

Legal Brief

Sterilization

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of January 1, 2013; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

Summary

A sterilization procedure may be performed on an adult patient capable of independently providing informed consent. Substitute consent is not permitted. Special considerations exist when performing the procedure on a minor, and reimbursement by third-party payors may be subject to special conditions.

Discussion

A mentally competent adult, capable of providing informed consent, may voluntarily elect to undergo a sterilization procedure. As to those adults not legally capable of giving consent, while state law does allow for some medical procedures to be performed with a substitute informed consent from an appointed guardian, attorney-in-fact, or other authorized person, SDCL 27A-12-3.11 specifies that “no sterilization may be authorized...for a person incapable of providing written informed consent” due to mental disability. As a result, the informed consent must come directly from the adult patient, who must be mentally competent to provide such consent, and no sterilization procedure may be performed on a person incapable of personally providing the consent.

Sterilization may not be performed on a minor without consent from a parent or guardian. In the case of sterilization of mentally incompetent minors, Courts generally hold that the interests of parents cannot be presumed to be identical to those of the incompetent child. “Thus a judicial determination is necessary to ensure that the child's personal right is protected.” *In the Matter of Guardianship of Hayes*, 93 Wn.2d 228, 608 P.2d 635, 640 (Wash. 1980). Physicians should also be mindful of their ethical duty not to perform procedures which are not medically necessary.

Private insurance companies may impose conditions for coverage for the cost of sterilization. Patients with private insurance should be encouraged to consult with their insurance company prior to the physician’s performance of the procedure. Patients should also be aware that Medicare covers the procedure only if it is considered medically necessary for the diagnosis or treatment of a medical condition.

South Dakota Administrative Rules and the United States Code of Federal Regulations dictate when reimbursement under Medicaid is permitted. Specifically, the requirements in South Dakota Administrative Rule 67:16:02:09 must be met before “payment for sterilization” is made by the Department of Social Services to the providing physician. The Administrative Rule is patterned after 42 CFR §441.253. In addition to meeting all other medical assistance eligibility requirements, the rule requires: (1) the patient be legally competent; (2) the patient sign the federally required informed consent form (which is available from the South Dakota Department of Social Services); (3) the patient be at least 21

years old; and (4) at least thirty (30) days but not more than one hundred eighty (180) days must pass between the date the informed consent form was signed and the date of the sterilization.

Consent obtained from an individual in labor or childbirth, from someone seeking an abortion, or from someone under the influence of alcohol or other substances that affect the individual's state of awareness is not considered valid. See 42 CFR §441.257. Appropriate arrangements must be made for any person needing accommodation due to language or disability.

In addition to the other requirements set out above, including the proper consent form, to qualify for reimbursement, federal rules require the following information be provided to the patient:

1. That the individual is free to withhold or withdraw consent to the procedure without affecting the right to future care or treatment and without loss or withdrawal of any federally funded program benefits.
2. A description of available alternative methods of family planning and birth control.
3. The sterilization procedure is considered to be irreversible.
4. An explanation of the specific sterilization procedure to be performed.
5. A description of the discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of the type and possible effects of any anesthetic to be used.
6. A description of the benefits or advantages that may be expected as a result of the sterilization.
7. The sterilization will not be performed for at least thirty (30) days, except under exceptions allowed by law.

See 42 CFR §441.257.

In the case of a premature delivery, the thirty (30) day wait period is waived if the informed consent was signed at least thirty (30) days before the expected delivery date and at least seventy-two (72) hours passed between the time the informed consent form was signed and the time of the actual delivery. Additionally, the thirty (30) day wait is waived in the case of emergency abdominal surgery if the informed consent form is signed at least seventy-two (72) hours before the emergency surgery is performed.

While sterilization may qualify for Medicaid reimbursement if all federal and state requirements are met, reversal of the procedure is not eligible for reimbursement under any circumstances.

Additional requirements must be met before reimbursement under Medicaid is made for a hysterectomy that results in sterilization. Medicaid funds may not be used for the performance of the procedure if “it was performed solely for the purpose of rendering an individual permanently incapable of reproducing;” or “if there was more than one purpose to the procedure, it would not have been performed but for the purpose of rendering the individual permanently incapable of reproducing.” Furthermore, unless the patient is already sterile or the procedure is necessary to treat a life-threatening emergency and prior consent is thus not possible, the patient must sign a statement acknowledging the receipt of information advising her that the hysterectomy will render her permanently incapable of reproducing. In the case of patients who are already sterile, the physician must so certify in writing and state the cause of the pre-existing sterility. In the case of a life-threatening emergency, the physician must certify that prior acknowledgement of the consequences of the procedure was not possible and explain the nature of the emergency. 42 CFR 441.255.

Conclusion

Sterilization may be performed only after receipt of informed consent directly from an adult patient competent to give that consent. Special considerations exist for performing a sterilization procedure on a minor; specifically, the physician should determine if the minor is competent to give consent, obtain consent from the minor's parent or guardian if the minor is competent and the court if the minor is incompetent, and not perform procedures that are not medically-necessary. Reimbursement by third party payors depends upon the coverage provided by the payor. Specific rules and timelines apply when seeking reimbursement through Medicaid.



SDSMA gratefully acknowledges the SDSMA Foundation for its support of this publication through funds awarded by The Physicians Foundation.