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An Analysis of Legal Issues—Child and Adolescent Behavioral Health, Part II: Consent for Behavioral Health Treatment by Minors

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Behavioral Health Task Force and Children's Hospital Affinity Group of the Academic Medical Centers and Teaching Hospitals and In-House Counsel Practice Groups

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Establishing rules regarding when minor patients may consent to health care treatment is difficult for policy makers, especially in areas such as reproductive rights, sexually transmitted diseases, behavioral health, and alcohol and drug treatment. Traditionally, rules regarding who may consent for the treatment of minor patients have been based upon the assumption that minors did not have the ability to understand their treatment options and were unable to make informed decisions regarding their health care. However, this approach has evolved and is now balanced with public health and policy considerations. In response, lawmakers have carved out exceptions that allow minors to consent to certain types of treatment under certain conditions, sometimes without their parents' knowledge or consent.

When Minors May Consent

State laws delineate situations when minors may consent for their own treatment. In the context of behavioral health care, the issue of minor consent is addressed in a variety of ways. Generally, states have laws that fall into two main categories. The first category includes laws that are based on the status of the minor. Is the minor emancipated or in the military? Is the minor married or pregnant? In some states, minors who fall into these categories may consent for their own treatment.[1] The second category of laws is based on the type of health care that is sought. Outlined below are some illustrative examples of how states have granted minors the authority to consent for specific types of treatment, including psychiatric, behavioral health, and substance abuse.

In New York, minors may access outpatient mental health treatment without parental consent if one of the following applies:

- The parent or guardian is not reasonably available to consent;
- Parental involvement would be detrimental to treatment; or

[1] *See, e.g.,* N.Y. PUB. HEALTH LAW § 504(1) (married minor may consent to treatment); TEX. FAM. CODE ANN. § 32.003(a)(1) (minor on active duty with the armed forces may consent to treatment).

- The parent or guardian has refused consent, and a physician determines that the treatment is necessary and in the minor's best interest.[2]

Practitioners are required to document the above information in the patient's medical record, and the minor must sign a written statement saying that they are voluntarily seeking services.[3] Additionally, in New York, a minor may see a provider without parental consent for the purpose of determining whether any of the above apply.[4] Moreover, in that state, minors 16 or older may seek inpatient psychiatric treatment without the consent of their parents or legal guardians.[5] For alcohol and drug abuse treatment, New York requires that steps be taken to involve the parent in care.[6] However, minors may consent to non-medical treatment for alcohol and substance abuse without parental consent or notification.[7] Further, New York law allows minors to consent to inpatient or outpatient medical treatment, if any one of the following applies:

- The health care provider determines that parental involvement is detrimental to treatment;
- The parent refuses to consent and the provider believes that treatment is necessary and in the child's best interests;[8] or
- The minor is emancipated, or a parent.[9]

The state of Texas allows inpatient mental health treatment for minors without parental consent who are 16 years or older, or 16 and younger but married.[10] In Texas, minors may give consent for admission to a mental health facility through a request filed with the administrator of the facility.[11]

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[2] N.Y. MENTAL HYG. LAW § 33.21(c); 14 N.Y.C.R.R. § 587.78(a)(3)(iii).
[3] N.Y. MENTAL HYG. LAW § 33.21(c).
[4] N.Y. MENTAL HYG. LAW § 33.21(d).
[5] N.Y. MENTAL HYG. LAW § 9.13(a).
[6] N.Y. MENTAL HYG. LAW § 22.11(b).
[7] Memorandum from Henry M. Greenberg, General Counsel, New York State Department of Health to Dennis P. Murphy, Acting Director, Division of Family and Local Health (June 29, 2000).
[8] *See,* N.Y. MENTAL HYG. LAW §22.11(c)(1); 14 N.Y.C.R.R. 820.4(c).
[9] N.Y. MENTAL HYG. LAW § 22.11(a).
[10] TEXAS HEALTH AND SAFETY CODE § 572.001.
[11] TEXAS HEALTH AND SAFETY CODE § 572.001.

In California, minors 12 years or older may consent to inpatient or outpatient mental health treatment if the following criteria are met:

- In the opinion of the provider, the minor is mature enough to intelligently participate; and
- The minor would present a danger of serious physical/mental harm to themselves or others without treatment; or
- The minor is an alleged victim of incest or child abuse.[12]

Similarly, for drug and alcohol treatment in California, a minor 12 years or older may consent to medical care or counseling for drug- or alcohol-related problems.[13] However, this does not include replacement narcotic treatment.[14] Further, California allows parents to consent for drug- or alcohol-related treatment for the minor if the minor does not consent.[15]

In Florida, minors may consent for substance abuse impairment services.[16] There is no specified age at which a minor may consent. However, parent participation may be required by the court for involuntary admissions.[17] In certain instances, minors over the age of 13 may consent to certain outpatient mental health services in Florida.[18] For example, if a minor is experiencing an emotional crisis, they may consent to diagnostic and evaluation services.[19] However, they may not consent to medication, aversive stimuli, or substantial deprivation.[20] The treatment may not exceed two visits during a one-week period, and if it does, parental consent is required.[21] Parental participation may be included in treatment if it is deemed appropriate by the mental health professional.[22] Additionally, minors over age 13 may consent to psychotherapy, group

[12] CAL. FAM. CODE § 6924(f).
[13] CAL. FAM. CODE § 6929(b).
[14] CAL. FAM. CODE § 6929(e).
[15] CAL. FAM. CODE § 6929(f).
[16] FLA. STAT. § 397.601.
[17] FLA. STAT. § 397.601.
[18] FLA. STAT. § 394.4784.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

therapy, or counseling when experiencing an emotional crisis, but the same exclusions listed above apply.[23]

Determining Capacity to Consent

When dealing with issues related to minor consent, questions often are raised regarding the capacity and competency of the minor. These terms often are used interchangeably, but there is a significant difference between the two. Competency is a legal determination, made by a court, while capacity is determined by the health care provider. Capacity focuses on the individual's ability to give consent. Does the patient understand the treatment that is being offered? Do they appreciate the risks and benefits of the treatment, and are they able to rationalize a reason for the treatment?

With respect to questions regarding an individual's capacity to understand and consent to treatment, it is important for the practitioner treating the patient to document why the practitioner determined that the patient had the capacity to consent. Things that physicians may wish to consider include the following:

- The patient's ability to demonstrate choice;
- The patient's ability to understand relevant information;
- The patient's ability to appreciate the situation and its consequences; and
- The patient's ability to manipulate information in a rational manner.[24]

When making the capacity determination, the physician should ask open-ended questions to allow the patient to demonstrate her capacity.[25] Documentation regarding the capacity determination should be kept in the patient's medical chart. This becomes extremely important when dealing with minors, because health care providers may later need to justify why they went forward with treatment based solely upon the minor's consent.

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[23] *Id.*
[24] Raphael J. Leo, M.D., "Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians," PRIM. CARE COMPANION J. CLIN. PSYCHIATRY, 1999 Oct; 1(5): 133-134.
[25] *Id.* at 134-135.

When Conflicts Arise

When states permit minors to consent to treatment, it can create conflict when the minor's parent or guardian disagrees with the decision to participate in treatment. Some states explicitly address this conflict. For example, Pennsylvania permits a minor to consent to voluntary inpatient mental health treatment and further notes that "a minor may not abrogate consent provided by a parent or legal guardian on the minor's behalf, nor may a parent or legal guardian abrogate consent given by the minor on his or her own behalf."[26] Pennsylvania's statutes even outline what should happen in the event that either the minor or the parent who initially consented to the treatment revokes that consent.[27] While Pennsylvania provides one of the more detailed statutes regarding a minor's consent, other states have included language within their respective statutes that specify that consent for treatment cannot be overridden by the parent or guardian because of the patient's minority.[28]

Other states do not explicitly address whether a minor's consent may be trumped by a parent's refusal. However, some instead include a provision that in the event that the minor consented to treatment, the parent will not be financially responsible for the treatment.[29] California and Florida both condition any liability for payment by the parent on participation in treatment, and the parent will only be responsible for payment for the part of treatment that involved their participation.[30]

In addition to legislating whether a minor may consent in the face of objections from a parent, some states also provide guidance on the reverse situation—where a minor who is capable of consenting to treatment refuses to provide consent, but the parents grant such consent to the treatment. This situation may become particularly concerning in the context of providing inpatient treatment over the minor's consent. Pennsylvania is a

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[26] 35 P.S. § 10101.1(b)(4).
[27] 35 P.S. § 10101.1(b)(5)-(6).
[28] *See e.g.* LA REV. STAT. § 40:1095(A)(1) (a minor's consent will not be overridden because of the fact of minority); COLO. REV. STAT. § 27-65-103(2) (a minor's consent will not be overridden because of the fact of minority); N.Y. MENTAL HYG. LAW § 33.21(c)(3)(iii) (allowing a minor to consent to treatment when a physician determines treatment is necessary and a parent has refused to provide consent).
[29] *See, e.g.,* OHIO REV. CODE § 5122.04(C); FLA. STAT. § 394.4784(4); CAL. CODE § 6924(e); TEX. FAM. CODE § 32.004(e).
[30] FLA. STAT. § 394.4784(4); CAL. CODE § 6924(e).

good example of state law providing the procedures that must be followed when conflict arises. Pennsylvania requires that the objecting minor be notified of the ability to file a petition opposing the treatment.[31] Once a petition is filed, the minor is then entitled to a hearing regarding whether the treatment represents the least restrictive alternative.[32] If a court finds that an inpatient admission is the least restrictive alternative, then treatment is authorized for 20 days, at which point the treatment will need to be reevaluated by the courts.[33] The care plan will continue to be reevaluated by the court for the duration of treatment.[34]

Conclusion

It is important to consult state law when advising clients on the ability of minors to consent to behavioral health care treatment. State laws vary widely regarding when a minor may consent and whether their parents or legal guardians may be notified. There also are distinct differences between the states regarding how much treatment may be provided, and under what circumstances. Some states limit the number of outpatient behavioral health sessions for which a minor may consent.[35] Others require that certain conditions be met before a minor may validly consent to treatment.[36] Additionally, it is crucial that health care providers who allow minors to consent for their mental health services carefully document how they determined the patient's capacity to consent to any given treatment. Documentation also may be required to demonstrate that any prerequisite conditions that would permit a minor to consent are satisfied.[37] Furthermore, if a minor consents to treatment it may impact other aspects of providers' practice besides the treatment plan. Practitioners should be aware that often if states do not require parental notification, they also do not require parents to pay for the services

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[31] 35 P.S. § 10101.1(b)(7)-(10).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See, e.g.,* OHIO REV. CODE 5122.04(B) (limiting the number of visits to a maximum of six visits or 30 days of service, whichever occurs sooner). *See also,* 405 ILCS 5/3-501(a) (limiting the number of treatments to a person under 17 to a total of five treatments of 45 minutes until the parents' consent is obtained).
[36] *See, e.g.,* N.Y. MENTAL HYG. LAW § 33.21(c); 14 N.Y.C.R.R. § 587.78(a)(3)(iii).
[37] N.Y. MENTAL HYG. LAW § 33.21(c).

provided to the minor.[38] Because of the wide variation in state law regarding a minor's consent to behavioral health treatment, there can be no one-size-fits-all guide to minor consent. Accordingly, behavioral health providers, and those advising them, must pay careful attention to their state's laws and regulations governing minor consent.

[38] *See, e.g.,* OHIO REV. CODE 5122.04.

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