

Consent and Confidentiality for Young People in New Mexico

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Introductions

- Matthew – one interesting thing about me
- Victoria – one interesting thing about me

Goals

- Help you help the youth you work with.
- Help you give the youth you work with good advice.

Housekeeping

- There will be a test and several quizzes. So stay on your feet people!
- We are covering a large amount of material in a short time.
- Please hold your questions until the end.
- Seriously. Be patient! Please write your questions down. Thank you!

Outline

I. Consent

II. Confidentiality

III. Sexual Activity

IV. Mandatory Reporting

V. Conclusion / Q. and A.

Key Themes

- This is difficult stuff.
- The biggest mistake is thinking this is simple
- The second biggest mistake is in trying to do too much, overreaching, or moving too fast.
- Slow down, read the law carefully, think about the practicalities in each case.
- Be kid centered. Build trust. Offer help.

I. Consent

- Definition:
 - The right to be able to make decisions.
 - Applies to both positive and negative situations.
 - Consent means you can decide to receive treatment, care, or medications.
 - Consent also means you can *refuse* to receive treatment, care, or medications.

Basic Rule: Medical Care

- Default rule: Parents / guardians consent to all care on behalf of their unemancipated children.
- Exception: Youth age 14+ who are:
 - living apart from their parents or
 - who are parents themselves.
 - NMSA § 24-7A-6.2(A)

Basic Rule: Medical Care

Default rule: Parents consent to all care on behalf of their unemancipated children.

Exception: In cases of emergency in which a minor is in need of care and the parents cannot be located, after reasonable efforts have been made, consent for the emergency attention may be given by **any person** standing in loco parentis to the minor.

NMSA § 24-10-2

Reproductive Health Care

Includes:

- Treatment and testing for sexually transmitted infections (NMSA §24-1-9)
- Pregnancy Related Services (NMSA §24-1-13.1)
- Contraception (NMSA §24-8-5)

Reproductive Health Care

Young people of any age can consent to reproductive health care.

Quiz!

Who can **consent** to the following healthcare without parental permission? (More than one answer may be correct)

A. A thirteen year old youth living in a shelter who needs an x-ray.

B. A thirteen year old youth living with her parents and her six month old son. The 13 year old wants a flu shot. Can she consent on her own?

C. A bus driver when a thirteen year old is seriously injured and needs emergency care.

D. A seventeen year old who is living with his parents, but managing his own financial affairs through his wages as a waiter. He has a bad cough and wants to go to his primary care physician for medication.

Quiz 2!

Who can **consent** to the following healthcare without parental permission? (More than one answer may be correct)

- A. A thirteen year old living with her parents who wants birth control. Her parents do not want her to be sexually active and do not want her to receive birth control.
- B. A sixteen year old boy who wants to talk to a Planned Parenthood social worker about how to use condoms.
- C. A seventeen year old girl who is on her parents' insurance. She has a UTI and wants to be seen for care.
- D. A twelve year old girl who thinks she might be pregnant but doesn't want her parents to know. She wants to talk to her primary care doctor to find out.

Mental Health Services

Children **under 14:**

Parents consent to treatment on behalf of children except:

A child under fourteen years of age may consent to an initial assessment for medically necessary early intervention services limited to verbal therapy for a two week period.

NMSA § 32A-6A-14

Mental Health Services

Children 14+

Have the right to consent to their mental health treatment, including for substance use disorders.

Can consent to psychotropic medications but the parent must receive notice.

If a child 14+ lacks capacity, there is a process for a parent to act as a surrogate without a court order.

- NMSA § 32A-6A-15 and -16

Quiz 3!

Who can consent to the following healthcare?

- (More than one answer may be correct)

A. A thirteen year old boy is feeling sad and wants to talk with a counselor about setting up a regular appointment.

B. A sixteen year old girl is hearing voices and her sister convinces her to talk to her doctor.

C. A seventeen year wants to talk in private with his psychiatrist.

D. A thirteen year old wants care for what she thinks is an STI.

II. Confidentiality

Definition:

- The right to control access to information regarding health care.
- Requires health care providers not to release information about the patient except as allowed by law.

Confidentiality

Laws affecting minors' rights to confidentiality:

- HIPAA: Health care settings
- FERPA: Educational settings
- State Laws

HIPAA

Health Insurance Portability and Accountability Act

Generally parents have access to their child's medical records.

- 45 CFR 164.502(g)

Exceptions:

- Minor consents to care and consent of parent not required under state law;
- Minor obtains care at direction of a court;
- Parent agrees to confidential relationship;

FERPA

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

FERPA gives parents right to access student's records

No state law exception (differs from HIPAA)

- 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.
 - 20 U.S.C. 1232; 34 C.F.R. Part 99

FERPA

- A school employee who knows or in good faith suspects any student of using or abusing alcohol or drugs shall report such use or abuse pursuant to procedures established by the local school board.
 - NMSA § 22-5-4.4

Practical Advice

- Get active: there are gray areas in the law and coming together as health care professionals allows you to have a stronger voice in policies and laws that impact access to care.
- Create written documents that can be used to establish community standards of care.
 - e.g. Summit on confidentiality vs. reporting abuse and neglect.

14+

Unaccompanied Youth Youth Who Are Parents

Uniform Health Care Decisions Act

- Statute is silent as to confidentiality.
- Provider must use judgement.

NMSA §24-7A-6.2

Confidentiality for Mental Health Care

Child under 14:

The child's legal custodian is authorized to consent to disclosure on behalf of the child. NMSA 32A-6A-24(B).

Child 14+:

Has the right to consent to disclosure of mental health records.

- EXCEPT parents must get notice of psychotropic medications
- NMSA 32A-6A-24(C).

Confidentiality in Reproductive Health Care

- NM law specifically addresses consent and is silent as to confidentiality.
- Typically providers interpret this as giving minor right to confidentiality.
- Exception: test results for sexually transmitted diseases **may** legally 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

Confidentiality is Easily Broken

- Insurance billers may release records to parents/guardians.
- School health care providers may make notes, which parent can access per FERPA.
 - Remember that site is not controlling for FERPA/HIPAA.
- Many people, including lawyers and doctors, do not know the law or do not care about upholding it.
- Children are traditionally disenfranchised and don't know their rights.

Quiz 4!

Which of the following situations will remain confidential?

- (More than one answer may be correct)

A. A thirteen year old boy is feeling sad and wants to talk with a counselor about setting up a regular appointment.

B. A sixteen year old girl is hearing voices and her sister convinces her to talk to her doctor. Neither wants their parents to know about the appointment.

C. A seventeen year old talks in private with his psychiatrist, who prescribes him Zoloft. He doesn't want his parents to know he is taking medication because they prefer a natural approach.

D. A thirteen year old wants care for what she thinks is an STI.

III. Sexual Activity of Minors

- Age of consent
- Statutory Rape
- Reporting

Sexual Activity of Minors

“Age of consent:”

- A child under age 13 cannot legally consent to sex.
- Therefore, by definition, any sexual contact of a child under 13 is not consensual.
- Other party may be prosecuted, regardless of age.

Statutory Rape

Criminal Sexual Penetration 4th Degree

NMSA § 30-9-11:

- (1) Child 13 to 16 years of age and
 - (a) Perpetrator is at least 18 years of age and
 - (b) Is at least 4 years older than the child +
 - (c) Not the child's spouse

Statutory Rape

Criminal Sexual Penetration 4th degree, cont'd:

2) **13 to 18** and

a) perp is licensed school employee, unlicensed school employee, contract employee, health provider, or volunteer,

b) at least 18 years of age, and

c) at least 4 years older

....

Statutory Rape

Criminal Sexual Penetration 4th degree, cont'd:

...

d) not the spouse, and

e) “learns while performing services in or for a school that the child is a student in a school”

Scenario: Christie

Christie comes to see you in your school counselor office. She is 15, and says she is four months pregnant and having abdominal pain.

- Can Christie consent to treatment?
- Will the pregnancy remain confidential?

Christie

Christie tells you her 19 year old boyfriend is the father.

- A. Is it statutory rape? (If she is 15).
- B. What if Christie is 13 and her boyfriend is 17?
- C. What if Christie is 16 and her boyfriend is 20?
- D. What if Christie is 17 bf is 25 and a school employee?
- E. If Christie was 12 and pregnant, would you have to report to CYFD?

IV. Mandatory Reporting

Duty to Report Abuse and Neglect

Every Person,

including a licensed physician; a resident or intern examining, attending or treating a child; a law enforcement officer; a judge presiding during a proceeding; a registered nurse; a visiting nurse; a schoolteacher or a school official or social worker acting in an official capacity a member of the clergy....

Duty to Report Abuse and Neglect

...who knows or has a reasonable suspicion that a child is an abused or a neglected child **shall** report the matter immediately. Failure to do so is a misdemeanor.

NMSA § 32A-4-3.

Duty to Report Abuse and Neglect

- Definition of “an abused or a neglected child” refers to a child who has been abused or neglected by a parent, guardian or custodian.
 - NMSA § 32A-4-2
- Duty to report applies only to abuse or neglect by a parent, guardian or custodian.

Duty to Report Abuse and Neglect

Key takeaway:

- **It is important not to create a duty to report where one doesn't actually exist.**

Duty to Report Abuse and Neglect

Initial question when considering whether or not to report:

Does the sexual activity of the child and surrounding circumstances create a reasonable suspicion of abuse or neglect on the part of a parent, guardian or custodian?

Person with information has a duty to report once they answer yes to the above question.

Reporting should not be delayed by a policy that requires consultation with a manager.

Reporting Sexual Activity of Minors

Remember the key themes:

- The biggest mistake is thinking this is simple.
- The second biggest mistake is in trying to do too much, overreaching, or moving too fast.
- Slow down, read the law carefully, think about the practicalities in each case.
- Be kid centered. Build trust. Offer help.

Duty to Report a Crime

There is no legal duty to report a crime other than abuse or neglect of a child by a parent, guardian or custodian.

Reporting

Where does that leave you when a child needs help, but does not want you to report?

- Talk to them about holding others accountable when they do harm.
- Help them develop a safety plan or encourage them to talk to someone who can help them create one.
- Counsel child about the importance of getting help from supportive adults

Final Exam! Thomas

Thomas is a fifteen-year-old male who attends Highland High School. He has been feeling depressed and anxious lately and his mood has been affecting his academic, professional, and social realms. He thinks medication may help him. His friend John suggests that he go to the school-based health clinic and get a referral to a psychiatrist outside of school. John tells Thomas that legally it must be confidential and since it isn't his family practitioner, his parents will never know.

Is John correct?

Chose the best answer:

- A. Thomas can consent to being seen and examined but not to medication management.
- B. Thomas can consent to the visit but will not be able to take medication if his parents do not approve.
- C. Thomas has the right to consent to the medication and his right to confidentiality depends on where he is seen.
- D. Thomas can consent to medication; however it is likely that his parents will be informed that he is taking it. Also, his parents may be able to see the records the school-based health center keeps about his visit.

Thomas Continued

Thomas is now a seventeen and a junior. He plays football and is doing well. One reason he is doing better is that he moved out of his parents' house seven months ago and is living with his girlfriend's family. One night, during a game against Albuquerque High, he gets tackled and can't get back up. He is taken to the hospital in an ambulance and the doctor says he needs to be admitted for observation.

Can he get treatment without his parent's consent?

Chose the best answer:

A. The hospital should call his girlfriend's parents for permission to admit him because he is a minor, is not homeless, and is currently living with them.

B. Under the law, Thomas can decide whether to receive treatment and can also consent to his release back to his girlfriend's house.

C. Because this is emergency care, anyone at the game can consent for treatment on Thomas's behalf.

D. Thomas has the right to get treated but not necessarily the right to confidentiality.

V. Wrap Up

Themes: Issue spotting

Kind of care

- Mental health vs. medical health vs. reproductive health

Age

- For health care, 14 and above vs. below 14
- For sexual consent, four year rule

Residence

- Living at home or away from home

Is the child a parent?

- If so, child can consent on behalf of self and child.

Selected References

NMSA §24-1-9 (treatment and testing for sexually transmitted diseases)

NMSA § 24-1-13.1 (pregnancy related services)

NMSA § 24-8-5 (contraception)

NMSA §32A-6A-1 *et. seq.* (New Mexico Children's Mental Health and Developmental Disabilities Act)

NMSA §24-7A-6.2 (Consent to Medically Necessary Care for Certain Minors)

45 C.F.R. 164.502(g) (Health Insurance Portability and Accountability Act)

20 U.S.C. § 1232; 34 C.F.R. Part 99 (Federal Education Rights and Privacy Act)

NMSA § 32A-4-3 (duty to report abuse and neglect)

NMSA § 30-9-11 (criminal sexual penetration)

V. Questions / Comments:

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