

TREATING MINORS: ISSUES OF CONSENT AND CONFIDENTIALITY

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Virginia Office of the Attorney General



Consent to Treatment

Participation in Decision Making

- Individuals receiving services have the right to participate meaningfully in decisions regarding all aspects of services affecting them.
- This premise extends to decision makers for minors, and to a certain extent, minors themselves.

Participation in Decision Making



“Consent” means the voluntary agreement of an individual or that individual’s authorized representative to specific service.

Participation in Decision Making

Generally, A MINOR CANNOT CONSENT TO HIS OR HER OWN TREATMENT (with some exceptions).

Consent for a minor is to be obtained from a parent with legal custody of the minor or other person authorized to consent to treatment pursuant to the Code of Virginia (12 VAC 35-115-146)

Participation in Decision Making

- Providers must obtain and document in the services record consent for any treatment, including medical treatment, before the treatment begins.
- If the individual is a minor in the legal custody of a natural or adoptive parent, the provider must obtain this consent from at least one parent.
But...

Participation in Decision Making

- The consent of a parent is NOT needed if a court has ordered or consented to services pursuant to:
 - ▣ **16.1-241(C)**: Judicial consent may be given for a child who has been separated from his parents, guardian, legal custodian, or other person in loco parentis and is in the custody of the court when such consent is required by law
 - ▣ **16.1-241(D)**: Judicial consent for emergency surgical or medical treatment for a child who has never been married when consent of parent, guardian or others is unobtainable because (i) not a VA resident; (ii) whereabouts unknown; (iii) can't be "consulted with promptness, reasonable under the circumstances"; or (iv) fails to give such consent or provide such treatment when requested by the judge to do so

Participation in Decision Making

- 16.1-275: Court order for juvenile to be physically examined and treated by physician, local mental health center, or, if such facility isn't available, any physician, psychiatrist, or clinical psychologist, including sending juvenile to state facility for 10 day evaluation; or
 - 54.1-2969(A)(1) or (B): similar to 16.1-241(C) and (D)
- Consent of a parent is also not needed if local DSS with custody has provided consent.

Participation in Decision Making

- In these circumstances, “reasonable efforts” must still be made to notify the parent or legal custodian “promptly” following the treatment or services
 - 12 VAC 35-115-70(B)(4)

Participation in Decision Making

- A competent minor may also independently consent to certain services pursuant to Virginia Code § 54.1-2969 (E), which says

Minor is deemed an adult for the purpose of consenting to:

Participation in Decision Making



- 1) Medical or health services needed to determine the presence of or to treat venereal disease or any infectious or contagious disease that the State Board of Health requires to be reported;

Participation in Decision Making

- 2) Medical or health services required in case of birth control, pregnancy or family planning, except for the purposes of sexual sterilization.

- 3) Medical or health services needed in the case of outpatient care, treatment or rehabilitation for substance abuse;

Participation in Decision Making

4) Medical or health services needed in the case of outpatient care, treatment, or rehabilitation for mental illness or emotional disturbance.

A minor is also deemed an adult for the purpose of accessing or authorizing disclosure of records related to 1 through 4, above.

Participation in Decision Making

Some other exceptions to parental consent requirement:

- pregnancy-related treatment for minor and her child
- married (or previously married) minors for surgical and medical treatment
- blood donation at 17 years old.

Participation in Decision Making

- Providers, in an **emergency**, may initiate, administer, or undertake a proposed treatment without the consent of the individual or the individual's AR. All emergency treatment shall be documented in the individual's services record within 24 hours.
 - ▣ Providers shall immediately notify the AR of the provision of treatment without consent during an emergency.

Participation in Decision Making

- Providers shall continue emergency treatment without consent beyond 24 hours only following a review of the individual's condition and if a new order is issued by a professional who is authorized by law and the provider to order the treatment.
- Providers shall notify the human rights advocate if emergency treatment without consent continues beyond 24 hours.

Participation in Decision Making

- Providers shall develop and integrate treatment strategies to address and prevent future such emergencies to the extent possible, into the individual's services plan, following the provision of emergency treatment without consent.

“Psychiatric Treatment of Minors Act”

- Governs all inpatient treatment of minors
- Found at Virginia Code § § 16.1-335 through 16.1-348
- Statute separates minors below age 14 from those ages 14-17
 - ▣ Parental discretion strongest for those younger than 14
 - ▣ Minors 14-17 presumed to have a right, although limited, to decide on hospitalization

Definitions

- “Mental Health Facility”:
 - ▣ Public or private
 - ▣ Operated or licensed by DBHDS
- “Consent”:
 - ▣ “voluntary, express, and informed agreement to treatment”
 - ▣ Given by minor fourteen or older and by parent or legally authorized custodian

Definitions, con't.

20

- “Parent”:
 - ▣ Biological or adoptive parent “who has legal custody,” including either parent if custody is joint;
 - ▣ Parent with whom the minor regularly resides;
 - ▣ Person judicially appointed as legal guardian; OR
 - ▣ Person who exercises “rights and responsibilities of legal custody” by parent’s delegation or by law (ex: DSS)

Definitions, con't.

- “Qualified Evaluator”:
 - Licensed psychiatrist or psychologist, or if **unavailable**:
 - Any mental health professional licensed through DHP as:
 - Clinical Social Worker
 - Professional Counselor
 - Marriage and Family Therapist
 - Psychiatric Nurse Practitioner
 - Clinical Nurse Specialist; or
 - Any mental health professional employed by a CSB

16.1-336.1. Admission Forms.

- The Office of the Executive Secretary (OES) is responsible for preparing the petitions, orders, and other legal forms for this article, and the Department of Behavioral Health and Development Services (DBHDS) is responsible for the preadmission screening report and other clinical forms.

Admissions

23

- ALL admissions of minors to mental health facilities for inpatient treatment must comply with the Act
- Different scenarios:
 - ▣ Minor younger than fourteen
 - ▣ Nonobjecting minor fourteen or older
 - ▣ Objecting minor fourteen or older
 - ▣ Involuntary Commitment

Minors Under Fourteen

24

- May be admitted to a willing mental health facility “upon application and with the consent of a parent”
 - ▣ Minor this young may not give consent
- Qualified evaluator must be involved in and approve the admission process
 - ▣ QE must conduct a personal exam of the minor within 48 hours of admission

Minors Under Fourteen, con't.

25

- QE must approve the admission through written findings that:
 - ▣ Minor appears to have a mental illness that justifies inpatient treatment and is reasonably likely to benefit;
 - ▣ Minor has been given a “clinically appropriate explanation” of nature and purpose of the treatment;
 - ▣ If minor is 14 or older, he’s been given an explanation of his rights and has consented to admission; and
 - ▣ No less restrictive alternative exists that would offer comparable benefits

Minors Under Fourteen, con't.

26

- CSB Report:
 - ▣ If admission is sought to a state facility, the CSB where the minor resides must provide a preadmission screening report instead and ensure the above written findings are made before approving admission
 - ▣ Copy must be given to the parent, and opportunity provided to discuss with the evaluator or CSB employee

Minors Under Fourteen, con't.

- Treatment Plan:
 - ▣ Individualized treatment plan must be done within **10 days** of admission
 - ▣ Involve minor and family in preparation to the maximum feasible extent consistent with understanding and treatment needs, and give each a copy
 - ▣ Include preliminary aftercare/placement plan
 - ▣ Include specific behavioral and emotional goals

Minors Under Fourteen, con't.

28

- If the parent revokes consent, or minor 14 or older objects to further treatment, minor must be released within 48 hours unless continued hospitalization is authorized under another provision of law
- Inpatient treatment may not exceed **90 consecutive days** unless, after interviewing the minor and consenting parent, and reviewing staff reports, hospital medical personnel make written findings that the initial admission criteria continue to be met

Minors Under Fourteen, con't.

29

- A minor (and his consenting parent) must be informed orally and in writing by the facility director within ten days of the minor's fourteenth birthday that continued voluntary treatment requires the minor's consent

Nonobjecting minors 14 or older

30

- A minor fourteen or older may be admitted to a willing mental health facility upon JOINT application and consent of the minor and the minor's parent
 - ▣ Note: A minor is deemed an adult for purposes of consenting to *outpatient* treatment for MI or SA (§ 54.1-2969)

Nonobjecting minors 14 or older, con't.

31

- Other admission procedures and requirements are the same as for minors under 14, except:
 - ▣ QE's written findings must also include a finding that the minor has been provided with an explanation of his rights were he to object, and a finding that he has consented

Nonobjecting minors 14 or older, con't.

32

- If the minor objects to further treatment at any time, he must be discharged within 48 hours to the consenting parent's custody, unless continued hospitalization is authorized under another provision of this law

Parental admission of objecting minor or minor lacking capacity 14 or older

33

- Governed by **Va. Code § 16.1-339**
- Parents may admit a minor fourteen or older who 1) objects to admission, or 2) is incapable of making an informed decision to a willing facility for up to **120** hours, pending an evaluation and judicial approval
 - ▣ This was changed from 96 hours on July 1, 2015 (SB779)

Parental admission of objecting minor or minor lacking capacity 14 or older, con't.

34

- Facility Petition:
 - ▣ Facility must file petition for judicial approval no sooner than 24 hours and no later than 120 hours after admission with the J&DR court where the facility is located
 - This was changed from 96 hours on July 1, 2015 (SB779)
 - Copy goes to the consenting parent

Parental admission of objecting minor or minor lacking capacity 14 or older, con't.

35

- Within 24 hours of admission, minor must be examined by a qualified evaluator
 - ▣ QE designated by the CSB or BHA where the facility is located
 - ▣ If admission is to a state facility, minor's resident CSB must also provide the preadmission screening report required by Va. Code § 16.1-338(B) and make written findings (except consent) before approving the admission

Parental admission of objecting minor or minor lacking capacity 14 or older, con't.

36

- QE makes written report to the J&DR court where facility is located whether:
 - 1) **The minor appears to have a mental illness serious enough to warrant inpatient treatment and is reasonably likely to benefit from the treatment;**
 - 2) **The minor has been provided with a clinically appropriate explanation of the nature and purpose of the treatment; and**

Parental admission of objecting minor or minor lacking capacity 14 or older, con't.

37

3) All available modalities of treatment less restrictive than inpatient treatment have been considered and no less restrictive alternative is available that would offer comparable benefits to the minor.

- **These are the new criteria, effective July 1, 2015 (HB1717). The previous criteria paralleled those for commitment.**

Parental admission of objecting minor or minor lacking capacity 14 or older, con't.

38

- The judge appoints a guardian ad litem for the minor, and counsel to represent the minor, unless the minor has retained counsel already
- Court, counsel, and GAL review petition and evaluator's report and ascertain views of minor, parent, evaluator, and attending psychiatrist
- Review to be done in the “place and manner, including the facility, as it deems to be in the best interests of the minor”

Parental admission of objecting minor or minor lacking capacity 14 or older, con't.

39

- Three possible outcomes:
 - ▣ If the minor does not meet admission criteria, he will be released to consenting parent's custody
 - ▣ If the minor meets admission criteria, he will remain hospitalized for up to 90 days under court order and parental consent
 - ▣ If insufficient information is available, court will schedule a commitment hearing within 120 additional hours (changed from 96 hours as of July 1, 2015)

Parental admission of objecting minor or minor lacking capacity 14 or older, con't.

40

- If the parent revokes consent at any time during hospitalization, the minor must be released within 48 hours to the parent's custody unless involuntarily committed or admitted on an emergency basis

16.1-340.3 Early Release

- Prior to a commitment hearing, the judge may release the minor to his parent if it appears from all evidence readily available that the minor does not meet the commitment criteria specified in § 16.1-345.
- The director of any facility in which the minor is detained may release the minor prior to a commitment hearing if it appears, based on an evaluation conducted by the psychiatrist or clinical psychologist treating the minor, that the minor would not meet the commitment criteria specified in § 16.1-345 if released.

Emergency Custody Order (Va. Code § 16.1-340)

42

- Magistrate issues upon sworn petition of minor's treating physician or parent, or, if parent is unavailable/unwilling, "any responsible adult," including the person having custody over a minor in detention or shelter care, or on the magistrate's own motion
- Criteria is the same as it is for commitment
- Magistrate may consider hearsay

Emergency Custody Order, con't.

- Taken into custody and transported to convenient location to be evaluated to see whether the minor meets the TDO criteria under § 16.1-340.1 and to assess the need for hospitalization and treatment
- Done by CSB serving the area where the minor is located
- Magistrate specifies the primary LE agency to provide transportation and may authorize alternative transportation provider
- ECO valid for up to 8 hours; state facility may continue to find an alternative facility for up to 4 more

Temporary Detention Order (Va. Code § 16.1-340.1)

- Similar to ECO (magistrate, same petitioners, same criteria, probable cause standard) but after an evaluation by the CSB
- CSB designates the facility of temporary detention; if one can't be identified by the expiration of the ECO, then it's the state facility
- Duration of TDO not to exceed 96 hours prior to a hearing (or COB the next day, if Saturday, Sunday, or legal holiday)

Involuntary Commitment

45

- **Petition-Va. Code § 16.1-341:**
 - Filed in J&DR court **where the minor is located;** taken under oath
 - By parent or “any responsible adult”
 - Must provide name and address of petitioner and minor, and set forth specifically why minor meets commitment criteria
 - Petition for judicial approval filed by facility may function as petition for involuntary commitment, so long as it conforms to this criteria

Involuntary Commitment, con't.

46

- Time frame for hearing:
 - ▣ J&DR court serving the jurisdiction in which the minor is located may schedule a hearing upon filing of the petition
 - ▣ To occur no sooner than 24 hours, and no later than 96 hours, after the petition is first filed or from the issuance of the TDO, whichever occurs later, or from the time of the hearing held pursuant to 16.1-339(C) (unless weekend or holiday)

Involuntary Commitment, con't.

47

- Procedural Rights of the Minor:
 - Copies of the petition, together with notice of the hearing, are to be served immediately upon the minor and his parents (if they are not petitioners)
 - At least 24 hours before the hearing, a guardian ad litem and counsel shall be appointed for any minor without one
 - One continuance of the hearing for up to 96 hours may be granted to the minor's lawyer, for good cause shown

Involuntary Commitment, con't.

- **Va. Code § 16.1-340.4, Preadmission Screening Report**
 - Prepared by an employee or designee of the CSB that serves the area where the minor resides or, if impractical, where the minor is located.
 - Assess commitment criteria, incl. whether inpatient treatment is the least restrictive alternative that meets the minor's needs; and make recommendations for the minor's placement, care, and treatment including, where appropriate, recommendations for mandatory outpatient treatment
 - Must be admitted into evidence

Involuntary Commitment, con't.

49

- **Clinical Evaluation – Va. Code § 16.1-342:**
 - CSB serving the area where the minor is located is to arrange an evaluation, if one has not been done, by a QE who “is not and will not” be treating the minor and who has no significant financial interest in the facility
 - Evaluation must be conducted in private, and should be conducted in person (or by two-way electronic means)
 - Language added in 2010 to specify that the QE cannot be excluded from the hearing pursuant to a sequestration order

Involuntary Commitment, con't

50

- Clinical Evaluation, con't.:
 - ▣ In conducting an evaluation of a minor in detention or shelter care, if the evaluator finds that the minor meets the criteria for involuntary commitment, the evaluator shall so recommend, irrespective of the fact that the minor has been detained

Involuntary Commitment, con't.

51

- Clinical Evaluation, con't.:
 - ▣ Petitioner, all public agencies, and all providers or programs that have/are treating the minor shall promptly deliver, upon request and without charge, all records of treatment or education of the minor

Involuntary Commitment, con't.

52

- Clinical Evaluation, con't.:
 - QE must submit a written report to the court at least 24 hours before the hearing that includes his opinion of whether the minor meets commitment criteria
 - QE to attend the hearing as witness, or at least be available through two-way electronic communication
 - Copy of the report must be provided to minor's GAL and counsel

Involuntary Commitment, con't.

- Clinical evaluation, con't:
- Shall consist of:
 - ▣ A clinical assessment that includes a mental status examination (including determination of current use of medications and a medical and psychiatric history),
 - ▣ A substance abuse screening if indicated,
 - ▣ A risk assessment,
 - ▣ An assessment of the minor's capacity to consent to treatment for minors 14 and older,

Involuntary Commitment, con't.

- Clinical Evaluation, con't:
 - ▣ A review of the minor's records from the TDO facility, if the minor was previously subject to a TDO,
 - ▣ A discussion of treatment preferences with the minor or his parents,
 - ▣ An assessment of alternatives to involuntary inpatient treatment, and
 - ▣ Recommendations for the placement, care and treatment of the minor.

Involuntary Commitment, con't.

55

- Hearing Procedures:
 - Court to summons all material witnesses requested by minor or petitioner
 - Rules of evidence apply and testimony is under oath, but QE's report admissible (diff than ECO and TDO)
 - Petitioner, minor, and with court approval, any other person, may present evidence and cross examine witnesses

Involuntary Commitment, con't.

56

- Hearing Procedures, con't.:
 - ▣ Closed to the public unless the minor *and* petitioner request it be open
 - ▣ Records are confidential

Involuntary Commitment, con't.

57

- Hearing Procedures, con't:
 - May conduct the involuntary commitment hearing using any two-way electronic audio and video communication system for appearance of any parties and witnesses
 - See specifics at Va. Code 19.2-3.1(B)
 - When a helpful witness can not be physically present, testimony may be received by telephone
 - Court must provide time and location of the hearing to the CSB at least 12 hours prior

16.1-344(B) Voluntary Admission

- At the commencement of the hearing involving a minor 14 years of age or older, the court shall inform the minor of his right to be voluntarily admitted for inpatient treatment, and shall afford the minor an opportunity for voluntary admission, provided that the minor's parent consents and the minor is capable of consenting.
 - SB669(2018) added a requirement that the court advise the minor that if they choose to be voluntarily admitted, they will be prohibited from possessing, purchasing, or transporting a firearm

16.1-344(B) Voluntary Admission, cont.

- In determining whether a minor is capable of consenting to voluntary admission, the court may consider evidence of past compliance or noncompliance with treatment.
- The purpose of this paragraph was to clarify that special justices do have the authority to permit voluntary admission of minors 14 and older when the minor and parent both consent.
- The goal is to promote voluntary treatment whenever possible.

Involuntary Commitment, con't.

60

- **Court must find by clear and convincing evidence that:**
 - 1) **Because of mental illness, the minor:**
 - **Presents a serious danger to himself or others to the extent that severe or irremediable injury is likely to result, as evidenced by recent acts or threats;**
- OR...**

Involuntary Commitment, con't.

61

- **is experiencing a serious deterioration of his ability to care for himself in a developmentally age-appropriate manner, as evidenced by delusional thinking or by significant impairment of functioning in hydration, nutrition, self-protection, or self-control;**

and

Involuntary Commitment, con't.

62

- 2) Minor is in need of compulsory treatment for a mental illness and is reasonably likely to benefit from the proposed treatment; and**

- 3) If the court finds that inpatient treatment is not the least restrictive treatment, the court shall consider entering an order for MOT pursuant to § 16.1-345.2**

Involuntary commitment, con't.

- The commitment criteria remained unchanged, but as of 2010, before deciding whether a minor meets the criteria, the judge must now observe the minor and consider the following:
 - Recommendations of any treating or examining physician or psychologist,
 - Any past actions of the minor,
 - Any past mental health treatment of the minor,
 - Any qualified evaluator's report,
 - Any medical records available,
 - The preadmission screening report, and
 - Any other evidence admitted.

Involuntary Commitment, con't.

64

- Parental Objection:
 - ▣ If the parent(s) with whom the minor resides are not willing to approve the proposed commitment, the court shall order inpatient treatment only if it finds, in addition to the criteria specified, that such treatment is necessary to protect the minor's life, health, or normal development, and issuance of a removal or protective order is authorized

Involuntary commitment, cont.

- Language implying that a special justice could issue a removal or protective order when a parent is not willing to approve commitment was revised in 2010:
- 16.1-345(3) now reads:
 - ▣ If a special justice believes that issuance of a removal or protective order may be in the child's best interest, the special justice shall report the matter to the local department of social services for the county or city where the minor resides.

Involuntary Commitment, con't.

66

- If best interests of the minor require, the court may enter an order directing the parent(s) to comply with “reasonable conditions” relating to the minor’s treatment
- CSB serving the political subdivision where the minor was evaluated is to designate the location for inpatient placement

16.1-345 Post-commitment hearing transportation

- When a judge or special justice commits a minor under this section, the judge or special justice may order that the minor be transported by either the sheriff or an alternative transportation provider (ATP).
- The ATP may be a parent, family member, friend, CSB representative, representative of the facility where the minor was detained, or any other provider trained to provide transportation in a safe manner.

16.1-345 Post-commitment hearing transportation, con't.

- If it's the sheriff's office, the judge shall order transportation by the sheriff of the jurisdiction where the minor is a resident unless the sheriff's office of that jurisdiction is located more than 100 road miles from the nearest boundary of the jurisdiction in which the proceedings took place. In that case, it shall be the responsibility of the sheriff of the latter jurisdiction to transport the minor.
- Transportation must commence no later than six hours after notification to the sheriff or the ATP of the judge's order.

16.1-345.2 Mandatory Outpatient Treatment

- After observing minor and considering:
 - Recommendations of any treating or examining physician or psychologist;
 - Any past actions of the minor;
 - Any past mental health treatment of the minor;
 - Any evaluation of the minor;
 - Any medical records available;
 - The pre-admission screening report; and
 - Any other relevant evidence that may have been admitted...

16.1-345.2 Mandatory Outpatient Treatment, con't.

- Court shall order MOT for up to 90 days if it finds by clear and convincing evidence that the MOT commitment criteria are met:
 1. Because of mental illness, the minor (i) presents a serious danger to himself or others to the extent that severe or irremediable injury is likely to result, as evidenced by recent acts or threats or (ii) is experiencing a serious deterioration of his ability to care for himself in a developmentally age-appropriate manner, as evidenced by delusionary thinking or by a significant impairment of functioning in hydration, nutrition, self-protection, or self-control;
 2. The minor is in need of compulsory treatment for a mental illness and is reasonably likely to benefit from the proposed treatment;

16.1-345.2 Mandatory Outpatient Treatment, con't.

3. Less restrictive alternatives to involuntary inpatient treatment that would offer an opportunity for improvement of his condition have been investigated and are determined to be appropriate;
4. The minor, if 14 years of age or older, and his parents (i) have sufficient capacity to understand the stipulations of the minor's treatment, (ii) have expressed an interest in the minor's living in the community and have agreed to abide by the minor's treatment plan, and (iii) are deemed to have the capacity to comply with the treatment plan and understand and adhere to conditions and requirements of the treatment and services; and
5. The ordered treatment can be delivered on an outpatient basis by the community services board or a designated provider.

16.1-345.4(B) MOT Review (JDR judges only)

- When creating the procedures for enforcing compliance with an MOT order for juveniles, the intent was to have a civil show cause summons issued, not to create a procedure comparable to the *capias* that is issued for adults. In order to resolve confusion over this issue, 16.1-345.4(B) has been revised.
- Language about keeping a minor in custody for up to four hours until a TDO is issued was deleted.

16.1-348, Availability of Judge

- The chief judge of every juvenile and domestic relations district court shall establish and require that a judge be available seven days a week, 24 hours a day, for the purpose of performing the duties established by the act.
- ▣ "Judge" means a juvenile and domestic relations district judge. In addition, "judge" includes a retired judge sitting by designation pursuant to § 16.1-69.35, substitute judge, or special justice authorized by § 37.2-803 who has completed a training program regarding the provisions of this article, prescribed by the Executive Secretary of the Supreme Court.

New in 2018

- Added § 16.1-337.1: For any minor 14 or older, the court (incl. SJ) must file any order for involuntary admission or MOT or the certification of a minor who agreed to voluntary admission following a TDO with the clerk of the J&DR court where the hearing took place “as soon as practicable but no later than the close of business on the next business day following completion of the hearing.”
- The clerk must then forward to the CCRE

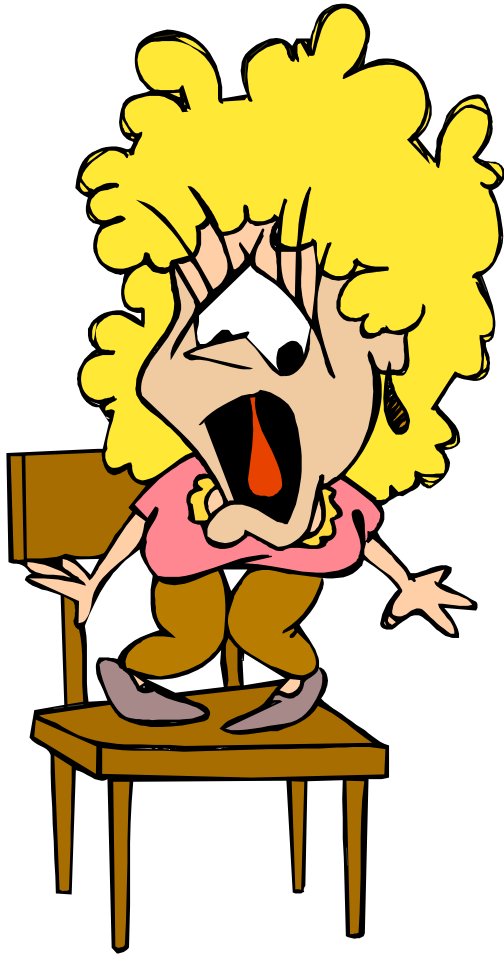
New in 2018, con't.

- SB392(2018) was passed to make clear that the hearing on an involuntary commitment petition may proceed if the court determines that copies of the petition and notice of the hearing have been served on at least one “parent” and “a reasonable effort has been made to serve such copies on both parents.”
 - This was done to address a problem where some courts were refusing to proceed unless *both* parents were served
 - Note the broad definition of “parent” (not just biological)



Confidentiality

AARRGHH!!!!



- You are the custodian of a minor's medical record and someone has just asked to see it. What do you do??

Pertinent Laws

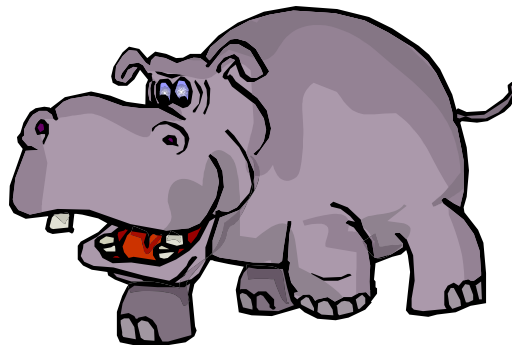
- Virginia Statutes
 - ▣ Patient Health Records Privacy Act (§ 32.1-127.1:03)
 - ▣ Authority to consent to medical treatment of certain minors (§ 54.1-2969)
 - ▣ Parental Access statute (§ 20-124.6)
 - ▣ Freedom of Information Act (§ 2.2-3705.5)
 - ▣ Exchange between CSBs and state facilities (§ 37.2-839)
 - ▣ Psychiatric Treatment of Minors Act (§ 16.1-337)

Pertinent Laws (cont'd)

- Virginia Regulations
 - ▣ Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded, or Operated by the Department of Behavioral Health and Developmental Services (12 VAC 35-115)
“Human Rights Regulations”

Pertinent Laws (cont'd)

- Federal Laws
 - ▣ Federal Substance Abuse Confidentiality Regulations (42 C.F.R. Part 2)
 - ▣ The HIPAA Privacy Rule (45 C.F.R. Parts 160 and 164)




Pertinent Questions

- Who is asking?
 - Minor
 - Parent
 - Custodial
 - Non-custodial
 - Guardian
 - Parental surrogate under § 54.1-2969
 - Treatment provider
 - Someone else

Pertinent Questions (cont'd)

- What kind of record is it?
 - ▣ General medical
 - ▣ Reportable infectious disease or STD
 - ▣ Pregnancy, birth control or family planning
 - ▣ Mental Health treatment for MI or ED
 - Inpatient
 - Outpatient
 - ▣ Substance Abuse treatment
 - Inpatient
 - Outpatient

Pertinent Questions (cont'd)

- Is this a request for access or a request for disclosure?
- Do I have a valid authorization? 
- If no valid authorization, is there a law that requires or permits me to honor the request without it?
 - ▣ If law permits, do I want to use it?

Authorization

- Can always disclose with a valid authorization
- How do I know if it's valid?
 - ▣ Meets all required elements
 - PHRPA; HR Regs; SA Regs; HIPAA
 - ▣ Signed by the correct person(s)
 - PHRPA; 54.1-2969; HR Regs; SA Regs; HIPAA

Access vs Disclosure

- Access – the right of an individual (patient) to inspect or obtain a copy of his medical record
 - ▣ Right exercised by the individual or the individual's authorized representative
- Disclosure – the release of the medical record to a third party

Medical Records Generally

□ ACCESS

- Minor – No right to access without parental consent unless minor consented to his own treatment per 54.1-2969

- Parent

- Custodial – Right to access

- Non-custodial – Right to access

- Exceptions

- Parental rights terminated or court order issued for good cause shown

- Reasonably likely to cause substantial harm to minor or another person (§ 20-124.6(B))

Medical Records Generally (Cont'd)

□ DISCLOSURE

- Minor – may not authorize the disclosure of his own general health records unless he's consented to his own treatment per 54.1-2969
- Parent
 - Custodial – May authorize disclosure
 - Non-custodial – may not authorize disclosure

Reportable Infectious Disease or STD

- ACCESS

- Minor

- Minor has right to access no matter who consented to the tx (§ 54.1-2969(E))

Reportable Infectious Disease or STD (cont'd)

ACCESS

▣ Parent

- Custodial – Right to access
- Non-custodial – Right to access
- Exceptions
 - Parental rights terminated or court order issued for good cause shown
 - Reasonably likely to cause substantial harm to minor or another person (§ 20-124.6(B))

Reportable Infectious Disease or STD (cont'd)

□ DISCLOSURE

- Minor – May authorize disclosure even over parental objection no matter who consented to the tx
- Parent – Depends on who consented to the treatment
 - If minor consented to tx – Parent may not authorize disclosure
 - If parent consented to tx – Custodial parent may authorize disclosure; Non-custodial parent may not

Pregnancy, Birth Control, Family Planning (not sterilization)

□ ACCESS

□ Minor

- Minor has right to access no matter who consented to the tx (§ 54.1-2969(E))

Pregnancy, Birth Control, Family Planning (not sterilization) (cont'd)

□ ACCESS

▣ Parent

- Custodial – Right to access
- Non-custodial – Right to access
- Exceptions
 - Parental rights terminated or court order issued for good cause shown
 - Reasonably likely to cause substantial harm to minor or another person (§ 20-124.6(B))

Pregnancy, Birth Control, Family Planning (not sterilization) (cont'd)

□ DISCLOSURE

- Minor – May authorize disclosure even over parental objection no matter who consented to tx
- Parent – Depends on who consented to the treatment
 - If minor consented to tx – Parent may not authorize disclosure
 - If parent consented to tx – Custodial parent may authorize disclosure; Non-custodial parent may not

Inpatient Mental Health Treatment

□ ACCESS

- Minor – No right to access without parental consent (see 12 VAC 35-115-90(B)(1))
- Exception – In the case of minors admitted for inpatient treatment pursuant to the Psychiatric Treatment of Minors Act, Virginia law requires the minor to be provided a copy of the treatment plan
(§ 16.1-338(C); § 16.1-346(A))

Inpatient Mental Health Treatment

- Exception – Any minor 14 or older who joined in the application and consents to admission under § 16.1-338 shall have the right to access his health information.

(§ 16.1-338(G))

Inpatient Mental Health Treatment (cont'd)

□ ACCESS

▣ Parent

- Custodial – Right to access
- Non-custodial – Right to access
- Exceptions
 - Parental rights terminated or court order issued for good cause shown
 - Reasonably likely to cause substantial harm to minor or another person (§ 20-124.6(B))

Inpatient Mental Health Treatment (cont'd)

□ DISCLOSURE

- Minor – may not authorize disclosure
- Parent
 - Custodial – May authorize disclosure
 - Non-custodial – May not authorize disclosure
- For minors 14 and older who joined in the application and consented to admission under § 16.1-338, concurrent authorization of both the parent and the minor is required to disclose the minor's health information (§ 16.1-338(G))

Outpatient Mental Health Treatment

- ACCESS

- Minor

- Minor has right to access no matter who consented to the tx (§ 54.1-2969(E))

Outpatient Mental Health Treatment (cont'd)

□ ACCESS

▣ Parent

- Custodial – Right to access

- Non-custodial – Right to access

- Exceptions

- Parental rights terminated or court order issued for good cause shown

- Reasonably likely to cause substantial harm to minor or another person (§ 20-124.6(B))

Outpatient Mental Health Treatment (cont'd)

- DISCLOSURE

- Minor

- Minor may authorize disclosure even over parental objection no matter who consented to tx (§ 54.1-2969(E))

Outpatient Mental Health Treatment (cont'd)

□ DISCLOSURE

□ Parent

- Minor consented to tx – parent may not authorize disclosure (see 42 CFR 2.14(a))
- Parent consented to tx
 - Custodial parent may authorize
 - Non-custodial parent may not authorize

Inpatient Substance Abuse Treatment

□ ACCESS

- Minor – No right to access without parental consent
 - Exception – In the case of minors admitted for inpatient treatment pursuant to the Psychiatric Treatment of Minors Act, Virginia law requires the minor to be provided a copy of the treatment plan
(§ 16.1-338(C); § 16.1-346(A))

Inpatient Substance Abuse Treatment

- Exception – Any minor 14 or older who joined in the application and consents to admission under § 16.1-338 shall have the right to access his health information.

(§ 16.1-338(G))

Inpatient Substance Abuse Treatment

- Parent

- Custodial – Need authorization of the minor to access
- Non-custodial – Need authorization of the minor to access
 - This comes from 42 CFR 2.14 and SAMSHA guidance

Inpatient Substance Abuse Treatment (cont'd)

□ DISCLOSURE

- Minor alone may not authorize disclosure
- Parent alone may not authorize disclosure
- Concurrent authorization of both the custodial parent and the minor is required

Outpatient Substance Abuse Treatment

- ACCESS

- ▣ Minor

- Minor has right to access no matter who consented to tx (§ 54.1-2969(E))

Outpatient Substance Abuse Treatment

□ ACCESS

- Parent – No right to access without the minor's authorization

Outpatient Substance Abuse Treatment (cont'd)

□ DISCLOSURE

- Minor - minor alone may authorize disclosure
- Parent – parent alone may not authorize disclosure

Disclosures Without Authorization

- Many instances where the law permits a disclosure without authorization
 - TPO
 - Required by law
 - Health oversight activities
 - Public health activities
 - Court orders

Disclosures Without Authorization

- If substance abuse treatment involved – be careful!
- Substance Abuse Regulations permit disclosure without authorization in limited circumstances
 - ▣ Medical emergencies (42 C.F.R. § 2.51)
 - ▣ Some audit and evaluation activities (42 C.F.R. § 2.53)
 - ▣ Court order that complies with the Substance Abuse Regulations

Parental Surrogate Issues

- Can DJJ, DOC and DSS authorize the disclosure of a minor's health records?
 - Virginia Code § 54.1-2969
 - Virginia Code § 32.1-127.1:03
 - Virginia Code § 16.1-248.3

Parental Surrogate Issues (cont'd)

- Virginia Code § 54.1-2969

Whenever any minor who has been separated from the custody of his parent or guardian is in need of surgical or medical treatment, authority commensurate with that of a parent is conferred, for purposes of giving consent to such treatment, as follows:

Parental Surrogate Issues (cont'd)

- Upon judges with respect to minors whose custody is within control of their court
- Upon local directors of DSS or their designees with respect to
 - ▣ Minors who are committed to the care and custody of the local board by a court
 - ▣ Minors taken into custody pursuant to § 63.2-1517 (child in imminent danger)
 - ▣ Minors entrusted to the board by the parent or guardian when the consent of the parent or guardian cannot be obtained immediately and a court order for treatment cannot be obtained immediately

Parental Surrogate Issues (cont'd)

- Upon the Director of the DOC or DJJ or his designees with respect to any minor who is sentenced or committed to his custody
- Directors of other institutions with respect to any minor whose custody is within the control of such institution

Parental Surrogate Issues (cont'd)

- Virginia Code § 32.1-127.1:03
Health care entities may disclose health records pursuant to the written authorization of the individual or in the case of a minor, his custodial parent, guardian or other person authorized to consent to treatment of minors pursuant to § 54.1-2969.
- Remember Substance Abuse Regulations

Parental Surrogate Issues (cont'd)

- DJJ/DOC

- Virginia Code § 16.1-248.3

Whenever a juvenile is placed in a secure facility pursuant to § 16.1-248.1, the director of the facility or his designee shall be entitled to obtain medical records from a provider.

Parental Surrogate Issues (cont'd)

- Director must first make a reasonable attempt to obtain consent for the release of records from the minor's parent or guardian or in instances where the minor can consent pursuant to § 54.1-2969, from the minor.
- If such consent is refused or is not readily obtainable and the records are necessary for the provision of health care to the minor; to protect the health and safety of the minor or other residents or staff; or to maintain security and safety of the facility, the director may proceed to obtain the records.

Parental Surrogate Issues (cont'd)

- Substance abuse records subject to federal regulations, 42 C.F.R. Part 2, shall not be subject to the provisions of this section (16.1-248.3).

Parental Surrogate Issues (cont'd)

- Substance Abuse records
 - ▣ If a minor acting alone has legal capacity under state law to consent to substance abuse treatment, minor must authorize disclosure no matter whether the minor actually consented to the treatment or not.
 - § 54.1-2969 allows a minor alone to consent to outpatient substance abuse treatment

Parental Surrogate Issues (cont'd)

- Substance Abuse records (cont'd)
 - Where state law requires a parent or other person to consent for a minor's substance abuse tx, authorization for disclosure must be given by both the minor and the parent, guardian or other person authorized under state law to act in the minor's behalf.
 - State law does not allow a minor alone to consent to inpatient substance abuse treatment.

Parental Surrogate Issues (cont'd)

- What if parent still has parental rights but minor is in the custody of DJJ/DOC?
 - ▣ Law allows both parent and DJJ/DOC to provide authorization for disclosure of records.
 - Preference for parent authorization?