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CLC Practice Point: Minor Consent for Health Care Services and Access to Minors' Health Records: General Application to Minnesota Foster Care Youth

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Many children in foster care have significant medical and mental health needs. These children often face barriers to obtaining appropriate health care services. In particular, health care providers cannot provide medical care to children without obtaining appropriate medical consent. In some cases, confusion may arise about who may provide consent for a foster child's medical care. Although foster children are subject to the general statutory requirements relating to minor consent, additional considerations often apply in this context. As an attorney representing youth in foster care, it is important to understand the law governing medical consent as it applies to your client. It is also crucial to know who may have access to your client's medical records at various stages of a case. Understanding these laws and considerations will help ensure that your client receives timely and appropriate medical care.

Who May Give Consent for a Minor's Medical Services?

In general, a parent or legal guardian must give informed consent in order for a minor to receive health care services in a non-emergency situation.¹ There are, however, some exceptions to this general rule which allow minors to give consent for medical and mental health services under certain circumstances. These exceptions apply to a minor regardless of whether he or she is a child in need of protection or services ("CHIPS") or under state guardianship pursuant to a termination of parental rights. In addition, a minor who gives legally effective consent for health services is financially responsible for the services rendered.²

Nature of Informed Consent

Regardless of whether the patient is a minor, to provide effective informed consent, he or she must be informed of, and able to understand:

- i the diagnosis;
- i risks and consequences of proposed treatment;
- i probability that treatment will be successful;
- i feasible treatment alternatives (and have the ability to make a voluntary choice among treatments);
- and,
- i prognosis if treatment is not given.

¹ Minn. Stat. § 260C.007, subd.23 defines a "minor" as an individual under 18 years of age.

² Minn. Stat. § 144.347. Where a minor is granted the legal authority to consent to health care, this does not necessarily mean the parent's insurance will not be billed (especially if the care is provided by a private physician).

Representation to Persons Rendering Service

If a minor represents that he or she is able to give effective consent for health services but in fact is not able to do so, his or her consent is effective if relied upon in good faith by the person rendering the health service.³

Who May Give Consent for a Minor's Medical Services When the Minor Is in the Foster Care System?

For a child in foster care, medical consent rules can become somewhat more complicated. Although entering the foster care system does not automatically remove a parent's right to consent to his or her child's health care, the parents lose this authority if the court terminates parental rights. Thus, the general rules still apply, but the legal authority to provide effective consent may shift, depending on the child's status (i.e., ward of the state or CHIPS).

Minor Under State Guardianship - Once a minor becomes a ward of the state, the court will transfer guardianship and legal custody of the child to the Commissioner of Human Services.⁴ In general, the Commissioner has the authority to consent for routine medical treatment for these youth.⁵ The social services agency may also have the authority to approve medical procedures for which consent is required.⁶ Thus, the agency's social worker is responsible for your client's medical care. Additionally, only the Commissioner may consent to organ donation, transfers to regional treatment centers, sterilization and do not resuscitate or intubation requests.⁷

CHIPS - If your client is a child in need of protection, the responsible social services agency has the authority to consent to the minor's routine health care services.⁸ Once the child is removed from the home by the juvenile court, the court grants the agency temporary legal custody of the child.⁹ The juvenile code defines legal custody as "the right to the care, custody and control of a child who has been taken from a parent by the court in accordance with the provisions of sections 260C.201 or 260C.317."¹⁰ Additionally, the local social service agency has the obligation to seek a court order authorizing the agency to act for the child if the child's parent refuses to consent to decisions "essential to the child's well-being" and for those decisions requiring parental consent.¹¹

Further, an out-of-home placement plan is required within 30 days after any child is placed in foster care by court order and is subject to court approval.¹² The child may be consulted in the preparation of this plan¹³ which must address the child's health care services.¹⁴ Specifically, the plan should address how the child's known medical problems will be addressed, how her medical information will be updated and shared, who is responsible for

³ Minn. Stat. § 144.345.

⁴ Minn. Stat. § 260C.325, subd.1(b).

⁵ Minn. Stat. § 260C.325, subd. 4(b) explains that the guardian may make major decisions affecting the person of the ward, including but not limited to, giving consent for medical, surgical, or psychiatric treatment of the ward.

⁶ Minn.R. 9560.0450, subp. 1 (2011) provides a list of consents that the Commissioner be delegate to local social services agencies by that include medical treatment, mental health services treatment with psychotropic medication, and surgical treatment.

⁷ Id. at subp.2.

⁸ Minn.R. 9560.0600(2011).

⁹ Minn. Stat. § 260C.178.

¹⁰ Minn. Stat. § 260C.007, subd.22.

¹¹ Minn.R. 9560.0552, subp.2 (2011). See also, Minn.R. 9560.0525 E (2011) requiring the local agency to request court permission for "any special treatment and care" if the parent fails to provide it.

¹² Minn. Stat. § 260C.212.

¹³ Minn. Stat. § 260C.212, subd.1(b).

¹⁴ Id. at subd. 1(c). The out-of-home placement plan must set forth the efforts the agency is taking to "ensure the oversight and continuity of health care services for the foster child."

coordinating and responding to her health care needs (including the role of the parent, agency and foster parent) and who is responsible for oversight of the child's prescription medications.¹⁵ Thus, your client's out-of-home placement plan can clearly delineate who is responsible for your client's medical care, so it is very important to ensure you have received a copy of your client's out of home placement plan and that you, as your client's representative, are consulted in any updated or amended plans.

Further, at each court review following the CHIPS adjudication of a child, the social service agency typically requests the court to reaffirm the case plan. Thus, if there are significant concerns or a lack of direction under the plan to address your client's health care needs, the concerns need to be raised and addressed by the court. Additionally, significant medical services, treatment or procedures beyond routine care warrant court approval.

Since additional parties may become involved in the decisions surrounding a minor's consent to medical treatment, it is important to understand the obligations of these parties with respect to ensuring appropriate medical care is provided to your client.

Foster Parents - Generally, foster parents do not have the authority to provide consent for medical procedures, but they can help coordinate and respond to the client's routine health care needs pursuant to the out of home placement plan.

Social Services Agency - As mentioned above, the social services agency will typically be authorized to consent to health care services for minors under state guardianship or routine care for children in need of protection. The agency is also responsible for determining if the child has had a physical examination within 12 months before coming into the agency's care. If not, the child must receive an examination within 30 days of entering care.¹⁶ The agency must ensure the child has an examination annually.¹⁷ Further, after there has been a court finding of a prima facie determination to believe that abuse occurred, a child may receive mental health treatment for the effects of the alleged abuse.¹⁸

Court - As previously explained, court authorization may be required for services beyond routine medical care, such as surgery and invasive procedures or procedures requiring anesthesia. The court is also authorized to order any minor under its jurisdiction to be examined by a qualified physician, psychiatrist, or psychologist appointed by the court.¹⁹

What Medical Services Do Not Require Consent by a Minor's Parent or Legal Guardian?

Regardless of whether a minor is in the foster care system, there are some cases in which the consent of a parent or legal guardian is not required. You should be aware of the circumstances in which your client can provide effective medical consent without obtaining prior approval from a parent, legal guardian, or social services agency. These include the following:

- ❖ Hepatitis B Vaccination - A minor may give effective consent for a hepatitis B vaccination.²⁰

¹⁵ Id. at subd.1(c) (9).

¹⁶ Minn.R. 9560.0600 (2011).

¹⁷ Minn. Stat. § 260C.212, subd. 4(d).

¹⁸ Minn. Stat. § 260C.178, subd. 4.

¹⁹ Minn. Stat. § 260C.157, subd. 1.

²⁰ Minn. Stat. § 144.3441.

- ❖ Pregnancy, Venereal Disease, Alcohol or Drug Abuse - A minor may give effective consent for medical, mental, or other health services to determine the presence of or to treat pregnancy, venereal disease, and alcohol and other drug abuse.²¹
- ❖ Marriage or Giving Birth - Any minor who has been married or has borne a child may give effective consent for personal medical, mental, dental, or other health services, and for services for the minor's child.²²
- ❖ Voluntary Institutional Treatment - Any person 16 years of age or older may consent to hospitalization for observation or treatment of mental illness, chemical dependency, or mental retardation and may give valid consent for hospitalization, routine diagnostic evaluation, and emergency or short-term acute care. However, for chemical dependency or mental illness treatment, a 16 or 17 year-old who refuses to consent to admission as a patient may be admitted with the consent of a parent or guardian, provided there is reasonable evidence that the proposed patient is chemically dependent or has a mental illness and is suitable for treatment. Any person under age 16 may be admitted as a patient with the consent of a parent or guardian, so long as there is some independent review of the placement.²³
- ❖ Emergency Treatment - Medical, dental, mental, and other health services may be provided to a minor without the consent of a parent or legal guardian when, in a professional's judgment, treatment should be given without delay.²⁴
- ❖ Abortion - A minor seeking an abortion in Minnesota must either notify both parents of the intended abortion and wait 48 hours, OR seek judicial approval for the procedure. A court may authorize an abortion if it finds either: (1) that the pregnant minor is mature and capable of giving informed consent, or (2) that authorizing the abortion without notification would be in her best interest. An expedited confidential appeal is available to any minor for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification is not subject to appeal.²⁵

Who May Access Health Care Records of Minors in the Foster Care System?

Children in foster care have the right to access their own medical records. Additionally, if data is maintained on a minor by a government entity, the minor may file a written request to deny his or her parents access to private data, including any medical data.²⁶ The authority holding the information may grant the minor's request if it determines that honoring the request is in the best interest of the minor.²⁷ Also, when a minor leaves the foster care system, the responsible social services agency must provide the minor, minor's parent, adoptive parent, or permanent legal and physical custodian with a current copy of the minor's health record.²⁸

When parental rights are terminated, a minor's parents lose all associated rights, powers, and privileges, including the right to access the minor's health information.²⁹ For a minor placed in foster care, the social services agency

²¹ Minn. Stat. § 144.343, subd. 1.

²² Minn. Stat. § 144.342.

²³ Parham v. JR, 442 U.S. 584, 99 S. Ct. 2493 (1979); Minn. Stat. 253B.03, subd. 6(d); 253B.04, subd. 1.

²⁴ Minn. Stat. § 144.344.

²⁵ Minn. Stat. § 144.343.

²⁶ Minn. R. 1205.0500, subp. 3 (2011).

²⁷ Id. In considering whether the request is in the best interest of the minor, the responsible authority must consider the age and maturity of the minor, whether denying access to the minor's parents may protect the minor from physical or mental harm, and whether there are grounds for believing that the minor's stated reasons are reasonably accurate. Id.

²⁸ Minn. Stat. § 260C.212, subd. 4(e).

²⁹ Minn. Stat. § 260C.317.

responsible for the placement has access to the minor's medical data in the same way that the minor's family typically would have access.³⁰

As previously noted, the social services agency must prepare an out-of-home placement plan for each child placed away from a parent or custodian in a child protection matter.³¹ It is important to remember that certain information contained in this plan—including contact information for the minor's health care providers, known medical problems, medications, and immunizations—potentially could reveal minor-consented services to the minor's parents, case worker, and other involved parties.³²

NOTE: An attorney representing a child in out-of-home care is entitled access to any records, social services agency files, and reports which form the basis of any recommendation made to the court.³³ This could include medical records and reports contained in agency or court files. A release of medical records may be necessary in order to obtain the records from other providers. Contact CLC if you need guidance in requesting records not contained in the social services or court files.

Tips for Representing Your Client

- ❖ Make sure your client is receiving regular medical care. Encourage them to be their own medical advocate to ensure they have access to appropriate health care services.
- ❖ Identify the individual who is responsible for consenting to your client's medical care.
- ❖ Address teenage pregnancy and birth control issues with a full understanding of your client's rights in this context.
- ❖ Encourage your client to be honest with everyone involved in their care about their medical concerns. It is particularly important for older foster care youth to learn their medical care protocol, medication and therapeutic routine as they prepare their transition to independence.
- ❖ Utilize court review hearings to address your client's medical needs and request written court orders to ensure compliance.
- ❖ For older youth, make sure the youth has his or her complete medical history, medical records, record of prescriptions and immunizations, and contact information for all dental and medical care providers before the case is dismissed.³⁴

³⁰ Minn. Stat. § 260C.208; Minn. Stat. Ann. § 13.384; Minn. Stat. Ann. § 13.875, subd. 5.

³¹ Minn. Stat. § 260C.201, subd. 6.

³² Specifically, the plan must include: (i) names and addresses of the child's health care and dental care providers; (ii) a record of the child's immunizations; (iii) the child's known medical problems; (iv) the child's medications; and (v) any other relevant health care information, such as eligibility for medical insurance or medical assistance. Minn. Stat. § 260C.212, subd. 1(c).

³³ Minn. Stat. § 260C.171, subd. 3.

³⁴ Minn. Stat. § 260C.212, subd. 7(d).