

MINORS' MEDICAL RECORDS IN WISCONSIN

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INTRODUCTION

Laws impacting medical record protection and privacy are complex. Both Wisconsin and Federal laws and regulations have general rules, some specific exceptions, and grey areas regarding when a minor may or may not consent to health care services or medical record disclosures. Wisconsin law generally takes precedence in these matters and has identified several circumstances where a minor may consent to health care services without parental consent, and where parents cannot access a minor's medical records without the minor's consent.

Topics:

I. Can a minor consent to specific health care services without parental consent?

II. Can a minor prohibit a parent or legal representative from accessing a specific medical record?

III. Overview of Medical Record Protection Laws

- a. **HIPAA Overview**
- b. **Wisconsin Law**
- c. **Additional Resources**

II. Can a Minor Consent to Specific Health Care Services?

In general, a minor's parent or guardian must consent in order for a minor to receive treatment.¹ This is because minors generally are considered incompetent to consent to medical treatment until they are adults. However, there are some exceptions to this rule:

1. **STD Testing and Treatment** – a physician may examine, diagnose, and treat a minor with an STD infection without the consent of their parent or guardian.²
2. **HIV testing** – a minor who is 14 or older may consent to HIV testing. Those results are strictly confidential and cannot be disclosed to their parent without the minor's permission.³
3. **Alcohol and Drug Abuse Treatment** – a minor who is 12 or older may consent to outpatient preventative, diagnostic, assessment, evaluation, or treatment for the abuse of alcohol or other drugs.⁴
 - a. A physician or health facility may admit the minor for up to 72 hours without the consent of their parent to detoxify the minor from alcohol or other drugs.

¹ See Wis. Stat. § 146.81(5).

² Wis. Stat. § [252.11\(1m\)](#).

³ Wis. Stat. § [252.15\(2m\)\(c\)](#).

⁴ Wis. Stat. § [51.45](#).

4. **Abortion** – A minor may consent to abortion without parental consent *if* they are emancipated, or in emergency cases, if they experienced sexual assault, suicide risk, incest, or parental abuse.⁵
5. **Contraceptives** – a minor may access contraceptives without parental consent (but this law may be called into question by recent U.S. Supreme Court abortion case).⁶
6. **Mental Health Care** – if a minor is 14 or older their consent is required *in addition* to their parents for outpatient or inpatient mental health treatment. A minor over 14 years old also may access their treatment records.⁷

For more details, see Wisconsin Legislative Council Issue Brief, [Health Care and Confidentiality of Records for Minors](#).

III. Can a Minor Prohibit Parent from Accessing Medical Record?

In general, a minor cannot prohibit their parent or guardian from accessing the minor’s health records. But there are some exceptions to this rule:

1. Records of medical treatment minors can consent to without parental consent.
2. Suspected child abuse or endangerment of the minor.⁸

IV. Overview of Medical Record Protection Laws

The Health Insurance Portability and Accountability Act (HIPAA) establishes national standards to protect individuals’ medical records and other personal health information (in any form or medium, including without limitation paper, electronic, and oral).⁹ State law – here, Wisconsin law – preempts HIPAA where the state law provides greater privacy protection or rights to individually identifiable health information, or where the law relates to certain reporting requirements.

a. **HIPAA Overview**

Who is Subject to HIPAA?

HIPAA applies to [covered entities](#):

1. Health care providers who transmit any health information in electronic form in connection with a covered transaction (discussed more below),
2. Health plans, and
3. Health care clearinghouses.

See [45 CFR § 160.103](#).

⁵ Wis. Stat. § [48.375](#).

⁶ See *Carey v. Population Services International*, 431 U.S. 678 (1977) (holding that reproductive privacy is a protected right or “liberty interest” of individuals regardless of age or marital status).

⁷ Wis. Stat. § [51.13](#).

⁸ 45 C.F.R. § 164.502(g)(5).

⁹ See 45 CFR § 160.

Health care providers are the most common “covered entity.” A health care provider is a provider of services,¹⁰ a provider of medical or health services,¹¹ and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.¹² These “covered transactions” can include claims, benefit eligibility inquiries, referral authorization requests, or other transactions under the HIPAA Administrative Simplification Rules, Transactions and Code Sets Standards. This broad definition of “health care provider” generally includes doctors, clinics, psychologists, dentists, chiropractors, nursing homes, assisted living facilities, and pharmacies.

What Information Does HIPAA Protect?

HIPAA covers “protected health information” (hereinafter “PHI”). PHI means individually identifiable health information, including demographic information collected from an individual that

1. Relates to: (a) the individual’s past, present or future physical or mental health or condition, (b) the provision of health care to the individual, or (c) the past, present or future payment for the provision of health care to the individual; *and*
2. Is held or transmitted by a covered entity or its vendor in any form or medium (whether electronic, paper or oral).¹³

PHI excludes certain information from the definition of PHI (i.e., such information is not subject to HIPAA but may be subject to other applicable state or federal laws). Information NOT covered by HIPAA includes:

1. “De-identified” information – individually identifiable health information that has been stripped of all of its identifiers using a method or process approved under HIPAA;
2. Employment records maintained by covered entities in their capacities as employers;
3. Education and other records subject to the [Family Education Rights and Privacy Act](#); and
4. Information regarding an individual who has been deceased for more than 50 years.

Who Can Access Minors’ Medical Records Under HIPAA?

The HIPAA Privacy Rule generally allows a parent or guardian to access their child’s medical record. Three exceptions would prevent the parent from accessing this information:

1. When the minor is the one who consents to care and the consent of the parent is **not** required under Wisconsin or other applicable law;
2. When the minor obtains care at the direction of a court or a person appointed by the court; or
3. When, and to the extent that, the parent agrees that the minor and the health care provider may have a confidential relationship. See [U.S. Dept. of Health & Human Services, Does the HIPAA Privacy Rule allow parents the right to see their children’s medical records?](#).

Please note, even in these situations, Wisconsin law may require or permit parental access to medical records. State law determines whether to deny parental access. If Wisconsin law is silent on a parent’s

¹⁰ [42 USC § 1395x\(u\)](#).

¹¹ [42 USC § 1395x\(s\)](#).

¹² See [45 CFR § 160.103](#).

¹³ See [45 CFR § 160.103](#).

right of access, the health care provider may exercise his or her professional judgment, to the extent allowed by law, to grant or deny parental access to the minor's medical information. See [U.S. Dept. of Health & Human Services, Does the HIPAA Privacy Rule allow parents the right to see their children's medical records?](#).

A provider may choose not to grant access to a parent 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." See [U.S. Dept. of Health & Human Services, Does the HIPAA Privacy Rule allow parents the right to see their children's medical records?](#); [45 CFR § 164.502\(g\)\(5\)](#).

Mental Health Information and PHI

In general, HIPAA treats mental health information the same as all other PHI. But HIPAA grants additional protection to psychotherapy notes.¹⁴ Generally, a covered entity must obtain a patient's authorization before disclosing psychotherapy notes for any reason.¹⁵ An exception is when other laws require disclosures, such as for mandatory reporting of abuse, and mandatory "duty to warn" situations regarding threats of serious and imminent harm made by the patient.

b. Wisconsin Law

State law preempts HIPAA (i.e., state law controls) if the state law:

1. Relates to the privacy of individually identifiable health information¹⁶ and provides greater privacy protections or rights with respect to such information; or
2. Provides for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention; or
3. Requires certain health plan reporting, such as for management or financial audits; or
4. When the U.S. Department of Health and Human Services ("HHS") determines, upon a specific requirement from a State or other entity, that a provision of State law which is "contrary" to the Federal requirements¹⁷ and which meets certain additional criteria, will not be preempted by the federal requirements.

Wisconsin state law provides additional health privacy protections for sensitive health information including:

1. Certain reproductive health care services (e.g., family planning services, pregnancy testing, obstetrical health care or screening, diagnosis and treatment for a sexually transmitted disease).¹⁸
2. Alcohol, drug abuse, developmental disabilities, and mental health.¹⁹

¹⁴ Psychotherapy notes are a mental health professional's notes on a counseling session conversation that are separated from the rest of an individual's medical record.

¹⁵ See [45 CFR § 164.508\(a\)\(2\)](#).

¹⁶ [45 CFR § 160.103](#).

¹⁷ As defined in the HIPAA Administrative Simplification Rule at [45 CFR § 160.202](#).

¹⁸ Wis. Stat. § 48.981(2m)(b)2.

¹⁹ Wis. Stat. § [51.13](#).

3. HIV test results.²⁰

Who is Subject to Wisconsin Health Information Confidentiality Law?

Health care providers are subject to Wisconsin Health Information Confidentiality Law.²¹

What Does Wisconsin Health Information Confidentiality Law Protect

Wisconsin health information confidentiality law protects “patient health care records.”²² Patient health care records are:

- 1) all records related to the health of a patient prepared by or under the supervision of a health care provider;
- 2) all records made by an ambulance service provider, an emergency medical technician, or a first responder in administering emergency care procedures to and handling and transporting sick, disabled, or injured individuals;
- 3) billing statements and invoices for treatment or services provided by a health care provider and includes health summary forms.

c. Additional Resources

1. HIPAA Collaborative of Wisconsin (HIPAA COW), hipaacow.org.
2. The Network for Public Health Law, networkforphl.org.
3. U.S. Department of Health & Human Services, hhs.gov.
4. Wisconsin Department of Health Services, dhs.wisconsin.gov.

²⁰ Wis. Stat. § [252.15](#).

²¹ See Wis. Stat. § [146.81\(1\)](#).

²² See Wis. Stat. § [146.81\(4\)](#).