

Ethical and Legal Issues with Children

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Workshop Description

The treatment of children in Pennsylvania involves a complex web of laws, court cases, and regulations that can become difficult to navigate. This workshop will cover common ethical and legal issues that arise when working with minors in Pennsylvania including consent to treatment, confidentiality with children, access to records, and other issues. It will not cover the Child Protective Services Law.

Learning Objectives

At the end of the workshop the participants will be able to:

1. Describe Pennsylvania's ethical and legal standards regarding minor's consent to treatment, confidentiality, and patient access to records; and
2. Analyze difficult cases using patient focused risk management principles.

Topics

Minors Consent to Treatment
Release of information
Patient/Parent Access to Records
Practical Considerations
High Conflict Families

Difficult Situation-1

One parent brought her 14 year old child into treatment, although the child did not want to come. The other parent also does not want the child to come to treatment. Should the psychologist go ahead and treat the child anyway?

Topic One: Consent to Treatment

Consent in other areas
Minors consent to mental health treatment
Grossman decision

A Comment about Mental Health Laws

Understanding the laws that govern minor's consent requires understanding several different state and federal statutes as well as court cases that sometimes appear to contradict themselves and sometimes leave important questions unanswered.

Nonetheless, this workshop is designed to give guidance in those situations.

Minors Consent in Other Settings

Drug and alcohol facilities have no minimal age of consent.

Schools have consent laws governed by PA School Code and federal laws

Minors can consent at any age to services for pregnancy.

Mental Health Treatment

Minors Consent to Treatment Law dealt with minors access to treatment.

Act 147 of 2004 amended that law to include specific language about mental health treatment.

Questions to Ask

Is the child 14 or older?

If so, is the child consenting to treatment?

If the child is under 14, what are the custodial relationships?

(Act 147) Amendments to Minors Consent to Treatment Law

A minor is 14 or older may consent to treatment on his or her own without the consent of either parent required.

If a minor is under 14, the consent of the parents is required.

If a minor is 14 and older and does not consent, the parent may consent on behalf of the child.

Children 14 or Older Who Consent

"Any minor who is fourteen years of age or older may consent on his or her own behalf to outpatient mental health examination and treatment, and the minor's parents or legal guardian's consent shall not be necessary"

35 P.S. §10101 (a) (1)

Children 14 and Older Who Do Not Consent

“A parent or guardian of a minor less than eighteen years of age may consent to voluntary outpatient mental health examination or treatment on behalf of the minor on his or her own behalf”

35 P.S. §10101 (a) (2)

No Abrogation

“A minor may not abrogate the consent 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”

35 P.S. §10101 (a) (3)

What Is Mental Health Examination or Treatment?

“A course of treatment, including evaluation, diagnosis, therapy and rehabilitation, designed and administered to alleviate an individual’s pain and distress and to maximize the probability of recovery from mental illness. The term also includes care and other services which supplement and aid or promote recovery”

35 P.S. 10101 (d)

Substantially Understands

The only limitation on minor’s consent is that the minor “substantially understands the nature of voluntary treatment”

Good Faith Representation

There is no liability if “the physician or other person relied in good faith upon the representation of the minor”

35 P.S. §10105

High School Graduates

Any minor who “has graduated from high school, or has married, or has been pregnancy may give effective consent to medical, dental and health services for himself or herself, and the consent of no other person shall be necessary”

35 P.S. §10101

Implications

The high school graduate provision creates an exception to the right of parents to seek treatment for a child under the age of 18

For college counseling centers it means that no parental consent is required regardless of the age of the child.

Minors as Parents

“Any minor who has been married or has borne a child may give effective consent to medical, dental, and health services for his or her child”

35 P.S. §10102

An Emergency

A health care professional may treat a minor without consent when “an attempt to secure consent would result in a delay in treatment which would increase the risk to the minor’s life or health”

35 P.S. §10104

Children and Youth

Whether or not children and youth agencies can consent to treatment on behalf of a child depends on the wording of the court order concerning the child. It is possible that the court order gave children and youth that authority; it is possible that the court order did not.

Inpatient Services

Parents can voluntarily admit a child under the age of 14.

Child who is 14 or older can admit themselves.

Inpatient Services (2)

Parents can voluntarily admit a child who is 14 to 18 EXCEPT child can request a hearing to determine if

- a. The child has a mental illness
- b. The disorder can be treated in the facility
- c. The facility is the least restrictive appropriate place of service

Involuntary

Immediate danger to self or others as evidenced by an overt act within the last 30 days and serious mental illness

Threat to others

Threat to self

Neglect of self

Grossman Decision

According to the decision of the State Board of Psychology, if there is a court order of joint legal custody, then the consent of both parents is required.

Although the decision dealt with evaluations, it is commonly interpreted to apply to psychotherapy as well.

Act 147 Interacts with Grossman

If a child is 14 or older, that child may consent or parents may consent on behalf of the child.

If a child is under 14, then the consent of both parents is required IF there is a court order of joint (shared) legal custody.

Legal Custody

Legal custody differs from physical custody- where the child is physically located.

Legal custody is the "legal right to make major decisions affecting the best interests of a minor child including, but not limited to, medical, religious, and educational decisions" (23 P.S. §5302).

Legal Custody (2)

Legal custody is usually, but not always, shared or joint, making both parents equal decision makers.

However, sometimes one party will be given sole legal custody OR one party will be given sole custody within a narrow domain of the child's life.

Physical Custody and Health Care

The parent with physical custody can make routine decisions about ordinary health care without the consent of the other parent.

The State Board of Psychology has implicitly determined that decisions about mental health services are not routine medical decisions.

What Do Parents Understand?

Often custody arrangements are not well explained to parents.

They often assume that physical custody necessarily means legal custody.

Custody

Custody is usually, although not always, determined when there is a divorce

If the parents are married, it is assumed that either parent can consent if there is no court order of joint legal custody.

If the parents were never married, it is assumed that either parent can consent if there is no court order of joint legal custody.

Possible Scenarios

My attorney told me I have full physical custody.

The other parent never pays the support.

The child is covered by my insurance.

The other parent is in jail.

My pediatrician never asked about custody.

There is a PFA against the other parent.

Example: Consent to Treat

The psychologist calls an absent parent to ask permission to treat. Parent says, "You psychologists are all quacks, psychology is a waste of time, you only want money, I don't care what you do as long as I don't have to pay for it." Psychologist paraphrased: "You are okay with treatment as you don't have to pay," Parent said "Yes."

Psychologist documented event and treated child.

More about Informed Consent

Psychologists are required to get consent and **document** this.

They are not required to get a signature on a document.

Example: Consent to Treat

Although Parent A initiated treatment, Parent B brought the child in for therapy numerous times and talked to the psychologist after each meeting, albeit briefly. The he complained to the Board that he never gave his consent. The investigators did not accept this as a formal complaint: bringing the child in was implied consent.

Although consent can be verbal, best to have it in writing.

ONE EXCEPTION

If parent and child present credible reports that the whereabouts of the other parent is unknown then it is acceptable to start treatment without the consent of the missing parent.

Send a letter to last known address, document efforts, and start treatment.

Remember: Difficult Situation-1

One parent brought her 14 year old child into treatment, although the child did not want to come. The other parent also does not want the child to come to treatment. Should the psychologist go ahead and treat the child anyway?

One Problem Area

What about a child 14 to 18 who does not consent to treatment and the parents disagree about whether the child should get treatment?

No clear guidance on this issue. Safest route is to get the consent of both parents.

Legal and Ethical Issues May Diverge

The legal ability to see a child does not mean there is a legal or ethical obligation to see the child.

Consent- legal ability to agree to participation

Assent- agreement of the child to participate

The Reluctant Patient

How do you respond to a 15 -17 year old who resist treatment, but parents can legally consent on behalf of the child?

Can you motivate the child to participate in treatment?

Three session rule?

Sliding scale of consent?

Test Your Understanding-1

John Doe and Jane Roe are not married but they have an 8 year old child together. There is no court order of joint legal custody. Jane Roe brought the child to a psychologist for treatment. Is the psychologist legally obligated to also get the consent of John Doe?

Test Your Understanding-2

Jane Doe brought her 14 year old daughter into psychotherapy. The daughter did not want to be there and refused to give consent. The father, Mr. John Doe also refuses to give consent. How should the psychologist proceed?

Test Your Understanding-3

Jimmy Jones aged 15, showed up in psychotherapy with Nancy, his 15 year old girl friend. Later that day the psychologist received an angry phone call from Nancy's father stating that she was providing psychotherapy to Nancy without the consent of the parents. Did the psychologist do anything wrong by allowing Nancy to come into the psychotherapy session with her boyfriend, Jimmy Jones?

Test Your Understanding-4

A parent called asking to get her 10 year old child into psychotherapy. There was a court order of joint legal custody. The parent who called said that the child's stepfather, who had raised the child since she was one year old, had agreed to psychotherapy as well. The child has had very limited contact with her biological father and calls the stepfather "Daddy."

Topic 2: Confidentiality Issues

Who controls release?

Patient/parent access to records

Look at HIPAA Privacy Rule and how it interacts with state law.

Record Retention

Who Controls the Release

If a minor is under the age of 14, the parents control confidentiality

If a minor is 14 or older and consents to treatment, then the minor controls confidentiality

Who Controls the Release (2)

If a minor is 14 or older BUT the parent consents on behalf of the minor, the minor controls confidentiality EXCEPT

1. Records of past treatment providers
2. Primary care provider
3. To parents– information on diagnosis, prognosis, etc. to make informed decision about treatment

Confidentiality Children 14 to 18 Who Do Not Consent

"The parent or legal guardian who is providing consent to mental health treatment of a minor fourteen years of age or older. . . Shall have the right to information necessary for providing consent to the minor's treatment, including symptoms and conditions to be treated, medications and other treatments to be provided, risks and benefits and expected results" 35 P.S. §10101.2 (c)

Release When There is Joint Legal Custody

Who controls the release of information when a child is under the age of 14 and there is a court order of joint legal custody?

Does the requirement to make joint decisions about health care extend to making joint decisions about the release of health care information?

Release Conundrum

A child in treatment is now 15 and a request was made to release the records, although the child started treatment when the child was 13. Who should sign the release for the child?

Who Consented?

A psychologist was treating a 16 year old girl and had both the parents and the child sign the consent to treatment form. When it comes to releasing information to the school guidance counselor who should sign the release of information form?

Who should sign the release of information form to send records to the child's primary care provider?

Access to Records

HIPAA gives patients access to protected health information but not psychotherapy notes

Protected health information, date and times of treatment, summary of treatment, results of evaluations and medications, etc.

EXCEPT if doing so would be life-endangering

Access to Psychotherapy Notes

Access required in for services provided in hospitals or facilities governed by Mental Health Procedures Act. Patients have access unless "that disclosure of specific information concerning treatment will constitute substantial detriment to the patient's treatment" or "when disclosure of specific information will reveal the identity of persons or breach the trust of confidentiality of persons who have provided information upon an agreement to maintain their confidentiality" (55 Pa. Code 5100.33 (c))

Access to Psychotherapy Notes

Psychotherapy notes include the contents of confidentiality communications with mental health professional.

Access to psychotherapy notes is controlled by state law.

Protected Health Information

“Medication, prescribing and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests and any summary of the following items: diagnosis, functional status, the treatment plan, prognosis and treatment to date”

45 CFR §164.501

Psychotherapy Notes

“Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversations during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record”

45 CFR §164.501

Record Retention

State Board– 5 years from last patient contact (may be changing)

Insurance contracts- typically 7 years

Risk management– 2 years after the child has turned 18

Test Your Understanding-1

A 14 year old has consented to treatment? Who should sign the release form to send the information to the child’s primary care provider?

A 13 year old has signed a consent to treatment form. Who should sign the release form to send information to the child’s primary care provider?

Test Your Understanding-2

Parents had consented to treatment for a 17 year old. The minor states that he wants the psychologist to tell nothing about his treatment to his parents. What legal standard is relevant here?

Topic 3: Parents/Patients Access to Treatment Records

Access by parents is required regardless of the custody arrangements.

Does not apply to children 14 or older- except for the limited access when parents consent.

A court may except the professional from sharing the information.

Parental Access- General Rule

“Except as provided in subsections (b) and (c):

1. A party granted sole or shared legal custody . . . Shall be provided access to:

(i) The medical, dental, religious and school records of the child. . .”

23 P.S. §5336 (a)

Parental Access- Exception

“The court shall not order the disclosure of any of the following information. . .

(4) Information independently protected from disclosure by the child’s right to confidentiality. . .”

23 P.S. §5336 (b)

Parental Access- Exception- 2

“The court may determine not to release information set forth in subsection (a), in which case it shall state the reason for its denial on the record”

23 P.S. §5336 (c)

Remember: Difficult Situation-2

Parents undergoing a difficult divorce have agreed to treatment for their 11 year old daughter. The mother wants a copy of the treatment records. However, the psychologist believes that showing the treatment records to the mother would get her very angry at her daughter and would risk subjecting the child to emotional mistreatment.

Withholding the Records?

If going to court to ask to withhold records, first

Ensure that the release would reasonably result in serious harm to the child

Attempt to resolve issue without conflict

Agree to release a summary or other information that would not harm the child.

Topic 4- Practical Issues

What if the minor aged 14 or older who consents to treatment wants me to tell nothing to their parents?

What if I want to conduct family therapy?

Confidentiality and Treatment Issues

How to structure the treatment relationship so that it protects patient privacy and can lead to optimal patient outcomes?

Establish Parameters of Treatment

At informed consent phase, establish the parameters of treatment:

Child has zone of privacy?

Family therapy?

Individual psychotherapy with parental involvement or updates?

Sharing Information

Clarify the circumstances under which information would be shared.

* Imminent danger?

* Threat to health?

* CPSL

Ensure all parties on the same page

Child Protective Services Law

Part of HIPAA Privacy Notice

In addition, go over this exception with every child case, especially the exceptions dealing with physical abuse or sexual abuse.

If you have been disciplined that suffered severe pain or physical injury in the last 2 years.

If you were a victim of any sexual crime.

Exceptions: Threat to Health?

Unprotected sex

Use of marijuana

In an abusive romantic relationship

Sexting

Sneaking out late at night

Not taking medication as prescribed

shoplifting

Topic 5: High Conflict Family

1. Parents may get seeking treatment to look good in anticipation of a future custody fight
2. Parents may not be able to report information accurately
3. Parents may be unable to separate their own needs from the needs of their children.

Remember: Difficult Situation-2

Parents undergoing a difficult divorce have agreed to treatment for their 11 year old daughter. The mother wants a copy of the treatment records. However, the psychologist believes that showing the treatment records to the mother would get her very angry at her daughter and would risk subjecting the child to emotional mistreatment.

Preventing Unwanted Court Appearances

1. Informed consent agreement, signed by parents, noting that any involvement would be harmful to child (EXCEPTION– sharing information with court-appointed custody evaluator)
2. Payment for noncovered services

Payment for Non Covered Services

Certain activities such as talking to pediatricians, school, etc. are not typically covered by insurance policies.

Does your informed consent agreement allow you to bill patients directly for these services?

Demanding Parent

A parents in a high conflict family send the psychologists about 400 pages of background material on his child. "You cannot really help my child unless you know this background" he proclaimed.

How should the psychologist respond?

Another Demanding Parent

A parent wanted a phone call and an written summary every time her 8 year old child attended a psychotherapy session.

Noncovered Services

I will charge you \$XX for every 15 minutes of noncovered work or any fraction of 15 minutes. This could include, but is not limited to writing letters or communicating with the school or other health care professionals, and any court-related work.

Also in Consent Agreement

The abrupt termination of treatment can harm some children. In the consent to agreement form that the parent signs note:

If one parents decides to discontinue treatment against the wishes of the child or another parents, that parent agrees that I am allowed up to three (3) sessions with the child to facilitate the termination of treatment.

Court Ordered Treatment

Reconciliation Treatment?

Parenting education?

Co-parent counseling?

Family therapy?

What Do These Words Mean?

Are you, the parent/child, and the court on the same page?

Do you know what the judge wants with "reconciliation therapy?" Are you willing to comply with the order of the court?

Goals, Methods, Money

Are you, the parents, and the court on the same page as to what the goals are and the modality of service delivery?

Are you, the parents, and the courts on the same page concerning the rules regarding releases of information?

Are you, the parents, and the courts on the same page concerning who will pay for services?

Questions?