

HIPAA PRIVACY BULLETIN

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INTRODUCTION

One of the purposes of the Privacy Rule was to provide individuals with greater access to, and control over, their personal health information. By way of illustration, the Rule authorizes patients to obtain access to their own health records and to request amendments to health information about themselves. The rule also allows patients, within certain limits, to control access to their personal health information. These rights rest with the individual or patient or that patient's "personal representative."

WHO IS CONSIDERED A PERSONAL REPRESENTATIVE?

With respect to an adult or emancipated minor, a covered entity must treat a person as the personal representative of the patient if, under applicable law, that person is authorized to act on behalf of the patient in making health care decisions. This may include a court appointed guardian or an individual with a power of attorney. 45 C.F.R. §164.502(g)(2).

In the case of an unemancipated minor, the parent or person acting *in loco parentis* is treated as the minor's personal representative where that person has the legal authority to control health care decisions with respect to the minor. There are exceptions, however, in which a parent may not be a personal representative with respect to certain health information about a minor child.

WHAT LEGAL RIGHTS DOES THE PERSONAL REPRESENTATIVE HAVE?

Generally, the personal representative has the same legal rights as the individual patient with respect to protected health information within the scope of his or her representation. The patient, of course, may limit the personal representative's authority. The preamble to the Rule provides the example of a representative whose authority is limited to decisions regarding the treatment of cancer. In that case, the representative may act as the individual

may act as the individual only with respect to protected health information relevant to the treatment of cancer. 65 Fed. Reg. at 82500. More commonly, an individual may execute a power of attorney that takes effect only if the individual becomes incapacitated. In such cases, the person holding the power of attorney would not be considered a personal representative of the patient unless, and until the patient became incapacitated.

DOES THE PRIVACY RULE AUTHORIZE MINORS TO BE TREATED WITHOUT PARENTAL CONSENT?

No. The Privacy Rule does not address consent to treatment, nor does it alter state laws with respect to a minor's right to consent to certain treatments.

WHAT ARE THE LIMITATIONS ON A PARENT'S RIGHT TO ACT AS PERSONAL REPRESENTATIVE FOR A MINOR CHILD?

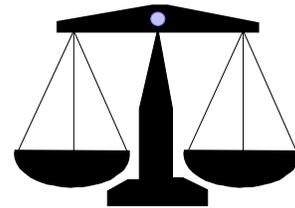
If, under applicable law, the minor does not need the consent of the parent in order to obtain treatment and the minor has not requested that the parent or person acting *in loco parentis* be treated as his or her personal representative, the parent is not the minor's personal representative under the Rule. For example, the Pennsylvania Mental Health Procedures Act, 50 P.S. §7101, *et seq.*, permits a child 14 years of age or older to request inpatient

inpatient mental health treatment. In Pennsylvania, minors of any age may also consent to drug and alcohol treatment. 71 P.S. §1690.112. Since parental consent is not necessary for such treatment to begin, the parent is not the personal representative of the minor with respect to such treatment.

Similarly, if a court orders treatment for the minor, the parent is not the personal representative of the minor with respect to such treatment. Such would be the case, for example, where the parents withhold consent to treatment of the minor child on religious grounds.

Finally, a parent may not be considered the personal representative of the minor child where the parent agrees to a confidential relationship between the minor and the health care provider. 45 C.F.R. §164.502(g)(3). This may be particularly useful where the minor child is undergoing voluntary outpatient psychotherapy, to which the consent provisions of the Pennsylvania Mental Health Procedures Act do not apply.

or may be subjected to domestic violence, abuse or neglect by such person or that treating such person as the personal representative could endanger the individual, the covered entity need not treat that person as the individual's personal representative. 45 C.F.R. §164.502(g)(5). This provision applies to both minor and adult patients. If a covered entity invokes this provision, it should also consider its reporting requirements under state statutes, such as Pennsylvania's Child Protective Services Act. 23 Pa.C.S. §6301, *et seq.*



ATTENTION READERS, the editors of Thomson, Rhodes & Cowie, P.C. *HIPAA Privacy Bulletin* invite you to submit general questions you may have dealing with HIPAA issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to address issues of common interest.

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ARE THERE CIRCUMSTANCES IN WHICH A COVERED ENTITY IS NOT REQUIRED TO DEAL WITH A PERSONAL REPRESENTATIVE ?

If a 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 individuals' personal representative and the covered entity has a reasonable belief that the individual has been or may

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Prior issues are available on request. Please direct inquiries to L. Jane Charlton or William James Rogers, Thomson, Rhodes & Cowie, P.C., Tenth Floor, Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400.