

Age of Consent to Mental Health Treatment in Pennsylvania

Effects of Act No. 2004-147 (Senate Bill No. 137, Session of 2004)

(These materials were developed for the Pennsylvania Psychiatric Society by Robert Hoffman of the Harrisburg Office of Wolf Block Schorr and Solis-Cohen, LLP, with the assistance of PPS Executive Director Gwen Lehman.)¹

Summary: Act No. 2004-147 addresses who may provide consent to voluntary mental health treatment for juveniles between ages 14-18 in both inpatient and outpatient settings. The Pennsylvania Psychiatric Society actively supported its enactment. We believe it will improve the availability and provision of mental health care to juveniles.

The Act both fills an ambiguity left by the Mental Health Procedures Act (the “MHPA”) as to consent for voluntary outpatient care and modifies the rule established by the MHPA for voluntary inpatient care. It also addresses confidentiality issues in both contexts. The Act does not alter the procedures or criteria for involuntary commitment under the MHPA, and adopts verbatim many of the important definitions (“facility,” “inpatient treatment,” “mental health treatment”) directly from the MHPA. The bill takes effect on or about January 22, 2005.

The summary below is intended to explain many of the basic rules under the Act. We believe the information is accurate, but many questions cannot be answered until they arise in practice under the Act. Finally, not all of the answers can be given with certainty. Courts may construe the provisions of the Act over the next several years, providing their answers to the questions raised. This material is not intended to provide legal advice to members and/or readers in any particular situation that may be encountered.

Note: Throughout this discussion, the phrase “age 14 – 18” means “age 14 or older, but younger than 18.” The word “juvenile” has the same meaning.

CONSENT TO TREATMENT

Outpatient Treatment

- **Who Can Consent To Outpatient Care?** A juvenile age 14-18 can consent to outpatient mental health examination and treatment for him/herself without parental consent. A parent or legal guardian of a juvenile under age 18 can also provide consent without the juvenile’s consent. Prior law was unclear as to whether juveniles 14-18 could consent to voluntary outpatient care for themselves or whether the general rule that parents controlled care until age 18 applied.

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- **Can The Non-Consenting Person Override Consent?** No. In either situation, the consent of one is sufficient without the consent of the other. A juvenile cannot abrogate consent that has been provided by a parent or guardian and, likewise, the parent or guardian cannot abrogate consent that a juvenile has provided.
- **Can Parents Object To Outpatient Treatment For Which a Juvenile Provided Consent?** No. Neither the MHPA nor this Act provides a formal procedure through which parents/guardian can object to voluntary outpatient treatment for which a juvenile has provided consent nor do they expressly confer any rights on parents/guardian to do so.

Inpatient Treatment

- **Who Can Consent To Inpatient Care?** The same rules regarding consent and abrogation of consent apply as in the outpatient setting. As is the case now under the MHPA, a juvenile age 14-18 can consent to inpatient mental health examination and treatment for him/herself without parental consent. What is new is that a parent or legal guardian of a juvenile under age 18 can also provide consent without the juvenile's consent. The MHPA gave that authority exclusively to juveniles age 14-18. Under the MHPA, a person can provide consent only if he or she "substantially understand[s] the nature of such treatment and the treatment setting."
- **Can The Non-Consenting Person Override Consent?** No. As with outpatient care, the consent of a juvenile is sufficient without the consent of the parents and vice versa. Neither can abrogate the other's consent to treatment.
- **Are There Any Extra Requirements When Parents Consent To An Inpatient Admission?** Yes. Parental consent must be preceded by the recommendation of a physician who has examined the juvenile. The extent to which that is a new or additional requirement is questionable. General medical standards and procedures would typically require a physician order for any medical, surgical, or mental health admission. That rule would apply to a mental health admission on a juvenile's consent, requiring a physician's order based on a determination that inpatient treatment was appropriate.
- **Do the voluntary admission rules under the MHPA apply?** Yes. Except for the change that parents/guardian can consent to treatment for juveniles 14-18, the existing rules and procedures under Article II of the MHPA apply. Some operational modifications may be needed to accommodate changes in the inpatient consent rules.
- **What Happens If The Person Who Consented Withdraws Consent?** If the person who provided consent withdraws it (*e.g.*, the juvenile), the other "party" (the parent) can provide it and treatment may continue. If there is no

“replacement consent” (e.g., by the parent for treatment initiated by a juvenile’s consent), the facility must discharge the juvenile unless it determines that involuntary commitment is appropriate and takes steps to secure it. If the juvenile who provided consent revokes it and the parents/guardian then provide replacement consent, the rules allowing juveniles to object, discussed separately below, would seemingly apply.

- **Can Parents Object To Inpatient Treatment For Which a Juvenile Provided Consent?** Yes. Parents and legal guardians maintain their existing rights to object to inpatient treatment initiated by the juvenile. Under Department of Public Welfare regulations implementing the MHPA, 55 Pa. Code § 5100.74, parents and guardians are to receive notice from a facility of a juvenile-initiated admission and an explanation of the proposed treatment; the parent/guardian then has the right to object to the treatment and receive a court hearing.
- **What Information Must Be Given To Juveniles When The Parent(s)Guardian Have Provided Consent To Inpatient Treatment?** When a parent or guardian has provided consent, the facility director/designee must provide the juvenile with an explanation of the nature of the treatment to be provided (recognizing that a formal treatment plan need not be developed until 72 hours after admission) and of his or her rights, including the right to object to treatment by filing a court Petition. The form itself will have to be developed. None of DPW’s forms under the MHPA (e.g. MH 781-C, Explanation of Voluntary Admission Rights (Minor between 14 and 18 years of age), can be used.
- **Can Juveniles Object To Inpatient Treatment For Which The Parent(s)Guardian Have Provided Consent?** Yes. A juvenile age 14-18 admitted on the consent of a parent or guardian can file a Petition seeking his/her release or a modification of treatment. The Petition is to be filed in the Court of Common Pleas in the county in which the facility is located. If the juvenile wants to file a Petition, the facility director must provide him/her with a form and arrange to file the Petition for him/her with the Court. The Act does not state how quickly the Petition must be filed, but it should be filed promptly.
- **What Is The Hearing Procedure?** The court is to appoint an attorney for the juvenile and schedule a hearing before a judge or Mental Health Review Officer. The hearing must be held within 72 hours of filing, absent an agreed-upon continuance. The Act does not describe or prescribe further procedural details of the hearing process and the Court will determine how the matter proceeds.
- **What Are The Issues At The Hearing?** The Petition is to be granted and the juvenile discharged unless the Court finds that all of the criteria below have been met by “clear and convincing” evidence. That is a heightened standard of evidence, in between the standards used in criminal (“beyond a reasonable

doubt”) and civil (“mere preponderance of the evidence”) cases. The Court must find that:

- the juvenile has a diagnosed mental disorder;
 - the disorder is treatable;
 - the disorder can be treated in the particular facility where the treatment is taking place; and
 - the proposed inpatient treatment setting represents the least restrictive alternative that is medically appropriate.
- **What Can The Court Order Following The Hearing?** If the Court rules that inpatient treatment should continue, the juvenile is to continue to receive treatment for up to 20 days (the precise period to be specified by the Court). If the attending physician determines the patient no longer needs inpatient care, the patient is to be discharged. Similarly, the patient is to be discharged if the parent/guardian who provided consent withdraws it and the juvenile does not then provide replacement consent.
 - **What Happens If Continued Care Is Needed?** If the attending physician determines the patient will need continued inpatient care at the end of the time specified in the Court order and the juvenile does not consent, the Court, prior to the end of that period, is to conduct a hearing to determine whether to release the juvenile or extend treatment for up to another 60 days.
 - **What Are The Issues At The Hearing?** The Act does not state the criteria the Court is to use in making that determination, but it is likely the criteria discussed above regarding the initial hearing would apply.
 - **What Happens During This Additional Period Of Care?** During this additional period, as during the prior treatment period and any subsequent ones, the patient is to be discharged whenever the attending physician determines it is appropriate to do so or when the parent/guardian revokes his/her consent (unless the juvenile then consents).
 - **Can Further Care Be Sought?** If necessary, the facility can seek additional treatment periods of up to 60 days, using the same procedures and criteria.
 - **What Are The Rights Of A Parent To Object To Inpatient Treatment Consented To By Another Parent?** If one parent provides consent to treatment, the other parent, if he or she has legal custody rights, can object and file a Petition. The statute does not state the criteria the Court is to use in ruling on the Petition, but, again, it is likely the criteria discussed above regarding the initial hearing would apply, as well as issues concerning the status of the objecting parent.

General Consent Rules

- **Can Parents Consent For All Minors?** No. Parents cannot consent as to those categories of minors who have the authority to consent to their own care under the Minor's Consent Act. Those categories are persons under 18 who (1) have graduated from high school, (2) have married, or (3) have been pregnant
- **Does the Act affect the Medical Consent Act (Act 1999-52, 11 PS 2511)?** No. The Medical Consent Act allows parents to convey to an adult relative or family friend the ability to consent to medical (including mental health) care for minors being cared for by the relative/friend. The powers to consent given to parents in Act 147 will be available to a juvenile's caretaker if the parents/guardian have given the caretaker authorization to act in the parents'/guardian's place under Act 99.
- **How Do The Consent Rules Apply To Psychiatric Consults?** The consent rules discussed above would apply in the context of a recommended psychiatric consult while the juvenile was an inpatient for medical/surgical reasons. A consult should be viewed as akin to outpatient care (albeit in an inpatient setting for other medical reasons). Accordingly, the various notice and other requirements discussed below and applicable to inpatient care on a parent's consent would not apply.
- **What Can A Juvenile Consent To?** A juvenile's right to consent to mental health treatment includes the right to consent to psychiatric medications and other conventional parts of mental health treatment. This is no different than an 18 year old consenting to care; the age of majority has simply been lowered for this purpose in the outpatient setting to where it was in the inpatient setting.
- **Can A Juvenile Consent To Medications To Treat Mental Illness?** Yes. That is part and parcel of what having the authority to consent includes.
- **Can A Juvenile Refuse to Consent To Medications To Treat Mental Illness?** Yes. A juvenile who has provided the consent to treatment can refuse to consent to certain treatment. That too is part and parcel of what having the authority to consent entails. A juvenile who has not provided the underlying consent to treatment - i.e., whose parents/guardian have provided the underlying consent - does not have the legal right to refuse medication any more than a child can refuse to consent to non-psychiatric medical treatment approved by the parents. In such cases, however, practical considerations as well as the psychiatrist's clinical judgment may result in either non-adherence or a decision not to prescribe.
- **When A Juvenile Has Provided The Underlying Consent To Treatment, Rather Than The Parents/Guardian, Must Consent For Medication Be Obtained From The Parents/Guardian?** As a matter of law, no. In such

situations the juvenile's consent is required, and the juvenile's consent or refusal controls. In actual practice, however, psychiatrists may involve parents in the decision, with the juvenile's consent, when it is clinically appropriate to do so in the judgment of the psychiatrist. Similarly, the psychiatrist may decline to prescribe a medication to which the juvenile has consented when, in the psychiatrist's clinical judgment, it is preferable to withhold medication in the absence of the parents' knowledge or agreement and there are no serious adverse consequences to withholding the medication. We advise psychiatrists to document their rationale in the record whenever they prescribe medication, or choose not to prescribe, in the absence of the parents'/guardian's knowledge and/or agreement.

- **May A Juvenile Consent To Non-Psychiatric/Medical Treatment?** No. A juvenile's right to consent to mental health treatment does not carry with it the right to consent to general medical-surgical care. For that care, age 18 remains the dividing line between the authority of parents/guardians and children.
- **Are There Special Rules for obtaining Consent From a Juvenile?** No. Nothing in the Act changes the standard for the kind of consent that must be obtained or imposes a new form of consent for juveniles; it only addresses who may provide consent.

CONTROL OF AND CONFIDENTIALITY OF MEDICAL RECORDS, INPATIENT AND OUTPATIENT SETTINGS

General Rules

- **Who Controls Release Of Medical Records?** Control over the release of medical records generally resides with the person who has provided the consent to treatment. There is no change with respect to the control over records of juveniles under 14. The changes with respect to juveniles 14-18 correspond to the changes in who can consent to their treatment.
- **What Happens If Consent Changes?** Although not stated in the Act, control over records would change as the consent to the underlying treatment might change, *i.e.*, parent revoked consent but the juvenile subsequently granted consent.

Release By Juveniles

- **What Records May A Juvenile Release?** A juvenile who has provided consent to inpatient or outpatient treatment controls access to his or her records. This is currently the case under the MHPA and its regulations, at least as to inpatient and involuntary outpatient care. Those regulations will now apply to outpatient care as well.

- **What Records May A Parent/Guardian Release To Mental Health Providers?** A parent/guardian who has provided consent to treatment may consent to release of the juvenile's medical records to the juvenile's mental health treatment providers. This includes the right to release records of both non-mental health treatment and of prior mental health treatment for which the parent/guardian had provided the consent to treatment.
- **May A Parent Release Records Of Mental Health Treatment For Which A Juvenile Has Previously Provided Consent?** Yes, but only if the juvenile's current mental health treatment providers deem it pertinent to current treatment.
- **How Are Records And Information To Be Transferred?** In both of the instances described above (regarding release of records by parents to mental health providers), the release of information must be from provider to provider, *i.e.*, not through the parents/guardian.
- **May A Parent Release Records Of Mental Health Treatment To A Primary Care Physician?** Yes. A parent/guardian who has provided consent to treatment may consent to release to the juvenile's primary care physician of the juvenile's records of his/her mental health treatment. This may be done only if the juvenile's current mental health treatment provider believes doing so would not be detrimental to the patient. Release of information in that instance must again be from provider to provider, *i.e.*, not through the parents/guardian.
- **May A Parent Release Records Of Mental Health Treatment To A Medical Specialist?** It is unclear whether the release in this context includes release to medical specialists, *i.e.*, physicians who are neither mental health treatment providers nor primary care physicians as that term is typically understood. We believe the provision was intended to distinguish between mental health and non-mental health providers and not between primary care physicians and specialists.
- **What Information May Be Released To Parents?** Parents/guardians who are providing consent for juveniles are to receive the standard type of information provided to patients that is necessary to provide meaningful consent to treatment. The information is to include the juvenile's symptoms and the conditions to be treated; medications and other treatments; and the risks, benefits, and expected results of treatment. The Act refers to the release of "information" to parents/guardian, not "records," and that distinction means precisely that.

OTHER ISSUES

- **What Rules Apply When Both The Juvenile And Parents Consent?** Act 147 contemplates a situation in which one party consents to the treatment and the other does not, and it spells out the rules on who prevails and what can occur in that event. In many instances, however, both the juvenile and his/her parents may agree with the need for treatment and be willing to participate in it (primarily the juvenile) and have it go forward (parents/guardian).

What Rules Apply Then?

The Act doesn't address whose consent controls in that situation. There are sound legal arguments supporting both the claims of the juvenile and his/her parents. Who controls can have concrete implications, primarily in terms of the juvenile's ability to keep records and/or information confidential from the parent. (DPW confidentiality regulations under the MHPA, which apply here as well, do allow treaters to withhold access to the record when doing so would be "a substantial detriment" to the patient's treatment or to the parents/guardian when they control access to records.) The issue could also arise when there are disagreements between the juvenile and parents regarding aspects of treatment.

We think the most likely outcome is that courts would rule that in a situation of joint consent to treatment, but disagreement over access to records, information, and/or treatment details, the juvenile controls. It is probably beneficial to try to sort out the "consent" issue when beginning treatment. For juveniles age 14-18 it might make sense to include, as part of the initial visit, information on "consent to treatment provided by [name]" and "release of records controlled by [name]," keeping in mind that when parents consent to treatment, both they and the juvenile control certain aspects of the release of records. Nothing in the Act prevents the psychiatrist, patient, and parents/guardian from entering into an agreement on these matters.

Payment Issues

How Does A Psychiatrist Make Sure He or She Gets Paid For Treating A Juvenile? There are no unusual payment issues when the parents consent to treatment, but there may be problems when the juvenile seeks treatment over parental objection, or without the parents' knowledge in the outpatient setting. The issues are no different than when a juvenile has provided consent to inpatient care under the MHPA. Parents are generally responsible for the debts of their minor children. When a child is treated in the emergency room without parental involvement (*e.g.*, following an automobile accident), there is nonetheless the expectation that the parents or their insurance will cover the costs. There is no reason why a different rule should apply for mental health care. If the parents/guardian have insurance that provides coverage for psychiatric care, it makes most sense to seek payment there.