she is of such age that no other consent is needed for treatment, when that assurance is in error (§ 22-8-6).

Under these provisions, there is little doubt that services at a campus medical clinic or counseling center may be offered to minors (age 14 or older) based solely on their consent. It is preferable that this consent be written so as to remove any question as to whether or not it was given.

A related question has to do with who may have access to the medical record of a minor receiving services from a campus medical clinic or counseling center. Specifically, are the medical records of a minor who has consented to medical treatment under the provisions of the statute quoted above accessible to the minor’s parents in the absence of the minor’s consent? There is an absence of direct legal authority in Alabama dealing with this issue. Alabama is one of those of states, constituting a majority, without a statute regarding the privacy of the records of minors who are of age to consent to medical treatment.

The first law that should be reviewed for possible applicability to these records is the Family Educational Rights and Privacy Act (FERPA). FERPA accords students certain privacy and other rights in their education records maintained by elementary and secondary schools and by institutions of higher education. Federal regulations issued under FERPA exclude from the definition of “education record” what are sometimes referred to as “treatment records,” that is, records maintained by health professionals in connection with treatment of the student. 34

C.F.R. § 99.3. Thus, FERPA does not pertain to the medical records in question.

Another federal statute, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), would appear to deal more directly with these records. After HIPAA was enacted, the Secretary of Health and Human Services was directed to develop regulations dealing specifically with access to and disclosures of confidential medical records. At the outset, it should be noted that the resultant HIPAA regulations (sometimes called the “Privacy Rule”) specifically exclude from the definition of “protected health information” any individually identifiable health information contained in FERPA “education records.” 45 C.F.R. § 160.103. The regulations then go further to exclude “treatment records” as well. *Id.* Thus, technically the medical records of a UAH student do not fall within the compass of the HIPAA regulations.

Notwithstanding that fact, it is instructive to examine how HIPAA handles access to a minor’s medical records (other than in the context where the records are maintained by school or university personnel). Generally, the HIPAA Privacy Rule provides an individual certain rights with respect to his/her personal health information. For a minor as to whom the parents have the right to make health care decisions, these rights are given to the minor’s parents, who are regarded as the minor’s “personal representative(s).” 45 C.F.R. § 164.502(g)(3)(i). There is an important situation, however, in which the parents may not be considered the minor’s personal representatives and, instead, the minor becomes the “individual” to whom these rights accrue. This situation involves medical care in a state such as Alabama where a minor is authorized under state law to give consent to treatment and can therefore obtain such treatment without parental involvement. 45 C.F.R. § 164.502(g)(3)(i)(A).

Even in the latter case, however, the Privacy Rule states that it does not preempt state law that specifically addresses the issue of parental access to a minor’s health information. In effect, HIPAA defers to state law in this area. If state law requires or permits disclosure of a minor’s records to a parent, the health provider is to comply with the law and grant access to parents. 45 C.F.R. § 164.502(g)(3)(ii)(A). On the other hand, a state statute forbidding access without the minor’s consent must be honored by the health provider. 45 C.F.R. § 164.502(g)(3)(ii)(B). Finally, if the state (as is true with Alabama) is silent regarding parental access, most observers have concluded that the decision is left to the discretion of the licensed health care provider. 45 C.F.R. § 164.502(g)(3)(ii)(C). In this state, then, it would be permissible for a physician, clinic, or hospital to disclose, as a matter of policy, medical or counseling records of a minor over age 14 to a parent.

There appear to be two exceptions to such a policy. First, a provider may withhold health information about a minor when his/her parents have agreed in advance that the minor and the provider will have a confidential relationship. 45 C.F.R. § 164.502(g)(3)(i)(C). For example, if a minor’s parents have agreed that communications between the student and counselors in a counseling center would not be disclosed to the parents, neither the records nor any information from the records could be made available to the parents in the absence of the minor’s consent. Secondly, the provider may, based on a reasonable belief formed in the exercise of his/her professional judgment that the minor has been or may be subjected to violence, abuse, or neglect at the hands of the parent(s) or that disclosure would endanger the minor, refuse to consider the

parent as the personal representative and withhold disclosure. 45 C.F.R. § 164.502(g)(4).

As is evident from the foregoing, this issue is complex and its resolution is not absolutely clear. Under the Privacy Rule issued during President Clinton's administration and later withdrawn, parents had no access rights to the records of a minor who had the authority to consent to treatment. An attorney with special expertise in this area of the law recently stated (speaking with respect to minors who are patients at a university health care facility, not university students) that if the minor is the one who gives consent to treatment, then it is the minor who must consent to any release of protected health information relating to the treatment. Certainly, the medical providers' standards of professional practice and ethics codes also may play a role in making the decision about the confidentiality of a minor's records in the context of parental access.

It has been suggested by one commentator that the current "Bush" Privacy regulations simply maintain what was the rule prior to the Clinton regulations, which may mean that the access issue, whether answered under HIPAA or independent of HIPAA, ends up at the same place. Under these circumstances, the recommendation of this Office is that the decision to grant or deny a parent access to the medical or counseling record of a minor child over 14 who is a UAH student should ordinarily be made by the provider. As noted above, there are variations on this position that may have to be taken account, depending on the facts in a particular situation. The question of who at the University should be involved in making this determination may merit further discussion. Of course, access to records of any student who is considered an adult under Alabama law would be dictated entirely by the student.

Does the foregoing analysis change if the student is deceased? It is interesting to note that FERPA privacy rights relating to a student's educational records terminate at death. That rule would appear to apply generally to other records in which a person may have some claim of privacy while alive. Under Rule 503 of the Alabama Rules of Evidence, there is an additional and separate "right" to preserve the confidentiality of communications with a psychologist that may be asserted by the patient or, in the case of a deceased patient, by the patient's personal representative. Though there is often not a formal administration of a student's estate, the personal representative of the student's estate, if one were appointed, would typically be the mother and/or father (assuming the student was not married). It may be appropriate, where parents seek access to university counseling records of a deceased minor child, to require that they sign a "release" or waiver of the right to claim the privilege.

If questions arise concerning these or related matters, do not hesitate to contact the Office of Counsel.