The National Society of Dental Practitioners
RISK MANAGEMENT Newsletter
Volume 33 | No. 2

Special Considerations for Treating Minors:
Part 2 : Confidentiality, Suspected Neglect and Abuse

By Jennifer Flynn, CPHRM

In Part One of *Special Considerations for Treating Minors*, we discussed the basic principles of obtaining informed consent to treat minor patients, and general risk management recommendations to help dental professionals navigate these concerns.

Part Two of this article will examine additional legal and ethical concerns related to treating minors, including privacy and confidentiality concerns, and instances of suspected abuse or neglect.

Confidentiality

The privacy rights of minors and who can access their protected health information are similar to what was discussed in Part One regarding informed consent.

There are specific provisions that vary by state, but in general minors cannot exercise their HIPAA privacy rights over their protected health information until they are 18 years-old or have reached the age of majority.

In most states, until age 18, a parent or guardian who is deemed the patient's "personal representative" is permitted to access the minor's health information records.

HIPAA Privacy Standards

The Department of Health and Human Services has developed provisions that address protected health information for minors that are available on their website.

Parents and guardians are considered to be the minor's personal representative if they have the right to make their health care decisions. As personal representatives, parents/guardians generally have access to their children's protected health information.

There are specific circumstances where parents may not be the personal representative of their minor children. A minor is considered "the individual" who can exercise their rights under the privacy rule in three circumstances:

- When the minor may legally receive care without parental consent, and the minor (or a court) has consented to the care
- When a parent has assented to an agreement of confidentiality between the health care provider and the minor
- When the parent is not the personal representative of the minor and does not automatically have the right of access to health information (unless the minor requests that the parent have access)

State Law

Each state has laws that allow minors to give their consent for treatment in certain health care situations, including emergency care, substance abuse, mental health, and/or pregnancy.

Some states also have laws that allow minors to consent to care if they meet certain conditions, such as being emancipated, living apart from their parents, military service, if the minor is a parent, or if they have graduated from high school. Check with your state to see under which circumstances a minor may consent to their own care and may exercise HIPAA rights regarding the records of that care. For minors, when it comes to parental access to information, HIPAA automatically defers to state laws unless they are silent or unclear.

Many states have laws regarding the disclosure of information to parents, but some do not allow disclosure without the minor's permission, and some are silent on the issue. In these cases, HIPAA gives discretion to the provider or health plan. Check to see what your state laws dictate.

Suspected Neglect

How do you identify neglect? How is it different from informed refusal? Dental neglect is defined by the American Academy of Pediatric Dentistry as:

"...willful failure of parent or guardian to seek and follow through with treatment necessary to ensure a level of oral health essential for adequate function and freedom from pain and infection."

Failure to seek or obtain proper dental care may result from various factors such as lack of finances, lack of perceived value of oral health care, or low health literacy.

Just because a parent or guardian refuses treatment does not necessarily constitute neglect on their part. Try to obtain the reasons behind failure to seek care; do not assume it is neglect. If there is concern about something such as finances or lack of knowledge, do your best to address the underlying issue and document these discussions in the dental record.

Refusing care is not considered neglect until two conditions are met:

- A parent/guardian has been properly educated regarding the nature and extent of the child's condition, the specific treatment needed, and available options
- The parent continues to fail to seek or obtain essential dental care for their child

In your professional opinion, if both conditions have been met, and you have documented your discussions with the parent/guardian regarding these concerns, it is your responsibility to report the situation to your local child protective services for the wellbeing of your patient.

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Suspected Abuse

What can dentists do to help potential victims of child abuse? What signs can dentists look for, and what should they do if they suspect abuse?

A careful and thorough intraoral and perioral examination is necessary in all cases of suspected abuse and neglect. In more than half of child abuse cases the minor displays physical signs of craniofacial, head, face, and neck injuries.

Dentists and RDH licensed DA's, are legally mandated in all 50 states and the District of Columbia to report suspected child abuse and neglect. Failure to do so can expose dentists to legal liabilities, fines, loss of license, or even imprisonment.

Duty to report supersedes many common law privileges. Any suspected instances of child abuse or neglect must be reported to your local child protective services office.

Summary

Pediatric dental patients have special clinical, liability and ethical considerations. Understand how HIPAA and your state's laws protect a minor's right to privacy, and under what circumstances information can or cannot be shared with a parent or legal guardian. Report all cases of suspected child abuse or neglect to the proper authorities.

Use the risk control recommendations in this article to help assess and enhance your facility's practices regarding care of minor patients.

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Special Considerations for Treating Minors: Risk Management Recommendations

Privacy

- Review a HIPAA privacy notice with patients and their parent/legal guardian when they give their consent to treatment
- Offer minor patients a private space away from parents/guardians for interviews, dental examinations, and dental procedures
- Allow minor patients to invite a family member, peer, or other chaperone to be present during discussions and examinations
- Educate minor patients about situations when information will be shared with parents or guardians
- Verify the method which may be used to contact the minor patient or their parent/guardian, and if it is by phone, whether messages may be left at that number

Confidentiality

- Have a written policy in place that protects patients' privacy rights
- Ensure there is a policy/procedure in place regarding sharing information with family and staff members
- Obtain consent from the minor or their parent/guardian before sharing dental information
- Promote minor's emerging autonomy whenever possible
- Make minor patients aware that certain billing situations may affect confidentiality
- Ensure policies address documentation issues such as access to electronic health records via online patient portals and billing procedures

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Dental Expressions® – From the CNA Claim Files

Practitioner: General practitioner (GP)

Subsequent practitioner: Endodontist; Oral-maxillofacial surgeon (OMFS)

Claimant: 27 year-old male

Risk management topics: Failure to diagnose; inadequate documentation; subsequent practitioner comments

Facts

August 17: The patient sought care with his GP for an examination and cleaning. The healthcare record note included: "Exam, FMX, prophy."

January 11, following year: The patient returned six months later and the chart note indicates:

"Good hygiene will come back for nightguard

and bleaching trays. Sensitivity after last bleaching. NV: prophy 6 months."

February 15: This visit to the GP's office is driven by pain in the lower anterior. The patient record indicates:

> "Periapical of 25 and 26 taken: [Patient] has been having severe pain in this area. Noticed tooth moving, been grinding…Refer to endo stat…Large radiolucency at apex of 24, 25, 26 area."

February 16: The patient is seen by the recommended endodontist. The endodontist documents in the patient record:

> "Root canal on 25 and 26 completed by another endodontist 10 years ago. Flare up 8 months ago, resolved in few days. Large diffuse radiolucent area. Referred to [OMFS]."

February 24: Utilizing general anesthesia, the OMFS completes an apicoectomy of 25 and 26, and submits excised tissue for biopsy.

March 1: The biopsy report documents a one year history of pain at the site of 25 and 26. Clinical differential diagnosis: chronic apical periodontitis, or central giant cell tumor. Pathology report: chronic apical periodontitis (dental granuloma).

March 3: The patient spoke with the OMFS and expressed his disappointment about the care provided by his GP: he specifically referred to a delayed diagnosis and stated that he has contacted a lawyer. The OMFS documented the discussion:

> "Considering the size of the lesion, a delay of a few months wouldn't have made much difference in the size of the lesion or its treatment. It was likely that the lesion was there for quite some time and the endodontist referral a reasonable recommendation."

March 9: The patient calls the OMFS on his personal cell phone. The patient repeatedly questioned his GP's judgment and why it took him so long to address his lower incisors. The OMFS's notes indicate that he…

> "responded that [he] could not make a fair and honest assessment because [he] didn't know what [the GP] had done or his course of treatment prior to me seeing [the patient]."

The patient then requested that his treatment records and pathology reports not be sent to any other provider. The OMFS informed the patient that the pathology and procedure report had been sent to the referring endodontist on the day of surgery, pursuant to customary protocol. The OMFS informed the patient that no further reports would be shared with anyone without his approval.

March 15: The GP offered to pay for any subsequent treatment needed by the patient.

March 17: The GP called the OMFS to discuss the case and the surgeon documented:

> "I did not give [the GP] any information. I apologized for not being able to share any information on the patient's care: I had to respect [the] patient's wishes and confidentiality. [The GP] was polite and said thank you and we ended the conversation."

August 15: The OMFS decides the long-term prognosis of 25 and 26 is poor, and recommends extraction of 23, 24, 25, 26, followed by the placement of dental implants in area of 23 and 26.

Key allegations

Delayed diagnosis and referral

Claimed injury/damages

Apicoectomy of 25 and 26; eventual loss of 23-26

Analysis:

- **Inadequate records.** This claim boils down to failure to diagnose the mandibular lesion on the August 17 visit. Although the patient later reported he had been suffering pain for over a year, the GP's records of August 17 are silent on complaints, test results, assessment or recommendations. The documentation looks like a billing statement instead of a progress note, making defense of this claim difficult. Were the radiographs reviewed? The results of all tests, including radiographs, should always be documented.
- The notes for the next patient visit reflect those customarily made by hygienists after a routine prophylaxis and exam. This note provides a bit more information though a statement that the patient had no complaints or pain would have been helpful for the defense.
- **HIPAA compliance.** Specialists routinely provide treatment reports and other patient information to the referring dentist. However, when a patient requests that records not be shared, that request must be honored. Subsequent record releases must be approved by the patient and documented.
- The failure to observe/document the lesion on radiographs taken during the August 17 visit is the lynchpin of the patient's claim. One mitigating factor—even if there was a failure to conform to the appropriate standard of care, there still must be resulting damages. In this case, there is no evidence to support a claim that the apicoectomy would have had a better outcome had the diagnosis been made at the August 17 visit. Additionally, the GP offered to pay for all subsequent dental treatment in an attempt to address his patient's dissatisfaction. Because the dentist was not precise in his language, the patient assumed that the offer encompassed all costs (leading to additional patient anger). It is important to be very clear when making an offer to assume a patient's subsequent treatment expenses.
- Even when pressed, the OMFS refused to offer judgment on the care provided by the GP beyond the facts known to him. The surgeon also displayed good judgment in obtaining a general release allowing disclosure of the patient's records to the referring dentist, and in honoring the patient's wishes to keep all records private once that release was withdrawn. Such a request would not apply to legally required release of records, such as release for defense of a professional liability case.
- **Inter-professional relations:** A specialist walks a tight rope every day in diagnosing a patient's needs without incriminating the referring dentist. It is always best to confine all commentary to known facts and avoid judgments based on suppositions about what might have been seen by the referring dentist.
- **Patient management:** Although offering to pay for subsequent dental treatment can circumvent a possible claim, dentists must be careful to define the parameters of such an offer.

Outcome:

A settlement of well under $20,000 was reached, which included an amount for out-of-pocket patient expenses but no lost wages or pain and suffering

DENTIST'S ADVANTAGE
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DENTIST'S ADVANTAGE

Did you know...

...that there is a full library of Risk Management information available to NSDP members on the Dentist's Advantage website?

As a member, you have access to a full range of helpful information that you can use everyday in your practice. They include:

- **Dental Office Forms** – Our Dental Office Forms system represents one of the valuable and useful tools we provide to assist you in managing your practice in the safest way possible. Included in this library are dozens of Record Keeping Forms and Consent Forms. Some examples are:
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  - Chart Review Checklist
  - Post Extraction Instructions
  - Consent Forms
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N-13186-0518