

**SUSAN DELLUTRI, LLC**  
**MINORS' PRIVACY RIGHTS RELATED TO ACCESS, INSPECTION & COPYING OF**  
**PROTECTED HEALTH INFORMATION**

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**Policy:**

It is the policy of Susan Dellutri, LLC to recognize the rights of minors and their parents, legal guardian, or other legally authorized representative to access, inspect and receive copies of their protected health information in compliance with state and federal regulations. In the State of Wisconsin, minors have many rights with regard to consent to their own care in certain situations. However, it is important to understand that these rights may not extend to their ability to control access to their protected health information.

State Preemption Issues: Wisconsin Statutes and Federal Regulations impact both consent for treatment and access to protected health information for minors seeking treatment for alcohol/drug detoxification and/or treatment, mental health care, developmental disabilities, HIV and a variety of other conditions. See the reference grid embedded in this policy for further (but not inclusive) information. A preemption analysis based on Wisconsin Statutes 146.81-83, 51.13, 51.30 and 252.15 has been completed with required regulatory information incorporated within this document. Preemption analysis information and deliverables are available at the [www.hipaacow.org](http://www.hipaacow.org).

**Definitions:**

Minor: A minor is a person under the age of 18 years and reliant upon parental support and control. Generally minors do not have the authority to grant consent or refuse care, with the exceptions outlined below.

Emancipated Minor: In Wisconsin, lawful marriage is the only circumstance that is statutorily recognized, as a general matter, as grounds for emancipation of a minor (in Wisconsin a person between the ages of 16 and 18 years may marry with the consent of a parent/legal guardian (§765.02)).<sup>1</sup> Once emancipated, the minor obtains the legal capacity of an adult.<sup>2</sup> The burden should be placed on the minor to show emancipation. If doubt exists regarding emancipation, parental consent should be secured in addition to the consent of the minor.

#### General Information:

Generally, the age in Wisconsin at which a minor obtains the right of access to their healthcare information is 18 because at that age the individual is no longer, under Wisconsin law, deemed a minor. Several specific Wisconsin laws grant a minor the right of access to their healthcare information and this right often directs a minor's statutory right to consent to treatment; however, there are exceptions.

The federal Privacy Rule<sup>3</sup>, as delineated in the appendix, also grants a minor access to their healthcare information but as a rule, only through the consent of a legally authorized representative. Unlike Wisconsin, the federal law does not provide for direct access by a minor under the age of majority. The federal Privacy Law delineates a process for interfacing the federal and state law when they are different.<sup>4</sup> The federal law allows the state law to preempt and control when state law provides a greater right of access to the individual in relation to their healthcare information. Therefore, Wisconsin law will control when a minor is provided a greater right of access.

Federal law requires that healthcare providers have in place and implement policies and procedures to ensure patients' right to access, inspect and copy protected health information (§164.524). Under the federal Privacy Rule, an individual has the right to access their information in all but a limited number of situations. When federal law limits the right of access interface with state law is required and the law that provides the individual the greater right of access controls. For instance, the Privacy Rule allows denial of access to specific types of healthcare information with or without a review of denial.<sup>5</sup> When Wisconsin law provides access to a minor or legally authorized individual and the Privacy Rule does not, Wisconsin law will control. Some of the specific instances where Wisconsin law will preempt federal are covered in

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<sup>1</sup> Wisconsin statutes adopt the following modified definition of emancipation for very limited purposes (abortion consent): "Emancipated minor" means a minor who is or has been married; a minor who has previously given birth; or a minor who has been freed from the care, custody and control of her parents, with little likelihood of returning to the care, custody and control prior to marriage or prior to reaching the age of majority (§48.375(2)(e)).

<sup>2</sup> When remaining under complete parental support, emancipation may be arguable.

<sup>3</sup> 45 CFR §164 Subpart E

<sup>4</sup> 45 CFR §160 Subpart B Preemption of State Law

<sup>5</sup> 45 CFR §164.524

the following grid. When processing a minor's request for access and there is no statutory authority allowing a minor under the age of 18 access, the authorization for access will be obtained from the minor's legally authorized representative.

The Privacy Rule defers to state law for the definition of a legal representative. State law generally recognizes the minor's parent, guardian or legal custodian<sup>6</sup> as the legally authorized representative. However a termination of parental rights or a denial of physical placement by a court of law will affect the status of a parent in relation to a minor. In addition, other specific statutes such as s. 51.30, may define the legal representative of a minor differently. Therefore, it will be necessary to determine what law is controlling to determine who may be the legally authorized representative for a minor regarding access.

### **Policy Statements:**

#### **Minor Access:**

A minor, or legally authorized representative, must make a request to a covered entity to access and inspect their protected health information. Whenever possible, this request shall be made in writing. The federal Privacy Rule allows the requirement of a written request for access as long as the individual has received notice of the written requirement in the "Notice of Privacy practices." The request for access may be documented on either the "Authorization for Disclosure" form or in the notes of the patient's health record. The minor's rights to access to should be determined based on the following statutory information and whether or not they are authorized to make the written request without parental/guardian consent.

#### **Mitigating Circumstances:**

The law of release of minor records is a matter of some ambiguity and controversy, particularly regarding the circumstances justifying allowing a minor to make decisions about disclosure of protected health information in the absence of parental consent, or to deny parental access to minor records. While the general rule is that parental consent is required until the patient is eighteen years of age, there may be extenuating circumstances justifying a variance from this rule. Legal counsel should be contacted for case-by-case determination of whether such circumstances are present.

### **Reference Table for Disclosure of a Minor's Protected Health Information**

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<sup>6</sup> Wisconsin Statute 146.81(5)

Type of Care	Age of Minor	May the Minor Consent to Disclosure of PHI Without Parental/Guardian Consent or Legally Authorized Representative	May the Minor Deny Parental/Guardian or Legally Authorized Representative Access to PHI	Citation/Reference
<b>Acute/General Medical Care</b>	< 18	No	No	WI Statutes 146.81-84
<b>Alcohol or Other Drug or Abuse</b>	< 12 Years	No	No	WI Statutes: 51.47; 51.30(4)(b) 20 42 CFR 2.14, HFS 92.05(1)(c)
	≥ 12 Years	Yes - If the minor is receiving treatment for preventive, diagnostic, assessment, evaluation, outpatient treatment, or detoxification services without parental consent, information shall be disclosed with the consent of the minor.	Yes	
<b>Contraceptive Care</b>	<18 years	No Minors may be able to receive confidential contraceptive advice and family planning services in certain circumstances without parental consent under the Federally Funded Family Planning Center, 42 CFR 59.5(a)(4) or under the Wisconsin Medicaid Family Planning Waiver Program, WI Stat. 253.07. Access to healthcare information of a minor within the confines of these programs may be restricted to the minor.	No	WI Statutes 253.07  42 CFR 59.5(a)(4)
<b>Developmentally Disabled</b>	<14 years	No	No	Wis. Stat. 51.30(5)(a) and (b)
<b>Developmentally Disabled</b>	>14 years	Yes	Yes. A developmentally disabled minor over the age of 14 may file a written objection to access by parent/legal guardian with the custodian of records.	Wis. Stat. 51.30(5)(a) and (b)
<b>HIV Test Results</b>	14 Years	Yes	Yes	WI Statute: 252.12(3)

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		WI Stat 252.12(3) states “The results of any test performed under (2)(a)5 are confidential and may be disclosed only to the individual who receives a test. HIV test results of minors 14 years or age or older may not be disclosed unless the minor gives prior written consent (unless adjudicated incompetent or unable to communicate due to a medical condition).” Parental authorization is not required.		
<b>Mental Health</b>	< 14 Years	No	No	WI Statutes: 51.14, 51.61(6), 51.30(5)(a) & (b), 51.30(4)(b) (20)
	≥ 14 Years	Yes – A minor age 14 or older may consent to the release of confidential information in court or treatment records without the consent of the minor’s parents/legal guardian. The parent may also authorize disclosure.	Yes. A minor over the age of 14 may file a written objection to access by parent/legal guardian with the custodian of records.	
<b>Newborn Care (Parent a Minor)</b>	0/< 18 Years	In general, once the minor has delivered her child as the parent, she is the legal representative for the child and may authorize disclosure (an exception maybe made for extreme immaturity and/or a court appointed legal guardian has been named).	Not Applicable.	WI Statute 146.81 (5), 146.82(1), 146.83(1), 146.835
<b>Pregnancy Care</b>	<18 Years	The condition of pregnancy does not in and of itself provide a minor with statutory rights of an adult in regard to access and disclosure of health records. There is a body of constitutional law that has been interpreted to allow pregnant minors (especially mature minors) to refuse to allow parents to access their records. <b><i>The organization will have to evaluate and determine its response to these types of requests.</i></b>		WI Statute 146.81 (5), 146.82(1), 146.83(1), 146.835
<b>Rape or Sexual Assault/ Abuse</b>  <i>WI Statute for Reporting Child Abuse: 48.981(7)(a) (3m)</i>	< 18 Years	No	No  In general, parental consent required for disclosure. If mitigating circumstances are present, legal counsel should be contacted (see #4).	WI Statutes 146.81-84

Type of Care	Age of Minor	May the Minor Consent to Disclosure of PHI Without Parental/Guardian Consent or Legally Authorized Representative	May the Minor Deny Parental/Guardian or Legally Authorized Representative Access to PHI	Citation/Reference
<b>Sexually Transmitted Diseases:</b>  "Sexually transmitted disease" means syphilis, gonorrhea, Chlamydia and other diseases the DHFS includes by rule.	<18 Years	Consent for disclosure is not specifically addressed in 252.11(1m); Access and disclosure of the minor's health information is subject to 146.81-84.		WI Statutes: 252.11(1m); 146.81-84

Parental, Legal Guardian or Other Legally Authorized Representative Access:

1. A parent, legal guardian or other legally authorized representative has the right to access a minor's protected health information on behalf of the minor, unless.
  - A. The statutes provide protection from access to the minor's protected health information;
  - B. The parent has been denied periods of physical placement with the minor; or
  - C. In the case of minors age 14 or older, the minor requests no disclosure of their mental health records.
  
2. A parent, legal guardian or other legally authorized representative has the right to access a minor's protected health information on behalf of the minor, even where the parent or guardian's consent was not required for treatment, unless
  - A. The statutes provide protection from access to the minor's protected health information;
  - B. The parent has been denied periods of physical placement with the minor; or
  - C. In the case of minors age 14 or older, the minor requests no disclosure of their mental health records.
  
3. A healthcare provider reserves the right to limit disclosure of protected health information to a minor's parent or guardian if, in the provider's professional judgment, they believe the minor would be in imminent danger if the information was released.

4. The parent's right of access terminates when the minor becomes emancipated or reaches the age of majority.<sup>7</sup> If doubt exists regarding emancipation, parental authorization should be secured in addition to the authorization of the minor. Once a minor becomes emancipated, or reaches the age of majority, the individual has the right to access and authorize to disclosure of protected health information. This includes access to and disclosure of information created while the individual was a minor.

#### Other Minors Issue:

5. The PHI of minors prior to an adoption process is not available for disclosure by the healthcare provider. Requests for access to the PHI of a minor prior to an adoption shall be referred to the State of Wisconsin Adoption Records Search Program. Requests for PHI post-adoption shall be processed in accordance with the organization's disclosure of PHI policies.
6. A healthcare provider may disclose a minor's/student's immunization information to a school or daycare upon written or verbal request. Parental or student permission is not required for disclosure. Immunization information may be provided between vaccine providers, including the local health department, without the consent of the parent or student.
7. Documentation of disclosure to the individual is required under some Wisconsin laws. To maintain consistency and compliance in practice, it is recommended that the following be documented when disclosing healthcare information to the patient: the time and date of request, the name of the inspecting person and the identity of the records released. s. 146.83(3).

#### **Appendix: Federal Privacy Rule – Access and Denial of Access**

An individual has the right to access their information in all but a limited number of situations, which include:

- Psychotherapy notes;
- Information compiled in anticipation of or use in a civil, criminal, or administrative action or proceeding;
- Protected health information subject to the Clinical Laboratory Improvements Amendment (CLIA) of 1988.

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<sup>7</sup> If an authorization is signed by a parent, who is the personal representative of the minor child at the time the authorization is signed, the covered entity may rely on the authorization for as long as it is a valid authorization, in accordance with § 164.508(b). A valid authorization remains valid until it expires or is revoked. This protects a covered entity's reasonable reliance on such authorization. The expiration date of the authorization may be the date the minor will reach the age of majority. In that case, the covered entity would be required to have the individual sign a new authorization form in order to use or disclose information covered in the expired authorization form (Federal Register / Vol. 65, No. 250 / Thursday, December 28, 2000 / Rules and Regulations 82651).

- Protected health information exempt from CLIA, pursuant to 42 CFR 493.3(a)(2). In other words, protected health information generated by 1) facilities or facility components that perform testing for forensic purposes; 2) research laboratories that test human specimens but do not report patient-specific results for diagnosis, prevention, treatment, or the assessment of the health of individual patients; 3) laboratories certified by the National Institutes on Drug Abuse (NIDA) in which drug testing is performed that meets NIDA guidelines and regulations.

In the situations above, the covered entity may deny the individual access without providing an opportunity for review.

A covered entity may also deny an individual access without providing an opportunity for review when:

- The covered entity is a correctional institution or a healthcare provider acting under the direction of the correctional institution and an inmate's request to obtain a copy of protected health information would jeopardize the individual, other inmates, or the safety of any officer, employee, or other person at the correctional institution, or a person responsible for transporting the inmate;
- The individual, when consenting to participate in research that includes treatment, agreed to temporary denial of access to protected health information created or obtained by a healthcare provider in the course of research, and the research is not yet complete;
- The records are subject to the Privacy Act of 1974 and the denial of access meets the requirement of that law;
- The protected health information was obtained from someone other than a healthcare provider under a promise of confidentiality and access would likely reveal the source of the information.

A covered entity may also deny an individual access under the following circumstances, provided that the individual is given a right to have such denials reviewed:

- A licensed healthcare professional has determined that the access is likely to endanger the life or physical safety of the individual or another person;
- The protected health information makes reference to another person who is not a healthcare provider, and a licensed healthcare professional has determined that the access request is reasonably likely to cause substantial harm to such other person;
- The request for access is made by the individual's personal representative and a licensed healthcare professional has determined that access is reasonably likely to cause substantial harm to the individual or another person.

Detailed requirements for denial review are outlined in Section 45 CFR, Section 164.524.

#### **References:**

- "Records of Minors," WHIMA Legal Resource Manual, 2006



- “Minors – Inpatient Admission Rights/AODA Treatment Without Parental Consent, State of Wisconsin, DHFS Website, 2006
- “Clarification of Current Language Regarding Minors to WHIMA,” Susan Manning, JD, July 2005
- “Balancing Patient Rights with Risk Management,” Presentation by Sarah J. Elliott, von Briesen & Roper, s.c., 12<sup>th</sup> Annual Wisconsin Society of Healthcare Risk Management Meeting, September, 2001.
- “Unemancipated Minors Policy,” von Briesen, October, 2002
- “Minors” Consent,” A Physician’s Guide to Wisconsin Health Law, State Medical Society of Wisconsin
- Rock County Human Services Department Statement on General Guidelines for Requests & Disclosures

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