

ATTORNEYS
AT LAW

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CRAMER PC

Practical Pediatric Legal Updates



Agenda

General legal topics

- Refusal to Vaccinate.
- Animals in the Waiting Room.
- HIPAA Enforcement Updates
- Minors and Privacy Rights

Employment law

- Mandatory Vaccines.
- CBD and Marijuana Use.

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**Refusal to
Vaccinate.**

Risks for your practice include:

Compromised health of unvaccinated patients.

Parental accusations that their refusal was not informed when unvaccinated child falls ill.

Risk to other patients in the office.

Current Clinical Report- Countering Vaccine Hesitancy:

<https://pediatrics.aappublications.org/content/138/3/e20162146>

Current AAP Policy – Responding to Parental Refusals of Immunization of Children:

<https://pediatrics.aappublications.org/content/115/5/1428>

AAP Form – Refusal to Vaccinate:

<https://downloads.aap.org/DOPCSP/SOID RTV form 01-2019 English.pdf>

Documentation is critical to support **informed refusal**.

Having the ability to **readily identify unvaccinated patients** is critical to protecting all your patients.

Can I dismiss a family who refuses to
vaccinate their child(ren)?

The short answer is generally, **yes**, but . . .

Exhaust all other avenues first, such as **addressing parental concerns, correcting misconceptions**, etc.

Inform yourself of all applicable rules, policies, and third-party payer provisions about dismissing a patient – similar to other contexts for patient dismissals.

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**Animals in the
Waiting
Room.**



Service Animals are legally defined and protected by Titles II and III of the Americans with Disabilities Act (ADA).



The **ADA limits the definition of Service Animals to dogs only**, however, in some states like Vermont, miniature horses are allowed to be service animals. Service Dogs are individually trained to do work or perform tasks for the benefit of an individual with a disability.

The ADA makes it clear that service animals are allowed in public facilities and accommodations.

Place of Public Accommodation is defined under Vermont Law as:

“any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered to the general public.”

A service animal must be allowed to accompany the handler to any place in the building or facility where members of the public, program participants, customers, or clients are allowed.

Even if the business or public program has a “no pets” policy, it may not deny entry to a person with a service animal. Service animals are not pets. So, although a “no pets” policy is perfectly legal, it does not allow a business to exclude service animals.

What Kinds of Tasks Do Service Animals Perform?

The work or tasks performed by a Service Dog must be directly related to the handler's disability.

- | | |
|-------------|--|
| Providing: | Providing stability for a person who has difficulty walking |
| Picking: | Picking up items for someone who has limited use of their hands or who uses a wheelchair |
| Preventing: | Preventing a child with autism from wandering away |
| Warning: | Warning a person with hearing loss that someone is approaching from behind |
| Alerting: | Alerting a person with diabetes to a drop in insulin or a person with epilepsy to the onset of a seizure |

What About Comfort Animals?

Comfort, therapy, or emotional support dogs are not service animals

A dog trained to sense an anxiety attack or lessen its impact would qualify

The ADA makes a distinction between an emotional support animal and a psychiatric service animal

A dog that simply provides comfort does not

How Do I Know if the Dog is Really a Service Animal?

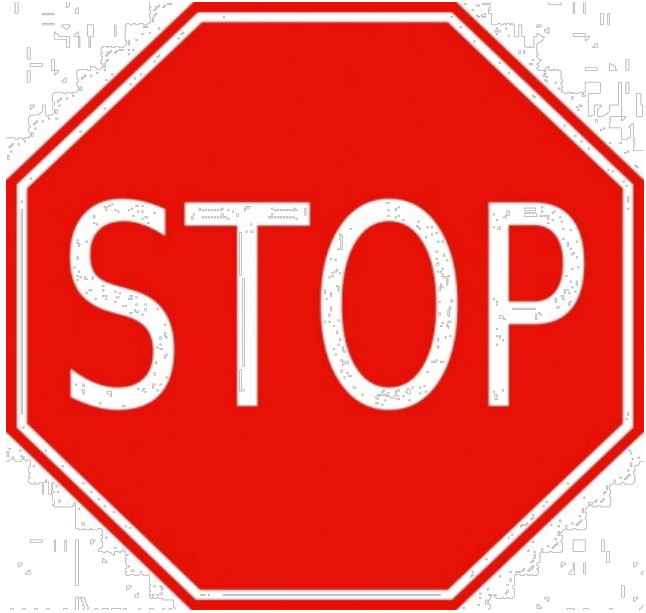
You may not know for sure

If the disability is obvious and the service performed is obvious (guide dog for a person who is visually impaired), then that ends the inquiry.

When it is not obvious, you have the right to ask two questions and only two questions.

The ONLY Two Questions You May Ask

- Is the dog required because of a disability?
- What work or task has the dog been trained to perform?



Questions You May Not Ask

- Never ask about the nature or extent or for proof of the person's disability.
- You are not entitled to a person's confidential medical information
- Do not ask for or about certification/vest.
- a) There is no state or national certification
- b) Service animals are not required to wear vests, ID, etc.
- Do not ask to have the animal perform the task

Are There Any Limitations?

The service animal must be LEASHED, HARNESSED OR TETHERED at all times UNLESS such devices interfere with the task to be performed or the person's disability prevents to the use of such devices. In that case the animal must be under VOICE CONTROL.

The service animal must be WELL BEHAVED (under control, housebroken, not barking, growling, baring of teeth etc.)

When Can Service Animals Be Excluded?

- If it fundamentally alters the nature of the services provided
- Legitimate health or safety concerns (i.e. operating room)
- If the service animal is out of control (not leashed or under voice control, not housebroken, barking, baring of teeth, growling etc.) and the handler does not take effective action to control it
- You can ask the person to remove the animal from the premises BUT you must continue to serve the individual

Best Practices

- Adopt a policy related to service animals
- Post the two questions in a place that is accessible to people who need to make decisions
- Train your staff
- Post a sign welcoming service animals

How Do I Protect Myself from Complaints?

- Follow best practices
- Don't exclude an animal or provoke a confrontation unless the animal is misbehaving even if you are not convinced it is a legitimate service animal
- DOCUMENT- If you exclude or request removal, document the circumstances
 - a) Have any employees involved write up what happened
 - b) Get the names and contact information of any witnesses
 - c) Record the specific behaviors that led to the request and the owner's response
 - d) Make sure you document date(s) and time(s)

Where Can I Get Additional Information?

- Human Rights Commission website:
hrc.vermont.gov
- USDOJ website:
usdoj.gov
- USDOJ Guidance(s)- Posted on both websites

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HIPAA Enforcement Updates.

Patient access to records.

Charges for copies must reflect reasonable, cost-based fees.

“Records review fee” will set off alarm bells.

Business Associate Agreements.

Have you audited for these?

Obtain satisfactory assurances that HIPAA Rules will be followed by your Business Associate.

Confirm that your Business Associate has performed an organization-wide risk analysis, has developed a risk management plan, and is reducing risks to an acceptable and appropriate level.

A covered entity will be in violation of HIPAA Rules if it knew of a pattern of activity or practice of the Business Associate in violation of HIPAA's Privacy or Security Regs.

Conditioning HIPAA compliance on patient agreement.

Practice requested patients sign “**Consent and Mutual Agreement to Maintain Privacy**,” prohibiting patient from directly or indirectly publishing or airing commentary about the physician, in exchange for the physician's compliance with the Privacy Rule.

A patient's rights under the Privacy Rule are not contingent on the patient's agreement with a covered entity.

Annual Security Risk Analysis

Accurate and thorough **assessment** of the potential **risks** and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information held your practice.

<https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/securityrule/riskassessment.pdf?language=es>

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Minors and Privacy Rights.

Minors and Privacy Rights

Age of Legal Consent = 18 years.

Under 18 = a minor.

In most circumstances, minors are not capable of giving informed consent to their own health care.

Minors and Privacy Rights

Who gives consent for a minor?

A parent (adopted or biological); or

A guardian or representative who has been appointed by a judge to make health care decisions for the child.

Minors and Privacy Rights

Sharing information with personal representative.

In general treatment situations, a parent, guardian, or other person acting in loco parentis usually is the personal representative of the minor child, and a health care provider is permitted to share patient information with a patient's personal representative under the HIPAA Privacy Rule.

There are important exceptions.

Minors and Privacy Rights

Parent is not a personal representative of a minor when:

- (1) 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, the minor consents to the health care service, and the minor child has not requested the parent be treated as a personal representative;
- (2) someone other than the parent is authorized by law to consent to the provision of a particular health service to a minor and provides such consent; or
- (3) a parent agrees to a confidential relationship between the minor and a health care provider with respect to the health care. (45 C.F.R. § 164.502(g)(3)).

Minors and Privacy Rights

Carve-out from parent as personal representative.

As is the case with respect to all personal representatives under the Privacy Rule, a provider may choose not to treat a parent as a personal representative when the provider reasonably believes, in his or her professional judgment, that the child has been or may be subjected to domestic violence, abuse or neglect, or that treating the parent as the child's personal representative could endanger the child. 45 C.F.R. § 164.502(g)(5).

Minors and Privacy Rights

Can you withhold (or redact) certain information from your patient's medical record when access is requested?

- This comes up in cases where there has been a concern about abuse by one of the parents or where there are things about a parent that he or she does not want other parent to see.
- HIPAA has a process, **45 C.F.R. §164.524(a)(3) (recommend advice of counsel)**.

Minors and Privacy Rights

Provider may deny an individual access (by redacting portions or denying in whole, depending on circumstances), as long as a right to review the denial is provided.

Licensed health care professional, using professional judgment, must first determine that:

(i) the access requested is **reasonably likely to endanger the life or physical safety of the individual or another person**; *(e.g., statements in records about where the key to a gun locker is maintained, where patient is suicidal).*

(ii) where the **PHI makes reference to another person** (unless such other person is a health care provider), the **access requested is reasonably likely to cause substantial harm to such other person**; *(e.g., records include information that family members have shared with the provider about the minor) or*

(iii) Where request is made by the individual's personal representative, the provision of **access to such personal representative is reasonably likely to cause substantial harm to the individual or another person**. *(e.g., atypical statements in record made by minor about parent who is requesting the records).*

You also need to check state law about an individual's access rights.

Minors and Privacy Rights

When can a minor provide consent for own care?

Emancipated under State law, examples:

- Married minors.

- Court Order of emancipation.

- Minors on active military duty.

State law has established important exceptions relating to STDs, drug or alcohol dependence, mental health and reproductive decisions.

Minors and Privacy Rights

When no parent or guardian informed consent needed, is the parent or guardian responsible for the costs?

Yes.

Generally, parents or guardians are responsible for support of their unemancipated minors if the treatment is medically necessary.

If a minor patient is seeking **alcohol or drug abuse treatment**, federal law prohibits disclosure of patient identifying information to parents for the purposes of seeking reimbursement. 42 C.F.R. § 2.14.

Thus, **providers must obtain a minor's consent before seeking reimbursement for these services from the minor's parent or guardian.**

Minors and Privacy Rights

Notice of treatment to parent/guardian?

Per HIPAA's Privacy Rule, when State law permits a minor to consent to health care without parental consent, and is silent on parental notification, the provider would need the child's permission to notify a parent.

<https://www.hhs.gov/hipaa/for-professionals/faq/231/if-patient-present-when-does-hipaa-allow-provider-to-discuss-information/index.html>

Minors and Privacy Rights

Patient Portals:

Age considerations – If minor may consent to some care, should parent have portal access to minor's medical information?

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**Mandatory
Vaccines.**

Mandatory Vaccinations & Employees

- Is the vaccine required by state law?
- Adopt a written policy; communicate it in advance.
- Provide reasonable accommodations for medical contraindications, disabilities, and sincerely held religious beliefs. Include process in policy. Have policy reviewed by employment counsel.
- Consult with employment counsel before declining an exemption request and/or taking adverse action against an employee.
- Follow applicable policies/agreements in connection with any adverse action.

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CBD and Marijuana Use.

Marijuana, CBD & the Workplace



Workplace Considerations: Marijuana

- What is the state law?
 - Recreational
 - Protections for employers to regulate workplace?
 - Protections for employees?
 - Therapeutic/medical use
 - What are employer/employee protections?
 - Public's use
 - Drug testing
- What federal laws apply?
- Review personnel policies
 - Confirm consistent with applicable law
 - Confirm workplace intoxication/impairment prohibited

Addressing Medical Marijuana Use

- Used to treat a disability?
- Employers also generally have a legal duty to provide a safe workplace for employees.
- Employer should engage in the “interactive process” with the employee to determine if they can perform essential job functions, with a reasonable accommodation.
- Employers do not have to accommodate an employee’s request to use marijuana at work, even if it is being used to treat a disability.
- Consult with experienced employment counsel prior to taking adverse action against an applicant or employee who is using medical marijuana.

Handling Suspected Employee Intoxication

- Important for managers to:
 - Understand symptoms of intoxication
 - Document reasonable suspicion of intoxication (be objective and factual)
 - Discuss observations with employee; assess credibility
 - Do not assume or try to diagnose substance abuse or other medical condition
 - A positive drug test or catching the employee “red handed” is generally not required before an employer takes adverse employment action against an at-will employee
 - Employers still need to confirm desired action is consistent with policies and any employment and/or union agreements
- The goal is to maintain a productive and safe work environment and follow applicable law

What about CBD?

- Cannabidiol (CBD) is a chemical derived from the Cannabis sativa L. plant.
- CBD does not make people high and is not intoxicating.
- BUYER BEWARE. Not regulated by FDA.
- Educate employees on policies and potential consequences if a CBD product does cause impairment.
- If CBD used for disability, consult with employment attorney before taking adverse action.

We hope this information is informative and helpful. However, it is not intended to constitute legal advice or create an attorney-client relationship.

We advise that you not take, or fail to take, any action based on this information or these materials without first consulting with your own legal counsel engaged for a particular matter.

THANK YOU FOR JOINING US.

You can find us at:

Alexandra Clauss, aclauss@primmer.com

Anne Cramer, acramer@primmer.com

Shireen Hart, shart@primmer.com

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Any questions?

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