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# Legal Issues in Providing Health Care to Minors

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**Vermont Medical Society**

# Presenters:

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# Vermont law and minors: Discussion Topics

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- Consent
- Access to Records of Minors
- Domestic matters
- Turning away/discharging patients
- Disruptive patients/families
- Patient portal – age considerations

# Legal consent age in Vermont

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- Vermont Age of Consent = 18 years.
- Under 18 = a minor.
- In most circumstances, minors are not capable of giving informed consent to their own health care.

# Who gives consent for a minor?

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- A guardian or representative who has been appointed by a judge to make health care decisions for the child; or
- A parent (adopted or biological).

# When can a minor provide consent for own care?

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## Emancipation examples:

- Married minors.
- Emancipated minors (court order).
- Minors on active military duty.

# When may unemancipated minor give informed consent?

- **Minors 12 years or older:** informed consent to treatment for **STDs/STIs** (including HIV and AIDS), **drug dependence, and alcoholism**.
  - But if a minor requires immediate **hospitalization** for treatment of any of these conditions, **the parents must be notified** of the hospitalization.
  - This does not include HPV vaccinations – parental consent is required.

# Consent by unemancipated minor (continued)

- **Minors 14 years or older:** may **voluntarily admit themselves to a hospital** for mental health related treatment if they give informed consent in writing.
- **Minors under 14:** may admit themselves to a hospital for mental health related treatment by providing their own written informed consent **and a written application from a parent or guardian.**



# Consent by unemancipated minor (continued)

- **Minors of any age:** may give informed consent to medical treatment associated with **rape, incest, or sexual abuse.**
  - Health care providers are required to report such incidents to the Department for Children and Families (“DCF”) within 24 hours.

# What if a minor is brought in by a relative?

- Provider should **exercise due care and make good faith determination** that the relative has been authorized by the child's parent or guardian to act as the agent in obtaining medical care for the minor.
- Unless minor has legal capacity to consent, the health care provider should make every effort to obtain the parent's **specific informed consent** before providing anything **more than routine, low-risk procedures**.
- Health care providers are expected to use professional judgment in determining which procedures require specific parental informed consent.

## Situation where no informed consent is needed before providing care.

- An emergency – a situation in which **immediate treatment is needed to save the patient's life or health** – where informed consent cannot be obtained.
- Good practice to try and obtain informed consent as soon as possible even in an emergency situation.

## If teen drives self to an appointment, is parental informed consent required before treating the minor?

- Exercise sound professional judgment as to whether the parent must be contacted before treating an unemancipated minor.
- If the office has a written consent on file that has been signed by the parent authorizing the health care provider and his/her staff to provide health care to the child, there is little or no risk in providing the child with routine health care.
- In situations **where the treatment is non-routine or poses some degree of risk to the child, it is always advisable to consult with the parent before proceeding.**

# When no parent or guardian informed consent needed, is the parent or guardian responsible for the costs?

- Yes.
- Generally, parents or guardians are responsible for support of their unemancipated minors if the treatment is medically necessary.
- If a minor patient is seeking **alcohol or drug abuse treatment**, federal law prohibits disclosure of patient identifying information to parents for the purposes of seeking reimbursement. 42 C.F.R. § 2.14.
  - Thus, **providers must obtain a minor's consent before seeking reimbursement for these services from the minor's parent or guardian.**

# Vermont consent law for minors to get abortions

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- Legal in Vermont without restriction, including
  - no waiting periods, and
  - no mandated parental involvement.

# Vermont Minor Consent Law

## H.230/Act 35

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- Outpatient Mental Health Treatment for Minors, 18 V.S.A. Section 8350.
- Minor may consent to receive any legally authorized outpatient treatment from a mental health professional.
- Effective 1/1/2018.

# Differences between bill as introduced and as enacted

## 8350. CONSENT BY MINORS FOR MENTAL HEALTH TREATMENT ~~RELATED TO SEXUAL ORIENTATION OR GENDER IDENTITY~~

A minor may give his or her consent to receive **any legally authorized** outpatient treatment from a mental health professional, as defined in section 7101 of this title, ~~for any underlying condition related to the minor's sexual orientation or gender identity.~~ Consent under this section shall not be subject to disaffirmance due to minority of the person consenting. The consent of a parent or legal guardian shall not be necessary to authorize **outpatient treatment** care ~~related to a consenting minor's sexual orientation or gender identity.~~ **As used in this section, "outpatient treatment" means psychotherapy and other counseling services that are supportive, but not prescription drugs.**



# Mental Health Professional

## 18 V.S.A. Section 8350

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- A person with
  - professional training,
  - experience, and
  - demonstrated competence in the treatment of mental illness, who shall be a
    - physician,
    - psychologist,
    - social worker,
    - mental health counselor,
    - nurse, or
    - other qualified person designated by the Commissioner.

# Outpatient Treatment

## 18 V.S.A. Section 8350

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- Psychotherapy and other counseling services that are supportive, but not prescription drugs.

# Parental consent not needed

## 18 V.S.A. Section 8350

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- The consent of a parent or legal guardian is not necessary to authorize outpatient treatment.

# Permissive

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- It permits the minor to consent to outpatient mental health treatment.
- Does not prohibit parents/guardian from accessing care for a minor, including emergency care.

# Refusal of care

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- Does NOT give minor the right to refuse care.
- Can continue to provide treatment to a minor with only parent/legal guardian signature on consent – even if minor refuses care. (Must comply with laws regarding minors and involuntary care.)

# Emergency health services 18 V.S.A. Section 8350

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- Not impacted by this new law.

# When minors are in the State's custody, who is authorized to provide informed consent for their health care?

- When a minor is in the custody of the State, the Commissioner for DCF has authority to provide informed consent for a minor's health care just as a parent/guardian would.
- The Commissioner has additional authority to delegate this responsibility to other members of DCF.
- Recent trial court ruling in Vermont holding that parents retain right to consent when their parental rights have not been terminated.

# Are minors in DCF custody able to receive contraceptive services?

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- According to DCF policies, caseworkers will ensure that appropriate supportive counseling and contraceptive services are available to teens in custody.

Social Services Policy Manual: Working with Families No. 74, 10/27/99.



# May minors in DCF custody receive pregnancy-related services without informing their parents?

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- DCF staff may or may not inform parents of teens in custody about their pregnancy-related care, depending upon DCF's determination of what is in the best interests of the minor.

# Who is authorized to consent to treatment when a child is in custody of the Department of Corrections?

- The State of Vermont, through the Commissioner of the Department of Corrections (“DOC”), has exclusive authority to consent to treatment for children in the custody of the DOC.
- DOC may try to involve the child's parents to obtain their input and background information.

## Can a corrections officer accompanying a minor receive medical records of the treatment?

- A health care provider may give the records to the DOC officer transporting the patient in a sealed envelope marked: "To the attention of the responsible Department of Corrections health authority."
- Records may also be mailed to the "designated health authority" at the facility where the child is residing.

# When minors are in custody of DOC who has access to their medical records?

- DOC Commissioner, Deputy Commissioner, Director of Correctional Services, clinical director, medical director and their designees - on an as needed basis;
- Health care providers designated by DOC;
- Non-health staff employed by DOC have access as determined by health services staff;
- Persons in custody are entitled to reasonable opportunities to discuss their medical care with health care providers; and
- Guardians, including parents, have the same type of access to discuss care that the person in custody has so long as the person in custody has signed a written release approved by the DOC health care provider or a court has approved the guardian to act on behalf of the minor in custody.

Department of Corrections Directive 254.02, *Access to Health Care Records*.

# Sharing information with personal representative

- In general treatment situations, a parent, guardian, or other person acting in loco parentis usually is the personal representative of the minor child, and a health care provider is permitted to share patient information with a patient's personal representative under the HIPAA Privacy Rule.
- There are important exceptions.

# Parent is not a personal representative of a minor when . . .

- (1) State or other law does not require the consent of a parent or other person before a minor can obtain a particular health care service, the minor consents to the health care service, and the minor child has not requested the parent be treated as a personal representative;
- (2) someone other than the parent is authorized by law to consent to the provision of a particular health service to a minor and provides such consent; or
- (3) a parent agrees to a confidential relationship between the minor and a health care provider with respect to the health care

# When State law is silent regarding disclosing to a parent . . .

- Where State or other applicable law is silent concerning disclosing a minor's PHI to a parent, and
- the parent is not the personal representative of the minor based on one of the 3 circumstances (previous slide),
- provider has discretion to provide or deny a parent access to the minor's health information, if doing so is consistent with State or other applicable law, and the **decision is made by a licensed health care professional in the exercise of professional judgment**

# Access to minor's records under new consent law in VT

- Law is silent about access to records related to outpatient mental health treatment where minor has consented and no other consent is needed.
- A parent/guardian can still access a minor's treatment records if the provider decides to grant such access **using professional judgment.**



# Carve-out to parent as personal representative

- As is the case with respect to all personal representatives under the Privacy Rule, a provider may choose not to treat a parent as a personal representative when the provider **reasonably believes, in his or her professional judgment, that the child has been or may be subjected to domestic violence, abuse or neglect, or that treating the parent as the child's personal representative could endanger the child.**

# Notice of treatment to parent/guardian

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- Per HIPAA's Privacy Rule, when Vermont law permits a minor to consent to health care without parental consent, and is silent on parental notification, the provider would need the child's permission to notify a parent.

<https://www.hhs.gov/hipaa/for-professionals/faq/231/if-patient-present-when-does-hipaa-allow-provider-to-discuss-information/index.html>

# Domestic matters

- Consent to treat by one or both parents?
- 15 VSA § 670 – parental/guardian access to records regardless of custody
- Can parent's significant other provide consent, have access to records, etc.?

# Domestic matters (continued)

- A parent asks you to write a letter for submission to court (e.g., Mother wants letter saying “Miranda is too sick to travel to her father’s this weekend”).
- A parent asks if you’ll testify in custody matter (e.g., “I’ve seen father and son interact, and he is not a good parent”).

# Domestic matters (continued)

- Considerations:
  - What is best for your patient?
  - What does that do to your rapport with your patient?
  - What does that do to your rapport with the other parent?
  - Do you want to have ongoing involvement in this family's legal matters?

# Domestic matters (continued)

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- Mandatory reports of suspected child abuse.
  - May justify withholding information if access to records is requested.
  - Maintain such reports outside the medical record – absent some legal requirement in your state.

# Domestic matters (continued)

- Can you withhold (or redact) certain information from your patient's medical record when access is requested?
  - This comes up in cases where there has been a concern about abuse by one of the parents or where there are things about a parent that he or she does not want other parent to see.
  - HIPAA has a process, **45 C.F.R. § 164.524(a)(3) (recommend advice of counsel)**.

# Domestic matters (continued)

## 45 CFR § 164.524(a)(3)

Provider may deny an individual access (by redacting portions or denying in whole, depending on circumstances), as long as a right to review the denial is provided.

Licensed health care professional, using professional judgment, must first determine that:

(i) the access requested is **reasonably likely to endanger the life or physical safety of the individual or another person**; *(e.g., statements in records about where the key to a gun locker is maintained, where patient is suicidal).*

(ii) where the **PHI makes reference to another person** (unless such other person is a health care provider), the **access requested is reasonably likely to cause substantial harm to such other person**; *(e.g., records include information that family members have shared with the provider about the minor) or*

(iii) Where request is made by the individual's personal representative, the provision of **access to such personal representative is reasonably likely to cause substantial harm to the individual or another person**. *(e.g., atypical statements in record made by minor about parent who is requesting the records).*

**\*You also need to check state law about an individual's access rights.\***



# Turning away and discharging patients

- **Turning away patients:**
  - Financial and ethical considerations.
- **Discharging patients for no shows:**
  - Policies and Procedures.
  - Be able to show non-discriminatory decision-making based on established policy and prior notice to patients.

# Disruptive patients and family members

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- Protecting staff while balancing access to care.
- Behavior contract.
- Documentation.
- Be mindful of rules that apply to discharging a patient (such as a notice period, care during that period, etc.).

# Patient Portal

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- Age considerations – If minor may consent to some care, should parent have portal access?



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## Questions?

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Date: April 18, 2018

Title of Talk: Legal Issues in Providing Health Care to Minors

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# VMS Wednesday Webinar Series

## Legal Issues in Providing Health Care to Minors

### Speakers:

Anne Cramer, Esq., Primmer Piper Eggleston & Cramer  
Shireen Hart, Esq., Primmer Piper Eggleston & Cramer  
Joseph Hagan, MD, Hagan, Rinehart & Connolly Pediatricians

### Planning Committee Members:

Jessa Barnard, ESQ, Wendy Davis, M.D., FAAP & Stephanie Winters

### Purpose Statement/Goal of This Activity:

Physicians will identify the legal concepts behind consent requirements for minors

### Learning Objectives:

Discuss Vermont's law pertaining to minor's access to mental health treatment.  
Providers' rights and responsibilities when there is a concern about potential abuse and neglect  
Access to medical records for parents/guardians who may share custody

### Disclosures:

Is there anything to Disclose? Yes  No

Did this activity receive any commercial support? Yes  No



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