



PARENTS' RIGHTS IN MEDICAL DECISION- MAKING ACT

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Written Resources

- Idaho Code 32-1015 (SB 1329), <https://legislature.idaho.gov/sessioninfo/2024/legislation/s1329/>
- Statement of Purpose for SB 1329, <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2024/legislation/S1329SOP.pdf>
- Stanger, *New Limits on Minor Consents in Idaho*, <https://www.hollandhart.com/new-limits-on-minor-consents-in-Idaho>.

Parent's Rights in Medical Decision-Making Act

Effective July 1, 2024:

- Must obtain parental consent to treat unemancipated minor with limited exceptions.
- Must allow parents to access unemancipated minor's records with limited exceptions.
- Parents may sue provider and recover damages for violations.

(IC 32-1015)

- “[T]he Act is intended to supersede any current provisions of Idaho law that may otherwise conflict with the Act.”

(SB 1329 Statement of Purpose, <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2024/legislation/S1329SOP.pdf>)

Parent's Right to Consent for Minors



Parent's Right to Consent for Minors

- “[C]onsent for the furnishing of health care services to any person who is an unemancipated minor must be given or refused by the parent of such person.”

(SB1329, Statement of Purpose, at <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2024/legislation/S1329SOP.pdf>)

- “**Except as otherwise provided by court order, an individual shall not furnish a health care service or solicit to furnish a health care service to a minor child without obtaining the prior consent of the minor child’s parent.**”

(IC 32-1015(3), emphasis added)

- *Not limited to healthcare providers.*
- *Likely need consent of only one parent.*

Effect on Other Laws

- “[T]he Act is intended to supersede any current provisions of Idaho law that may otherwise conflict with the Act.”

(SB 1329 Statement of Purpose)

- *It appears that the new act nullifies other Idaho statutes that would allow minors to consent to their own care, e.g.,*
 - *Exams, prescriptions, devices and info re contraception. (IC 16-604)*
 - *Treatment for certain infectious or communicable diseases, including STDs. (IC 39-3801)*
 - *Hospitalization for mental illness. (IC 66-318(b))*
 - *Treatment or rehab for drug abuse. (IC 37-3102)*
 - *Blood donations. (IC 39-3701)*
 - *Abortion resulting from rape or sex with certain family members, guardian or foster parent. (IC 18-609A)*
 - *Others?*

“Healthcare Services”

- “Health care service” = “a service for the diagnosis, screening, examination, prevention, treatment, cure, care, or relief of any physical or mental health condition, illness, injury, defect, or disease.”

(IC 32-1015(1)(c))

- *Seem fairly all inclusive.*
- *Likely includes counseling concerning health issues.*

Unemancipated “Minor”

- “Minor child” = “an individual under eighteen (18) years of age but does not include an individual who is an emancipated minor.”

(IC 32-1015(1)(e))

– “Emancipated” not defined, but likely includes:

- Court declared the person emancipated.
 - Married or has been married. (See, e.g., IC 39-4516(2)(c))
 - Serving in active military. (See, e.g., IC 39-4516(2)(c))
 - Living on own and self-sufficient.
- Not pregnancy. (See, e.g., IC 18-609A)

“Parent”

- “Parent” = “biological parent ..., an adoptive parent ..., or an individual who has been granted exclusive right and authority over the welfare of a child under state law.”

(IC 32-1015(1)(f))

- *Biological or adoptive parent*
- *Court-appointed guardian*
- *Dept of Health & Welfare?*
- *Grandparent?*
- *Foster parent?*
- *Stepparent?*
- *Others?*

Parent's Right to Consent: Exceptions

Not required to obtain parental consent if:

- Minor is emancipated,
- “[A]s otherwise provided by court order.”

(IC 32-1015(3))

- “A parent of the minor child has given blanket consent authorizing the health care provider to furnish the health care service.
- “The health care provider reasonably determines that a medical emergency exists and (i) furnishing the health care service is necessary in order to prevent death or imminent, irreparable physical injury to the minor child; or (ii) after a reasonably diligent effort, the health care provider cannot locate or contact a parent of the minor child and the minor child's life or health would be seriously endangered by further delay in the furnishing of health care services.”

(IC 32-1015(4))

Parent's Right to Consent: Exceptions

Not required to obtain parental consent if:

- A federal law authorizes minors to consent and preempts Idaho law, e.g.,
 - EMTALA?
 - Title X programs? *But see Deandra v. Becerra*, No. 23-10159 (5th Cir. 2024).
 - Other?

“Blanket Consent”: Content

- *Presumably, consent still needs to be sufficiently informed to be effective.*
- “Consent, or refusal to consent, for the furnishing of health care services shall be valid in all respects if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting the need for, the nature of, and the significant risks ordinarily attendant upon such a person receiving such services, as to permit the giving or withholding of such consent to be a reasonably informed decision.
- “Any such consent shall be deemed valid and so informed if the health care provider to whom it is given or by whom it is secured has made such disclosures and given such advice respecting pertinent facts and considerations as would ordinarily be made and given under the same or similar circumstances.”

(IC 39-4506)

“Blanket Consent”: Form

- *Presumably, blanket consent may be oral or written, but likely want written to protect self.*
- “It is not essential to the validity of any consent for the furnishing of health care services that the consent be in writing or any other specific form of expression; provided however, when the giving of such consent is recited or documented in writing and expressly authorizes the health care services to be furnished, and when such writing or form has been executed or initialed by a person competent to give such consent for himself or another, such written consent ... is presumed to be valid for the furnishing of such health care services, and the advice and disclosures of the attending licensed independent practitioner ..., as well as the level of informed awareness of the giver of such consent, shall be presumed to be sufficient.”
(IC 39-4507)

Who May Consent for Minor if Parent Not Available

“Consent for the furnishing of health care services to ... a minor may be given or refused in the order of priority set forth hereafter....

(a) The court-appointed guardian of such person; ...

(e) A parent of such person;

(f) The person named in a delegation of parental authority executed pursuant to IC 15-5-104;

(g) Any relative of such person;

(h) Any other competent individual representing himself or herself to be responsible for the health care of such person; or

(i) If the person presents a medical emergency or there is a substantial likelihood of his or her life or health being seriously endangered by withholding or delay in the rendering of health care services to such person and the person has not communicated and is unable to communicate his or her wishes, the attending health care provider may, in his or her discretion, authorize or provide such health care services, as he or she deems appropriate...”

(IC 39-4504(1))

Delegation of Parental Authority

- “A parent or a guardian of a minor ..., by a properly executed power of attorney, may delegate to another person, for a period not exceeding six (6) months, ... any of the parent’s or guardian’s powers regarding care, custody, or property of the minor or ward including, but not limited to, powers for medical care
- “The power of attorney does not need to be notarized or recorded to be valid.”

(IC 15-5-104)

➤ *See statute for additional conditions and situations.*

What if Parents Refuse Necessary Care?

- Report child neglect per IC 16-1605.
 - “’Neglected’ means a child ... [w]ho is without proper parental care and control, or subsistence, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them.”
- Seek emergency court order per 16-1627.
 - Court may order care if “[a] physician informs the court orally or in writing that in his professional opinion, the life of the child would be greatly endangered without certain treatment and the parent, guardian or other custodian refuses or fails to consent.”

Parent's Right to Access Minor's Records



Parent's Right to Access Records

- “No health care provider or governmental entity shall deny a minor child's parent access to health information that is:
 - (a) In such health care provider's or governmental entity's control; and
 - (b) Requested by the minor child's parent.”

(IC 32-1015(5))

- “[T]he Act is intended to supersede any current provisions of Idaho law that may otherwise conflict with the Act.” (SB 1329 Statement of Purpose, <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2024/legislation/S1329SOP.pdf>)

➤ *Apparently, must allow access to all records of health services, even that which was provided before July 1, 2024 on the assumption of confidentiality.*

“Health Care Provider”

"Health care provider" =

- (i) A physician, health care practitioner, or other individual licensed, accredited, or certified to perform health care services or provide counseling consistent with state law, or any agent or third-party representative thereof; or
- (ii) A health care facility or its agent.”

(IC 32-1015(1)(b))

“Health Information”

"Health information" = “information or data, collected or recorded in any form or medium, and personal facts of information about events or relationships that relates to:

- (i) The past, present, or future physical, mental, or behavioral health or condition of an individual or member of the individual’s family;
- (ii) The provision of health care services to an individual; or
- (iii) Payment for the provision of health care services to an individual.”

(IC 32-1015(1)(d))

Parent's Access to Minor's Records: Exceptions

May deny parent access if:

- Minor is emancipated.

(See IC 32-1015(5))

- “Parent's access to the requested health information is prohibited by a court order;” or
- “The parent is a subject of an investigation related to a crime committed against the child, and a law enforcement officer requests that the information not be released to the parent.”

(IC 32-1015(6))

- Another federal law preempts disclosure, e.g.,
 - HIPAA (42 CFR part 164)
 - Substance Use Disorder regulations (42 CFR part 2)
 - Title X programs? (*But see Becerra case*)
 - Information Blocking Rules (45 CFR part 171)

HIPAA: Disclosures to Personal Representatives

- “If, and to the extent, permitted or required by an applicable provision of State or other law ... a covered entity may disclose, or provide access in accordance with [45 C.F.R.] § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in loco parentis.”

(45 CFR 164.502(g)(3)(ii)(A))

HIPAA: Disclosures to Patient or Personal Representatives

- May deny patient and personal rep access if:
 - PHI outside designated record set.
 - Psychotherapy notes.
 - Correctional institution if disclosure would jeopardize safety.
 - Research.
 - PHI obtained under promise of confidentiality and disclosure would reveal source of info.
 - Licensed provider determines that disclosure is “reasonably likely to endanger the life or physical safety of the individual or other person.”
 - Subject to review.

HIPAA: Disclosures to Personal Representatives

- Under HIPAA, must treat personal rep as the patient, *e.g.*, personal rep has right to access PHI.
- “Personal rep” = person with authority to consent to care of patient under state law.
- Exception:
 - “Notwithstanding a State law or any requirement of this paragraph to the contrary, a covered entity may elect not to treat a person as the personal representative of an individual if:
 - (i) The covered entity has a reasonable belief that:
 - (A) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or
 - (B) Treating such person as the personal representative could endanger the individual; and
 - (ii) The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual’s personal representative.”

(45 CFR 164.502(g))

New Rule: HIPAA and Reproductive Rights

The Biden-Harris Administration Issues New Rule to Support Reproductive Health Care Privacy Under HIPAA



OCR HIPAA Security Rule information distribution <OCR-SECURITY-LIST@LIST.NIH.GOV> on behalf of OS OCR SecurityList, OCR (HHS/OS) <OCRSecurityList@HHS>
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U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office for Civil Rights

April 22, 2024

The Biden-Harris Administration Issues New Rule to Support Reproductive Health Care Privacy Under HIPAA

The Final Rule strengthens privacy protections for medical records and health information for women, their family members, and doctors who are seeking, obtaining, providing, or facilitating lawful reproductive health care.

Today, the Biden-Harris Administration, through the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS) announced a Final Rule, entitled *HIPAA Privacy Rule to Support Reproductive Health Care Privacy*. The Final Rule strengthens the Health Insurance Portability Act of 1996 (HIPAA) Privacy Rule by prohibiting the disclosure of protected health information (PHI) related to lawful reproductive health care in certain circumstances. HHS is issuing this Final Rule after hearing from communities that changes were needed to better protect patient confidentiality and prevent medical records from being used against people for providing or obtaining lawful reproductive health care. This Final Rule will bolster patient-provider confidentiality and help promote trust and open communication between individuals and their health care providers or health plans, which is essential for high-quality health care.

HIPAA and Reproductive Rights

Effective 60 days after but not enforced until 240 days after rule is published:

- Covered entity may not use or disclose PHI when sought to investigate or impose civil, criminal or administrative liability on individuals, health care providers, or others who seek, obtain, provide, or facilitate reproductive health care that is lawful under the circumstances in which such health care is provided.
- Requires a regulated health care provider or their business associates to obtain a signed attestation that certain requests for PHI potentially related to reproductive health care are not for these prohibited purposes.

Effective February 16, 2026:

- Covered entities must modify their Notice of Privacy Practices to support reproductive health care privacy.

(45 CFR 164.502(a)(5)(iii))

HIPAA and Reproductive Rights

- “[T]his final rule also does not interfere with the ability of states to define the nature of the relationship between a minor and a parent or guardian.”
- “[U]nder this final rule, a regulated entity is prohibited from using or disclosing a minor’s PHI for the purposes prohibited [by the rule]. The Privacy Rule generally permits a parent to have access to the medical records about their child as their minor child’s personal representative when such access is consistent with state or other law, with limited exceptions. Additional information about how the Privacy Rule applies to minors can be found at 45 CFR 164.502(g) and on the OCR website.”

(Final Rule re HIPAA and Reproductive Rights (emphasis added))

➤ *Does this mean the “substantial harm” exceptions under 164.502(g)(5) apply?*

Info Blocking Rule: Preventing Harm Exception

- IBR generally prohibits blocking access to electronic health info.
- Exceptions, e.g., preventing harm exception
 - The actor must hold a reasonable belief that the practice will substantially reduce a risk of harm;
 - The actor's practice must be no broader than necessary;
 - The actor's practice must satisfy at least one condition from each of the following categories: type of risk, type of harm, and implementation basis; and
 - The practice must satisfy the condition concerning a patient right to request review of an individualized determination of risk of harm.

(45 CFR part 171)

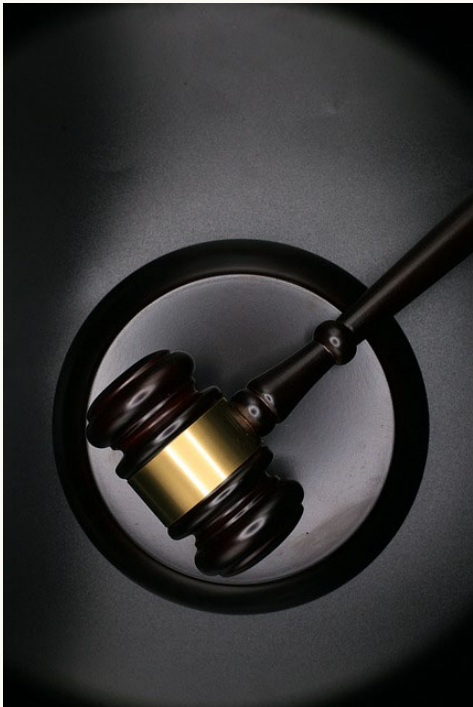
➤ *Not clear if this would preempt Idaho law.*

Non-Custodial Parent Access

- “Notwithstanding any other provisions of law, access to records and information pertaining to a minor child including, but not limited to, medical, dental, health, and school or educational records, shall not be denied to a parent because the parent is not the child’s custodial parent.
- “[I]nformation concerning the minor child’s address shall be deleted from such records to a parent, if the custodial parent has advised the records custodian in writing to do so.”

(IC 32-717A)

Violations



Lawsuits by Parents

- “[A]ny parent who is deprived of a right as a result of a violation of this section shall have a private right of action against the individual, health care provider, or governmental entity.”
- “A parent who successfully asserts a claim or defense under this section may recover declaratory relief, injunctive relief, compensatory damages, reasonable attorney's fees, and any other relief available under law.”

(IC 32-1015(12))

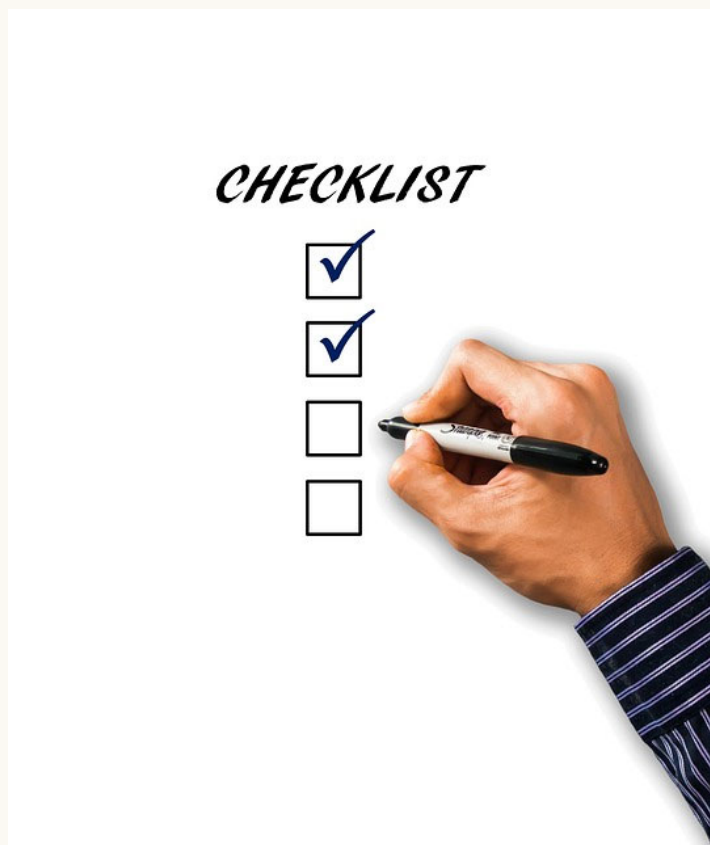
- Subject to Idaho Tort Claims Act.
- 2 year statute of limitations.

(*Id.*)

Additional Consequences

- HIPAA violations, e.g.,
 - Improper denial of access to personal representative.
 - (See OCR's Right of Access Initiative)
- Additional bases for damages
 - Lack of informed consent.
 - Assault or battery.
 - Others?

To Do Before July 1, 2024



To Do Before July 1, 2024

- ✓ Educate minor patients.
- ✓ Update consent forms, policies, and practices to ensure compliance.
- ✓ Update medical record forms, policies, and practices to ensure compliance, including HIPAA policies concerning parental access.
- ✓ Review and, if necessary, update HIPAA Notice of Privacy Practices to reflect the Act's requirements.
- ✓ Update patient portal policies and/or access rights.
- ✓ Train personnel concerning the new rules, policies and practices.
- ✓ Discuss the potential for lawsuits with your insurance broker to ensure that you have adequate insurance coverage for claims brought under the Act.
- ✓ Others?

Questions?



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