

Minor Consent, Confidentiality, and Reporting Child Sexual Abuse:

A Guide for Title X Family Planning Providers in Hawai'i

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February 2011
Second edition



This publication was created for the **Center for Health Training** by the **National Center for Youth Law**.¹ Funding for this manual as well as the first edition (published in 2004) was provided by the Center for Health Training, Oakland, CA through DHHS Office of Population Affairs Grant #FPTPA090026.

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The Center for Health Training is the Title X Regional Training Center in Federal Health and Human Services Region IX. Founded in 1977, the Center for Health Training has regional offices in Oakland, California; Seattle, Washington; and Austin, Texas. In addition to serving Title X programs, it offers training and technical assistance to agencies that deliver a wide variety of health care and related services to underserved populations, especially women and children.

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Disclaimer: This manual provides information. It does not constitute legal advice or representation. For legal advice, readers should consult their own counsel. This manual presents the state of the law as of October 2010. While we have attempted to assure the information included is accurate as of this date, laws do change, and we cannot guarantee the accuracy of the contents after publication.

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Suggested citation: R. Gudeman, *Minor Consent, Confidentiality and Reporting Child Sexual Abuse: A Guide for Title X Family Planning Providers in Hawai'i* (Center for Health Training: Oakland, 2nd ed. 2011).

¹ **Acknowledgements:** NCYL sincerely thanks Christiana Macfarlane, J.D., NCYL; Sara Madge, J.D., NCYL; and Marsha Gelt, MPH, Center for Health Training, for their contributions to this manual.

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I. INTRODUCTION

The Title X Family Planning program is part of the federal Public Health Service Act. “Title X is the only federal grant program dedicated exclusively to providing individuals with comprehensive family planning and related preventive health services. The Title X program is designed to provide access to contraceptive services, supplies and information to all who want and need them,” including adolescents.²

Agencies that receive Title X funding must comply with federal Title X regulations, including regulations on consent to care and confidentiality. Recipients also must comply with applicable state law, including mandatory child abuse reporting laws. Title X recipients sometimes have questions about their legal obligations regarding consent, confidentiality and child abuse reporting when providing services to adolescent patients.

This document is intended as a legal resource for Title X grantees, delegate agencies and their legal counsel. The document provides an overview of the pertinent federal and state medical consent, confidentiality and child abuse reporting laws that apply when adolescents seek family planning services in a Title X funded agency. The document does not address the confidentiality and reporting laws that may apply in other service settings, such as schools, or with other patient populations. The document also does not address other factors that clinics should take into account in developing confidentiality and reporting policy. For this reason, the document should be used as a reference only and not as a best practice or provider guide.

II. GENERAL AGE OF CONSENT INFORMATION

What is the age of majority/minority?

The age of majority in Hawaii is 18. Haw. Rev. Stat. § 577-1.

What is the age of consent for sexual activity?

While no statute specifically establishes an age at which a minor legally may consent to sexual activity, there can be criminal penalties for consensual sexual activity with a minor less than 16 years old, depending on the age of the minor and the age of the minor’s sexual partner at the time of the activity. See Haw. Rev. Stat. §§ 707-730, 707-732.

What is the age of consent for medical care?

An individual usually can consent for his or her own health care beginning at

² Excerpted from the U.S. Department of Health and Human Services, Office of Population Affairs description of the Title X program. Available at: <http://www.hhs.gov/opa/familyplanning/index.html>

majority. In addition, minors may consent for their own health care in certain situations. The following sections provide examples of these situations.

III. TITLE X: Overview of Consent and Confidentiality Rules

What laws must a Title X funded provider follow?

When providing Title X funded care, health care providers must follow federal Title X law and regulations. *See* 42 U.S.C. §300; 42. C.F.R. §59.1. In addition, the providers must follow applicable state and federal law to the extent possible. If a state law conflicts with a Title X regulation, the Title X regulation preempts the state law if the state law would limit access or eligibility to the services provided through Title X.³

Who may consent for Title X funded family planning services on behalf of a minor patient?

The minor and only the minor. Federal Title X law and regulations establish special consent rules for services funded through Title X. In short, Title X funded services must be made available to all adolescents, regardless of their age. *See* 42 U.S.C. § 300(a); 42 C.F.R. § 59.5(a)(4). Courts have held that this rule prohibits implementation of any state law to the contrary, even if the state law explicitly requires parental consent or notification for the same service.⁴ Thus, minors of any age may consent to services on their own behalf when those services are funded in full or in part by Title X monies, and Title X service provision cannot be conditioned on parent consent or parent notification.

What is the confidentiality rule for Title X information?

The Title X regulations require Title X funded clinics to keep confidential “all information as to personal facts and circumstances obtained by the project staff” about patients. The regulations prohibit the clinics from releasing this personal information unless (1) the clinic has written authorization for the release, (2) the release is necessary to provide services to the patient, or (3) state or federal law requires the release. (*See the next questions in this section for more information on these exceptions.*) The regulations also require that clinics implement “appropriate safeguards for confidentiality.” 42 C.F.R. § 59.11.⁵ In addition to the Title X

³ *See Planned Parenthood Federation v. Heckler*, 712 F. 2d 650, 663-664 (D.C. Cir. 1983)(“[U]nder the Supremacy Clause of the Constitution states are not permitted to establish eligibility standards for federal assistance programs that conflict with the existing federal statutory or regulatory scheme.”); *Planned Parenthood Assoc. of Utah v. Matheson*, 582 F. Supp. 1001, 1006 (D. Utah 1983); *see also County of St. Charles v Missouri Family Health Council*, 107 F.3d 682 (8th Cir. 1997); *Does 1-4 v. Utah Dept. of Health*, 776 F.2d 253 (10th Cir. 1985); *Doe v. Pickett*, 480 F. Supp. 1218, 1220-1221 (D.W.Va. 1979).

⁴ *County of St. Charles v Missouri Family Health Council*, 107 F.3d 682 (8th Cir. 1997), *reh. den.* 1997 U.S. App. LEXIS 6564, *cert. den.* 522 U.S. 859 (1997); *see Does 1-4 v. Utah Dept. of Health*, 776 F.2d 253 (10th Cir. 1985); *Planned Parenthood Assoc. of Utah v. Matheson*, 582 F. Supp. 1001, 1006 (D. Utah 1983); *Doe v. Pickett*, 480 F. Supp. 1218, 1220-1221 (D.W. Va. 1979).

⁵ 42 C.F.R. § 59.11(“[a]ll information as to personal facts and circumstances obtained by the project staff

regulations, clinics also must follow applicable federal and state confidentiality law to the extent possible. As just one example, if the clinic is a “covered entity” subject to HIPAA, the clinic must follow the HIPAA Privacy Rule as well as Title X regulations. (See Section IV for a discussion of HIPAA.)

Who may authorize disclosure of Title X funded service information?

The minor patient and only the minor patient. Federal Title X regulations state that the “individual” must sign the authorization to release information. 42 C.F.R. § 59.11. This means that the patient, even if he or she is a minor, must sign any authorization to release Title X related medical information. No one else has the authority to sign the release.

What disclosures are permitted without an authorization?

The Title X regulations prohibit clinics from releasing information unless the clinic has written authorization for the release, the release is necessary to provide services to the patient, or state or federal law *requires* the release.⁶ If a state law allows but does not require release of information, then the clinic cannot release the information without patient authorization. There are a few state laws that *require* release of health information in certain situations. Here are examples:

- ***Mandated Child Abuse Reporting***
Hawaii’s child abuse reporting law requires certain named professionals to make child abuse reports and requires release of certain otherwise protected medical information as part of the report. (See section (V) below for more detail.) Because the reporting law requires release of the relevant medical information at that point, Title X providers who are mandated reporters must comply with the child abuse reporting law. See Haw. Rev. Stat. § 350-1.1(a&d).
- ***Reporting Certain Diseases and Conditions to Department of Health***
State law requires certain health professionals to report certain diseases and conditions declared to be communicable or dangerous to the department of health. Because this is a mandated disclosure, Title X providers must comply. Haw. Rev. Stat. § 325-2; see 45 C.F.R. 164.512.
- ***Other Required Disclosures***
Other federal and state laws may require other disclosures. Providers should consult legal counsel for more information regarding these laws.

about individuals receiving services must be held confidential and must not be disclosed without the individual’s documented consent, except as may be necessary to provide services to the patient or as required by law, with appropriate safeguards for confidentiality. Otherwise, information may be disclosed only in summary, statistical, or other form which does not identify particular individuals”).

⁶ See 42 C.F.R. § 59.11(allowing Title X funded clinics to disclose information “as required by law.”)

Do parents have a right to information regarding Title X services provided to minor patients?

No. While Title X requires that grantees encourage family participation in Title X projects to the extent practical,⁷ health care providers cannot disclose Title X service information to parents without the minor's written consent. The Title X regulations require Title X funded clinics to keep all client information confidential in most cases unless the clinic has written authorization for the release from the patient or the release is otherwise required by law. 42 C.F.R. § 59.11.⁸ No federal or state law requires disclosure of Title X funded service information to parents.⁹ Thus, if a minor receives Title X funded services, records of that service cannot be disclosed to parents without obtaining the minor's documented consent.

IV. GENERAL MEDICAL CARE: Overview of medical consent and confidentiality rules

What laws control medical consent and confidentiality generally in Hawai'i?

There are a number of federal and state laws regarding consent to treatment and confidentiality of medical information and they apply depending, among other things, on the type of service provided, the funding source, and the agency or clinician providing the service.

Who may consent for a minor's medical care in Hawaii?

Usually a parent or guardian must consent for health care on behalf of a minor. However, there are exceptions in federal and state law that allow or require minors or others to consent for treatment based on the funding source for the service, minor's status, or the type of services being sought. The following describes many of the relevant minor consent exceptions in Hawaii law.

When can minors consent for their own care?

In addition to the right to consent to Title X services, Hawaii state law grants minors the right to consent to their own health care, irrespective of funding source, in the following situations:

⁷ 42 U.S.C. § 300(a) ("To the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection.").

⁸ 42 C.F.R. § 59.11 ("[a]ll information as to personal facts and circumstances obtained by the project staff about individuals receiving services must be held confidential and must not be disclosed without the individual's documented consent, except as may be necessary to provide services to the patient or as required by law, with appropriate safeguards for confidentiality.").

⁹ If any state or federal rule is passed that requires parent notification regarding Title X services, providers should consult legal counsel for advice because Title X's confidentiality protections may preempt or otherwise prohibit implementation of the new rule. See e.g. *Planned Parenthood v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983).

When minors are:

- ***Married or Divorced Minor***

A minor “who has been married” is emancipated and has “all the rights, duties, privileges, and responsibilities provided...a person...of majority.” Haw. Rev. Stat. § 577-25.

When minors seek the following medical services:

- ***Abortion***

No statute or regulation requires parental consent or notification for abortion services in Hawaii.

Article I, Section 6 of the Hawaii Constitution grants the people of Hawaii a right to privacy. This section was included in the Hawaii Constitution in part to ensure freedom of choice. In other states, similar provisions of those states’ constitutions have been interpreted to allow minors the right to make confidential independent decisions about abortion. *See, e.g., American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997).

- ***Alcohol or Drug Abuse: Counseling***

For minors of any age, “[t]he consent to the provision of furnishing counseling services for alcohol or drug abuse by the counselor when executed by a minor *who is or professes to suffer from alcohol or drug abuse*, shall be valid and binding as if the minor had achieved his majority; that is, the minor who is or professes to suffer from alcohol or drug abuse, shall be deemed to have, and shall have the same legal capacity, the infancy of the minor and any contrary provisions of law notwithstanding, and such consent shall not be subject to later disaffirmance by reason of such minority; and the consent of no other person (including but not limited to a spouse, parent custodian, or guardian) shall be necessary in order to authorize such counseling services to such a minor.” Haw. Rev. Stat. § 577-26(e).

- ***Family Planning***

For services funded in full or in part by Title X, the minor must consent. (*See section (III) above.*) For family planning services not funded by Title X, state law generally applies; however, if services were funded by other federal programs, such as Medicaid, other consent rules may apply.

Hawaii state law says that minors ages 14 through 17 may consent to family planning services. For minors ages 14 through 17, “[t]he consent to the provision of medical care and services by public and private hospitals or

public and private clinics... when executed by ...a minor seeking family planning services shall be valid and binding as if the minor had achieved his or her majority...and the consent of no other person or persons ...shall be necessary in order to authorize such hospitals or such clinics or medical care and services provided by a physician licensed to practice medicine, to such a minor." Haw. Rev. Stat. § 577A-2.

For this purpose, "'family planning services' includes counseling and medical care designed to facilitate family planning." Haw. Rev. Stat. § 577A-1. "Medical care and services" includes the diagnosis, examination and administration of medication to a minor. It also shall include counseling. (*See Mental Health.*) This provision does not allow a minor to consent to surgery or abortion. Haw. Rev. Stat. § 577A-1. (*But see "Abortion" above.*)

- ***HIV/AIDS Testing***

For an HIV test funded in full or in part by Title X, the minor must consent to the HIV / AIDS test. (*See section (III) above.*) In most other situations, state law applies.

State law says that providers must have the subject's informed oral or written consent, except in a few circumstances. For example, informed consent is not required when the patient is unable to give consent and the treating physician determines that determining HIV status is necessary to make a diagnosis or to determine the best course of treatment. A blood bank, plasma center or any other public or private agency, institution or individual (except health care providers) must obtain informed written consent for HIV testing. Informed consent is not required when courts order a test of juveniles charged with or convicted of certain crimes. Haw. Rev. Stat. § 325-16.

- ***Mental Health Counseling***

For minors ages 14 through 17, when a minor seeks medical care and services for *venereal disease, pregnancy or family planning*, the medical care "shall include individual counseling for each minor patient by a physician licensed to practice medicine." Haw. Rev. Stat. § 577A-4. "Such counseling shall seek to open the lines of communication between parent and child." Haw. Rev. Stat. § 577A-4(b).

- ***Pregnancy Care***

For minors ages 14 through 17, "[t]he consent to the provision of medical care and services by public and private hospitals or public and private clinics... when executed by a female minor *who is or professes to be pregnant*...shall be valid and binding as if the minor had achieved his or

her majority...and the consent of no other person or persons ...shall be necessary in order to authorize such hospitals or such clinics or medical care and services provided by a physician licensed to practice medicine, to a minor." Haw. Rev. Stat. § 577A-2.

Medical care and services includes the diagnosis, examination and administration of medication to a minor. It also shall include counseling. This provision does not allow a minor to consent to surgery or abortion. Haw. Rev. Stat. §§ 577A-1, 577A-4. (*But see "Abortion" above.*)

- ***Sexually Transmitted Disease (STD): Diagnosis and Services***

For STD services funded in full or in part by Title X, the minor must consent to the service. (*See section (III) above.*) In most other situations, state law applies.

For minors ages 14 through 17, "[t]he consent to the provision of medical care and services by public and private hospitals or public and private clinics, when executed by ...a minor *who is or professes to be afflicted with a venereal disease...* shall be valid and binding as if the minor had achieved his or her majority...and the consent of no other person or persons ...shall be necessary in order to authorize such hospitals or such clinics or medical care and services provided by a physician licensed to practice medicine, to a minor." Haw. Rev. Stat. § 577A-2.

Medical care and services includes the diagnosis, examination and administration of medication to a minor. It also shall include counseling. (*See "Mental Health" above.*) This provision does not allow a minor to consent to surgery or abortion. Haw. Rev. Stat. §§ 577A-1, 577A-4.

- ***X-rays and Diagnostic Exam of Suspected Abuse/Violence***

"Any health professional... physician... nurse... social worker...who has before the person a child the person reasonably believes has been harmed, shall make every good faith effort to take or cause to be taken color photographs of the areas of trauma visible on the child. If medically indicated, such person may take or cause to be taken x-rays of the child or cause a radiological or other diagnostic examination to be performed on the child." Haw. Rev. Stat. §350-1.5.

Who is financially liable for minor consent services?

Title X funded services are provided on a sliding fee scale, with services available for free to some. A minor receiving services funded by Title X may be assessed a fee based on a sliding scale according to the minor's income.

For non-Title X funded care, “if a minor consents to receive medical care and services, the spouse, parent, custodian, or guardian of the minor patient shall not be liable for the legal obligations resulting from the furnishing of medical care and services. ... A minor who consents to the provision of medical care and services under this section shall assume financial responsibility for the costs of such medical care...” Haw. Rev. Stat. § 577A-4; *see also* Haw. Rev. Stat. § 577-26(b). However, no action to recover debt can commence against a minor until the minor has reached the age of majority. Haw. Rev. Stat. § 577A-5.

What laws protect the confidentiality of health information in Hawaii?

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule protects the confidentiality of health information in Hawaii. 45 C.F.R. Parts 160 and 164. Hawaii had its own general health privacy law; however, the state legislature repealed it, in part because the legislature felt there was “little support for a Hawaii Medical Privacy law in light of the adoption of [HIPAA].”¹⁰ Hawaii does have some confidentiality statutes that apply in limited circumstances to protect specific records. Other federal laws and regulations, such as Title X, also may apply in certain circumstances, depending on, for example, the type of service provided or the funding source for the service.

Health care providers must follow both the federal HIPAA Privacy Rule and state law. In general, if the federal and state laws conflict, and the state law provides greater confidentiality protection than HIPAA, providers must follow state law. When HIPAA provides greater protection, providers must follow HIPAA.¹¹

What is the confidentiality rule under HIPAA?

HIPAA limits “covered entities” from disclosing what HIPAA defines as “protected health information” (PHI).¹² A health care provider can only disclose PHI if the provider either has a signed authorization allowing for the disclosure, or a specific exception in federal or state law allows or requires the disclosure. *See* 45 C.F.R. § 164.502.

Who may authorize disclosure of a minor’s protected health information?

Under HIPAA, a parent or guardian usually must sign the authorization to release information. 45 C.F.R. §§ 164.502(g)(1); (g)(3); *see* 45 C.F.R. § 164.508(c)(vi). However, if the minor consented for his or her own care, the

¹⁰ H.B No. 201 (2001)(repealing newly enacted laws relating to the privacy of health care information).

¹¹ 45 C.F.R. § 160.203.

¹² 45 C.F.R. § 160.103 (defining “protected health information,” “health information,” and “individually identifiable health information”). PHI includes oral communications as well as written or electronically transmitted information, created or received by a health care provider; that relate to the past, present or future physical or mental health or condition of an individual; and either identify the individual or can be used to identify the individual patient.

HIPAA regulations state that the minor must authorize disclosure of the related records. 45 C.F.R. §§ 164.502(g)(3)(i). The minor also must sign the authorization in a few other situations, for example, if a court consented for the minor's medical care pursuant to state law or the parent or guardian assented to an agreement of confidentiality. *Id.*

Other laws and regulations contain different rules regarding who must sign an authorization to release records, and these rules may apply depending on the type of service provided or the funding source for the service, among other things. For example, as noted above, if the records relate to services funded under the federal Title X family planning program, Title X regulations dictate that the minor sign any authorization to release medical information.

What disclosures are permitted without an authorization?

HIPAA and state law contain several exceptions that allow or require providers to disclose medical information in certain circumstances without need of a written authorization. In all cases, disclosure must be limited to the requirements of the law. *See* 45 C.F.R. §164.512(a)(1). Examples of these exceptions include the following:

- ***Reporting Certain Diseases and Conditions to Department of Health***
State law requires certain health professionals to report certain diseases and conditions declared to be communicable or dangerous to the department of health. HIPAA permits providers to comply with this state law. Haw. Rev. Stat. § 325-2; *see* 45 C.F.R. 164.512.
- ***For Treatment, Payment and Health Care Operations***
HIPAA permits a health care provider to use or disclose protected health care information for treatment, payment and health care operations, as defined by HIPAA. 45 C.F.R. § 164.502; *see* 45 C.F.R. § 164.506.
- ***Mandated Child Abuse Reporting***
Hawaii's child abuse reporting law requires certain named professionals to make child abuse reports and requires release of certain medical information as part of the reporting process. Haw. Rev. Stat. § 350-1.1(a&d). (*See section (V) below for more information on reporting*). Because the reporting law requires release of the relevant medical information at that point, the HIPAA regulations allow health care providers to comply with this law. *See* 45 C.F.R. § 164.512(b)(ii).
- ***Reporting Certain Wounds***
State law requires reporting certain wounds inflicted by violence. "Every physician... and surgeon attending or treating a case of knife wound, bullet wound, gunshot wound, powder burn, or any injury that would seriously maim, produce death, or has rendered the injured person unconscious, caused by the use of violence or sustained in a suspicious or unusual

manner,... or whenever the case is treated in a hospital, clinic, or other institution, the manager, superintendent, or person in charge thereof, shall report the case... to the chief of police of the county within which the person was attended or treated..." Haw. Rev. Stat. § 453-14. HIPAA regulations allow health care providers to comply with this law. See 45 C.F.R. § 164.512.

- ***Other Disclosures***

There are additional exceptions allowing or requiring disclosures, even absent authorization. Please see HIPAA and other relevant law and consult legal counsel.

May parents access health information regarding services provided to their children?

Under HIPAA, parents and legal guardians generally have a right to control access to their child's medical information. This includes the right to inspect children's records. 45 C.F.R. §§ 164.502(g)(1); (g)(3); (a)(1)(i); (a)(2)(i);164.524.

However, when a minor consents for his or her own care, the HIPAA regulations state that a parent's right to inspect the related medical records depends on state law. 45 C.F.R. § 164.502(g)(3)(ii). If there is nothing in state or other law, including case law, specifying whether or not a parent may have access to the information, a provider may provide or deny access to a parent or guardian, as long as that decision is consistent with state or local law and the decision is made by a licensed health care professional, in the exercise of professional judgment. 45 C.F.R. §§ 164.502(g)(3)(ii)(C).

Other laws and regulations contain different rules regarding parent access, and these rules may apply depending on, for example, the type of service provided or the funding source for the service. For example, as noted above, if the records relate to services funded under the federal Title X family planning program, parents cannot access information without the minor patient's consent.

Do parent have rights to information from the following records?

- ***General "Parent Consent" Health Records***

Under HIPAA, parents and guardians usually have the right to inspect their children's records when the parents consented to the care. 45 C.F.R. §§ 164.502(g)(1); (g)(3); (a)(1)(i); (a)(2)(i);164.524. There is an exception to this rule, however. Health care providers who are covered under the HIPAA Privacy Rule may refuse to provide parents access to a minor's medical records, even when parents otherwise would have a right of access, if:

- (1) The providers have a "reasonable belief" that:
 - (A)The minor has been or may be subjected to domestic violence, abuse or neglect by the parent, guardian or other giving consent;

or

(B) Treating such person as the personal representative could endanger the minor; and:

(2) The provider, in the exercise of professional judgment, decides that it is not in the best interest of the minor to give the parent, guardian or other such access.

45 C.F.R. § 164.502(g)(5).

Providers should consult with their legal counsel before using their discretion to deny access to records under this law.

- ***Drug and Alcohol Abuse Treatment Records***

Federal regulations establish special protections for substance abuse treatment records. Providers that meet certain criteria must follow the federal rule.¹³

For those providers who must comply with federal rules, the federal regulations prohibit disclosing any information to parents without a minor's written consent if the minor acting alone under applicable state law has the legal capacity to apply for and obtain alcohol or drug abuse treatment. 42 C.F.R. § 2.14. There is one exception: A provider or program may share with parents if the individual or program director (if it is a program) determines the following three conditions are met: (1) that the minor's situation poses a substantial threat to the life or physical well-being of the minor or another; (2) that this threat may be reduced by communicating relevant facts to the minor's parents; and (3) that the minor lacks the capacity because of extreme youth or a mental or physical condition to make a rational decision on whether to disclose to her parents. 42 C.F.R. §2.14.

- ***Family Planning Records (other than Title X)***

For agencies delivering services funded in full or in part by Title X, Title X confidentiality rules apply. (*See section (III) above.*) In most other cases, state law applies. State law reads: "Public and private hospitals, or public and

¹³ Federal confidentiality law applies to any individual, program, or facility that meets the following two criteria:

1. The individual, program, or facility is federally assisted. (Federally assisted means authorized, certified, licensed or funded in whole or in part by any department of the federal government. Examples include programs that are: tax exempt; receiving tax-deductible donations; receiving any federal operating funds; or registered with Medicare.) 42 C.F.R. § 2.12;

And:

2. The individual or program:
 - 1) Is an individual or program that holds itself out as providing alcohol or drug abuse diagnosis, treatment, or referral; OR
 - 2) Is a staff member at a general medical facility whose primary function is, and who is identified as, a provider of alcohol or drug abuse diagnosis, treatment or referral; OR
 - 3) Is a unit at a general medical facility that holds itself out as providing alcohol or drug abuse diagnosis, treatment or referral. 42 C.F.R. § 2.11; 42 C.F.R. § 2.12.

private clinics or physicians... may, at the discretion of the treating physician, inform the spouse, parent, custodian or guardian of any minor of the provision of medical care and services to the minor or disclose any information pertaining to such care and services after consulting with the minor patient to whom such care and services have been provided..." Haw. Rev. Stat. § 577A-3.

Records of family planning services funded by other federal programs, such as Medicaid, may be protected under separate federal confidentiality rules. Constitutional law also may provide a separate basis for providers to treat minors' information confidentially. Providers of family planning services in non-Title X funded programs should consult with their legal counsel for further information.

- ***HIV/AIDS Records***

For agencies delivering services funded in full or in part by Title X, Title X confidentiality rules apply. (See section (III) above.) In most other cases, state law applies. Public and private medical providers are obligated to keep records indicating that a minor has HIV, AIDS-related complex, or AIDS strictly confidential. There are only a few exceptions which allow disclosure, -- for example, to the department of health, other medical providers, the patient's insurer for reimbursement for services, the patient's needle sharing or sexual contact, or, in cases involving child abuse, to the department of human services, with a variety of qualifications and limitations. Haw. Rev. Stat. §§ 325-101, 325-16.

- ***Mental Health Counseling Records***

When a minor consented to his or her own mental health counseling, "[p]ublic and private hospitals, or public and private clinics or physicians... may, at the discretion of the treating physician, inform the spouse, parent, custodian or guardian of any minor... of the provision of medical care and services to the minor or disclose any information pertaining to such care and services after consulting with the minor patient to whom such care and services have been provided..." Haw. Rev. Stat. § 577A-3.

- ***Pregnancy Service Records***

For agencies delivering services funded in full or in part by Title X, Title X confidentiality rules apply. (See section (III) above.) In most other cases, state law applies. When a minor consented to her own services, "Public and private hospitals, or public and private clinics or physicians... may, at the discretion of the treating physician, inform the spouse, parent, custodian or guardian of any minor... of the provision of medical care and services to the minor or disclose any information pertaining to such care and services after

consulting with the minor patient to whom such care and services have been provided..." Haw. Rev. Stat. § 577A-3.

- ***Sexually Transmitted Disease Records***

For agencies delivering services funded in full or in part by Title X, Title X confidentiality rules apply. (See section (III) above.) In most other cases, state law applies. When a minor consented to his or her own services, "Public and private hospitals, or public and private clinics or physicians... may, at the discretion of the treating physician, inform the spouse, parent, custodian or guardian of any minor of the provision of medical care and services to the minor or disclose any information pertaining to such care and services after consulting with the minor patient to whom such care and services were provided..." Haw. Rev. Stat. § 577A-3.

Can individuals be held accountable for revealing confidential information outside the exceptions specifically listed in federal or state law?

Yes. If no exception applies that would allow a provider to share information, providers who reveal confidential information may be held accountable. The HIPAA regulations give the United States Department of Health and Human Services the authority to enforce HIPAA confidentiality regulations and to impose sanctions. See 45 C.F.R. § 160.

V. CHILD ABUSE REPORTING REQUIREMENTS

A. Does Title X include child abuse reporting requirements?

The Title X regulations require that providers comply with any applicable mandated abuse reporting law. Title X regulations do not include their own child abuse reporting requirements or alter the following state reporting obligations in any way.

B. Am I a Mandated Reporter?

Who is a mandated reporter?

Under Hawaii law, mandated reporters include the following:
(*Reporters in the health care professions are highlighted in bold.*)

- **Any licensed or registered professional of the healing arts or any health-related occupation who examines, attends, treats or provides other professional or specialized services, including but not limited to physicians, including physicians in training, psychologists, dentists, nurses, osteopathic physicians and surgeons, optometrists,**

chiropractors, podiatrists, pharmacists, and other health-related professionals.

- Employees or officers of any public or private school.
- **Employees of public or private agencies providing social, medical, hospital, or mental health services, including financial assistance.**
- Employees or officers of any law enforcement agency including but not limited to the courts, police departments, department of public safety, correctional institutions, and parole or probation offices.
- Individual providers of child care, or employees or officers of any licensed or registered child care facility, foster home, or similar institution.
- **Medical examiners or coroners.**
- Employees of any public or private agency providing recreational or sports activities.

Haw. Rev. Stat. § 350-1.1(a).

Who is *not* a mandated reporter?

Parents and volunteers are not mandated reporters. Haw. Rev. Stat. § 350-1.1(a).

Can someone report child abuse even if not a mandated reporter?

Yes. Anyone may report child abuse. Haw. Rev. Stat. § 350-1.3.

C. When is a Report Required from a Mandated Reporter?

What are mandated reporters required to report under Hawaii law?

Reporters must make a report when in their professional or official capacity they have reason to believe that child abuse has occurred or that there exists a substantial risk that child abuse or neglect may occur in the reasonably foreseeable future. Haw. Rev. Stat. § 350-1.1(a).

When is the mandated reporter's duty to report triggered under Hawaii law?

Reporters must report whenever they have "reason to believe," based on facts learned in their professional or official capacity, that child abuse has occurred. Confirmation of abuse is not required.

What if a mandated reporter believes child abuse or neglect may occur in the future?

A mandated reporter must make a report if:

- (1) The reporter believes that there is a *substantial risk* that a child will suffer abuse or neglect in the *reasonably foreseeable future*; and
- (2) That belief was developed in the reporter's professional or official capacity.

Haw. Rev. Stat. § 350-1.1(a).

D. What Type of Activity Must Be Reported?

What constitutes abuse or neglect?

For reporting purposes, Hawaii law defines “child abuse or neglect” as acts or omissions that:

- (1) Were caused by a person who (or legal entity which) is in any manner or degree related to the child, residing with the child, or otherwise responsible for the child’s care; and
- (2) Have resulted in harm or any reasonably foreseeable, substantial risk of harm to the child’s physical or psychological health or welfare.

Haw. Rev. Stat. § 350-1.

What are some indications that abusive acts or omissions have occurred?

Haw. Rev. Stat. § 350-1 provides a list of circumstances that indicate child abuse. The list includes but is not limited to:

- (1) When the child exhibits such symptoms as substantial skin bruising or extreme mental distress and the symptoms are not justifiably explained or the explanation is at variance with the degree or type of injury;
- (2) When the child has been “the victim of sexual contact or conduct, including, but not limited to, sexual assault as defined in the penal code, molestation, sexual fondling, incest, or prostitution; obscene or pornographic photographing...; or other similar forms of sexual exploitation”; and
- (3) When the child is not provided in a timely manner with adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision.

Haw. Rev. Stat. § 350-1.

Section 350-1 provides additional examples that reporters should review. The statute explicitly states that this list is for illustrative purposes and other circumstances also may indicate child abuse.

E. What Sexual Activity Must Be Reported?

What sexual acts are reportable as child abuse?

Mandated reporters must report (1) acts or omissions by a person who (or legal entity which) is in any manner or degree related to the child, residing with the child or otherwise responsible for the child’s care (2) that have resulted in harm to a child or put a child at substantial risk of harm. Haw. Rev. Stat. § 350-1.

Hawaii law states that indications that such acts or omissions have occurred include that the child has been the victim of “sexual contact or conduct.” Haw. Rev. Stat. § 350-1.

Under the statute, abusive “sexual contact or conduct” includes, but is not limited to, “sexual assault as defined in the penal code, molestation, sexual fondling, incest, or prostitution; obscene or pornographic photographing...; or other... forms of sexual exploitation.” Haw. Rev. Stat. § 350-1(2).

Is “sexual contact or conduct” between a minor and a person not “responsible for the minor’s care” ever reportable as child abuse?

Yes, sometimes. Mandated reporters must report acts or omissions by a person who is responsible for the child’s care that have resulted in harm to a child or put a child at substantial risk of harm. Haw. Rev. Stat. § 350-1. Hawaii law states that indications that such acts or omissions have occurred include (1) that the child has been the victim of “sexual contact or conduct” as defined in the statute or (2) that the caretaker has not provided adequate care or supervision in a timely manner. Haw. Rev. Stat. § 350-1.

Thus, the statute clearly requires that mandated reporters report when a minor has been the victim of “sexual contact or conduct” perpetrated by a caretaker. The statute also clearly requires that mandated reporters report when a minor has been the victim of “sexual contact or conduct” perpetrated by anyone else, if the minor’s caretaker failed to adequately supervise and protect the minor from this sexual harm.

The statute also can be read to require reports of all “sexual contact or conduct” perpetrated by anyone, even where there is no evidence that the caretaker failed to protect the minor. Although section 350-1 limits the definition of child abuse to only those acts or omissions perpetrated by a caretaker, the statute also states that any “sexual contact or conduct” perpetrated by anyone is evidence on its own of abusive acts or omissions by a caretaker.

There is no guidance from the Hawaii Legislature, Attorney General or courts that clarifies whether section 350-1 should be read to require reports of all “sexual contact or conduct” perpetrated by non-caretakers. For this reason, it is critical that mandated reporters consult legal counsel for assistance in developing a reporting policy on this issue.

For the purposes of the following questions, however, this document assumes that mandated reporters must report all instances of “sexual contact or conduct” as described in the statute, even if caretakers cannot be explicitly linked to the abuse by an “act” or “omission” on their part.

What is reportable “sexual contact or conduct”?

For the purpose of this question, this document assumes that mandated reporters must report all instances of sexual assault as child abuse. However, providers should speak to legal counsel for guidance on this issue, as discussed above.

Hawaii law states that evidence of any of the following indicates reportable child abuse:

- Sexual assault as defined in the penal code
- Molestation
- Sexual fondling
- Incest
- Prostitution
- Obscene or pornographic photographing, or
- Other forms of sexual exploitation

Haw. Rev. Stat. § 350-1.

“**Sexual assault** as defined in the penal code” includes, but is not limited to, the following criminal acts:

- Knowingly subjecting another person to sexual penetration¹⁴ or contact¹⁵ in the absence of consent, or by physical force, use of a dangerous instrument, or an express or implied threat that places a person in fear of public humiliation or bodily injury to the individual or another;
- Knowingly subjecting another person to sexual penetration or contact when that person is suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person's conduct;
- Knowingly subjecting to sexual penetration or contact a person who is temporarily incapable of appraising or controlling the person's conduct as a result of the influence of a substance that the actor knowingly caused to be administered to the other person without the other person's consent;
- Knowingly exposing ones genitals to another person under circumstances in which the actor's conduct is likely to alarm the victim or put him/her in fear or bodily injury constitutes a sexual assault in the fourth degree;
- Certain sexual conduct based on age of minor and/or partner. (*See the following questions for more information*).

¹⁴ Haw. Rev. Stat. § 707-700 (For this purpose, sexual penetration includes vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body.).

¹⁵ Haw. Rev. Stat. § 707-700 (Sexual contact means “any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.”).

Haw. Rev. Stat. §§ 707-700, 707-730, 707-731, 707-732, 707-733.

For more detail on other acts the Hawaii penal code criminalizes as “sexual assault,” see the above referenced statutes and consult legal counsel.

Is sexual activity ever reportable as child abuse based on age alone?

Yes. State law defines “sexual assault” to include certain sexual acts performed with young minors. Assuming mandated reporters must report all instances of sexual assault as child abuse, mandated reporters will have to report some instances of sexual activity based on the age of their patient and/or the age of the other party.

Sexual acts that must be reported as sexual abuse, based solely on the ages of the persons involved, include:

- When someone knowingly engages in sexual penetration¹⁶ with a person who is under 14 years old;
- When someone knowingly engages in sexual contact¹⁷ with a minor under 14 years old or causes the minor to engage in sexual contact;
- When someone knowingly engages in sexual penetration with a minor who is 14 or 15 years old unless the actor is less than five years older than the minor or is legally married to the minor;
- When someone knowingly engages in sexual contact with a minor 14 or 15 years old unless the actor is less than five years older than the minor or is legally married to the minor.

See Haw. Rev. Stat. §§ 350-1.1, 350-1, 707-730, 707-732.

What sexual activity with a minor *does not* require reporting?

Some sexual activity with a minor is not reportable as child abuse. When there is no other sign of abuse or neglect, (*see below*), the following consensual sexual activity is not reportable as child abuse:

- Sexual penetration or sexual contact with a minor who is 14 and a partner who is at least 14 but less than 19 years of age;
- Sexual penetration or sexual contact with a minor who is 15 and a partner who is at least 14 but less than 20 years of age;

¹⁶ Haw. Rev. Stat. § 707-700 (For this purpose, sexual penetration includes vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person’s body or of any object into the genital or anal opening of another person’s body.).

¹⁷ Haw. Rev. Stat. § 707-700 (Sexual contact means “any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.”).

- Any sexual activity between minors 16 years old and older.

See Haw. Rev. Stat. §§ 350-1.1, 350-1, 707-730, 707-732.

Of course, this activity is still reportable if there is any reasonable suspicion that it qualifies as “sexual assault” as defined above. For example, if there is any reasonable suspicion that the sexual activity occurred “in the absence of consent,” then the mandated reporter must report it as child abuse. (*See the definition of reportable sexual assault in the question “What is reportable ‘sexual contact or conduct?’” above for more detail and consult legal counsel*). See Haw. Rev. Stat. §§ 350-1.1, 350-1, 707-730, 707-731, 707-732, 707-733.

For the purposes of child abuse reporting, does a mandated reporter have a duty to try to ascertain the ages of the minor’s partners?

No statute or case obligates providers to ask their minor patients about the age of the minors’ sexual partners.

Does child prostitution or the use of minors in pornography qualify as reportable child abuse?

Yes. Assuming mandated reporters must report all circumstances described in Hawaii Rev. Stat. § 350-1 irrespective of caretaker involvement, mandated reporters must make a child abuse report when they have reason to believe a minor has been or is at substantial risk in the near future of becoming the victim of:

- Prostitution;
- Obscene or pornographic photographing; or
- Other forms of sexual exploitation.

Haw. Rev. Stat. § 350-1.

Section 350-1 does not explicitly define these terms but other state laws may provide guidance to mandated reporters in determining what acts are reportable as child abuse.

For example, Haw. Rev. Stat. § 712-1202 makes prostitution illegal. It states that a person commits prostitution “if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee.” Haw. Rev. Stat. § 712-1200. Other laws make the promotion of prostitution and travel for prostitution illegal. See Haw. Rev. Stat. §§ 712-1201 through 1208.

Several state statutes also criminalize acts related to pornography and the use of minors in other sexual contexts, including trafficking and sexual performances. See, e.g. Haw. Rev. Stat. §§ 712-1210 through 712-1219.5.

Providers should consult legal counsel for assistance in determining what activities qualify as “prostitution”, “obscene photographing” and “sexual exploitation” and should be reported as child abuse.

F. How Does Reporting Work?

To whom should reports be made?

In cases involving suspected child abuse or neglect, the reporter must direct the report to the department of social services or the police. Haw. Rev. Stat. § 350-1.1(a).

How does a reporter make a report?

The reporter should immediately make an oral report to the police or the department of social services. As soon as possible thereafter, the reporter must report in writing to the department. If a police department or the department of public safety is the initiating agency, a written report must be filed with the department for cases that the police or the department of public safety takes further action on or for active cases in the department. Haw. Rev. Stat. § 350-1.1(a), (c).

Within a school, agency or institution, how does a reporter make a report?

If a mandated reporter is a member of any public or private school, agency, or institution, the reporter must immediately report directly to the department of social services or to the police, and also immediately notify the person in charge or his or her delegate about the report. Haw. Rev. Stat. § 350-1.1(b).

What information must be included in a report?

“All written reports shall contain the name and address of the child and the child's parents or other persons responsible for the child's care, if known, the child's age, the nature and extent of the child's injuries, and any other information that the reporter believes might be helpful or relevant to the investigation of the child abuse or neglect.” Haw. Rev. Stat. § 350-1.1(c). The fact that a mandated reporter does not have all required information does not excuse the reporter from making a report.

G. What are the Consequences of the Reporting Decision?

What will the police or department of social services do after I make my report?

The police and department of social services are required to inform each other of any reported child abuse. After receiving a report that a child has been harmed, has been threatened with harm, or faces imminent harm, the department of social services will order whatever investigation it deems appropriate. As part of its investigation, the department may involve law enforcement and may interview the child.

The department will then take what it believes to be the best course of action to resolve the situation. For example, the department may: (1) resolve the matter in an informal manner appropriate to the circumstances; (2) enter into a service plan to maintain the child in the family home or place the child in voluntary foster care; or (3) assume temporary foster custody of the child and file a petition with the court. 2010 Hi. ALS 135, § 11 (SB 2716).

Will the report be confidential?

Yes. All reports concerning child abuse are confidential. Any person who intentionally makes an unauthorized disclosure of a report or record of a report, shall be guilty of a misdemeanor. Haw. Rev. Stat. § 350-1.4(a).

Can individuals be held liable for making child abuse reports?

Only rarely. Anyone who makes a report in good faith has immunity from civil or criminal liability that might otherwise be incurred or imposed as a result of the making of the report. Haw. Rev. Stat. § 350-3.

Can individuals be held liable for not making a child abuse report?

Yes. Any mandated reporter who knowingly fails to provide information in a written report or as requested, or who prevents others from reporting, is guilty of a petty misdemeanor. Haw. Rev. Stat. § 350-1.2.

Will my report be collected and stored?

Yes. The department of social services is required to maintain a central registry of reported child abuse or neglect cases. Haw. Rev. Stat. § 350-2.

H. Do Medical Records Remain Confidential in Cases of Alleged Abuse?

Is information in the medical chart and provider notes confidential?

For the most part, yes. HIPAA and Title X regulations protect the confidentiality of individual health information. However, providers must release information if state law requires the release. Hawaii state law requires that mandated reporters share medical information with the police or the

department of social services if the information is related to the alleged incident of abuse being reported. *See* Haw. Rev. Stat. § 350-1.1(c, d).

If released, the child abuse report itself is protected. “All reports... concerning child abuse... are confidential...[and] [a]ny person who intentionally makes an unauthorized disclosure of a report or record of a report... shall be guilty of a misdemeanor.” Haw. Rev. Stat. § 350-1.4.

How should a subpoena or other legal request for confidential information be handled?

While both federal and state law allow providers to release health information in some circumstances when subpoenaed, there are procedural and substantive standards that must be met before a subpoena is valid. Many subpoenas will not withstand legal challenge. For this reason, when presented with a subpoena, it is always advisable to seek legal counsel before releasing any information.

I. Potential Criminal Charges Arising out of Abuse Reports

Is there a chance someone could be prosecuted for child abuse or neglect as a result of an abuse report?

Yes. Upon receiving a report concerning child abuse, the department must inform the appropriate police department. If the police department or office of the prosecuting attorney decides to investigate or prosecute the case of child abuse or neglect, the department must also provide any information requested by the police or prosecutor. The police and prosecutor will decide how best to investigate and possibly prosecute criminal incidents.

In a case involving consensual sexual activity that meets the definition of sexual assault, who, if anyone, might be prosecuted?

The caretaker may be prosecuted for abuse or neglect for allowing the sexual activity to occur. In addition, the minor’s partner may be prosecuted for the criminal act of sexual assault. In some cases, both minors may be prosecuted if they each can be charged with sexual assault against the other, although this is probably rare. The police and prosecutor’s office will decide who to charge and with what. Because the prosecutor has some discretion, if you have questions about how such charges are handled in your jurisdiction, it is best to speak to your local department of social services, police or prosecutor’s office.

In a case involving sexual conduct, will the offender be required to register as a sex offender?

Maybe. In cases involving sexual conduct against a minor, perpetrators who are investigated, prosecuted, and convicted are required to register as sex offenders. However, if the conduct was criminal only because of the age of the minor, and

the perpetrator was 18 years of age or younger, no registration is necessary. *See* Haw. Rev. Stat. § 846E-1 *et seq.*.