

**HIPAA COW  
PRIVACY NETWORKING GROUP**

**MINORS' PRIVACY RIGHTS RELATED TO ACCESS, INSPECTION & COPYING OF  
PROTECTED HEALTH INFORMATION**

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PRIVACY NETWORKING GROUP**

**MINORS' PRIVACY RIGHTS RELATED TO ACCESS, INSPECTION & COPYING OF  
PROTECTED HEALTH INFORMATION (PHI)**

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**Policy:**

It is the policy of [Insert Organization's Name] to recognize the rights of minors and their parents, legal guardian, or other legally authorized representative to access, inspect and receive copies of their protected health information (PHI) in compliance with state and federal regulations.

**Based on Final HIPAA Security Rule & HITECH Final Rules (03/26/2013)**

In the State of Wisconsin, minors have the right to consent to their own medical care (i.e., without the consent of a parent or guardian) in certain limited situations. However, it is important to understand that the ability of a minor to control access to their protected health information (PHI) is a separate and distinct concept from consent to medical treatment. As a result, in certain circumstances, a minor may be able to consent to treatment on their own but not able to block a parent from accessing treatment records, or vice versa.

**State Preemption Issues:** Wisconsin Statutes and federal regulations impact both consent for treatment and access to protected health information for minors seeking treatment for alcohol/drug detoxification and/or treatment, mental health care, developmental disabilities, HIV and a variety of other conditions. See the reference grid embedded in this policy for further (but not inclusive) information. A preemption analysis based on Wisconsin Statutes 146.81-83, 51.13, 51.30 and 252.15 has been completed with required regulatory information incorporated within this document. Preemption analysis information and deliverables are available at the [www.hipaacow.org](http://www.hipaacow.org).

**Definitions:**

**Minor:** A minor is a person under the age of 18 years and reliant upon parental support and control. Generally, minors do not have the authority to control access to their protected health information (PHI), unless an exception applies.

**Emancipated Minor:** In Wisconsin, lawful marriage is the only circumstance that is statutorily recognized, as a general matter, as grounds for emancipation of a minor (in Wisconsin a person between the ages of 16 and 18 years may marry with the consent of a parent/legal guardian (Wis. Stat. §765.02).<sup>1</sup> Courts may also grant emancipation in unique circumstances. Once emancipated, the minor obtains the legal capacity of an adult.<sup>2</sup> The burden should be placed on the minor to show emancipation. If doubt exists regarding emancipation, parental consent should be secured in addition to the consent of the minor.

**Parent** is defined as either a biological parent, a husband who has consented to artificial insemination of his wife under Wis. Stat. §891.40, or a parent by adoption. It does not include any person whose parental rights have been terminated. (Wis. Stat. § 48.02 (13)).

**Legal Guardian** The parent or legal custodian of a minor patient as defined by 48.02(8) and (11). The legal guardian or legal custodian must provide court documentation that they are legally authorized to act on behalf of the minor. An individual named by a court having the duty and authority of guardianship or an individual other than a parent or an agency to whom

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<sup>1</sup> Wisconsin statutes adopt the following modified definition of emancipation for very limited purposes (abortion consent): "Emancipated minor" means a minor who is or has been married; a minor who has previously given birth; or a minor who has been freed from the care, custody and control of her parents, with little likelihood of returning to the care, custody and control prior to marriage or prior to reaching the age of majority (§48.375(2)(e)).

<sup>2</sup> When remaining under complete parental support, emancipation may be arguable.

legal custody of the child has been transferred by a court. “Legal Guardian” does not include an individual who has only physical custody of a child. (Wis. Stat. § 48.02 (8), 48.02 (11).

General Information:

Generally, the age in Wisconsin at which a minor obtains the right of access to and control over their healthcare information is 18, because at that age the individual is no longer, under Wisconsin law, deemed a minor. However, several specific federal and Wisconsin laws provide minors with rights to access and/or control their healthcare information depending on the type of information in question.

Under the Privacy Rule<sup>3</sup>, if under applicable law an individual has the right to make decisions related to health care on behalf of a minor, they must be treated as a representative of the minor for access purposes. Exceptions to this general rule include situations where the minor has the authority to consent to treatment on his/her own behalf, or when a minor’s legal representative has agreed to maintain confidentiality between the health care provider and the minor.<sup>4</sup>

The Privacy Rule defers to state law for the definition of a legal representative. Wisconsin law generally recognizes the minor’s parent, guardian, or legal custodian<sup>5</sup> as the legally authorized representative. However, a termination of parental rights or a denial of physical placement by a court of law may affect one’s right of access. In addition, other specific statutes such as Wis. Stat. §51.30 (Alcohol, Drug Abuse, Developmental Disabilities, and Mental Health records), may define the legal representative of a minor differently. Therefore, it will be necessary to determine what law is controlling to determine who may be the legally authorized representative for a minor regarding access.

Federal law requires that healthcare providers have in place and implement policies and procedures to ensure the right of a minor’s legal representative to access, inspect and copy the minor’s PHI (§164.524). Under the federal Privacy Rule, a minor’s legal representative has the right to access the minor’s information in all but a limited number of situations. As stated above, when federal law limits the right of access to a minor or the minor’s representative, but state law would provide such access, the law that provides the individual the greater right of access (in this example, state law) controls. For instance, the Privacy Rule allows denial of access to specific types of healthcare information with or without a review of denial.<sup>6</sup> When Wisconsin law provides access to a minor or minor’s representative and the Privacy Rule does not, Wisconsin law will control. Some of the specific instances where Wisconsin law will preempt federal are covered in the following grid. However, when processing a minor’s request for access where there is no authority (federal or state) allowing a minor to have access without parental approval, authorization will be obtained from the minor’s legally authorized representative.

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<sup>3</sup> 45 CFR §164 Subpart E

<sup>4</sup> 45 CFR §164.502(g)(3).

<sup>5</sup> Wis. Stat. §146.81(5)

<sup>6</sup> 45 CFR §164.524

**Based on Final HIPAA Security Rule & HITECH Final Rules (03/26/2013)**

When the minor is in danger, or subject to abuse or neglect, the Privacy Rule preempts any contrary state law.<sup>7</sup> Specifically, a covered entity may elect not to treat a person as the personal representative of a minor if: (1) the covered entity has a reasonable belief that the minor has been or may be subjected to domestic violence, abuse, or neglect by the personal representative; (2) the covered entity has a reasonable belief that treating the person as a personal representative could endanger the individual; or (3) 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.

**Policy Statements:****Minor Access:**

A minor, or legally authorized representative, must make a request to a covered entity to access and inspect their PHI. Whenever possible, this request shall be made in writing. The federal Privacy Rule allows the requirement of a written request for access as long as the individual has received notice of the written requirement in the "Notice of Privacy practices." The request for access may be documented on either the "Authorization for Disclosure" form or in the notes of the patient's health record. The minor's rights to access should be determined based on the following statutory information and whether or not they are authorized to make the written request without parental/guardian consent.

**Mitigating Circumstances:**

The law of release of minor records is a matter of some ambiguity and controversy, particularly regarding the circumstances justifying allowing a minor to make decisions about disclosure of PHI in the absence of parental consent, or to deny parental access to minor records. While the general rule is that parental consent is required until the patient is eighteen years of age, there may be extenuating circumstances justifying a variance from this rule. Legal counsel should be contacted for case-by-case determination of whether such circumstances are present.

**Reference Table for Disclosure of a Minor's Protected Health Information**

Type of Care	Age of Minor	May the Minor Consent to Disclosure of PHI Without Parental/Guardian Consent	May the Minor Deny Parental/Guardian or Legally Authorized Representative Access to PHI	Citation/Reference
Acute/General Medical Care	< 18	No.	No, unless the minor is in danger or subject to abuse/neglect.	WI Statutes: §146.81-84; 45 CFR §164.502(g)(5).

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<sup>7</sup> 45 CFR §164.502(g)(5).

## Based on Final HIPAA Security Rule &amp; HITECH Final Rules (03/26/2013)

Type of Care	Age of Minor	May the Minor Consent to Disclosure of PHI Without Parental/Guardian Consent	May the Minor Deny Parental/Guardian or Legally Authorized Representative Access to PHI	Citation/Reference
Alcohol or Other Drug or Abuse	< 12 Years	No -- the consent of <u>both</u> the minor and the minor's parent/guardian or legal representative is required. <sup>8</sup>	No, unless the minor is in danger or subject to abuse/neglect.	WI Statutes: 51.47 51.30(5)(a); DHS 92.06 42 CFR 2.14 45 CFR §164.502(g)(5).  WI Statutes: 51.47; DHS 92.06(2) 42 CFR 2.14
	≥ 12 Years	Yes - If the minor is receiving treatment for preventive, diagnostic, assessment, evaluation, outpatient treatment, or detoxification services without parental consent.	Yes, when state law allows the minor to receive treatment without parental consent, minor may deny a parent/guardian or legal representative access to PHI.	
Contraceptive Care	<18 years	Debatable. The general rule is no, except when the minor is receiving confidential contraceptive advice and family planning services without parental consent under the Federally Funded Family Planning Center, 42 CFR 59 or under the Wisconsin Medicaid Family Planning Waiver Program, Wis. Stat. 253.07. However, some organizations recognize that minors have a constitutional interest in reproductive privacy regardless of age. <sup>9</sup> <b>Each</b>	Debatable. The general rule is no, unless the minor is in danger or subject to abuse/neglect, or if the minor is receiving confidential contraceptive advice and family planning services without parental consent under the Federally Funded Family Planning Center, 42 CFR 59 or under the Wisconsin Medicaid Family Planning Waiver Program, Wis. Stat. 253.07. However, some organizations recognize that minors have a constitutional interest in reproductive privacy regardless of age. <sup>10</sup> <b>Each</b>	WI Statutes: 253.07(3)(c); 42 CFR 59.11

<sup>8</sup> However, if 42 CFR Part 2 applies, a minor under 12 may consent to disclosure without other consent, if the minor alone agreed to the alcohol or other drug treatment, in situations where a parent with legal custody or a guardian of the minor could not be found, or if there is no parent with legal custody of the minor.

<sup>9</sup> Specifically, some Wisconsin healthcare organizations refer to: "The expectation of privacy in matters of reproductive health is so substantial that the United States Supreme Court has declared as a matter of constitutional law that reproductive privacy is a protected right, or 'liberty interest,' of individuals regardless of age or marital status." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Carey v. Population Services International*, 431 U.S. 678 (1977).

<sup>10</sup> See Note 9.

## Based on Final HIPAA Security Rule &amp; HITECH Final Rules (03/26/2013)

Type of Care	Age of Minor	May the Minor Consent to Disclosure of PHI Without Parental/Guardian Consent	May the Minor Deny Parental/Guardian or Legally Authorized Representative Access to PHI	Citation/Reference
		<i>organization will have to evaluate and determine its response to these types of requests.</i>	<i>organization will have to evaluate and determine its response to these types of requests.</i>	
<b>Developmentally Disabled</b>	<14 years	No.	No, unless the minor is in danger or subject to abuse/neglect.	Wis. Stat. 51.30(5)(a) and (b)  45 CFR §164.502(g)(5).
	>14 years	Yes.	Yes. A developmentally disabled minor over the age of 14 may file a written objection to access by parent/legal guardian with the custodian of records.	Wis. Stat. 51.30(5)(a) and (b)
<b>Drug Testing</b>	<18 years	No.	No, unless the minor is in danger or subject to abuse/neglect.	WI Statutes: 51.48  45 CFR §164.502(g)(5).
<b>HIV Test Results</b>	<14	No.	No, unless the minor is in danger or subject to abuse/neglect.	WI Statutes: 252.15
	≥14	Yes – ONLY the minor may provide written authorization.	Yes, the legal/guardian does not retain the right to authorize disclosure. Minor must complete a written authorization form to grant access to parent/legal guardian.	WI Statutes: 252.12(c) 252.15(2m)(c) 252.15(3m)(c)
<b>Mental Health</b>	< 14 Years	No	No, unless the minor is in danger or subject to abuse/neglect.	WI Statutes: 51.14, 51.61(6), 51.30(5)(a) & (b), 51.30(4)(b) (20)
	≥ 14 Years	Yes – the minor may consent to the release of confidential information in court or treatment records without the consent of the minor’s parents/legal guardian. The parent may also authorize disclosure.	No, unless developmentally disabled or the minor is in danger or subject to abuse/neglect.	
<b>Newborn Care (Parent a Minor)</b>	< 18 Years	Yes, once a pregnant minor has delivered a child, she becomes the parent of the minor child. Although a minor herself, the mother becomes the legally authorized “adult”	Yes, the minor parent must authorize access to the newborn’s PHI to her parent, guardian or legal representative.	WI Statutes: §146.81-84;

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Type of Care	Age of Minor	May the Minor Consent to Disclosure of PHI Without Parental/Guardian Consent	May the Minor Deny Parental/Guardian or Legally Authorized Representative Access to PHI	Citation/Reference
		for her minor child; however, without further legal authority, she continues to be a minor with respect to her own records and the authorization of her parent, guardian or legal representative is required unless she is deemed emancipated.		
<b>Pregnancy Care</b>	<18 Years	The condition of pregnancy does not in and of itself provide a minor with statutory rights of an adult in regard to access and disclosure of health records. There is a body of constitutional law that has been interpreted to allow pregnant minors (especially mature minors) to refuse to allow parents to access their records. <sup>11</sup> <i>Each organization will have to evaluate and determine its response to these types of requests.</i>		WI Statutes 146.81(5), 146.82(1), 48.981(2m)(a) 48.981(2m)(b)(2)
<b>Rape or Sexual Assault/Abuse</b>  <i>NOTE: WI Statute for Reporting Child Abuse: 48.981(7)(a)(3m)</i>	< 18 Years	No.	No, unless the minor is in danger or subject to abuse/neglect.	WI Statutes 146.81-84 48.981(2m)(a) 48.981(2m)(b)(2)  45 CFR §164.502(g)(5).
<b>Sexually Transmitted Diseases:</b>  "Sexually transmitted disease" means syphilis, gonorrhea, Chlamydia and other diseases the DHFS includes by rule.	<18 Years	No.	No, unless the minor is in danger or subject to abuse/neglect.	WI Statutes: 252.11(1m); 146.81-84 48.981(2m)(a) 48.981(2m)(b)(2)  45 CFR §164.502(g)(5).

Parental, Legal Guardian or Other Legally Authorized Representative Access:

1. A parent, legal guardian or other legally authorized representative has the right to access a minor's PHI on behalf of the minor, even where the parent or guardian's consent was not required for treatment, unless
  - A. The statutes provide protection from access to the minor's PHI;
  - B. The parent has been denied periods of physical placement with the minor; or
  - C. In the case of developmentally disabled minors aged 14 or older, the minor requests no disclosure of their mental health records.

<sup>11</sup> See Note 9.

**Based on Final HIPAA Security Rule & HITECH Final Rules (03/26/2013)**

2. Notwithstanding the above, a healthcare provider may limit disclosure of PHI to a minor's parent, legal guardian or other legally authorized representative if they have a reasonable belief that the minor has been or may be subjected to domestic violence, abuse, or neglect by the personal representative, that treating the person as a personal representative could endanger the individual, or, if in the exercise of professional judgment, they decide that it is not in the best interest of the individual to treat the person as the minor's personal representative.
3. The parent/guardian right of access terminates when the minor becomes emancipated or reaches the age of 18.<sup>12</sup> If doubt exists regarding emancipation, parental authorization should be secured in addition to the authorization of the minor. Once a minor becomes emancipated, or reaches the age of majority, the individual has the right to access and authorize disclosure of PHI. This includes access to, and disclosure of information created while the individual was a minor.

**Other Minors Issue:**

1. The PHI of minors prior to an adoption is not available for disclosure by the healthcare provider. Requests for access to the PHI of a minor prior to an adoption shall be referred to the State of Wisconsin Adoption Records Search Program. Requests for PHI post-adoption shall be processed in accordance with the organization's disclosure of PHI policies.
2. A healthcare provider may disclose a minor's/student's immunization information directly to a school that is required by law to have such proof prior to admitting a minor student, with the oral or written agreement of a parent or guardian.
3. Documentation of disclosure to the individual is required under some Wisconsin laws. To maintain consistency and compliance in practice, it is recommended that the following be documented when disclosing healthcare information to the patient: the time and date of request, the name of the inspecting person and the identity of the records released. s.146.83(3).

**Appendix: Federal Privacy Rule – Access and Denial of Access**

An individual has the right to access their information in all but a limited number of situations, which include:

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<sup>12</sup> If an authorization is signed by a parent, who is the personal representative of the minor child at the time the authorization is signed, the covered entity may rely on the authorization for as long as it is a valid authorization, in accordance with § 164.508(b). A valid authorization remains valid until it expires or is revoked. This protects a covered entity's reasonable reliance on such authorization. The expiration date of the authorization may be the date the minor will reach the age of majority. In that case, the covered entity would be required to have the individual sign a new authorization form in order to use or disclose information covered in the expired authorization form (Federal Register / Vol. 65, No. 250 / Thursday, December 28, 2000 / Rules and Regulations 82651).



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- Psychotherapy notes.
- Information compiled in anticipation of or use in a civil, criminal, or administrative action or proceeding.
- PHI subject to the Clinical Laboratory Improvements Amendment (CLIA) of 1988.
- PHI exempt from CLIA, pursuant to 42 CFR 493.3(a)(2). In other words, PHI generated by 1) facilities or facility components that perform testing for forensic purposes; 2) research laboratories that test human specimens but do not report patient-specific results for diagnosis, prevention, treatment, or the assessment of the health of individual patients; 3) laboratories certified by the National Institutes on Drug Abuse (NIDA) in which drug testing is performed that meets NIDA guidelines and regulations.

In the situations above, the covered entity may deny the individual access without providing an opportunity for review.

A covered entity may also deny an individual access without providing an opportunity for review when:

- The covered entity is a correctional institution or a healthcare provider acting under the direction of the correctional institution and an inmate's request to obtain a copy of PHI would jeopardize the individual, other inmates, or the safety of any officer, employee, or other person at the correctional institution, or a person responsible for transporting the inmate.
- The individual, when consenting to participate in research that includes treatment, agreed to temporary denial of access to PHI created or obtained by a healthcare provider in the course of research, and the research is not yet complete.
- The records are subject to the Privacy Act of 1974 and the denial of access meets the requirement of that law.
- The PHI was obtained from someone other than a healthcare provider under a promise of confidentiality and access would likely reveal the source of the information.

A covered entity may also deny an individual access under the following circumstances, provided that the individual is given a right to have such denials reviewed:

- A licensed healthcare professional has determined that the access is likely to endanger the life or physical safety of the individual or another person.
- The PHI makes reference to another person who is not a healthcare provider, and a licensed healthcare professional has determined that the access request is reasonably likely to cause substantial harm to such other person.
- The request for access is made by the individual's personal representative and a licensed healthcare professional has determined that access is reasonably likely to cause substantial harm to the individual or another person.

When a covered entity decides to deny a request for access, review, or copy, the Information Blocking exceptions are to be used and documented in the patient's medical record. The 21<sup>st</sup> Century Cures Act exceptions are to be used for denying a minor and/or their parent/legal guarding

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access or review of PHI.<sup>13</sup> There are 8 exceptions available for when denying access or review to PHI.

1. Preventing Harm
2. Privacy
3. Content and Manner
4. Security
5. Infeasibility
6. Health IT Performance
7. Licensing
8. Fees

Detailed requirements for denial review are outlined in HHS 45 CFR §164.524.

**References:**

- “Records of Minors,” WHIMA Legal Resource Manual, 2006
- “Minors – Inpatient Admission Rights/AODA Treatment Without Parental Consent, State of Wisconsin, DHFS Website, 2006
- “Clarification of Current Language Regarding Minors to WHIMA,” Susan Manning, JD, July 2005
- “Balancing Patient Rights with Risk Management,” Presentation by Sarah J. Elliott, von Briesen & Roper, s.c., 12<sup>th</sup> Annual Wisconsin Society of Healthcare Risk Management Meeting, September, 2001.
- “Unemancipated Minors Policy,” von Briesen, October, 2002
- “Minors” Consent,” A Physician’s Guide to Wisconsin Health Law, State Medical Society of Wisconsin
- Rock County Human Services Department Statement on General Guidelines for Requests & Disclosures

**Version History:**

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<b>Prepared by:</b>	<b>Reviewed by:</b>	<b>Content Changed:</b>
Julie Fugate, MSW, APSW; Lutheran Social Services of WI and Upper MI, Inc	Chrisann Lemery, MSE, RHIA, CHPS, FAHIMA; Advocate Health, Co-Chair Privacy Networking Group	Added reference to 21 <sup>st</sup> Century Cures Act
Dana DeMasters, RN, MN, CHPS; Liberty Hospital	Becky Kilen-Carter, MS, RHIA, CHPS; Gundersen Health System, Co-Chair Privacy Networking Group	

<sup>13</sup> <https://www.healthit.gov/sites/default/files/2022-07/InformationBlockingExceptions.pdf>

**Previous Versions:**

<b>Date:</b>	<b>Prepared by:</b>	<b>Reviewed by:</b>	<b>Content Changed:</b>
10/01/2020	John Bartell, BSN RN CRCR M. Scott LeBlanc, JD Wendy Ostrander, RHIA Ulla Pinion, CIPP/US		<ul style="list-style-type: none"> <li>Updated references and definitions to align with current HIPAA, HITECH and Wisconsin State Statutory requirements.</li> </ul>
7/19/13	Nancy Davis, MS, RHIA, CHPS Chrisann Lemery, MS, RHIA, CHPS, FAHIMA Kathy Johnson, DHFS	HIPAA COW Privacy Networking Group Co- Chairs	

**Original Version: 1/3/11**

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