Consent and Confidentiality for Children in New Mexico

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Overview

- Multiple laws are relevant to figuring out what care children can consent to on their own and whether that care can be confidential.
- NM policy choices: reproductive health care, mental health care, and medically necessary health care for homeless teens and teens who are parents.
Definitions

Uniform Health-Care Decisions Act:

“health-care” means any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual’s physical or mental condition.
Children’s Ability to Consent to Services

- Reproductive Health Care
- Mental Health Care
- Medically Necessary Care for 14+ Homeless Youth and Youth Who Are Parents
Reproductive Health Care

- Treatment and testing for sexually transmitted diseases (NMSA 24-1-9)
- Pregnancy Related Services (NMSA 24-1-13.1)
- Contraception (NMSA 24-8-5)
Reproductive Health Care

- Young person of any age can consent.
- Treatment is confidential EXCEPT parents may be able to access results of testing for sexually transmitted diseases upon request.
Mental Health Services

Children under 14:

- Parents consent to treatment
  (NMSA 32A-6A-14)

  except:
A child under fourteen years of age may consent to an initial assessment for medically necessary early intervention service limited to verbal therapy. The purpose of the initial assessment is to allow a clinician to determine what, if any, action needs to be taken to ensure appropriate mental health services are provided to the child.
Children fourteen years of age or older.
A child fourteen years of age or older is presumed to have capacity to consent to treatment.

NMSA 32A-6A-15
Mental Health Services

- individual psychotherapy
- group psychotherapy
- guidance counseling
- case management
- behavioral therapy
- family therapy
- counseling
- substance abuse treatment
- or other forms of verbal treatment that do not include aversive interventions
Mental Health Services

Children fourteen years of age or older

- Can consent to psychotropic medications with the informed consent of the child and notice to parent.

- If a child 14+ lacks capacity, there is a process for a parent to act as a surrogate without a court order (Children’s Mental Health Code NMSA §32A-6A-1).
Consent to health care for certain minors fourteen years of age or older.

An unemancipated minor fourteen years of age or older who has capacity to consent may give consent for medically necessary health care under certain circumstances.

NMSA 24-7A-6.2
Homeless Youth and Youth Who are Parents

(1) living apart from the minor's parents or legal guardian; or

(2) the parent of a child
Capacity

- An individual is presumed to have capacity under NMSA 1978 §24-7A-11(B).

- Capacity is determined by two physicians—doesn’t require court determination. NMSA 1978 §24-7A-11(C).
End of Life Decision Making

- A minor may make the decision to withhold or withdraw life-sustaining treatment for themselves if they have capacity. NMSA 1978 §24-7A-6.1(C)

- Procedure for determining capacity—is done by physicians and doesn’t require court determination. NMSA 1978 §24-7A-6.1(D)
Confidentiality

- Right to control access to health care and mental health care information.
- Requirement on health care provider not to release information about the patient except as allowed by law.
- Complicated concept as applied to children.
- Services provided by school district employees to students require separate analysis.
Confidentiality

Laws affecting minors’ rights to confidentiality:

- HIPAA
- FERPA
- State Laws
Health Insurance Portability and Accountability Act/ HIPAA

Generally a parent has access to their child’s medical records. 45 CFR 164.502(g)
Health Insurance Portability and Accountability Act/ HIPAA

Exceptions:

a. Minor consents to care and consent of parent not required under state law;

b. Minor obtains care at direction of a court;

c. Parent agrees to confidential relationship;
Health Insurance Portability and Accountability Act/ HIPAA

- Still have to look to state law –
  - If state permits or denies access, state law controls
  - If state law is silent, provider may exercise professional judgment

● FERPA gives parents right to access student’s records and there is no state law exception.

- FERPA does not allow schools to protect health information differently than other school information when it is created by school personnel.

- Must determine whether a school based health center is separate from school. Will be considered separate if it is clear that health care provider owns the medical practice and controls medical records. In other words, site of service is not controlling.
Relevant NM Laws

Reproductive Health 24-1-9, 9.4, 13, 13.1

Children’s Mental Health 32A-6A-1

Consent to health-care for certain minors 24-7A-6.2
Reproductive Health Care

- Generally, NM law specifically addresses consent and is silent as to confidentiality.

- Exception: test results for sexually transmitted diseases may be released to both the subject of the test or the subject's legally authorized representative, guardian or legal custodian. NMSA 24-1-9.4
NM Laws on Confidentiality

- Uniform Health Care Decisions Act:
  Consent to health care for certain minors fourteen years of age or older (Homeless Youth and Youth Who are Parents)
  
  - Statute is silent as to confidentiality.
Child under 14:
When the child is under fourteen years of age, the child's legal custodian is authorized to consent to disclosure on behalf of the child. Information shall also be disclosed to a court-appointed guardian ad litem without consent of the child or the child's legal custodian.
Confidentiality for Mental Health Care

Child 14 and older:
A child fourteen years of age or older with capacity to consent to disclosure of confidential information shall have the right to consent to disclosure of mental health records.
Confidentiality for Mental Health Care

Child 14 and older:
Parents have right to access a summary of therapy notes but not notes themselves.
Duty to Report Abuse and Neglect

- Every person, including but not limited to . . . a schoolteacher or a school official or social worker acting in an official capacity who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately. NMSA 32A-4-3.

- Must “personally” report (meant to address schools that required report to come through principal).
Christie, 15 years old, ran away from home 3 months ago. She has been living with a friend’s family. Christie has some health problems but is being told she cannot access treatment without authorization from her parent or legal guardian.
Christie says she is four months pregnant and having abdominal pain.

Can Christie consent to treatment? Will the treatment be confidential?
Christie

Christie has a urinary tract infection.

Can Christie consent to treatment? Will the treatment be confidential?
Christie also says she has been very depressed and would like to get counseling.

Can Christie consent to treatment?
Will the treatment be confidential?
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