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THE RIGHT OF PARENTS TO ACCESS THEIR CHILDREN'S MEDICAL RECORDS

Occasionally, parents[1] are told by healthcare providers that they may only have limited access—or perhaps no access at all—to their minor child's medical records. Often this occurs when parents seek to use a healthcare provider's online portal to view their teenager's records. But sometimes, parents are even told, inaccurately, that they may not access some or all of their child's medical records without their teenager's express authorization. Scenarios like this can leave parents feeling as if they have been pushed out of their child's treatment relationship. But understanding the law in this area can be helpful. This resource outlines general legal issues pertinent to the general right of parents to access their minor child's medical records in Virginia.

The General Parental Right of Access

In Virginia, as a general rule, healthcare providers are required to make minors' medical records available to their parents if requested.[2] But one statute in particular sparks some confusion on this issue. Virginia Code § 54.1-2969, subsection E, establishes that a minor is deemed an adult specifically for the purpose of "consenting to"—or "accessing or authorizing the disclosure of medical records related to"—care for one of four categories: (1) sexually transmitted diseases or any infectious disease required to be reported (e.g. COVID-19), (2) substance abuse, (3) mental illness or emotional disturbance, or (4) pregnancy and birth control matters.[3]

Regarding medical records, this provision permits minors to authorize their healthcare providers to disclose to others records that are related to these four categories of care. However, if not read carefully, this provision would seem to allow minors or their providers to prevent parental access to their records. But significantly, the language of the statute sets forth no restriction on the general statutory right of parents to access their child's records—regardless of the type of care at issue. That right was not changed by this statute.[4] Moreover, a latter portion of the statute further substantiates this. Subsection K of the statute states: "Nothing in subsection E shall prevent a parent . . . from obtaining" results from certain nondiagnostic drug

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[1] This resource pertains only to parents with full parental rights to unemancipated minors outside the litigation context.

[2] Va. Code § 20-124.6; Va. Code § 32.1-127.1:03(D)–(E); 45 C.F.R. § 164.502(g)(3)(ii).

[3] The pregnancy/birth control category does not apply to sexual sterilization, and it likely does not apply to preparations for, or the occurrence of, an abortion. Va. Code § 16.1-241(W) (generally prohibiting abortions for minors absent parental or judicial involvement).

[4] Similar observations are made in the following: *Rights of Virginia Minors Under HIPPA*, CENTER FOR ETHICAL PRACTICE, https://centerforethicalpractice.org/ethical-legal-resources/virginia-legal-information/legal-opinions-rights-virginia-minors/rights-of-virginia-minors-under-hipaa-legal-opinion-re-consent-and-disclosure/ (last visited Mar. 13, 2023); *Teen Health Guide*, LEGAL AID JUSTICE CENTER 10 (Oct. 2011), https://www.justice4all.org/wp-content/uploads/2013/05/45513-TeenHealthGuid1.pdf.

tests or "a minor's other health records." Though not yet addressed in any Virginia court opinions to date, subsection K arguably only further clarifies what already was the case under subsection E: although minors have authority to consent to certain categories of care and to access or authorize the disclosure of records for care in those categories, that in itself, does not remove the general right of parents to access their minor children's medical records regardless of what category of care the records may address.

"Substantial Harm" Exception

There is an exception to the general right of parents to access their children's medical records. If the healthcare provider believes that parental review of a minor's records would be reasonably likely to cause the minor or another person substantial harm, and the provider notes this belief in the minor's medical records, then the healthcare provider may withhold those records from the requesting parent.[5] But in withholding records on this basis, in response to a valid record request, the provider must inform the parent that it has done so and that the parent may have that determination reevaluated by another healthcare provider.[6]

Reevaluating Whether the Substantial Harm Exception Applies

Healthcare providers only need to meet a low threshold to withhold records based on a reasonable likelihood of substantial harm. The decision is made solely as "an exercise of his professional judgment."[7] But when a healthcare provider withholds records in this fashion, a parent may have that determination reevaluated by taking one of two steps. First, the parent may designate, in writing, a healthcare provider of their own choosing, "whose licensure, training and experience relative to the [minor's] condition are at least equivalent" to that of the first healthcare provider, who could then "make a judgment as to whether to make the health record available to the [parent]." This review would be undertaken at the parent's own expense. Or second, the parent may, in writing, request that the healthcare provider who withheld the requested records designate a provider of similar background to review the decision. This review would be undertaken at the expense of the healthcare provider that withheld the records.[8] But of note, this second method of revaluation involves an inherent conflict of interest which could lessen the objectivity desired for such a review. Nonetheless, if the reviewing provider determines that the withheld records should be disclosed, that assessment controls.[9]

[5] Va. Code § 54.1-2969(K); Va. Code § 20-124.6(B); Va. Code § 32.1-127.1:03(F).

[6] Va. Code § 32.1-127.1:03(E)–(F).

[7] Va. Code § 20-124.6(B).

[8] Va. Code § 20-124.6(B); Va. Code § 32.1-127.1:03(F).

[9] Va. Code § 32.1-127.1:03(F); *Sherfey v. Cushing*, 103 Va. Cir. 285, 294 (Fairfax 2019).

Parental Access to a Healthcare Provider's Online Medical Records Portal

What complicates this issue is the use of online portals for accessing medical records. Currently, the law on whether parents have a right to access their minor child's records online—which involves numerous state and federal statutes and regulations—is not settled.[10] And the fact that some records may be withheld only further complicates the issue. Given the substantial harm exception, one could imagine that some healthcare providers may find it difficult to make all of a child's records available for parental access via an online portal while ensuring that no aspect of those records relate to information the provider is statutorily required to withhold. Avoiding such difficulties, some providers (e.g. UVA Health Systems) bar parents from accessing their teenager's records online altogether unless the teenager expressly authorizes parental access.

But although healthcare providers often disallow parental access to teenager's medical records online unless the teenager consents, generally healthcare providers still must give parents access to their teenager's records *in some form* (aside from records that fit the "substantial harm" exception) regardless of whether the teenager consents. To make this possible, some healthcare providers require parents to request their child's medical records in a non-online format, such as a request for paper records. But notably, not all healthcare providers are forthcoming about this option. Sometimes parents are told, inaccurately, that they cannot access their teenager's records at all without their teenager's authorization. So, when instructed in this fashion, parents should know that they indeed may request access to their teenager's records in a non-online format without their teenager's permission.

Summary

Parents in Virginia have a general right to access their minor children's medical records. But the law is currently unsettled regarding whether parents have a right to do so via a healthcare provider's online portal. Given the statutory provision for certain records be withheld, some healthcare providers only permit parents to access their teenager's medical records online with the teenager's consent. So, when seeking their teenager's records, ordinarily parents should simply secure their teenager's authorization to access their records online. But if doing so is infeasible, parents may still request that the healthcare provider give them copies of the teenager's medical records in a non-online format, such as paper.

In response to a parent's request for records, a health care provider may withhold records the provider believes would risk substantial harm to the minor or someone else. But that decision can be challenged. Parents may have a comparable, outside provider review the withheld records to reevaluate whether those records indeed should be withheld.

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[10] A full discussion of this aspect of law is beyond the scope of this resource. But of note, on April 5, 2021, regulations connected to the federal law entitled the 21st Century Cures Act took effect requiring certain healthcare providers to make medical records available to patients online. *See generally* https://www.healthit.gov/topic/information-blocking. But while these requirements prohibit certain access restrictions, called "information blocking," it is unclear if this prohibition gives parents a right to access their teenager's records online. *See* Alexander Dworkowitz, *Provider Obligations for Patient Portals Under the 21st Century Cures Act*, HEALTHAFFAIRS (May 16, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220513.923426/.