Minor Consent, Confidentiality, and Reporting Child Sexual Abuse:

A Guide for Title X Family Planning Providers in Nevada

Rebecca Gudeman

April 2011
Second edition

Center for Health Training

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.

Center for Health Training
614 Grand Avenue Suite 400
Oakland, CA 94610
www.centerforhealthtraining.org

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.

National Center for Youth Law
405 14th St., Suite 1500
Oakland, CA 94612
www.youthlaw.org / www.teenhealthlaw.org

The National Center for Youth Law is a national, non-profit organization that uses the law to improve the lives of poor children. NCYL works to ensure that low-income children have the resources, support and opportunities they need for a healthy and productive future.

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 February 2011. 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.

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

---

[1] ***Acknowledgements*:** NCYL sincerely thanks Linda Anderson, Chief Deputy Attorney General, Nevada Attorney General's office; Sara Madge, J.D., NCYL; and Marsha Gelt, MPH, Center for Health Training, for their contributions to this manual.

Table of Contents

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.

[2] Excerpted and adapted 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

II. GENERAL AGE OF CONSENT INFORMATION

What is the age of majority/minority?

A minor legally becomes an adult in Nevada at 18 years old. N.R.S. § 129.010.

What is the age of consent for sexual activity?

While no statute specifically establishes an age at which a minor may legally consent to sexual activity, there can be criminal penalties for voluntary sexual activity with a minor under 16 years of age. *See* N.R.S. §§ 200.368; 201.230; 200.364.

What is the age of consent for medical care?

An individual usually can consent for his or her own health care beginning at 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. *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). Thus, minors of any age must 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 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. §

[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).

59.11.[4] In addition to the Title X 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) below for more information about 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.[5] 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 Nevada state laws that *require* release of health information in certain situations. Here are examples:

- ***Mandated Child Abuse Reporting***
  Nevada'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 allows providers who are mandated reporters to comply with the child abuse reporting law. *See* N.R.S. § 432B.220.

- ***Reporting Certain Communicable Diseases to the Health Authority***
  State law requires certain health professionals to report to the Department of Health certain diseases and conditions declared to be communicable or dangerous. Because this is a mandated disclosure, Title X allows providers to comply. N.R.S. § 441A.150; *see* 45 C.F.R. § 164.512.

[4] 42 C.F.R. § 59.11("All 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. Otherwise, information may be disclosed only in summary, statistical, or other form which does not identify particular individuals.").
[5] *See* 42 C.F.R. § 59.11(allowing Title X funded clinics to disclose information "as required by law").

- ***Reporting Certain Wounds***
  State law requires reporting certain wounds inflicted by violence. "Every provider of health care to whom any person comes or is brought for treatment of an injury which appears to have been inflicted by means of a firearm or knife, not under accidental circumstances, shall promptly report the person's name, if known, his or her location and the character and extent of the injury to an appropriate law enforcement agency." N.R.S. § 629.041. Because the disclosure is required by state law, Title X regulations allow health care providers to comply with this law. *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.

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,[6] 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.[7] No federal or state law requires disclosure of Title X funded service information to parents.[8] 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.

[6] 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.").
[7] 42 C.F.R. § 59.11("All 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.").
[8] Even if there were a federal regulation or state law to this effect, Title X's confidentiality protections may preempt or otherwise prohibit disclosure. *See e.g. Planned Parenthood v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983). If any state or federal rule is passed that requires parent notification regarding Title X services, providers should consult legal counsel for advice.

IV. GENERAL MEDICAL CARE: Overview of Medical Consent and Confidentiality Rules

What laws control medical consent and confidentiality generally in Nevada?

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 usually consents for a minor's medical care in Nevada?

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, the minor's status, and the type of services being sought. The following describes many of the relevant minor consent exceptions in Nevada law.

When can minors consent for their own care?

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

When minors are:

- ***In Danger of a Serious Health Hazard Without Care***

  A minor who "in a physician's judgment, [is] in danger of suffering a serious health hazard if health care services are not provided" may give consent for all services for himself or herself, except sterilization, as long as the minor "understands the nature and purpose of the proposed examination or treatment and its probable outcome, and voluntarily requests it." N.R.S. § 129.030. [9]

- ***Emancipated***

  Minors who have been emancipated by a court are "held and considered to be of lawful age" and have the same right to consent to medical, dental or psychiatric care without parental consent, knowledge or liability as does any adult. N.R.S. §§ 129.130(3)(d); 129.010.

[9] *See* discussion of special requirements for consent to "do-not-resuscitate" orders, as described in N.R.S. § 450B.525.

- ***Living Apart from Parents***

  A minor who has been "living apart from his or her parents or legal guardian, with or without the consent of the parent, parents or legal guardian, and has so lived for a period of at least 4 months" may give consent for all services for himself or herself or for his or her child, except sterilization, as long as the minor "understands the nature and purpose of the proposed examination or treatment and its probable outcome, and voluntarily requests it." N.R.S. § 129.030.[10]

- ***Married or Have Been Married***

  A minor who is or has been married may give consent for all services for himself or herself or for his or her child, except sterilization, as long as the minor "understands the nature and purpose of the proposed examination or treatment and its probable outcome, and voluntarily requests it." N.R.S. § 129.030.[11]

- ***Mothers or Have Borne a Child***

  A minor who is a mother or has borne a child may give consent for all services for herself or her child, except sterilization, as long as the minor "understands the nature and purpose of the proposed examination or treatment and its probable outcome, and voluntarily requests it." N.R.S. § 129.030.[12]

When minors seek the following medical services:

- ***Abortion***

  Minors may consent to abortion and providers do not need to notify parents. While Nevada has a parental notification statute on the books, the Ninth Circuit Court of Appeals found it unconstitutional and held that it cannot be enforced. *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991).

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

"[A]ny minor who is under the influence of, or suspected of being under the influence of, a controlled substance:

(a) May give express consent; or
(b) If unable to give express consent, shall be deemed to consent,

[10] *See* id.
[11] *See id.*
[12] *See Id.*

to the furnishing of hospital, medical, surgical or other care for the treatment of abuse of drugs or related illnesses by any public or private hospital, medical facility, facility for the dependent, other than a halfway house for alcohol and drug abusers, or any licensed physician, and the consent of the minor is not subject to disaffirmance because of minority."

N.R.S. § 129.050.

- ***Emergency (consent by in loco parentis)***

  "Notwithstanding any other provision of law, in cases of emergency in which a minor is in need of immediate hospitalization, medical attention or surgery and, after reasonable efforts made under the circumstances, the parents of such minor cannot be located for the purpose of consenting thereto, consent for such emergency attention may be given by any person standing in loco parentis to such minor." N.R.S. § 129.040. "In loco parentis" is a legal term. Providers should consult legal counsel for more information about who may qualify as "in loco parentis" under Nevada law.

- ***Sexually Transmitted Diseases***

  For services funded in full or in part by Title X, minors of any age may consent to the service. (*See Section III above*). In most other situations, state law applies.

  Nevada law says: "Notwithstanding any other provision of law, the consent of the parent, parents or legal guardian of a minor is not necessary in order to authorize a local or state health officer, licensed physician or clinic to examine or treat, or both, any minor who is suspected of being infected or is found to be infected with any sexually transmitted disease." N.R.S. § 129.060.

  Nevada law also allows the health authority to require that a minor undergo an STD exam and treatment at times. It says that except in certain circumstances, "when any minor is suspected of having or is found to have a sexually transmitted disease, the health authority may require the minor to undergo examination and treatment, regardless of whether the minor or either of his parents consent to the examination and treatment." N.R.S. § 441A.310.

- ***Suspected Child Abuse***

  "A designee of an agency investigating a report of abuse or neglect of a child may, without the consent of the person responsible for a child's welfare:

  (a) Take or cause to be taken photographs of the child's body, including the areas of trauma; and

(b) If indicated after consultation with a physician, cause X-rays or medical tests to be performed on a child."

"As used in this section, "medical test" means any test performed by or caused to be performed by a provider of health care, including, without limitation, a computerized axial tomography scan and magnetic resonance imaging."

N.R.S. § 432B.270(2), (5).

What laws protect the confidentiality of health information in Nevada?

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule protects the confidentiality of health information in Nevada. 45 C.F.R. Parts 160 and 164. Nevada also has some confidentiality statutes that apply in specific circumstances to protect specific records. For example, one statute protects the confidentiality of patients in medical facilities.[13] N.R.S. § 449.720.[14] Health care providers must follow both the federal HIPAA Privacy Rule and applicable 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.[15]

In addition, other federal laws and regulations, such as Title X, also may apply in certain circumstances, depending on the type of service provided or the funding source for the service, among other things.

What is the confidentiality rule under HIPAA?

HIPAA limits "covered entities" from disclosing what HIPAA defines as "protected health information" (PHI).[16] A health care provider can only disclose PHI if the provider either has a signed authorization allowing for the disclosure, or a specific

[13] N.R.S. § 449.0151 (defining "medical facility" for purpose of confidentiality law to include "1. A surgical center for ambulatory patients; 2. An obstetric center; 3. An independent center for emergency medical care; 4. An agency to provide nursing in the home; 5. A facility for intermediate care; 6. A facility for skilled nursing; 7. A facility for hospice care; 8. A hospital; 9. A psychiatric hospital; 10. A facility for the treatment of irreversible renal disease; 11. A rural clinic; 12. A nursing pool; 13. A facility for modified medical detoxification; 14. A facility for refractive surgery; 15. A mobile unit; and 16. A community triage center.").

[14] N.R.S. § 449.720 ("Except as otherwise provided in NRS 108.640, 239.0115, 439.538, 442.300 to 442.330, inclusive, and 449.705 and chapter 629 of NRS, discussions of the care of a patient, consultation with other persons concerning the patient, examinations or treatments, and all communications and records concerning the patient are confidential. The patient must consent to the presence of any person who is not directly involved with the patient's care during any examination, consultation or treatment.").

[15] 45 C.F.R. § 160.203.

[16] 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.

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 an authorization to release health information about their child. 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 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 Communicable Diseases to the Health Authority***
  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, providers may comply. N.R.S. § 441A.150; *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(a)(1)(ii); 45 C.F.R. § 164.506(a),(c). Providers should consult legal counsel regarding the intersection of HIPAA and state law regarding these kinds of release.

- ***Mandated Child Abuse Reporting***
  Nevada'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, the HIPAA regulations allow health care providers to comply with this law. *See* 45 C.F.R. § 164.512.

- ***Reporting Certain Wounds***
  State law requires reporting certain wounds inflicted by violence. "Every provider of health care to whom any person comes or is brought for treatment of an injury which appears to have been inflicted by means of a firearm or knife, not under accidental circumstances, shall promptly report the person's name, if known, his or her location and the character and extent of the injury to an appropriate law enforcement agency." N.R.S. §629.041. 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 guardians generally have a right to control access to their child's medical information. This includes the right to inspect their 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 exercising his or her professional judgment. 45 C.F.R. §§ 164.502(g)(3)(ii)(C). The Nevada state laws that limit parental access to a child's minor consent records are discussed in the following section.

When parents consent for their children's medical services, Nevada law does not explicitly allow or prohibit parents from accessing the related health records in most cases. Nevada law requires "provider[s] of health care"[17] to allow a patient and a

[17] N.R.S. § 629.031("'Provider of health care' means a physician licensed pursuant to chapter 630, 630A or 633 of NRS, dentist, licensed nurse, dispensing optician, optometrist, practitioner of respiratory care, registered physical therapist, podiatric physician, licensed psychologist, licensed marriage and family therapist, chiropractor, athletic trainer, perfusionist, doctor of Oriental medicine in any form, medical laboratory director or technician, pharmacist or a licensed hospital as the employer of any such person.").

"representative with written authorization from the patient" to inspect the "health care records"[18] of the patient. The statute also specifically requires providers to make a minor's health records available to a parent or guardian when the records are those "of a deceased patient who died before reaching the age of majority." N.R.S. § 629.061. However, the statute does not address parent access in other contexts. When there is no applicable state law, the HIPAA Privacy Rule controls.

Other laws and regulations contain different rules regarding parent access, 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, parents cannot access the 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 if 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).

  Nevada law also may restrict parent access to records at times. Providers should consult with legal counsel regarding the intersection of HIPAA and Nevada law on this issue.

- ***Records of Minor who is in Danger of Serious Health Hazard***

[18] N.R.S. § 629.021("'Health care records' means any reports, notes, orders, photographs, X rays or other recorded data or information whether maintained in written, electronic or other form which is received or produced by a provider of health care, or any person employed by a provider of health care, and contains information relating to the medical history, examination, diagnosis or treatment of the patient.").

"A person who treats a minor [under minor consent because in the physician's judgment, the minor is in danger of suffering a serious health hazard if health care services are not provided] shall, before initiating treatment, make prudent and reasonable efforts to obtain the consent of the minor to communicate with his or her parent, parents or legal guardian, and shall make a note of such efforts in the record of the minor's care. If the person believes that such efforts would jeopardize treatment necessary to the minor's life or necessary to avoid a serious and immediate threat to the minor's health, the person may omit such efforts and note the reasons for the omission in the record." N.R.S. §129.030.

- ***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.[19]

  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 (federally funded, other than Title X)***

  Family planning records for services funded by other federal programs, such as Medicaid, may be protected by separate federal confidentiality rules. The federal

[19] 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.

and state constitutions 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 legal counsel for further information.

- ***Records of Minor who is a Mother, Married, or Living Apart from Parents***

  "A person who treats a minor [under minor consent because the minor is a mother, married or living apart from parents] shall, before initiating treatment, make prudent and reasonable efforts to obtain the consent of the minor to communicate with his or her parent, parents or legal guardian, and shall make a note of such efforts in the record of the minor's care. If the person believes that such efforts would jeopardize treatment necessary to the minor's life or necessary to avoid a serious and immediate threat to the minor's health, the person may omit such efforts and note the reasons for the omission in the record." N.R.S. § 129.030.

Can individuals be held accountable for revealing confidential information outside the exceptions 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 Department of Health and Human Services the authority to enforce HIPAA confidentiality regulations and to impose sanctions on providers who breach these rules. 45 C.F.R. § 160.

V. Child Abuse Reporting Requirements

A. Who is a Mandated Reporter?

Who is a mandated reporter?

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

(a) **A physician, dentist, dental hygienist, chiropractor, optometrist, podiatric physician, medical examiner, resident, intern, professional or practical nurse, physician assistant licensed pursuant to chapter 630 or 633 of NRS, psychiatrist, psychologist, marriage and family therapist, clinical professional counselor, clinical alcohol and drug abuse counselor, alcohol and drug abuse counselor, clinical social worker, athletic trainer, advanced emergency medical technician or other person providing medical services licensed or certified in this State.**
(b) **Any personnel of a hospital or similar institution engaged in the admission, examination, care or treatment of persons or an administrator, manager or other person in charge of a hospital or similar institution upon notification of suspected abuse or neglect of a child by a member of the staff of the hospital.**
(c) **A coroner.**
(d) A member of the clergy, practitioner of Christian Science or religious healer, unless the person has acquired the knowledge of the abuse or neglect from the offender during a confession.
(e) **A social worker and an administrator, teacher, librarian or counselor of a school.**
(f) Any person who maintains or is employed by a facility or establishment that provides care for children, children's camp or other public or private facility, institution or agency furnishing care to a child.
(g) Any person licensed to conduct a foster home.
(h) Any officer or employee of a law enforcement agency or an adult or juvenile probation officer.
(i) An attorney, unless the attorney has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect.
(j) Any person who maintains, is employed by or serves as a volunteer for an agency or service which advises persons regarding abuse or neglect of a child and refers them to persons and agencies where their requests and needs can be met.
(k) Any person who is employed by or serves as a volunteer for an approved youth shelter. As used in this paragraph, "approved youth shelter" has the meaning ascribed to it in NRS 244.422.
(l) Any adult person who is employed by an entity that provides organized activities for children.

N.R.S. § 432B.220(4).

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

Yes. "A report *may* be made by any other person." N.R.S. § 432B.220(5).

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

When must a mandated reporter report abuse?

Mandated reporters must report when, "in [their] professional or occupational capacity, they know or have reasonable cause to believe that a child has been abused or neglected." N.R.S. § 432B.220(1).

Mandated reporters must "make such a report as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that the child has been abused or neglected." *Id*.

What if the mandated reporter is not sure that abuse has occurred?

Reporters must report whenever they have a "reasonable cause to believe" that abuse has occurred. Confirmation of abuse is not required.

C. What Type of Activity Must be Reported?

What constitutes reportable abuse or neglect?

Mandated reporters must report when, in their professional or occupational capacity, they know or have reasonable cause to believe that a child has been subject to abuse or neglect. N.R.S. § 432B.220(1). Abuse and neglect are defined for this purpose as:

1. Physical or mental injury of a nonaccidental nature;
2. Sexual abuse or sexual exploitation; or
3. Negligent treatment or maltreatment of a child caused or allowed by a person responsible for the welfare of the child under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

N.R.S. § 432B.020.

State law further defines these terms.

> "**Physical injury**" includes, without limitation: "**1.** A sprain or dislocation; **2.** Damage to cartilage; **3.** A fracture of a bone or the skull; **4.** An intracranial hemorrhage or injury to another internal organ; **5.** A burn or scalding; **6.** A cut, laceration, puncture or bite; **7.** Permanent or temporary disfigurement; or

8. Permanent or temporary loss or impairment of a part or organ of the body." N.R.S. § 432B.090.

"**'Mental injury'** means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior." N.R.S. § 432B.070.

"**Negligent treatment** or maltreatment of a child occurs if a child has been abandoned, is without proper care, control and supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so." N.R.S. § 432B.140.

"**Sexual abuse**" and "sexual exploitation" are defined in the following questions.

D. What Sexual Activity Must be Reported as Child Abuse?

What sexual activity is reportable as child abuse?

Mandated reporters must report when, in their professional or occupational capacity, they know or have reasonable cause to believe that a child has been subject to **sexual abuse** or **sexual exploitation**. N.R.S. §§ 432B.220(1), 432B.020.

S**exual abuse** is defined as acts upon a child constituting:

- Incest[20];
- Lewdness with a child[21];
- Sado-masochistic abuse[22];
- Sexual assault;[23]
- Statutory sexual seduction;[24]
- Open or gross lewdness;[25] and
- Mutilation of the genitalia of a female child.[26]

N.R.S. § 432B.100. Each of these terms has a specific definition under state law. Both "lewdness" and "sexual assault" are defined in the following question.

[20] As defined in N.R.S. § 201.180.
[21] As defined in N.R.S. § 201.230.
[22] As defined in N.R.S. § 201.262.
[23] As defined in N.R.S. § 200.366.
[24] As defined in N.R.S. §§ 200.364, 200.368.
[25] As defined in N.R.S. § 201.210.
[26] As defined in N.R.S. § 200.5083.

S**exual exploitation** is defined as "forcing, allowing or encouraging a child:"

- To solicit for or engage in prostitution;
- To view a pornographic film or literature; and
- To engage in:
    - Filming, photographing or recording on videotape; or
    - Posing, modeling, depiction or a live performance before an audience which involves the exhibition of a child's genitals or any sexual conduct with a child, as defined in NRS 200.700.

N.R.S. § 432B.110

What is reportable "lewdness" and "sexual assault"?

Mandated reporters must report when, in their professional or occupational capacity, they know or have reasonable cause to believe that a child has been subject to sexual abuse or sexual exploitation. Sexual abuse is defined to include the crimes of "lewdness with a child", "open or gross lewdness" and "sexual assault" among others. N.R.S. §§ 432B.220(1), 432B.020, 432B.100. State law defines "lewdness" and "sexual assault" as follows:

"**Lewdness with a child**" occurs when "[a] person willfully and lewdly commits any lewd or lascivious act … upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child . . . ." N.R.S. § 201.230. For this purpose, the term "lewd" is not specifically defined by statute. The Nevada Supreme Court has held that the word itself sufficiently conveys a warning regarding the conduct it proscribes. *Summers v. Sheriff,* 521 P.2d 1228 (S.C. Nev. 1974); *See Berry v. State of Nevada*, 213 P.3d 1085, 1096 (S.C. Nev. 2009).

"**Sexual assault**" occurs when a person subjects another person to sexual penetration[27], or forces another person to make a sexual penetration on himself or herself or another, or on a beast:
(1) against the will of the victim or
(2) under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct.
N.R.S. § 200.366.

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

[27] N.R.S. § 200.364("'Sexual penetration' means cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning.").

Yes. Sexual abuse is defined to include the crimes of "statutory sexual seduction" and "lewdness with a child." These statutes make certain sexual acts illegal based solely on the age of one or both participants. For the purpose of child abuse reporting, this means reporting is triggered based on age alone. Activity that must be reported based on age alone includes:

- Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years;
- Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.
- Any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child.
- Sexual penetration or activity with a minor of <u>any</u> age, if the mandated reporter has a reasonable suspicion that the acts actually occurred against the will of the victim or otherwise can be described as "sexual assault," regardless of the age of the minor or partner. (*See discussion of "sexual assault" in above question*. *See also discussion of sexual activity and reporting neglect in following question.)*

N.R.S. §§ 432B.220, 432B.020, 200.364, 200.368, 201.230.

For this purpose, "sexual penetration" means cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal opening of the body of another…" N.R.S. § 200.364.

Is sexual activity ever reportable as neglect?

Mandated reporters must make a neglect report when a caretaker subjects a minor to "negligent treatment" under circumstances which indicate that the child's health or welfare has been harmed or is threatened with harm. A caretaker has subjected a minor to "[n]egligent treatment…if [the] child has been abandoned, is without proper care, control and supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so." N.R.S. § 432B.140.

In some cases, knowledge that a minor is engaging in sexual activity, when combined with additional information, may present a reasonable suspicion that a caregiver is or has been "neglecting" the minor and that this neglect is harming or threatening harm to the child's health or welfare. In such cases, providers should make a neglect report. In

considering whether neglect reports are ever necessary or advisable in this context, providers may wish to consult legal counsel for further guidance. Providers also may wish to seek further information about current reporting practice in the health care community as well as information about the current practice of their local child welfare agency when it receives such reports.

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

Not all sexual activity with or between minors is reportable as child abuse. The following sexual activities, if there are no signs of coercion, force, or neglect, are not reportable as child abuse:

- Consensual sexual activity between minors who are each 14, 15, 16, or 17 years of age.
- Consensual sexual activity between one person who is age 16 or older and a partner age 16 or older.

N.R.S. §§ 432B.220, 432B.020, 200.364, 200.368, 201.230.

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

Is the prostitution of a minor reportable as child abuse?

Yes in most cases. Nevada law requires reporting the sexual exploitation of a minor, which includes encouraging, allowing or forcing a minor to engage in prostitution. N.R.S. §§ 432B.220(1), 432B.020, 432.110. Prostitution is defined as engaging in sexual conduct for a fee. N.R.S. § 201.295.

E. How Does Reporting Work?

To whom should reports be made?

Mandated reporters should "report the abuse or neglect of the child to an agency which provides child welfare services or to a law enforcement agency." N.R.S. § 432B.220.

How does a reporter make a report?

"A person may make a report by telephone or, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, by any other means of oral, written or electronic communication that a reasonable person would believe, under those facts and circumstances, is a reliable and swift means of communicating information to the person who receives the report. If the report is made orally, the person who receives the report must reduce it to writing as soon as reasonably practicable." N.R.S. § 432B.230.

What information must be included in a report?

"The report must contain the following information, if obtainable:
(a) The name, address, age and sex of the child;
(b) The name and address of the child's parents or other person responsible for the care of the child;
(c) The nature and extent of the abuse or neglect of the child, the effect of prenatal illegal substance abuse on the newborn infant or the nature of the withdrawal symptoms resulting from prenatal drug exposure of the newborn infant;
(d) Any evidence of previously known or suspected:
(1) Abuse or neglect of the child or the child's siblings; or
(2) Effects of prenatal illegal substance abuse on or evidence of withdrawal symptoms resulting from prenatal drug exposure of the newborn infant;
(e) The name, address and relationship, if known, of the person who is alleged to have abused or neglected the child; and
(f) Any other information known to the person making the report that the agency which provides child welfare services considers necessary."
N.R.S. § 432B.230.

What if a reporter doesn't have all the required information?

If a mandated reporter knows or has reasonable cause to believe that a child has been subject to abuse or neglect, the reporter must make a reporter, even if the reporter does not have all the information described above.

Is reporting required under section 202.882 as well as the mandated child abuse reporting law?

No. Mandated reporters of child abuse (as described above) are exempt from the reporting duty under section 202.882 of the Nevada code. *See* N.R.S. § 202.888. Section 202.882 requires reporting certain violent or sexual offenses against children 12 years old or younger to law enforcement and describes how these reports should be made. While most persons must report pursuant to section 202.882, some individuals are exempt from the reporting requirement, such as specified family members. Mandated

reporters of child abuse are also exempt. Mandated child abuse reporters only need to report the abuse pursuant to the child abuse reporting law.

F. What are the Consequences of the Reporting Decision?

What will the police or child welfare agency do after a report is made?

It depends on the type of abuse, age of the child, and the level of risk. In most circumstances, the welfare agency will evaluate reports to see if investigation is warranted. In some cases, the agency will immediately initiate an investigation – for example if the report indicates that the child involved is 5 years old or younger or that there is a high risk of serious harm to the child. In other cases, the agency will conduct an evaluation within three days to determine whether an investigation is warranted.

According to Nevada state law, an investigation is not warranted if:
(a) The child is not in imminent danger of harm;
(b) The child is not vulnerable as the result of any untreated injury, illness or other physical, mental or emotional condition that threatens the immediate health or safety of the child;
(c) The alleged abuse or neglect of the child or the alleged effect of prenatal illegal substance abuse on or the withdrawal symptoms resulting from any prenatal drug exposure of the newborn infant could be eliminated if the child and the family of the child are referred to or participate in social or health services offered in the community, or both; or
(d) The agency determines that the:
    (1) Alleged abuse or neglect was the result of the reasonable exercise of discipline by a parent or guardian of the child involving the use of corporal punishment, including, without limitation, spanking or paddling; and
    (2) Corporal punishment so administered was not so excessive as to constitute abuse or neglect as described in NRS 432B.150.

If the agency determines that an investigation is warranted, the agency shall initiate the investigation not later than 3 days after the evaluation is completed. If an agency initiates an investigation, the agency shall inform the person responsible for the child's welfare who is named in the report as allegedly causing the abuse or neglect of the child of any allegation which is made against the person at the initial time of contact with the person by the agency. The agency shall not identify the person responsible for reporting the alleged abuse or neglect.
N.R.S. § 432B.260.

Section 432B.260 of Nevada Statutes provides further detail about what may happen after a report is made.

Will the report be confidential?

For the most part, yes. "Reports as well as all records concerning these reports and investigations are confidential." N.R.S. § 432B.280

However, they may be released to certain parties such as the district attorney or a court. A parent or legal guardian may get access to the report "if the identity of the person responsible for reporting the alleged abuse or neglect of the child…is kept confidential." N.R.S. § 432B.290.

Can individuals be held liable for not making reports?

Yes. "Any person who knowingly and willfully violates the [reporting requirements] is guilty of a misdemeanor." N.R.S. § 432B.240.

G. 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 protected health information if state law requires the release. Nevada state law requires that a child abuse report contain any "information that the agency which provides child welfare services considers necessary." N.R.S. § 432B.230. This does not mean the agency has free access to the medical chart or provider notes though. Providers should consult legal counsel for more information if asked to release additional protected information after a report has been made.

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.

H. Potential Criminal Charges Arising Out of Abuse Reports

Will evidence of sexual activity uncovered during an abuse/neglect investigation be prosecuted?

It might. 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 abuse, who if anyone might be prosecuted?

Depending on the situation, a parent 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 a sexual crime 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 welfare, police and prosecutor's office.

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

Maybe. It depends what the offender is convicted of. Under Nevada law, "statutory sexual seduction" and "lewdness with a child" are "sexual offenses." Persons convicted of "sexual offenses" must register as sex offenders. N.R.S. §§ 179D.410, 179D.450.

For more information or for training on this topic, please contact the Center for Health Training at 510.835.3700 or oakland@jba-cht.com.