

Department of Legislative Services  
Maryland General Assembly  
2017 Session

FISCAL AND POLICY NOTE  
First Reader

Senate Bill 935  
Finance

(Senator Smith)

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Public Health - Delegation of Health Care Decisions - Temporary Health Care  
Agent for Minors

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This bill authorizes a parent or legal guardian of a minor to delegate the authority to consent to, and make decisions regarding, medically necessary health care treatment for the minor to a temporary health care agent. The delegation must be made on a medical authorization treatment form. The bill includes a template for a suggested form. However, the power to make decisions regarding withholding or withdrawing life-sustaining treatment of the minor may not be delegated to a temporary health care agent.

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Fiscal Summary

**State Effect:** The bill is not expected to materially affect State operations or finances.

**Local Effect:** None.

**Small Business Effect:** None.

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Analysis

**Bill Summary:** “Temporary health care agent” means an individual who is authorized by the parent or legal guardian of a minor to consent to medically necessary immediate health care treatment on behalf of the minor.

“Medical authorization treatment form” means a form that delegates medical treatment decision-making authority on behalf of a minor to another individual. The form must include specified information, including any limitations on the medical treatment decision-making authority of the temporary health care agent and the duration of the

authority. The form may expire no later than 90 days from the form's effective date. The form is revocable at any time.

A health care provider is immune from criminal prosecution or civil liability and may not be subject to disciplinary action by the appropriate licensing authority as a result of relying in good faith on consent given by a temporary health care agent when treating a minor.

Among other provisions, the bill's template for a medical authorization treatment form includes the provision that, for all purposes related to the document, the temporary health care agent is the person in interest under the Maryland Confidentiality of Medical Records Act and the personal representative under the federal Health Insurance Portability and Accountability Act (HIPAA).

### **Current Law/Background:**

#### *Minor's Consent to Treatment*

A minor has the same capacity as an adult to consent to medical or dental treatment if the minor is married, the parent of a child, or living separately from the minor's parents or guardian and self-supporting. A minor may also consent to medical treatment if, in the judgment of the attending physician, the life or health of the minor would be affected adversely by delaying treatment to obtain the consent of another individual. Similarly, a minor has the same capacity as an adult to consent to psychological treatment about drug abuse or alcoholism if, in the judgment of the attending physician or a psychologist, the life or health of the minor would be affected adversely by delaying treatment to obtain the consent of another individual.

In addition, a minor may consent to (1) treatment for or advice about drug abuse, alcoholism, venereal disease, pregnancy, or contraception other than sterilization; (2) physical examination and treatment of injuries from an alleged rape or sexual offense; (3) physical examination to obtain evidence of an alleged rape or sexual offense; and (4) initial medical screening and physical examination on and after admission of the minor into a detention center. The capacity of a minor to consent to treatment for drug abuse or alcoholism does not include the capacity to refuse treatment in an inpatient drug or alcoholism treatment program for which a parent or guardian has given consent.

A licensed health care practitioner who treats a minor is not liable for civil damages or subject to any criminal or disciplinary penalty solely because the minor did not have capacity to consent.

Without the consent of or over the express objection of a minor, a licensed health care practitioner may, but need not, give a parent, guardian, or custodian of the minor or the

spouse of the parent information about treatment needed by the minor or provided to the minor, except information about an abortion.

### *Disclosure of Medical Records*

Generally, a health care provider may not disclose medical records without the authorization of the person in interest. Under State law, “person in interest” includes (1) a minor, if the medical record concerns treatment to which the minor has the right to consent and has consented; (2) a parent, guardian, custodian, or representative of the minor designated by a court, in the discretion of the attending physician who provided the treatment to the minor, under specified circumstances; (3) a parent of the minor generally, except if the parent’s authority to consent to health care for the minor has been specifically limited by a court order or a valid separation agreement entered into by the parents of the minor; or (4) another person authorized to consent to health care for the minor.

### *Federal Health Insurance Portability and Accountability Act*

In addition to restrictions in State law, federal law and regulations restrict the ability of a health care provider to disclose a medical record (also referred to as protected health information) without the authorization of the person in interest. Generally, federal law and regulations preempt state law with respect to protected health information confidentiality. However, HIPAA and its standards do not preempt state law if the state provision (1) relates to the privacy of individually identifiable health information and (2) is “more stringent” than HIPAA’s requirements.

Under HIPAA regulations, a health care provider is required to treat a personal representative of an individual *as the individual* for the purposes of disclosure of protected health information and may be required to disclose an individual’s protected health information to a personal representative without the individual’s consent. For example, generally, when a parent, guardian, or other person acting in place of the parent has the authority to act on behalf of an unemancipated minor in making health care decisions, a health care provider must treat that person as the personal representative of the individual and disclose the protected health information. However, if a person is not authorized to make health care decisions, that person likely does not qualify as a personal representative for purposes of the disclosure of protected medical information.

There are three circumstances under HIPAA in which the parent is *not* the personal representative of the child: (1) when state or other law does not require the consent of a parent or other person before a minor can obtain a particular health care service and the minor consents to the service; (2) when someone other than the parent is authorized by law to consent to the provision of a particular health care service to a minor and provides such consent; and (3) when a parent agrees to a confidential relationship between the minor and

a health care provider. If state law expressly addresses the ability of a parent to obtain health information about the minor child, HIPAA defers to state law, regardless of whether the parent is the personal representative of the minor child.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 961 (Delegate Kelly) - Health and Government Operations.

**Information Source(s):** Department of Health and Mental Hygiene; U.S. Department of Health and Human Services; Department of Legislative Services

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