

State Efforts to Protect Confidentiality for Insured Individuals Accessing Contraception and Other Sensitive Healthcare Services

Overview

Privacy and confidentiality are central components of healthcare, with federal and state laws and regulations providing formal protections around personal health information, medical records, and other aspects of health privacy. The ability to confidentially access contraception or other reproductive health services may determine whether an individual decides to access services at all, particularly for adolescents aged 10-19. Similar concerns about confidentiality can also arise around other sensitive health services, including mental healthcare or substance abuse, and for vulnerable individuals, such as those experiencing domestic violence. However, common practices used during the insurance billing and claims process can inadvertently break confidentiality. These most commonly occur when someone is insured as a dependent on another person's insurance plan.

In 2010, the passage of the ACA led to two big changes in insurance coverage. Now, more people are covered by health insurance due to expansions in both Medicaid and the individual market. In addition, more individuals are covered as dependents as federal requirements allow those under age 26 to stay on their parents' health insurance. While this provision has led to significant expansions in coverage for young adults, it has generated additional concerns about confidential access to services for those insured as dependents. While a handful of states had begun to address this issue before the ACA, several states have since looked for additional legislative and regulatory solutions. This factsheet introduces state approaches and factors to consider around protecting confidentiality for insured individuals—particularly adolescents—accessing contraception and other reproductive health services.

Why Confidentiality Matters

Most individuals value confidentiality in their healthcare overall, particularly around sensitive services.¹ In a 2014 survey by the Kaiser Family Foundation, 61 percent of women ages 18-44 reported it is important that information about their healthcare visits be kept confidential from a parent or spouse, increasing to 71 percent among women ages 18-25.¹ In addition, numerous studies show confidentiality can determine whether adolescents decide to access such services, particularly for reproductive health care.²

The American Medical Association,³ the American Academy of Pediatrics (AAP),⁴ the Society for Adolescent Health and Medicine (SAHM),⁵ the American Congress of Obstetricians and Gynecologists (ACOG),⁶ the American Academy of Family Physicians,^{7,8} and other professional organizations support adolescent confidentiality in healthcare, in conjunction with state laws and recommendations to encourage parent or guardian involvement where appropriate. SAHM and AAP issued a position paper in support of confidentiality protections in healthcare billing and insurance claims processes for those covered as dependents recognizing how those processes may compromise confidentiality and deter individuals from seeking needed healthcare. ACOG endorsed the recommendations included in the position paper.⁹

¹ Sensitive services are usually defined as those relating to reproductive and sexual health, mental health, and substance abuse.

What Information is Shared and Who is Affected

The concern around confidentiality arises when insurance communications address the primary policy holder revealing information about healthcare services that individuals declared as dependents on that policy may not wish to share. Most often this information comes in the form of an “Explanation of Benefits” (EOB) that tells the policyholder what services were performed by which provider, what portion of the cost is covered by insurance, what portion of the cost the policyholder needs to pay, and any additional information that may be mandated by federal or state law. EOBs are a standard part of the insurance billing and claims process and started as a consumer-friendly tool to increase transparency and reduce fraud. Policyholders may also receive information about services obtained by other members on the plan and an annual summary of services and notices of claim denials. This information may also be available to the primary policy holder on an insurance web portal or through other online tools.

While not a new problem, the 2010 ACA expansion for young adults up to the age of 26 brought new light to the potential for dependent health insurance communications to potentially affect their receipt of confidential services. As of 2016, 6.1 million young adults under 26 are estimated to have gained coverage as a result of the ACA.¹⁰ There has not been extensive tracking of how many gained coverage specifically as dependents after 2013, though the provision allowing them to stay on their parents’ health insurance is often assumed to have helped increase insurance coverage in this age group. Six states (FL, IL, NJ, PA, SD, and WI) also have laws that require covering young adults beyond the requirements in the ACA, with age limits as high as 31.¹¹ Thirty-seven states had such laws before the ACA so it is possible many of them could be enacted again if the ACA is repealed or rolled back.¹² For employer-sponsored insurance, women are less likely to be covered in their own name as compared to men (35% vs. 44% respectively) and more likely to be covered as dependents compared to their male counterparts (24% vs. 16%).¹³

Federal Regulation of Health Privacy and Insurance: The HIPAA Privacy Rule and Other Requirements

At the federal level, the major law that regulates confidentiality in healthcare is the Health Insurance Portability and Accountability Act of 1996 (HIPAA). A 2002 regulation stemming from the requirements outlined in HIPAA (i.e., the “Standards for Privacy of Individually Identifiable Health Information” and also known as the HIPAA Privacy Rule) establishes the federal floor for confidentiality and privacy protection, though states may adopt more stringent protections. The HIPAA Privacy Rule generally prevents the disclosure of protected health information (PHI) without authorization by covered entities, which includes healthcare providers, health plans, and insurers. However, there is a broad exception for treatment, payment, or healthcare operations, which allows disclosure of PHI for many common insurance billing and claims functions.^{14,15}

The HIPAA Privacy Rule establishes certain protections for minors under the age of 18 about the disclosure of the minor’s PHI, while granting deference to federal and state laws and the judgement of healthcare providers. Adolescents over the age of 18 and emancipated minors have the same rights as adults. For individuals under 18, there are various circumstances when there is exception to the general rule. This most commonly occurs where minors are able to consent to their own treatment and do so; the circumstances under which vary based on state law.¹⁶ For example, all states have laws allowing minors to consent on their own for services related to sexually transmitted diseases (STDs), though states may have a minimum age requirement, and many have laws allowing minors to consent to other

services related to reproductive health, including contraception.¹⁷ Minors can also be protected from disclosure of their PHI to their parents in circumstances where a provider believes the parent has subjected or may subject the minor to domestic violence, abuse, or neglect or disclosure may endanger or otherwise not be in the minor's best interest.¹⁸

The HIPAA Privacy Rule outlines two important provisions for individuals, including minors who are treated as adults under the rule, who are particularly concerned about the release of their PHI. Individuals can request that healthcare providers and health plans communicate with them confidentially, such as by e-mail or phone, or at another location other than their home address. Healthcare providers must accommodate reasonable requests while health plans are only required to comply if an individual states that disclosure of any or all of the information could endanger the individual. In addition, individuals can also request restrictions on the disclosure of their PHI for treatment, payment, or healthcare operations, and while covered entities are not required to comply, they are required to comply in situations where it is not otherwise required by law and the service has been paid in full.¹⁹

Federal law, under the Employee Retirement Insurance Security Act, also requires most private insurers to send out notices when claims are denied. These requirements were further refined under the ACA and added content around procedures for claims and appeals.²⁰

Medicaid and Confidentiality

The Medicaid program allows family planning services to be provided confidentially to "individuals of childbearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies."²¹ Recognizing the sensitive nature of these services, many state Medicaid programs, particularly family planning expansion programs, were at the forefront of efforts to put in place protections to ensure that no unwanted communications were sent to participants, such as not sending ID cards to recipients.

Unlike commercial insurance, Medicaid does not have the same requirements to send out EOBs. However, in many states, fee-for-service Medicaid plans may send out periodic EOBs as a method of complying with the federal regulation to combat fraud and verify receipt of services with Medicaid beneficiaries. States have other methods of complying with this regulation and can also exclude certain services, such as family planning, from EOBs. Prior to the ACA, many Medicaid managed care plans reported that they did not regularly send out EOBs.²² However, this may change as the practices of managed care plans and commercial insurance plans converge, particularly with the same plans participating in both Medicaid and the commercial marketplaces.

Confidentiality in Medicaid can also be breached as it is required to be the payer of last resort. States must determine if those receiving services through Medicaid have other types of insurance that may be responsible for payment, which could require notification of receipt of those services to another individual if that policyholder may be responsible for payment instead of Medicaid. There is, however, a "good-cause exception" where information about third parties who may be responsible for payment does not have to be provided if "it is anticipated that cooperation will result in reprisal against, and cause physical or emotional harm to, the individual or other person."^{23,24}

Other Federal Programs and Confidentiality

Federal programs funding reproductive and sexual health services may also allow minors to receive that type of healthcare confidentially. In particular, the Title X family planning program includes extremely strong confidentiality protections allowing all individuals, including minors, to receive confidential family planning services. Section 330 of the Public Health Service Act, which funds Federally Qualified Health Centers, includes similarly strong language in its regulations about protecting patient confidentiality.²⁵

However, like Medicaid, both of these federal programs are also required to collect revenue from third-party payers where possible, conflicting with their mandates around confidentiality. This makes state efforts to protect the confidentiality of minors and dependents in Medicaid and insurance programs an important strategy to ensure that these public programs can accomplish their mission without conflict and ensure their limited funding can reach those who truly have no other source of coverage.²⁶

State Regulation of Health Privacy and Insurance

States are also generally the primary regulators of insurance, making laws and regulations about the circumstances in which insurance companies have to provide information to policyholders and enrollees and setting other related requirements. There are a wide range of state laws and regulations related to insurance information, billing, and payment. For example, a 2012 review conducted by the Guttmacher Institute and Public Health Solutions looking at state laws and policies that could affect confidentiality for individuals insured as dependents identified six major areas of potential concern, including statutes and regulations related to:

- EOBs
- denial of claims
- acknowledgment of claims
- requests for additional information
- payment
- divorce and child custody²⁷

Overview of State Approaches

Given the variability at the state level around regulation of insurance and state-level HIPAA Privacy Rule implementation, states have also taken a variety of different approaches to addressing the range of confidentiality issues. States have used legislative and regulatory strategies, and at least one has addressed the issue in Medicaid managed care contracts. Some states have focused their approach solely on minors; others focused those over 18, and still others for all those covered as dependents. Three states have protections for minors specifically related to treatment for STDs.

The following is a summary of state approaches^{28,29}:

Enacted through legislation:

- State requires insurers to provide confidential communications upon written request of insured dependent (including minors): CA, MD, OR
- EOB protections:
 - No EOB required (unless requested by the patient) when there is no balance: NY, WI
 - EOBs suppressed in Medicaid for sensitive services: IL

- Confidentiality for minors:
 - Broader protections against disclosure of health information without minor's consent: HI, ME
 - Specifically for STD treatment, including in billing process: CT, DE, FL

Enacted through regulation:

- State requires insurers to provide confidential communications upon written request of insured dependent (including minors): WA
- State requires insurers to provide confidential communications upon written request of insured dependent (excluding minors): CO

Policies for Medicaid managed care organizations:

- Policy memorandum requiring these organizations to suppress EOBs for healthcare services provided to minors who can consent to their own health care: NY
- Managed care contract amendments to conform with state law confidentiality protections: IL

A Closer Look at Sample State Approaches

California's Confidential Health Information Act, [Cal. Civil Code § 56 et seq.](#), is often considered to be one of the broader approaches to the issue. The state builds on the process outlined in the HIPAA Privacy Rule, as well as a strong framework of patient privacy and confidentiality protections, including for minors, that had previously been in place in the state. The California Confidential Health Information Act creates both a right and a process for individuals to make a request to their health insurance or managed care plan for "confidential communications." This means that healthcare information related to sensitive services can be sent to a subscriber or enrollee at an address, e-mail, or phone number requested by the subscriber or enrollee. Healthcare information can also be sent confidentially if the subscriber or enrollee believes that disclosure could result in endangerment. Key coalition partners at the American Civil Liberties Union of Northern California, the American Civil Liberties Union of Southern California, Essential Access Health (California's Title X grantee), and the National Center for Youth Law have collaborated on a public education campaign for both healthcare providers and consumers that includes a [website](#) to educate them about the law and how consumers can apply for confidential communications.³⁰

[Maryland](#) and Oregon passed laws similar to California's. The Oregon Health Authority built a [website](#) for providers about the law ([Or. Rev. Stat. § 743B.555](#)). The state's division of financial regulation has also created a standardized [form](#) that can be used to request confidential communications from any insurance company in the state.

Illinois and New York state focused on confidentiality in Medicaid managed care. The Illinois General Assembly amended its [law](#) (305 Ill. Comp. Stat. 5/5-30) in 2015 to protect against disclosure of information, including in billing and EOBs, about sensitive healthcare services.³¹ State officials are now working to ensure this language is included in managed care contracts. The New York State Department of Health's Office of Health Insurance Programs sent out a [policy memo](#) in 2016 outlining the procedures for the state's Medicaid managed care plans to comply with confidentiality protections for minors who are enabled under state statute consent to their own healthcare.³²

Washington state and Colorado have used insurance regulations rather than legislation to protect confidentiality. Washington's regulatory [model](#) represents the broader approach and is based on the [Health Information Privacy Model Act](#) issued by the National Association of Insurance Commissioners. Washington, however, was the only state to adopt the model. The Washington regulations, adopted in 2001, are notable because they explicitly require insurers to obtain authorization for disclosure from minors for any healthcare service for which they have consented. In addition, the regulations require insurers to limit disclosure of health information if the individual states in writing that such disclosure could jeopardize his/her safety. Insurers must also honor written requests to limit disclosure of health information related to sensitive services. Even though the regulations have been in place for a long time, implementation has been relatively limited, though efforts have started to increase in recent years.³³

Colorado's regulatory [approach](#) is more limited in that it only applies to adult children or adult dependents covered under a family member's plan and requires carriers to take reasonable steps to ensure their PHI is protected, but does not outline specific procedures by which this needs to happen. The lack of specificity has presented challenges around implementation since the regulation took effect in January 2014.³⁴

As an additional resource, the National Family Planning and Reproductive Health Association's Confidential & Covered project produced in-depth profiles on the legislation in [California](#) and the regulations in [Colorado](#) and [Washington](#).

Factors to Consider in Your State

As states think about what approaches may work to enhance confidentiality for minors and/or individuals insured as dependents, some factors to consider include:

- State age of consent requirements for family planning and other healthcare services.
- State requirements around parental notification and involvement in healthcare services.
- Existing state-level confidentiality laws and regulations on which you may be able to build, including state-level implementation of the HIPAA Privacy Rule.
- State insurance statutes, regulations, and policies around insurance information and disclosure, such as those identified in this [report](#).
- State Medicaid policies in both fee-for-service and managed care related to disclosure of information around sensitive services.

¹ Salganicoff A, Ranji A, Beamesderfer M, *et al.* "Women and Health Care in the Early Years of the Affordable Care Act: Key Findings from the 2013 Kaiser Women's Health Survey." Available at <https://kaiserfamilyfoundation.files.wordpress.com/2014/05/8590-women-and-health-care-in-the-early-years-of-the-affordable-care-act.pdf>. Accessed 5-26-2017.

² For a list of studies about the impact of confidentiality on minors' access to care, please see:

- Endnote 4 in A English, Ford C. "The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges." *Perspect Sex Repro H* 2004. 36(2):80-86. Available at: <https://www.guttmacher.org/journals/psrh/2004/hipaa-privacy-rule-and-adolescents-legal-questions-and-clinical-challenges>. Accessed 5-31-2017.
- Endnote 4 in English A, Summers R, Lewis J, *et al.* "Confidentiality, Third Party Billing, and the Health Insurance Claims Process: Implications for Title X." Available at https://www.confidentialandcovered.com/file/ConfidentialandCovered_WhitePaper.pdf. Accessed 5-31-2017.

- ³ American Medical Association. “Opinion 5.055: Confidential Care for Minors.” Available at <http://journalofethics.ama-assn.org/2014/11/coet1-1411.html>. Accessed 5-26-2017.
- ⁴ American Academy of Pediatrics Committee on Adolescence. “Achieving Quality Health Services for Adolescents.” *Pediatr* 2016. 138(2). Available at <http://pediatrics.aappublications.org/content/138/2/e20161347>. Accessed 5-26-2017.
- ⁵ Ford C, English A, Sigman G. “Confidential Health Care for Adolescents: Position Paper for the Society for Adolescent Medicine.” *J Adolesc Health* 2004. 35:160-7. Available at https://www.adolescenthealth.org/SAHM_Main/media/Advocacy/Positions/Aug-04-Confidential_Health_Care_for_Adolescents.pdf. Accessed 5-26-2017.
- ⁶ American Congress of Obstetricians and Gynecologists. “Committee Opinion No. 599 – Adolescent Confidentiality and Electronic Health Records.” *Obstet and Gynecol* 2014. 123:1148-50. Available at <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Adolescent-Health-Care/Adolescent-Confidentiality-and-Electronic-Health-Records>. Accessed 5-26-2017.
- ⁷ American Academy of Family Physicians. “Adolescent Health Care, Confidentiality.” Available at <http://www.aafp.org/about/policies/all/adolescent-confidentiality.html>. Accessed 5-26-2017.
- ⁸ American Academy of Family Physicians. “Adolescent Health Care, Sexuality and Contraception.” Available at <http://www.aafp.org/about/policies/all/adolescent-sexuality.html>. Accessed 5-26-2017.
- ⁹ Burstein G, Blythe M, Santelli J, *et al.* “Confidentiality Protections for Adolescents and Young Adults in the Health Care Billing and Insurance Claims Process: Position Paper for the Society for Adolescent Health and Medicine and the American Academy of Pediatrics.” *J Adolesc Health* 2016. 58:374-77. Available at <http://www.jahonline.org/article/S1054-139X%2815%2900723-5/pdf>. Accessed 5-27-2016.
- ¹⁰ Uberoi N, Finegold K, Gee E. “ASPE Issue Brief: Health Insurance Coverage and the Affordable Care Act.” Available at <https://aspe.hhs.gov/system/files/pdf/187551/ACA2010-2016.pdf>. Accessed 6-5-2017.
- ¹¹ National Council of State Legislators. “Dependent Health Coverage and Age for Healthcare Benefits.” Available at <http://www.ncsl.org/research/health/dependent-health-coverage-state-implementation.aspx#2>. Accessed 6-5-2017.
- ¹² *Ibid.*
- ¹³ Kaiser Family Foundation. “Women’s Health Insurance Coverage.” Available at <http://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/>. Accessed 6-5-2017.
- ¹⁴ English A, Summers R, Lewis J, *et al.* “Confidentiality, Third Party Billing, and the Health Insurance Claims Process: Implications for Title X.” Available at https://www.confidentialandcovered.com/file/ConfidentialandCovered_WhitePaper.pdf. Accessed 5-31-2017.
- ¹⁵ English A, Ford, CA. “The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges.” *Perspect Sex Repro H* 2004. 36(2):80-86. Available at: <https://www.guttmacher.org/journals/psrh/2004/hipaa-privacy-rule-and-adolescents-legal-questions-and-clinical-challenges>. Accessed 5-31-2017.
- ¹⁶ *Ibid.*
- ¹⁷ Guttmacher Institute. “An Overview of Minors’ Consent Law.” Available at <https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law>. Accessed 5-26-2017.
- ¹⁸ English A, Ford, CA. “The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges.” *Perspect Sex Repro H* 2004. 36(2):80-86. Available at: <https://www.guttmacher.org/journals/psrh/2004/hipaa-privacy-rule-and-adolescents-legal-questions-and-clinical-challenges>. Accessed 6-5-2017.
- ¹⁹ English A, Summers R, Lewis J, *et al.* “Confidentiality, Third Party Billing, and the Health Insurance Claims Process: Implications for Title X.” Available at https://www.confidentialandcovered.com/file/ConfidentialandCovered_WhitePaper.pdf. Accessed 6-5-2017.
- ²⁰ English A, Summers R, Lewis J, *et al.* “Confidentiality, Third Party Billing, and the Health Insurance Claims Process: Implications for Title X.” Available at https://www.confidentialandcovered.com/file/ConfidentialandCovered_WhitePaper.pdf. Accessed 6-5-2017.
- ²¹ 42 U.S.C 1396d(a)(4)(c)
- ²² Fox H, Limb S. “State Policies Affecting the Assurance of Confidential Care for Adolescents.” Available at <http://www.thenationalalliance.org/pdfs/FS5.%20State%20Policies%20Affecting%20the%20Assurance%20of%20Confidential%20Care.pdf>. Accessed 6-5-2017.
- ²³ English A, Summers R, Lewis J, *et al.* “Confidentiality, Third Party Billing, and the Health Insurance Claims Process: Implications for Title X.” Available at https://www.confidentialandcovered.com/file/ConfidentialandCovered_WhitePaper.pdf. Accessed 6-5-2017.
- ²⁴ 42 U.S.C. § 1396k; 42 C.F.R. § 433.147.

²⁵ English A, Summers R, Lewis J, *et al.* "Confidentiality, Third Party Billing, and the Health Insurance Claims Process: Implications for Title X." Available at https://www.confidentialandcovered.com/file/ConfidentialandCovered_WhitePaper.pdf. Accessed 6-5-2017.

²⁶ *Ibid.*

²⁷ English A, Gold R, Nash A, *et al.* "Confidentiality for Individuals Insured as Dependents: A Review of State Laws and Policies." Available at https://www.guttmacher.org/sites/default/files/report_pdf/confidentiality-review.pdf. Accessed 6-5-2017.

²⁸ Guttmacher Institute. "Protecting Confidentiality for Individuals Insured as Dependents." Available at <https://www.guttmacher.org/state-policy/explore/protecting-confidentiality-individuals-insured-dependents>. Accessed 6-5-2017.

²⁹ English A, Gold R, Nash A, *et al.* "Confidentiality for Individuals Insured as Dependents: A Review of State Laws and Policies." Available at https://www.guttmacher.org/sites/default/files/report_pdf/confidentiality-review.pdf. Accessed 6-5-2017.

³⁰ English A, Lewis J, Morales M, *et al.* "Protecting Patients' Privacy in Health Insurance Billing & Claims: A California Profile." Available at https://www.confidentialandcovered.com/file/A_California_Profile.pdf. Accessed 6-5-2017.

³¹ Illinois General Assembly Public Act 099-0181. Available at <http://www.ilga.gov/legislation/publicacts/99/PDF/099-0181.pdf>. Accessed 6-5-2017.

³² New York State Department of Health Office of Health Insurance Programs. "Policy for the Protection of Confidential Health Information for Minors Enrolled in NYS Medicaid Managed Care Plans."

³³ English A, Lewis J, Morales M, *et al.* "Protecting Patients' Privacy in Health Insurance Billing & Claims: A Washington Profile." Available at https://www.confidentialandcovered.com/file/A_Washington_Profile.pdf. Accessed 6-5-2017

³⁴ English A, Lewis J, Morales M, *et al.* "Protecting Patients' Privacy in Health Insurance Billing & Claims: A Colorado Profile." Available at https://www.confidentialandcovered.com/file/A_Colorado_Profile.pdf. Accessed 6-5-2017.