
RISK MANAGEMENT ISSUES IN THE PSYCHIATRIC TREATMENT OF CHILDREN AND ADOLESCENTS

CONSENT TO TREATMENT

Traditionally, the law has considered minors to be incompetent to give consent to medical treatment. Most states have statutes that govern who may consent to mental health treatment and under what circumstances. Generally, a parent or legal guardian must consent to the treatment of a minor. There are various statutory and judicial exceptions to the rules of who may consent.

Comment: Know your state statutes about who may consent to a minor's psychiatric treatment or admission to a mental health treatment facility before treating a minor. Written consent for treatment should be obtained from the parent(s) or legal guardian and maintained in the child's medical record. Consent given by one who does not have the legal authority to give consent is no consent. Individuals who do not have the legal authority to consent to treatment often present children for treatment (grandparents, babysitters, stepparents, a sibling, etc.). In a non-emergency situation, the psychiatrist must determine who may legally consent and obtain that person's written consent, before beginning treatment.

Child custody situations complicate the issue of who has authority to consent to a child's psychiatric treatment. See [Child Custody](#) below.

Exceptions to the Parental Consent Requirement

Exception for Older Minors. Minors of a certain age have been granted the right to consent to specific types of treatment in some states. For example, minors may have the right to consent themselves to treatment for sexually transmitted disease or health services for birth control or pregnancy. Several states permit minors to obtain psychiatric treatment and/or substance abuse treatment without parental consent. However, even states that permit minors over a certain age to consent to mental health treatment usually do not allow the minor to give informed consent for psychotropic medications.

In some states, a minor of a certain age may not be admitted to a mental health treatment facility unless he/she gives voluntary consent along with the parent(s) or legal guardian. Other states require that minors older than a specified age consent for themselves to voluntary admission.

Most states allow emancipated minors or "mature minors" to give consent for mental health treatment. State law establishes the criteria for being considered an emancipated or mature minor.

Comment: Do not treat a minor under an exception to the consent law unless you have confirmed that the exception is valid and applies to the particular situation under the laws of your jurisdiction. Documentation in the medical record should support treatment under the exception.

Exception for Emergencies. In an emergency, treatment may be provided without consent. Some states have passed laws applicable to minors and emergency consent; they vary as to the immediate and probable harm that must be present for treatment to be provided under this exception. A child may be presented for emergency treatment when it is questionable that a true “emergency” exists. This may occur when the presenting party does not have the legal authority to consent but has other motives for obtaining medical intervention and the related medical records. See Child Custody below.

Comment: The psychiatrist should be familiar with the minor consent laws in their states. The psychiatrist must make a clinical decision about whether treatment is appropriate when a minor is presented for psychiatric treatment under the emergency exception. The documentation in the medical record should include the clinical rationale for the decision.

SELECTED TREATMENT ISSUES

Informed Consent

After the initial determination of who has legal authority to consent to begin treatment, specific informed consent must be obtained in relation to the distinct components of the treatment plan, such as informed consent to medication. Informed consent is a communication process involving the psychiatrist and patient which requires the patient to be both instructed in, and to demonstrate an understanding of, the risks and benefits of the proposed treatment. The parent or legal guardian must give informed consent unless the minor has the capacity to consent under a legal exception to that rule (the common exceptions are enumerated above). If the minor has the right to give informed consent, the psychiatrist must ensure that the information provided is understandable to the minor so the minor can truly make an informed decision.

Comment: Document the informed consent process. Record the patient's adherence or non-adherence with treatment, response to treatment, and changes in the treatment plan. Informed consent forms, written instructions, and educational information provided to the parent/legal guardian or minor should be part of the medical record.

Medication Prescribing

Psychiatrists have increasingly come to rely on psychoactive medications in the treatment of both adults and children. Drug therapy is now regarded as one of the most useful and important forms of treatment available for mental illness. Certain medications have proven to be controversial even after they have been approved by the FDA and been on the market for years. Although these medications have been proven repeatedly to be relatively safe when used as directed, misconceptions about them may continue. Naturally, psychiatrists should try to avoid allowing societal attitudes to influence their clinical judgment. If a certain drug is indicated, and it is clinically appropriate to prescribe it, then the psychiatrist should, by all means, prescribe it and document his/her decision-making process appropriately.

Comment: Do communicate with other health care professionals about the medications that are being prescribed by all physicians involved in the patient's treatment and about signs, symptoms, and responses to the medications. When prescribing for children, it may also be necessary to communicate with (after obtaining the parents' consent) and get feedback from teachers, babysitters, and/or other caretakers regarding the child's response to the medication.

"Off-Label" Use of Drugs

Many psychiatric drugs approved by the FDA are not approved for treating children and thus prescribing these drugs for children is considered "off-label". "Off-label" prescribing of psychiatric drugs ranges from the clearly controversial to that which is considered established as the standard of care. Prescribing medications that are off-label for children must be carefully considered. Education of the family and child about any prescribed medication is crucial and is part of the informed consent process. The psychiatrist should ascertain whether teachers, babysitters, or other caregivers need to have information about the child's medications.

Comment: Malpractice allegations related to off-label use of drugs would most likely claim deviation from the standard of care in the prescription, administration, and monitoring of medications, and/or lack of or insufficient informed consent. Risk may be minimized by documenting the clinical basis for prescribing the off-label use, the process of informed consent, and the reasons and results of any modifications in the prescription and by appropriate on-going monitoring of the medication. Copies of written instructions or information provided to the patient/parent/legal guardian about the medication should be part of the medical record. It is recommended that the psychiatrist keep a file of any scientific literature or professional information that he or she relies on as support for the off-label use of medications.

Civil Commitment

State laws governing the hospitalization of minors vary substantially as to who may consent, whether the minor has some degree of veto power over admissions initiated by parents/legal guardians, and the procedures for involuntary commitments. In some states there has been significant litigation involving psychiatrists alleged to have improperly hospitalized minors without regard to their clinical needs.

Comment: The psychiatrist must know and follow the state law provisions that govern hospitalization of minors. A second opinion should be considered if there are questions about the appropriateness of hospitalization.

Restraint and Seclusion

The psychiatrist must know and comply with the legal and regulatory requirements related to the use of restraints and seclusion in children. Orders for restraint or seclusion should be time-limited and take into consideration the child's age, developmental level, clinical condition, and other relevant factors.

Comment: State mental health laws and regulations govern legal requirements for the use of restraint and seclusion. Federal law governs restraint or seclusion in some populations. Accrediting bodies establish standards for the use of restraint or seclusion. For example, JCAHO publishes standards for restraint or seclusion time limits related to the age of the child. The psychiatrist should know the applicable laws and professional standards related to the use of restraint or seclusion. The American Academy of Child and Adolescent Psychiatry has developed a practice parameter on seclusion and restraint, which is available on the organization's website, www.aacap.org

Mandatory Child Abuse Reporting

Every psychiatrist is aware of the state-imposed duties to report known or suspected abuse and neglect. However, whether to report in a certain situation may seem unclear. State statutes tend to provide no discretion to the required reporter concerning whether or not to make a report.

Comment: Know the requirements of the state child abuse reporting law and what triggers mandatory reporting. Civil immunity is usually granted under abuse reporting laws for "good faith" reporting.

CONFIDENTIALITY

Confidentiality involving communications with a minor is one of the more confusing and troubling areas of confidentiality rights. Rules governing disclosures about adults break down when applied to minors, because minors lack the same abilities and legal rights to privacy as adults. In general, states that have enacted mental health confidentiality statutes give parents the right to exercise a minor patient's right to access and authorize disclosure of medical records. Parents also may usually waive the psychiatrist-patient privilege. The federal Privacy Rule, under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) addresses the issue of disclosure of minors' protected health information by specifically deferring to state law.

The right to access medical records does not mean that a parent must be told everything that a child says in therapy. The psychiatrist should be sensitive to disclosing information that may harm the parent-child or the psychiatrist-child relationship.

Adolescents, or older children, may have additional confidentiality rights under state statutes. Some state confidentiality statutes explicitly connect the adolescent's authority to consent to treatment with the authority to consent to disclosure of medical information. In the absence of statutory authority, it is reasonable to accord adolescents the same confidentiality rights as adults unless there are strong countervailing interests.

Comment: Maintain a separate record for each person attending a patient's session. This will assist in preserving confidentiality and facilitate processing valid requests for the release of information. When treating children and adolescents, an important part of the treatment plan may include communicating with school personnel and other significant people in the child's life. Written consent must be obtained from the parent/legal guardian and/or the child, when required, before discussing confidential information with others.

A valid request for release of information should be in writing and signed by the person legally authorized to consent to release of mental health treatment information. Under federal confidentiality law, as well as under some states' laws, the release authorization is required to be in writing, and distinct elements are required to be included in the release authorization. Even when not mandated by law, written authorizations help the requestor focus on the issue of confidentiality and provide valuable documentation should a dispute about disclosure arise. Remember, all patient information should be considered confidential, including the fact that the individual is a patient. Release only the information that has been requested.

SEPARATION, DIVORCE, CHILD CUSTODY

Forensic Issues

Treating vs. Forensic. Treating psychiatrists are often asked to assume, or are pressured into assuming, the additional role of forensic psychiatrist for child custody disputes. Treating psychiatrists should firmly and clearly limit their involvement to that of treating psychiatrist and should not take on the role of forensic evaluator. The treating psychiatrist is an advocate for the patient. The forensic evaluator does not have a psychiatrist–patient relationship and the related duty to the child and parent(s). Once additional roles have been assumed, the psychiatrist will almost certainly be faced with conflicting demands that ultimately impact negatively upon the treatment relationship. Patients should be directed to obtain independent evaluations for forensic determinations.

Independent Evaluations. Many states have statutory requirements about the necessary qualifications for professionals who give forensic testimony. Several professional organizations have published guidelines about conducting child custody evaluations. See Resources.

Comment: A psychiatrist should have the appropriate knowledge, training, and skills before conducting a forensic evaluation. Clarify your role with the child and parent(s). Provide information about the purpose and limits of the evaluation. Inform the participants about limits of confidentiality and who has access to the forensic evaluation report.

Consent Issues

If parents are separated or divorced, the psychiatrist must take reasonable steps to determine which parent(s) have the legal authority to consent to treatment. The rights of parents should be set out in a custody decree or divorce decree. The psychiatrist should request copies of any custody or divorce decrees and all modifications. The medical record should document requests for such documents and the steps taken to verify proper consent. Copies of documents should be reviewed carefully and maintained in the patient's record.

Comment: An attorney should be consulted if the psychiatrist has questions about the legal documents obtained from parents or legal guardians.

Even when a custody or divorce decree exists, parents may still disagree about who may give consent. The psychiatrist should not treat the child (except for an emergency) until the parents agree or a court order settles the issue.

Guardians

In some cases a guardian *ad litem* or legal guardian may be appointed to represent the interests of the child. Sometimes a state agency has custody of the child and is the legal guardian. The responsibilities and limits of the guardian will be stated in a court order. The court order should be examined carefully to determine any limits on the ability of the legal guardian to consent to treatment for the child. For example, in some jurisdictions a legal guardian may not consent to hospitalization.

Release of Information

The release of medical records and/or the disclosure of confidential information are often areas of significant conflict for families involved in child custody and divorce actions. Sometimes one party wants to use information in the medical record that may be viewed as unfavorable to the other party as a “weapon” in the legal action. Generally, both parents have a right to their child’s treatment information, unless parental rights have been terminated. However, it is not uncommon for psychiatrists to be caught between parents in a custody or divorce battle with conflicting demands about releasing or not releasing medical records.

Comment: If there is conflict over who may consent to the release of information, and to whom the information may be released, it is prudent to let the court rule on the disposition of the records. If that is not possible, the psychiatrist should consult an attorney about the relevant state law.

The psychiatrist may receive a subpoena to release records/information and/or testify in court or at a deposition in relation to child custody issues. Do not automatically release information in response to a subpoena. Generally speaking, either the person with the proper legal authority must give consent for the release of information, or the party who issued the subpoena must obtain a court order.

Comment: Contact your risk manager or personal counsel to review the legal documents.

These common conflicts over the release of medical records illustrate why it is important to maintain separate files for each person who attends family sessions or is seen separately in relation to the treatment of the child or adolescent. There may be sensitive information in a joint record about an individual family member that the individual does not want released if the child’s record is released.

Allegations of Abuse

Abuse allegations, especially involving child sexual abuse, have become frequent complications in child custody disputes. There is significant controversy about the frequency of false or uncorroborated allegations. Therapists have been accused of influencing the abuse victim’s allegations by asking leading questions during interviews, and of failing to attempt to find corroborating evidence – especially when a child makes extreme claims of abuse. Allegations by children are sometimes later recanted or denied and a lawsuit against the therapist results.

Comment: Suspected child abuse must be reported, in good faith, according to state law. Evaluating complicated cases involving abuse allegations may require referral or consulting with a qualified specialist. Do not focus on the child’s allegations

of sexual abuse to the exclusion of performing a comprehensive psychiatric assessment and evaluation of all the child's problems and needs.

RESOURCES

- American Academy of Child and Adolescent Psychiatrists, *Practice parameters for child custody evaluation*. www.aacap.org
- *Helping Parents, Youth, and Teachers Understand Medications for Behavioral and Emotional Problems: A Resource Book of Medication Information Handouts*. Edited by Mina K. Dulcan, MD, 2007, American Psychiatric Press, Inc. Arlington, VA.
- American Academy of Psychiatry & the Law, *Ethical Guidelines for the Practice of Forensic Psychiatry*. www.aapl.org



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