

Consent to Treatment and Confidentiality Provisions Affecting Minors in Pennsylvania

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Introduction

This manual is designed to provide guidance to health care providers who directly treat minors as well as to those child-serving professionals who assist youth in obtaining health care. For these professionals, questions regarding consent to treatment and the confidentiality of health care records often arise. As detailed in this manual, a number of laws and regulations – both on the state and federal levels – govern the ability of minors to consent to their own medical testing and treatment, as compared to situations requiring the consent of the minor's parent or legal guardian. Professionals who serve youth also must be familiar with the many legal requirements regarding confidentiality of records, particularly when parents wish to access their child's records.

Since publication of the first edition of this guide in 2002, there have been at least two major changes in the laws affecting minors in this area. On the federal level, final regulations implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) became effective. (At the time of the first edition's publication, certain changes to the regulations were still pending.) In Pennsylvania, the Minor's Consent Act was amended in 2005 to modify the laws of consent for mental health treatment for minors 14-17 years of age. Both of these legal changes are discussed extensively in this edition.

While there are many legal provisions regarding consent and confidentiality, child-serving professionals routinely encounter scenarios that the law does not squarely address. In some situations, two or more legal provisions seem to contradict each other. Professionals are often left to reason not only from existing law, but also from their profession's own duties and ethical codes. One of the goals of this manual is to identify and navigate those gray areas.

Questions regarding consent to treatment and confidentiality of records become even more complex when a youth is involved in either the child welfare or juvenile justice system. When a minor enters foster care or the juvenile justice system, a number of different actors play a role in the child's life. For children in foster care, these actors can include county children and youth agencies, child residential facilities, private foster care agencies, foster parents, and the dependency court. For those youth involved with the juvenile court, these actors include temporary detention centers, child residential facilities, juvenile probation officers and, of course, the delinquency court itself. Frequently questions arise regarding who can consent to medical testing and treatment on behalf of minors involved in these systems. There is often confusion as to the permitted disclosure of a minor's health care records between health care providers and these different actors, as well as among the actors themselves. This manual includes special sections on consent and confidentiality provisions affecting court-involved youth, including a discussion on the impact of HIPAA on information-sharing within the child welfare and juvenile justice system.

When using this guide, it is important for readers to keep in mind that laws and regulations are constantly changing. For that reason, readers should periodically consult the Juvenile Law Center website at www.JLC.org for posted updates.

The authors gratefully acknowledge the assistance of Rebecca Lasher and Joann Viola in the production of this manual.

Juvenile Law Center works to advance the rights and well-being of children as they make the critical transition from youth to adulthood. In publishing this manual, Juvenile Law Center hopes to further this important mission that we share with so many dedicated child-serving professionals in our community.

Part I

Consent to Medical Treatment and Health Care Services

In Pennsylvania, persons age 18 years or over can consent to their own medical, dental and health care.¹ Pennsylvania law also allows minors -- which are defined for purposes of this manual as persons under the age of 18 -- to consent to a wide variety of medical testing and treatment and health care services; in these cases, the consent of the minor's parent/guardian is not needed. This Part describes when minors are allowed to authorize their own health care as contrasted to when the consent of a parent/guardian is necessary.

A. General Medical Treatment and Health Care Services

Under the Minors' Consent Act, a minor who has graduated from high school, has been pregnant or has married can consent to medical, dental and health services for himself/herself.² (It is important to note that the Minors' Consent Act allows any minor who has "been pregnant" to authorize her own health care; the statute does not require that the minor have actually given birth.) If a minor fits into one of these categories, parental consent is not required. Because "medical, dental, and health services" are not further defined or enumerated by the Minors' Consent Act, **minors who meet the above criteria can consent to all such services unless otherwise prohibited by state law.**

The Minors' Consent Act also allows any minor to consent to testing and treatment for what are known as "reportable diseases" under the Disease Prevention and Control Law of 1955.³ "Reportable diseases" are defined in the Disease Prevention and Control Law of 1955 as those communicable and non-communicable diseases declared reportable either by state regulation or by the state Secretary of Health.⁴ At the time of this writing, the list of reportable diseases in Pennsylvania included those listed in the table on page 2.⁵

In addition, a minor who has received a judicial decree of emancipation (that states either that the minor is emancipated for all purposes or that s/he is emancipated for purposes of consenting to medical treatment and health care) from the Court of Common Pleas where s/he resides can consent to his/her own medical treatment and health care.⁶

¹ Minors' Consent Act, 35 P.S. § 10101.

² Minors' Consent Act, 35 P.S. § 10101.

³ Minors' Consent Act, 35 P.S. § 10103.

⁴ Minors' Consent Act, 35 P.S. § 10103, citing the Disease Prevention and Control Law of 1955, 35 P.S. § 521.2(k).

⁵ Providers are required to report all incidents of these diseases to the local health authorities, regardless of the age of the person diagnosed with the disease. 28 Pa. ADC § 27.3. With the person's consent, the local health department may contact the person's sexual partners to alert the latter that they have been in contact with a person who has a sexually transmitted disease and, thus, they should be tested. However, the local health department will not reveal the name of the individual who has been tested to the sexual partners that the individual has identified for notification. 28 Pa. ADC § 27.32c.

⁶ Pennsylvania does not have an emancipation statute. Instead, the practice of granting judicial decrees of emancipation has grown out of Pennsylvania case law describing the circumstances under which a court may find that a minor is emancipated. See *Berks County Children & Youth Servs. v. Rowan*, 631 A.2d 615 (Pa. Super. 1993); *Trosky v. Mann*, 581 A.2d 177 (Pa. Super 1990). Because there is no emancipation statute in Pennsylvania, each county has developed its own procedures for a minor to petition the court for a judicial decree of emancipation. For more information about emancipation, please see the emancipation fact sheet posted on Juvenile Law Center's website, www.JLC.org.

**MINORS CAN CONSENT TO TESTING AND TREATMENT
FOR THE FOLLOWING REPORTABLE DISEASES:**

AIDS	Lyme disease
Amebiasis	Lymphogranuloma venereum
Animal bites	Malaria
Anthrax	Measles (rubeola)
Arboviruses	Meningitis – all types not caused by invasive
Botulism – all forms	haemophilus influenza or Neisseria
Brucellosis	meningitis
Campylobacteriosis	Meningococcal infections
Cancer	Mumps
Chancroid	Pertussis (whooping cough)
Chicken pox (varicella)	Plague
Chlamydia trachomatis infections	Poliomyelitis
Cholera	Psittacosis (ornithosis)
Creutzfeldt-Jakob disease	Rabies
Cryptosporidiosis	Respiratory syncytial virus
Diphtheria infections	Rickettsial diseases/infections
Encephalitis	Rubella (German Measles)
Enterohemorrhagic E. coli infections or	and congenital rubella syndrome
infections caused by other subtypes	Salmonella
producing shiga-like toxins	Salmonellosis
Food poisoning	Shigella
Giardiasis	Shigellosis
Gonococcal infections	Small pox
Granuloma inguinale	Staphylococcus aureus, Vanomycin-resistant
Guillain-Barre syndrome	(or intermediate) invasive disease
Haemophilus influenzae invasive disease	Streptococcal invasive disease (group A)
Hantavirus pulmonary syndrome	Streptococcus pneumoniae,
Hemorrhagic fever	drug-resistant invasive disease
Hepatitis, viral, acute and chronic cases	Syphilis—all stages
Histoplasmosis	Tetanus
HIV	Toxic shock syndrome
Influenza	Toxoplasmosis
Lead poisoning	Trichinosis
Legionellosis	Tuberculosis, suspected or confirmed active
Leprosy (Hansen's disease)	disease
Leptospirosis	Tularemia
Listeriosis	Typhoid

Source: 28 Pa. Code §§ 27.21(a) and 27.22. Because the list of reportable diseases can change from year to year, readers are encouraged to consult the Pennsylvania Department of Health website at <http://www.dsf.health.state.pa.us/health/site/default.asp>.

Notes:

1. There are certain diseases that are reportable if diagnosed in children under five (5) years of age. See 28 Pa. Code §§ 27.21a, 27.22, and 27.30.
2. Minors can consent to testing and treatment for all sexually transmitted diseases, and not just those that are reportable to the Department of Health. See text in Part I.B.3.

B. Reproductive Health

1. BIRTH CONTROL, PREGNANCY TESTING AND PRENATAL CARE

Minors can obtain contraception (birth control) without parental consent or involvement.⁷ Under the Minors' Consent Act, any minor can consent to testing for pregnancy, and medical and health "services to treat pregnancy, including prenatal care."⁸

2. ABORTION SERVICES

It is important to note, however, that the term "services to treat pregnancy" as used in the Minors' Consent Act (see preceding section), does not include abortion services. **The state's Abortion Control Act governs a minor's ability to obtain abortion services.**⁹ When a minor wishes to obtain an abortion, the provider must obtain the informed written consent of the minor and one of her parents or legal guardians. If the pregnant minor's parents are divorced, the consent of the custodial parent is sufficient. If the pregnancy is the result of incest by the minor's father, the minor need only obtain consent from her mother.¹⁰ If neither the minor's parent nor legal guardian is available to the physician in a reasonable period of time, the consent of any adult person standing *in loco parentis* is sufficient.¹¹ A parent/guardian cannot coerce his/her minor child to undergo an abortion.¹²

Without the consent of a parent/guardian or an adult standing *in loco parentis*, there are two other circumstances in which a minor can obtain a non-emergency abortion in Pennsylvania. The first situation is when the minor is emancipated.¹³ The second circumstance is when the minor has received authorization, or what

⁷ See *Parents United for Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 978 F.Supp 197, 209 (E.D.Pa. 1997), *aff'd on other grounds*, 148 F.3d 260 (3d Cir.1998) (holding that the U.S. Constitution forecloses an interpretation of Pennsylvania law that would compel parental consent whenever a minor seeks contraceptives). See also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). Furthermore, federal law prohibits the imposition of parental consent requirements on minors who obtain contraception through Title X of the Public Health Services Act, 42 U.S.C. § 300, et.seq., or Medicaid, 42 U.S.C. § 1396a(10)(A).

⁸ Minors' Consent Act, 35 P.S. § 10103.

⁹ Abortion Control Act, 18 Pa.C.S.A. § 3201.

¹⁰ Abortion Control Act, 18 Pa.C.S.A. §§ 3206(a).

¹¹ Abortion Control Act, 18 Pa.C.S. § 3206(b). The Abortion Control Act does not further define the term *in loco parentis*. Under Pennsylvania case law, the term *in loco parentis* describes a relationship in which an adult assumes the legal rights and duties of parenthood. *Commonwealth v. Gerstner*, 656 A.2d 108, 112 (Pa. 1995). It should be noted that Pennsylvania courts have found that when a county children & youth agency places a child with foster parents, the foster parents do **not** stand *in loco parentis* to the child. *In the Interest of G.C.*, 735 A.2d 1226, 1228 (Pa. 1999) (citing *In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1149 (Pa. Super. 1984)).

¹² Abortion Control Act, 18 Pa.C.S. § 3206(g).

¹³ Abortion Control Act, 18 Pa.C.S. §§ 3206(a). Pennsylvania does not have an emancipation statute. Instead, the practice of granting judicial decrees of emancipation has grown out of Pennsylvania case law describing the circumstances under which a court may find that a minor is emancipated. See *Berks County Children & Youth Servs. v. Rowan*, 631 A.2d 615 (Pa. Super. 1993); *Trosky v. Mann*, 581 A.2d 177 (Pa. Super 1990). Because there is no emancipation statute in Pennsylvania, each county has developed its own procedures for a minor to petition the court for a judicial decree of emancipation. For more information about emancipation, please see the emancipation fact sheet posted on Juvenile Law Center's website, www.JLC.org.

is known as a judicial by-pass, from the Court of Common Pleas in either the judicial district where she resides or in the district where she seeks to have the abortion performed.¹⁴

3. SEXUALLY TRANSMITTED DISEASES (STDs) AND HIV

A minor can consent to testing for any venereal or sexually transmitted disease (STD), and medical and health services to treat the disease.¹⁵ These include but are not limited to HIV and AIDS, chlamydia, gonorrhea, and syphilis. In addition, minors age eleven (11) and older who seek care for the diagnosis and/or treatment of STDs can consent to a vaccination for hepatitis B, a disease that infects individuals through unprotected sexual contact and/or contaminated needles.¹⁶

C. Mental Health Treatment

1. VOLUNTARY INPATIENT TREATMENT

On January 22, 2005, the Minor's Consent Act was amended by Act 147, which changed the law regarding consent to mental health treatment for Pennsylvania minors 14-17 years of age. Prior to the passage of Act 147, the Mental Health Procedures Act (MHPA),¹⁷ and accompanying regulations found in the Mental Health Manual,¹⁸ set forth the consent requirements for voluntary inpatient treatment in Pennsylvania. These consent requirements still apply to a variety of mental health facilities, including any mental health establishment, hospital, clinic, institution, center, day care center, base service unit or community mental health center that provides for the diagnosis, treatment, care or rehabilitation of persons with mental illness.¹⁹ However, these facilities are now subject to the amended Minor's Consent Act as well. The following text sets forth the provisions of the Mental Health Procedures Act and the Minor's Consent Act, as amended by Act 147, that govern the consent requirements for mental health treatment for minors.²⁰

a. Minors 14 Years and Older

(1) By Consent of the Minor

A minor who is 14 years or older who believes that s/he is in need of treatment and substantially understands the nature of treatment may consent to voluntary inpatient mental health examination and treatment.²¹ The consent must be voluntary and in writing,²² and obtained after the minor is given an explanation

¹⁴ Abortion Control Act, 18 Pa.C.S. § 3206(c).

¹⁵ Minors' Consent Act, 35 P.S. § 10103; Disease Prevention and Control Law of 1955, 35 P.S. § 521.14a; Confidentiality of HIV-Related Information Act, 35 P.S. §§ 7602(c), 7605(a); 28 Pa. Code § 27.97.

¹⁶ Pennsylvania Department of Health memorandum, "Hepatitis B Vaccination Protocols in Sexually Transmitted Disease Clinics," attached at Appendix A.

¹⁷ 50 P.S. § 7101 *et seq.*

¹⁸ See Title 55 Pa. Code Chapter 5100.

¹⁹ Mental Health Procedures Act, 50 P.S. § 7103.

²⁰ Act 147 does not change the procedural requirements that apply to involuntary emergency examination and treatment under the Mental Health Procedures Act §§ 7301, 7302.

²¹ Mental Health Procedures Act, 50 P.S. §§ 7103, 7201; Mental Health Manual, 55 Pa. Code § 5100.71(a).

²² When the minor gives consent but the consent cannot be obtained in writing, a statement on a form approved by the Department of Public Welfare documenting that the minor acknowledged the information presented and gave his/her consent shall be signed by the person presenting the information and at least one witness. The statement shall
(continued...)

of the prospective treatment and his/her rights.²³ The consent of the minor's parent or legal guardian is not necessary; neither can a parent or legal guardian abrogate consent given by a minor on his or her own behalf.²⁴ Act 147 does not change the ability of a parent or legal guardian to object to a minor's inpatient mental health treatment provided pursuant to a minor's consent on his or her own behalf.²⁵

When a mental health facility accepts a minor 14 years of age or older for examination and treatment, based upon the minor's own consent, the facility's director must promptly notify the minor's parent, guardian or person standing *in loco parentis* that the minor has been admitted.²⁶ The notification must explain the nature of the minor's proposed treatment, and inform the minor's parent/guardian that s/he has a right to file an objection in writing with the director of the facility or the county mental health/mental retardation administrator.²⁷ The facility has to inform the parent/guardian by telephone where possible, and also by delivery of a form to the parent/guardian.²⁸ If the facility director cannot locate the parent, guardian or person standing *in loco parentis*, the director shall take such action as s/he deems appropriate, including notifying appropriate child welfare agencies.²⁹ If the parent/guardian files an objection, a hearing shall be held within 72 hours. The hearing will be held before a judge of the Court of Common Pleas or a mental health review officer appointed by the court, who shall determine whether or not the voluntary inpatient treatment is in the best interest of the minor.³⁰

Similarly, a minor age 14 years or older in a voluntary inpatient program, upon the minor's own consent, can be transferred to another facility only with his/her written consent and only after being informed about the next facility's treatment setting and modalities.³¹ The facility shall send notice of the proposed transfer to the minor's parent/guardian, and indicate on the notice that the parent/guardian has a right to object to the transfer by requesting a hearing.³²

(2) By Consent of the Parent or Legal Guardian

²² (...continued)

become part of the minor's records. Mental Health Manual, 55 Pa. Code § 5100.73(c).

²³ Mental Health Procedures Act, 50 P.S. § 7203; Mental Health Manual, 55 Pa. Code §§ 5100.71(b), 5100.73(a), (b), and (c); Minor's Consent Act, 35 P.S. § 10101.1(b)(7).

²⁴ Minor's Consent Act, 35 P.S. § 10101.1(b)(2) and (4).

²⁵ Minor's Consent Act, 35 P.S. § 10101.1(b)(3).

²⁶ Mental Health Procedures Act, 50 P.S. § 7204; Mental Health Manual, 55 Pa. Code § 5100.74. The Mental Health Procedures Act does not further define the term *in loco parentis*. Under Pennsylvania case law, the term *in loco parentis* describes a relationship in which an adult assumes the legal rights and duties of parenthood. *Commonwealth v. Gerstner*, 656 A.2d 108, 112 (Pa. 1995). It should be noted that Pennsylvania courts have found that when a county children & youth agency places a child with foster parents, the foster parents do **not** stand *in loco parentis* to the child. *In the Interest of G.C.*, 735 A.2d 1226, 1228 (Pa. 1999) (citing *In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1149 (Pa. Super. 1984)).

²⁷ Mental Health Procedures Act, 50 P.S. § 7204; Mental Health Manual, 55 Pa. Code § 5100.74.

²⁸ Mental Health Manual, 55 Pa. Code § 5100.74(a).

²⁹ Mental Health Manual, 55 Pa. Code § 5100.74(b).

³⁰ Mental Health Procedures Act, 50 P.S. § 7204.

³¹ Mental Health Procedures Act, 50 P.S. § 7207; Mental Health Manual, 55 Pa. Code § 5100.78(b).

³² Mental Health Manual, 55 Pa. Code § 5100.78(b).

Prior to the enactment of Act 147, with respect to voluntary inpatient treatment, the consent of a parent or legal guardian was **not** valid for a minor 14 years or older.³³ With the enactment of Act 147, which amends the Minor's Consent Act and not the MHPA, **a parent or legal guardian can consent to inpatient mental health treatment for minors 14-17 years of age on the recommendation of a physician who has examined the minor, and over the objections of the minor.**³⁴ A minor may not abrogate the consent provided by a parent or legal guardian on the minor's behalf.³⁵ A parent or legal guardian who has provided consent to inpatient mental health treatment may revoke that consent, unless the minor 14-17 years of age has provided consent for continued inpatient mental health treatment.³⁶

Under Act 147, when a minor has given consent on his or her own behalf and then revoked that consent, the revocation is **not** effective if the parent or legal guardian has consented to continued treatment on the recommendation of a physician who has examined the minor.³⁷

If A Minor Objects to Mental Health Treatment Provided by Consent of the Parent or Legal Guardian

Because Act 147 amended the Minor's Consent Act to permit the parent or legal guardian to consent to inpatient mental health treatment for minors 14-17 years of age on the recommendation of a physician who has examined the minor, and over the objections of the minor, the Act also establishes a process for objecting minors to have their commitment reviewed by a court.³⁸ Under Act 147, the following rules apply when a minor has been admitted for inpatient mental health treatment pursuant to a parent's consent:

- **The minor must be informed of his/her right to file a petition objecting to treatment.** At the time of admission, the director of the admitting facility (or his/her designee) must give the minor 14-17 years of age an explanation of the nature of the proposed treatment and the right to object by filing a petition with the Court of Common Pleas.³⁹
- **A petition must be filed on behalf of objecting minor by the facility.** If a minor wishes to object, the director of the facility (or his/her designee) must provide a form for the minor to fill out to give notice of his/her request for modification of or withdrawal from treatment. The director of the facility (or his/her designee) must file the signed petition with the Court of Common Pleas.⁴⁰
- **The objecting minor is entitled to a hearing within 72 hours.** Once the petition is filed, the court must promptly appoint an attorney for the minor and schedule a hearing to be held within 72 hours.⁴¹
- **The court must find that treatment represents the least restrictive alternative.** For inpatient mental health treatment to continue against the minor's wishes, the court must find that treatment is in the best interest of the minor by finding **all** of the following by clear and convincing evidence: (a) the minor has a diagnosed mental disorder; (b) the disorder is treatable; (c) the disorder can be treated in the particular facility where the treatment is taking

³³ Mental Health Procedures Act, 50 P.S. § 7201; Mental Health Manual, 55 Pa. Code § 5100.71(a).

³⁴ Minor's Consent Act, 35 P.S. § 10101.1(b)(1).

³⁵ Minor's Consent Act, 35 P.S. § 10101.1(b)(4).

³⁶ Minor's Consent Act, 35 P.S. § 10101.1(b)(5).

³⁷ Minor's Consent Act, 35 P.S. § 10101.1(b)(6).

³⁸ Minor's Consent Act, 35 P.S. § 10101.1(b)(7) and (9).

³⁹ Minor's Consent Act, 35 P.S. § 10101.1(b)(7).

⁴⁰ Minor's Consent Act, 35 P.S. § 10101.1(b)(7).

⁴¹ Minor's Consent Act, 35 P.S. § 10101.1(b)(8).

place; and (d) the proposed inpatient treatment represents the least restrictive alternative that is medically appropriate.⁴²

- **The court can initially order continued treatment for up to 20 days.** If the court finds (using the standard above) that continued treatment is in the best interests of an objecting minor, the court may order treatment to continue for a period of up to 20 days. The minor must be discharged (a) whenever the attending physician determines that the minor is no longer in need of treatment; or (b) at the end of the time period of the order; or (c) when the parent revokes consent, **whichever occurs first.**⁴³
- **At a review hearing, the court can subsequently order continued treatment for a period of up to 60 days.** If the attending physician determines that continued inpatient treatment will be necessary and the minor does not consent to continued treatment, the court shall conduct a review hearing prior to the end of the time period of the original order. The court will conduct the review hearing to determine whether the minor should be released or if continued treatment should be ordered for a period up to 60 days.⁴⁴ The minor must be discharged: (a) whenever the attending physician determines that the minor is no longer in need of treatment; or (b) at the end of the time period of the order; or (c) when the parent revokes consent, **whichever occurs first.**⁴⁵ This procedure for a 60 day period of treatment will continue until: (a) the court determines that the minor is no longer in need of treatment; or (b) the attending physician determines that the minor is no longer in need of treatment; or (c) the parent revokes consent, **whichever occurs first.**⁴⁶

b. Minors under the age of 14

The parent or legal guardian of a minor who is younger than 14 years of age may consent to voluntary inpatient mental health examination and treatment for the minor. In such cases, the parent/guardian shall be deemed as acting for the minor. The consent must be voluntary and in writing, and obtained after the parent or legal guardian is given an explanation of the prospective treatment and his/her rights.⁴⁷

The parent or legal guardian of a minor who is younger than 14 years of age may effect the release of the minor from a voluntary inpatient mental health facility.⁴⁸ If the parent/guardian did not agree at admission to a delayed release provision, the parent/guardian may immediately withdraw the minor from the facility. If the parent/guardian did agree at admission to a delayed release, the same rules as described in the preceding section apply to the parent/guardian.⁴⁹ Similarly, the parent/guardian of a minor younger than 14 years of age

⁴² Minor's Consent Act, 35 P.S. § 10101.1(b)(8)(i)-(iv).

⁴³ Minor's Consent Act, 35 P.S. § 10101.1(b)(9). Note that the minor 14-17 can remain in the facility after his/her parent revokes consent if the minor consents to the treatment. 35 P.S. § 10101.1(b)(5).

⁴⁴ Minor's Consent Act, 35 P.S. § 10101.1(b)(9).

⁴⁵ Minor's Consent Act, 35 P.S. § 10101.1(b)(9)(ii). Note that the minor 14-17 can remain in the facility after his/her parent revokes consent if the minor consents to the treatment. 35 P.S. § 10101.1(b)(5).

⁴⁶ Minor's Consent Act, 35 P.S. § 10101.1(b)(10). Note that the minor 14-17 can remain in the facility after his/her parent revokes consent if the minor consents to the treatment. 35 P.S. § 10101.1(b)(5).

⁴⁷ Mental Health Procedures Act, 50 P.S. §§ 7201, 7203; Mental Health Manual, 55 Pa. Code §§ 5100.71 (a) and (b), 5100.73(a)-(c); 35 P.S. § 10101.1(b)(1).

⁴⁸ Mental Health Procedures Act, 50 P.S. § 7206(b).

⁴⁹ Mental Health Manual, 55 Pa. Code § 5100.76(a)-(f).

must consent to any transfers.⁵⁰

2. VOLUNTARY OUTPATIENT TREATMENT

a. Minors 14 Years and Older

(1) By Consent of the Minor

Any minor who is 14 years or older may consent to outpatient mental health examination and treatment. The consent of the minor's parent or legal guardian is not necessary;⁵¹ neither can a parent or legal guardian abrogate consent given by a minor on his or her own behalf.⁵²

(2) By Consent of the Parent or Legal Guardian

A parent or legal guardian can consent to outpatient mental health examination and treatment for a minor 14-17 years of age. The consent of the minor is not necessary;⁵³ neither can a minor abrogate consent given by the parent or legal guardian on behalf of the minor.⁵⁴ There is no objection process for objecting minors in the context of outpatient treatment unlike for inpatient treatment.

b. Minors under the Age of 14

Prior to the passage of Act 147, no Pennsylvania statute explicitly addressed the age at which a minor could consent to outpatient mental health treatment. In an effort to provide some guidance, the Department of Public Welfare's Office of Mental Health and Substance Abuse Services (OMHSAS) issued a bulletin in 2001 offering an interpretation of Pennsylvania law.⁵⁵ OMHSAS looked to the purposes of the MHPA and the Minor's Consent Act, 35 P.S. §§ 10101-10105, and applied "common sense" to develop interpretations of law that could be applied to outpatient mental health treatment for minors.⁵⁶

When Act 147 was passed it partially remedied the gap in the law by explicitly addressing voluntary outpatient treatment for minors 14 and older, stating that minors 14-17 can consent to outpatient treatment.⁵⁷ Act 147 does not explicitly address outpatient treatment for minors under the age of 14. However, it is implicit in Act 147's language that minors under the age of 14 require parental consent to receive outpatient mental health treatment. This interpretation is supported by the OMHSAS bulletin,⁵⁸ as well as the MHPA's inpatient

⁵⁰ Mental Health Procedures Act, 50 P.S. §§ 7201, 7207; Pa. Code § 5100.78(b).

⁵¹ 35 P.S. § 10101.1(a)(1).

⁵² 35 P.S. § 10101.1(a)(3).

⁵³ 35 P.S. § 10101.1(a)(2).

⁵⁴ 35 P.S. § 10101.1(a)(3).

⁵⁵ Pennsylvania OMHSAS Bulletin 01-04 "Age of Consent for Voluntary Outpatient Mental Health Treatment," effective June 18, 2001, attached at Appendix B.

⁵⁶ Pennsylvania OMHSAS Bulletin 01-04 "Age of Consent for Voluntary Outpatient Mental Health Treatment," effective June 18, 2001, attached at Appendix B.

⁵⁷ 35 P.S. § 10101.1(a).

⁵⁸ Pennsylvania OMHSAS Bulletin 01-04 "Age of Consent for Voluntary Outpatient Mental Health Treatment," effective June 18, 2001, attached at Appendix B, citing Mental Health Procedures Act, 50 P.S. § 7201.

consent provisions with respect to minors under 14 years of age.⁵⁹ Accordingly, the parent/guardian of a minor under the age of 14 must consent to voluntary outpatient treatment on behalf of the minor.

D. Substance Abuse Treatment

A minor who "suffers from the use of a controlled or harmful substance" can consent to medical care and counseling related to the diagnosis or treatment of a substance abuse problem. The consent of the minor's parents or legal guardians is not necessary to authorize medical care or counseling related to such diagnosis or treatment.⁶⁰ There is no age limit for giving consent to substance abuse treatment under Pennsylvania law; therefore, a provider may treat a minor who has consented to treatment if the provider determines that the consent is knowing and voluntary.

With regard to parental notification, Pennsylvania law states that a physician, organization, or agency operating a substance abuse program which provides counseling to a minor **may, but is not obligated to**, inform the parents or legal guardian of the minor as to the substance abuse treatment given or needed.⁶¹ However, **if the program is federally** assisted, the program may only disclose such information to the minor's parent or guardian with the minor-patient's prior written consent; this includes situations when disclosure of information to the minor's parent or guardian is needed to obtain financial reimbursement.⁶² See *Part II* for a full discussion regarding the confidentiality of minors' substance abuse treatment records.

E. Emergency Situations

A physician can provide medical, dental and health services to minors of any age without the consent of the parent or legal guardian where the physician determines that an attempt to secure consent would increase risk to the minor's life or health.⁶³

A physician also can perform an abortion on a minor without obtaining parental consent in a medical emergency.⁶⁴

F. When Minors Participate in Medical Research

Title 45 of the Code of Federal Regulations, Subpart D, Section 46, governs consents required for minors

⁵⁹ Mental Health Procedures Act, 50 P.S. §§ 7201, 7203; Mental Health Manual, 55 Pa. Code §§ 5100.71 (a) and (b), 5100.73(a)-(c); 35 P.S. § 10101.1(b)(1).

⁶⁰ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.112.

⁶¹ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.112.

⁶² 42 U.S.C.A. § 290dd-2; 42 C.F.R. §§ 2.3, 2.12, 2.13, 2.14(b). But federal regulations do not prohibit a program from refusing to provide treatment until the minor consents to the disclosure necessary to obtain reimbursement. 42 C.F.R. § 2.14(b).

⁶³ Minor's Consent Act, 35 P.S. § 10104. See also 55 Pa. Code §§ 3130.91(3), 3680.52(4), 3800.19(b)(3) (noting that consent to treat is not needed in an emergency situation).

⁶⁴ Abortion Control Act, 18 Pa.C.S. §§ 3204(b), 3205(a), 3206(a), and 3209(c). "Medical emergency" is defined by the Abortion Control Act as that condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of the same to avert the death of the mother or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function. Abortion Control Act, 18 Pa.C.S. § 3203. This statutory language has been interpreted to mean that a "medical emergency" exists in any situation where there is a threat to the life or health of the pregnant woman. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879-80 (1992) (citations omitted).

to participate in medical research. Generally, a minor must have parental permission in order to participate in medical research.⁶⁵ Minors are defined under federal regulation as "persons who have not attained the legal age for consent to treatment or procedures involved in the research, under the applicable law of the jurisdiction in which the research will be conducted."⁶⁶ This provision has been interpreted to mean that if a minor is able to consent to medical, dental and health services under state law, the minor is also able to consent to take part in medical research.

For minors who are not legally capable of consenting to medical treatment, Federal regulations require parental consent to a child's participation in any medical research program.⁶⁷

The regulations divide medical research involving children into four categories. In the first two, the consent of only one parent or guardian is required. In the third and fourth categories, the consent of both parents, if legally possible, is required.⁶⁸

Consent from only one parent is required for:

- Research not involving greater than minimal risk.⁶⁹
- Research involving greater than minimal risk, but presenting the prospect of direct benefit to the individual subject.⁷⁰

Unless one parent is deceased, unknown, incompetent, or not reasonably available, or only one parent has legal responsibility for the minor, consent from **both** parents is required for:

- Research that has a greater than minimal risk and no prospect of direct benefit to the child.
- Research that is otherwise not approved, but presents an opportunity to understand, prevent or alleviate a serious problem affecting children's health.⁷¹

G. Minors Who Are Parents

Any minor who has borne a child or is or has been married can consent to medical, dental and health services for his/her minor child.⁷²

⁶⁵ 45 C.F.R. §§ 46.402, 46.404, 46.405, 46.406, and 46.408.

⁶⁶ 45 C.F.R. § 46.402.

⁶⁷ 45 C.F.R. § 46.401-46.416. Parental consent is one of two safeguards for children who may be potential subjects for medical research. The second are internal institutional review boards (IRB) that review the research activities conducted by their institutions. 45 C.F.R. § 46.403. IRB's must pay particular attention to medical research involving vulnerable populations such as children. 45 C.F.R. § 46.111(a)(3). For further discussion, see Wenner, William, *The Impact of Medical Research on Children*, 8 U.C. Davis J. Juv. L. & Pol'y, 243, 257-58 (2004).

⁶⁸ 45 C.F.R. § 46.408(b), defines the circumstances where both parents' consent would not be required.

⁶⁹ 45 C.F.R. § 46.405. Minimal risk means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests. 45 C.F.R. § 46.102(i).

⁷⁰ 45 C.F.R. § 46.405-06. Both of these types of medical research are termed "therapeutic research"

⁷¹ 45 C.F.R. § 46.406-07. Both of these types of medical research are termed "nontherapeutic research."

⁷² Minors' Consent Act, 35 P.S. § 10102. It is not clear whether minor fathers are considered to "have borne" a child for purposes of this statute. As a matter of practice, health professionals will allow a minor father to consent to services for his child as long as the minor father can produce some evidence of his paternity (e.g., the minor is listed as the father
(continued...)

H. Minors Whose Parents Are Incapacitated

Pennsylvania's Medical Consent Act, 21 P.S. § 2513, permits a parent or legal guardian to confer upon an adult who is a relative or family friend the power to consent to a child's medical treatment.⁷³ The parent or legal guardian may also confer any existing parental rights to obtain records and information with regard to the health care services and insurance.⁷⁴ If a child is in the custody of a county or youth agency, the parent cannot confer powers granted under the Medical Consent Act.⁷⁵

To be valid, a document conferring power to consent under the Medical Consent Act must: (1) be in writing; (2) state the name of the person upon whom the power is conferred; (3) include the name and date of birth of each minor with respect to whom the power is conferred; (4) include a statement by the parent or guardian conferring the power that there are no court orders that preclude them from conferring this power; (5) contain the signature of the parent or guardian; (6) be witnessed by two persons who are at least 18 years of age; and (7) include the signature of the person to whom the power is being conferred.⁷⁶ A sample Medical Consent Authorization form is included in this manual at Appendix E.

Consent under the Medical Consent Act is revocable at will and is effective upon notifying all parties of interest in writing.⁷⁷

I. Consent Issues When Minors are in the Child Welfare System

Questions arise regarding who can consent to medical testing and treatment on behalf of minors involved in the child welfare system. When a minor enters foster care, a number of different actors -- including county children & youth agencies, child residential facilities, private foster care agencies, foster parents and the dependency court -- play a role in the minor's life. Minors under the supervision of their county children & youth agency may still be in the legal custody of their parents, but often a court has awarded temporary legal custody to the agency. When the agency becomes the child's legal custodian, another individual or entity is given physical custody of the minor (i.e., the minor goes to live with a relative, a foster parent, or in a residential facility).

Consequently, often times the adult who accompanies a minor to a doctor's appointment is not his/her parent/guardian, but instead a foster parent, a representative of the facility where the child resides, or an agency caseworker. But who among these actors can legally consent to testing and treatment of the minor in the absence of parental consent? This section attempts to clarify this issue.⁷⁸

⁷² (...continued)
on the child's birth certificate.)

⁷³ Medical treatment includes surgical, dental, developmental, mental health and other treatments rendered by a nurse, physician, school nurse, dentist, mental health or other licensed health care professional. Medical Consent Act, 21 P.S. §2513(a)

⁷⁴ Medical Consent Act, 21 P.S. §2513(a). This right extends only to records or documents that a parent or guardian has the right to review.

⁷⁵ Medical Consent Act, 21 P.S. §2513(a).

⁷⁶ Medical Consent Act, 21 P.S. § 2513(c)(1)

⁷⁷ Medical Consent Act, 21 P.S. § 2513(e)

⁷⁸ With respect to consents for participation in medical research for children who are wards of the state, see *Part I.F supra*.

1. CHILDREN IN THE CUSTODY OF COUNTY CHILDREN & YOUTH AGENCIES⁷⁹

DPW regulations governing county children and youth agencies,⁸⁰ private foster care agencies and foster families,⁸¹ and child residential facilities⁸² distinguish between **routine versus non-routine** medical and dental examinations and treatment for purposes of consent. The regulations do not define routine and non-routine treatment but instead offer examples of each. Examples of routine treatment in the regulations include well baby visits and child health examinations, dental care, vision care, hearing care, immunizations, and treatment for injuries and illnesses. Examples of non-routine treatment include non-emergency (elective) surgery, cosmetic surgery and experimental procedures or treatment.⁸³

When a minor has been **voluntarily** placed in the legal custody of the county children & youth agency (the minor's parent/guardian has signed a voluntary placement agreement), the minor's parent or legal guardian must give prior written consent before the minor can receive **routine** examinations and treatment, and must give prior written consent to each instance of **non-routine** treatment for the minor. If the parent/guardian does not consent or cannot be located, the county children & youth agency, the private foster care agency or the residential facility with physical custody of the minor must obtain a court order authorizing the treatment.⁸⁴

If the minor has been **involuntarily** removed from the home and is in the legal custody of the children & youth agency, but parental rights have not been terminated, the minor's county child & youth agency caseworker can authorize **routine** examination and treatment for the minor; the consent of the parent/guardian is not needed. The minor's parent or legal guardian, however, must still give prior consent to each instance of **non-routine** examination or treatment for the minor.⁸⁵ Again, if the parent/guardian does not consent or cannot be located, the county children & youth agency, the private foster care agency or the residential facility with physical custody of the minor must obtain a court order authorizing the treatment.⁸⁶

It also should be noted that when a child is in the legal custody of a county children & youth agency, only designated staff members from the agency may enroll/disenroll a child from a HealthChoices Managed Care Organization (MCO) and/or change the child's primary care physician or dentist.⁸⁷ No one else is authorized to take such actions for children in the custody of a county children & youth agency.⁸⁸

Finally, when the county children & youth agency has custody of a minor for whom a decree of

⁷⁹ In cases of suspected child abuse, health care providers, as persons required to report cases of suspected child abuse, may take photographs and administer radiological examinations and other appropriate medical tests to the child without first obtaining parental consent. Child Protective Services Law, 23 Pa.C.S.A. §§ 6311(a) and (b), 6314.

⁸⁰ Title 55 Pa. Code Chapter 3130.

⁸¹ Title 55 Pa. Code Chapters 3680 and 3700.

⁸² Title 55 Pa. Code Chapter 3800.

⁸³ 55 Pa. Code §§ 3130.91(1), 3680.52(2), and 3800.19(b).

⁸⁴ 55 Pa. Code §§ 3130.91(1), 3680.52(2), and 3800.19(b).

⁸⁵ 55 Pa. Code §§ 3130.91(1)(ii) and 3130.91(2)(ii).

⁸⁶ 55 Pa. Code §§ 3130.91(2), 3680.52(1), and 3800.19(b); The Juvenile Act, 42 Pa.C.S.A. § 6357 (stating that the custodian to whom legal custody of a child has been given by the Court of Common Pleas under the Juvenile Act, has the right to determine the nature of the care and treatment of the child, including ordinary medical care).

⁸⁷ Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures," effective April 1, 1999, at pp. 2-3 and 8, attached at Appendix D.

⁸⁸ Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures," effective April 1, 1999, at p. 8, attached at Appendix D.

termination of parental rights has been entered, the agency can consent to all **routine** and **non-routine** examination or treatment, including major medical, psychiatric and surgical treatment for the minor.⁸⁹

2. PRIVATE FOSTER CARE AGENCIES

No existing state regulation gives private foster care agencies the authority to consent to treatment on behalf of children in their care. As a general practice, private agencies have parents/guardians sign a general release authorizing the agency to obtain routine medical examination and treatment. When a child requires non-routine treatment, the private agency will first attempt to obtain the parent's specific written consent to the treatment. If the parent is unavailable or unwilling to give his/her consent, the private agency will then seek a court order authorizing the treatment.

3. CHILD RESIDENTIAL FACILITIES

Children in the legal custody of a county children & youth agency are sometimes physically placed in facilities governed by the Title 55 Chapter 3800 regulations (hereinafter the "3800 regulations"). The 3800 regulations apply to child residential facilities, including transitional living facilities.⁹⁰ These regulations mandate that child residential facilities comply with all state laws and regulations pertaining to consent to treatment, including those provisions reviewed earlier in this Part.⁹¹ Where there is no other statute or regulation directly on point, the Chapter 3800 regulations set up the following default rule. The facility must obtain general written consent from the minor's parent or legal guardian to obtain routine care on behalf of the child, and a separate written consent for each instance of non-routine treatment.⁹² Absent such consent, the facility must obtain a court order authorizing the examination and/or treatment.⁹³

4. FOSTER PARENTS⁹⁴

No regulation authorizes foster parents to consent to medical treatment -- whether routine or non-routine -- for children in their care. As a matter of practice, upon accepting a new child for services, private agencies have the child's parent/guardian sign a general release authorizing the agency to obtain routine medical examination and treatment for the child. The private agencies in turn authorize the foster parent to obtain routine examinations and immunizations for the children. When a child requires non-routine treatment, the private agency will first attempt to obtain the parent's specific written consent to the treatment. If the parent is unavailable or unwilling to give his/her consent, the private agency will then seek a court order authorizing the treatment.

5. DEPENDENCY COURT

During the pendency of a dependency proceeding, the Court of Common Pleas may order a physical or mental examination of the minor, and may also order medical or surgical treatment of a minor who is suffering a serious physical condition or illness which, in the opinion of a physician, requires prompt treatment. The court

⁸⁹ Adoption Act, 23 Pa.C.S.A. § 2521(c).

⁹⁰ 55 Pa. Code § 3800.2.

⁹¹ 55 Pa. Code § 3800.19(a).

⁹² 55 Pa. Code § 3800.19(b). Of course, as mentioned above, when the minor is in the custody of a county children & youth agency, the agency caseworker may consent to routine health care. 55 Pa. Code §§ 3130.91(2), 3680.52(1)

⁹³ 55 Pa. Code § 3800.19(b).

⁹⁴ It should be noted that Pennsylvania courts have found that when a county children & youth agency places a child with foster parents, the foster parents do **not** stand *in loco parentis* to the child. *In the Interest of G.C.*, 735 A.2d 1226, 1228 (Pa. 1999) (citing *In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1149 (Pa. Super. 1984)).

may order the treatment even if the parent, guardian or custodian has not been given notice of the pending hearing, is not available, or without good cause informs the Court that s/he does not consent to the treatment.⁹⁵

6. MEDICAL RESEARCH WHEN MINORS ARE IN THE CHILD WELFARE SYSTEM

Children who are wards of the state,⁹⁶ or any other agency, institution or entity can be included in medical research that would otherwise require the consent of two parents (see *Part I.F*) **only** if such research is (a) related to their status as wards, or (b) conducted in schools, camps, hospitals, institutions or similar settings in which the majority of children involved as subjects are **not** wards.⁹⁷

Further, if the proposed research meets the criteria set forth above, the institution's Internal Review Board **shall** require appointment of an advocate for each child who is a ward, in addition to any other individual acting on behalf of the child as guardian or *in loco parentis*.⁹⁸ The advocate must act in the best interests of the child for the duration of the child's participation in the research and may not be associated in any way with the research, the investigators of the guardian organization.⁹⁹

J. Consent Issues When Minors are Involved in the Delinquency System

As described in the previous section, minors in the child welfare system are sometimes placed in the legal custody of the county children & youth system, either voluntarily by their parents or pursuant to a court order. By contrast, minors involved in the delinquency system often remain in the legal custody of their parents/legal guardians, even when the minors are physically placed in a facility by order of the delinquency court (which is part of the county Court of Common Pleas). Therefore, health care providers still have to obtain the consent of parent/guardian to treat a minor involved in the juvenile justice system, except when the minor can legally give his/her own consent as described above or when there is a court order authorizing treatment.

1. SECURE DETENTION CENTERS AND PRIVATE RESIDENTIAL FACILITIES

Minors involved in the juvenile justice system are sometimes temporarily placed by the court in secure detention facilities. These facilities house both pre-adjudicated minors (who are awaiting trial) and post-adjudicated minors (who've had their trials and were adjudicated, and are now awaiting a permanent placement.) Secure detention centers are governed by the Chapter 3800 regulations,¹⁰⁰ and must comply with

⁹⁵ The Juvenile Act, 42 Pa.C.S.A. § 6339(b). The statute does not provide a further definition of "good cause." See also 55 Pa. Code § 3130.91(1) and (2), § 3680.52(1) and (2), and § 3800.19(b) (mandating that county children & youth agencies, private foster care agencies, and child residential facilities seek court orders to authorize medical treatment for a minor in their care when the minor's parent/guardian refuses to give consent, or cannot be located to give consent, except in those instances where the regulations permit the county children & youth agency to consent to routine treatment.)

⁹⁶ The federal regulations do not define the term "wards of the state", and the term is not used in Pennsylvania's Juvenile Act, 42 Pa.C.S.A. § 6301-6365, which governs the adjudication and disposition of dependent children. Presumably, in the context of medical research, youth who are in the custody of a county children & youth agency would be considered wards of the state such that these provisions apply to them.

⁹⁷ 45 C.F.R. § 46.409(a).

⁹⁸ 45 C.F.R. § 46.409(b).

⁹⁹ 45 C.F.R. § 46.409(b).

¹⁰⁰ 55 Pa. Code § 3800.2(d)(2).

all state laws and regulations pertaining to consent to treatment, including those reviewed earlier in this Part.¹⁰¹ Where there is no other statute or regulation directly on point, the default rule applies -- the detention center must obtain general written consent from the minor's parent or legal guardian to obtain routine care on behalf of the child, and a separate written consent for each instance of non-routine treatment.¹⁰² Absent such consent, the facility must obtain a court order authorizing the examination and/or treatment.¹⁰³

Delinquency court judges sometimes place youth who have been adjudicated delinquent in private residential facilities as part of the youth's disposition. The 3800 regulations are also applicable to private facilities that house minors who have been adjudicated delinquent.¹⁰⁴ These facilities must follow the same rules pertaining to consent to treatment as outlined in the preceding paragraph.

2. FACILITIES OPERATED BY THE DEPARTMENT OF PUBLIC WELFARE

Juvenile courts also can place minors who have been adjudicated delinquent in facilities operated directly by the Department of Public Welfare (DPW). DPW-operated facilities for youth who have been adjudicated delinquent include the Youth Development Centers (YDCs) and forestry camps. The Chapter 3800 regulations governing private child residential facilities are not applicable on their face to DPW-operated facilities.¹⁰⁵ However, DPW has stated that state-operated facilities for youth will follow the 3800 regulations.¹⁰⁶

3. JUVENILE PROBATION OFFICERS

Youth who become involved in the delinquency system are assigned county juvenile probation officers (JPOs). No state law or regulation gives JPOs the authority to consent to medical examination or treatment on behalf of a minor whom they are monitoring.¹⁰⁷ Therefore, health care providers still have to obtain consent of parent/guardian to treat a minor involved in the juvenile justice system, except when the minor can legally give his/her own consent as described above or they have a court order.

4. DELINQUENCY COURT

During the pendency of a delinquency proceeding, the Court of Common Pleas may order a physical or mental examination of the minor, and may also order medical or surgical treatment of a minor who is suffering a serious physical condition or illness which, in the opinion of a physician, requires prompt treatment. The court may order the treatment even if the parent, guardian or custodian has not been given notice of the pending hearing, is not available, or without good cause informs the Court that s/he does not consent to the treatment.¹⁰⁸

¹⁰¹ 55 Pa. Code § 3800.19(a).

¹⁰² 55 Pa. Code § 3800.19(b).

¹⁰³ 55 Pa. Code § 3800.19(b).

¹⁰⁴ 55 Pa. Code § 3800.2.

¹⁰⁵ 55 Pa. Code § 3800.3(1).

¹⁰⁶ See DEPARTMENT OF PUBLIC WELFARE'S LICENSING IMPLEMENTATION MANUAL FOR CHILD RESIDENTIAL AND DAY TREATMENT FACILITIES REGULATIONS, 55 PA. CODE CHAPTER 3800 (September 1999) at p. 6.

¹⁰⁷ See DEPARTMENT OF PUBLIC WELFARE'S LICENSING IMPLEMENTATION MANUAL FOR CHILD RESIDENTIAL AND DAY TREATMENT FACILITIES REGULATIONS, 55 PA. CODE CHAPTER 3800 (September 1999) at p. 30.

¹⁰⁸ The Juvenile Act, 42 Pa.C.S.A. § 6339(b). The statute does not provide a further definition of "good cause." See also 55 Pa. Code § 3130.91(1) and (2), § 3680.52(1) and (2), and § 3800.19(b) (mandating that county children & youth agencies, private foster care agencies, and child residential facilities seek court orders to authorize medical treatment (continued...))

It also should be noted that when a child is involved in the juvenile justice system, the child's juvenile probation officer (JPO) may enrol/disenroll the child from a HealthChoices Managed Care Organization (MCO) and/or change the child's primary care physician or dentist if the JPO is authorized to do so by the juvenile court through specific court order.¹⁰⁹

¹⁰⁸ (...continued)

for a minor in their care when the minor's parent/guardian refuses to give consent, or cannot be located to give consent, except in those instances where the regulations permit the county children & youth agency to consent to routine treatment.)

¹⁰⁹ Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures", effective April 1, 1999, at pp. 2-3 and 8, attached at Appendix D.

Part II

Confidentiality of Minors' Health Care Records¹¹⁰

This Part examines the many statutes and regulations currently in effect that govern the confidentiality of minors' medical treatment and health care records. As a general rule, where a minor has the authority to consent to his/her own treatment and the consent of the minor's parent/guardian is not needed, the minor controls the release of his/her records regarding that treatment. There are exceptions to this general rule, however, and these exceptions are discussed throughout this Part.

The landscape of confidentiality rules in Pennsylvania is made up of both state and federal law. The baseline for the protection of health information was established by the federal Health Insurance Portability and Accountability Act (HIPAA), which was passed in 1996 to protect the privacy of consumers' medical records.¹¹¹ HIPAA's privacy standards are implemented via a comprehensive set of regulations that were issued by the U.S. Department of Health and Human Services (HHS) and went into effect in April 2001.¹¹² HIPAA does not override any state laws that provide consumers with greater privacy protections; HIPAA simply sets a floor for privacy protections and states may give consumers even greater protections.¹¹³

A. Overview of HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) imposes a set of responsibilities on some agencies, organizations and people who have access to certain health information. The responsibilities imposed by HIPAA are designed to ensure that certain health information can be disclosed when sharing information is important and can be protected when privacy is important. A complete discussion of HIPAA is beyond the scope of this manual, but this section provides a general overview of the aspects of HIPAA that are most relevant to information sharing and confidentiality with respect to minor's records.

The HIPAA rules for disclosing and protecting health related information apply only to entities that can be classified as either a covered entity, a hybrid entity, or a business associate of a covered entity. Under the HIPAA regulations, a covered entity is defined as (1) a health plan (an individual or group plan that provides or pays the cost of medical care),¹¹⁴ (2) a healthcare clearinghouse (an entity, such as a billing service or community health management information system that processes health information received from another

¹¹⁰ The confidentiality provisions in this section do not override the duties of mandated reporters of child abuse under the Child Protective Services Law, 23 Pa.C.S. §§ 6301-6385, and accompanying regulations, Title 55 Chapter 3490. See 23 Pa.C.S.A. § 6311(a) (stating that except with respect to confidential communications made to an ordained member of the clergy, the privileged communication between a professional person required to report and his patient or client does not apply to situations involving child abuse and is not a justification for failing to report suspected child abuse); 55 Pa. Code § 3490.14 (same). Under regulations issued pursuant to the federal Health Insurance Portability and Accountability Act (HIPAA), prior written consent is not needed by a provider to report cases of suspected cases of child abuse or neglect or domestic violence as mandated by state law. 45 C.F.R. § 164.512(b)(1)(ii) and (c). The HIPAA regulations also provide that in cases where the health care provider suspects that a minor has been or may be subjected to violence, abuse or neglect by a parent, guardian or other person standing *in loco parentis*, the provider may elect not to provide health care information to the minor's parent/guardian even if the minor's parent/guardian would otherwise be entitled to that information under state laws. 45 C.F.R. §§ 164.502(g)(5), 164.512(c)(2)(ii).

¹¹¹ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.

¹¹² 45 C.F.R. Parts 160 and 164.

¹¹³ 45 C.F.R. § 160.203.

¹¹⁴ 45 C.F.R. § 160.103. Note that the definition of a *health plan*, in that it includes the provision as well as payment for medical care, appears to overlap with the definition of a *health care provider*.

individual or organization),¹¹⁵ or (3) a health care provider (any person or organization who furnishes, bills, or is paid for health care in the normal course of business who transmits any health information in *electronic form*).¹¹⁶

A hybrid agency or organization is one whose business activities include both covered functions and non-covered functions, and that designates the covered portion of its organization as its health care components.¹¹⁷ Covered functions are functions, the performance of which qualify the performing entity as a health plan, a healthcare clearinghouse or a health care provider.¹¹⁸ By designating the portion of its organization that performs covered functions, the hybrid entity restricts the application of HIPAA to that portion of the organization.

Business associates are persons or organizations who/that perform certain functions or activities on behalf of, or provide certain services to a covered entity that involve the use or disclosure of protected health information (PHI).¹¹⁹ Business associates must be willing to provide certain assurances regarding the protection of PHI to the covered entities with whom they work. The failure of a business associate to provide required assurances does not constitute a violation of HIPAA on the part of the business associate. However, HIPAA prohibits covered entities from contracting with business associates who do not provide these assurances.

Any entity that does not meet HIPAA's definition of a health plan, clearinghouse or provider, or that falls into one of the designated exceptions to those categories, is not covered by HIPAA. Such an entity is still responsible for complying with all other applicable laws regarding confidentiality.

The HIPAA rules for disclosing and protecting health related information apply only to protected health information (PHI). HIPAA rules apply only to protected health information (PHI), defined as all individually identifiable health information transmitted or maintained by a covered entity, in any form or media.¹²⁰ Individually identifiable health information is health information that relates to (1) the past, present, or future physical or mental health or condition of an individual, (2) the provision of health care to an individual, or (3) the past, present or future payment for the provision of health care to an individual, and that identifies the individual or gives rise to a reasonable basis to believe the information could be used to identify the individual.¹²¹ For example, social security numbers, full face photos, phone numbers and birth dates all serve to make health information individually identifiable.¹²² There are no restrictions on the use or disclosure of de-identified information.¹²³

¹¹⁵ 45 C.F.R. § 160.103.

¹¹⁶ 45 C.F.R. § 160.103.

¹¹⁷ 45 C.F.R. § 164.103.

¹¹⁸ 45 C.F.R. § 164.103.

¹¹⁹ 45 C.F.R. § 160.103.

¹²⁰ 45 C.F.R. § 160.103. This includes information in electronic, paper, or oral form. *Summary of the HIPAA Privacy Rule*, H.H.S. O.C.R. Privacy Brief, last revised May, 2003, p. 3, available at <http://www.hhs.gov/ocr/privacysummary.pdf>. PHI excludes *individually identifiable health information* in education records covered by the Family Education Rights and Privacy Act, as amended, 20 U.S.C. § 1232g; records described at 20 U.S.C. § 1232g(a)(4)(B)(iv); and employment records held by a covered entity in its role as an employer. 45 C.F.R. § 160.103.

¹²¹ 45 C.F.R. § 160.103. See also H.H.S. fact sheet, "Protecting the Privacy of Patients' Health Information," available at <http://www.hhs.gov/news/facts/privacy.html>.

¹²² 45 C.F.R. § 164.514(b)(2)(i).

¹²³ 45 C.F.R. § 160.502(d)(2), 164.514(a) and (b).

B. HIPAA AND MINORS

There are two significant concepts that frame the rules for disclosing and protecting PHI: (1) the minimum information necessary requirement and (2) the concept of the individual. With some designated exceptions, HIPAA requires a covered entity that uses or discloses PHI to make reasonable efforts to use and disclose only the minimum amount of information necessary to accomplish the intended purpose of the use or disclosure.¹²⁴ The Department of Health and Human Services has issued materials that state: "[w]hen the minimum necessary standard applies to a use or a disclosure, a covered entity may not use, disclose, or request the entire medical record for a particular purpose, unless it can specifically justify the whole record as the amount reasonably needed for the purpose."¹²⁵

The second concept, and one that is particularly relevant to minors, is that of the individual. Most of the protections and rights provided by HIPAA belong to the individual. Usually, the individual is the person who is the subject of the PHI.¹²⁶ However, in some cases, another person will be designated as the personal representative of the person who is the subject of the PHI. Under HIPAA, the personal representative steps in the shoes of the individual and assumes the control and rights that would otherwise belong to the individual.¹²⁷ The role of personal representatives is particularly important in the context of child serving systems because an unemancipated minor is generally not the individual; instead, the minor's parent, guardian or person standing *in loco parentis* is generally the minor's personal representative, and thus has the rights and control of the individual.¹²⁸ (In contrast, an emancipated minor is the equivalent of an adult under HIPAA; an emancipated minor is always the individual and has the control and attendant rights regarding PHI.)

There are three primary exceptions to the general rule that a parent is an unemancipated minor's personal representative. First, the HIPAA regulations provide that if under state law a minor can consent to a health care service without the consent of a parent/guardian, and in fact the minor consents to the service, then the minor controls the release of the records related to that service, including release to the minor's parent/guardian.¹²⁹ For example, because under Pennsylvania law a minor can consent to testing and treatment for sexually transmitted diseases (STDs), see *Part I.B.3*, the minor controls the release of his/her records related to any testing and treatment for STDs to which s/he consents. Second, HIPAA provides that a minor's parent/guardian does not control the minor's records nor does the parent/guardian have access to the records of a particular service if a court issued an order either authorizing the service or giving the minor or another adult the authority to consent to that service. An example of where this would apply in Pennsylvania is in the abortion context. Under Pennsylvania law, a minor may obtain a judicial by-pass authorizing an abortion in lieu of parental consent. See *Part I.B.2*. Thus, when a minor obtains a judicial by-pass (which is a court order), HIPAA affirms that the minor's parents do not have access to the abortion records. Third, a minor's parent/guardian does not control the minor's records nor does the parent/guardian have access to the records of a particular service if the parent/guardian had previously assented to an agreement of confidentiality between the health care provider and the minor.¹³⁰

¹²⁴ 45 C.F.R. § 164.502(b), 45 C.F.R. § 164.514(d).

¹²⁵ Summary of the HIPAA Privacy Rule, H.H.S. O.C.R. Privacy Brief, last revised May, 2003, available at <http://www.hhs.gov/ocr/privacysummary.pdf>.

¹²⁶ 45 C.F.R. § 160.103.

¹²⁷ 45 C.F.R. § 164.502(g)(1).

¹²⁸ 45 C.F.R. § 164.502(g)(2).

¹²⁹ 45 C.F.R. § 164.502(g)(3).

¹³⁰ 45 C.F.R. § 164.502(g)(3)(i)(B) and (C).

In addition, a covered entity can reject a personal representative's request for access to PHI if a licensed health care professional has determined, in the exercise of professional judgment, that provision of access to the personal representative is reasonably likely to cause substantial harm to the individual (e.g., the minor receiving treatment) or another person.¹³¹ In this case, the parent is still the personal representative, but his or her particular request for access can be denied.

Even when a parent is not the personal representative of a minor, HIPAA regulations do not overrule any state laws that either authorize or prohibit a health care provider or health plan to disclose a minor's health information to a minor's parent or guardian, or a person standing *in loco parentis* to the minor.¹³²

When a parent is not the personal representative of a minor, and state law is silent with respect to disclosure by the licensed health care professional, HIPAA states that the health care professional may provide or deny access to a parent requesting access to his/her minor child's records.¹³³ The health care professional must exercise professional judgment in making this decision.¹³⁴ It is important to note that this discretion is granted to the health care professional only where a parent has made a request to access records; affirmative disclosures are forbidden.¹³⁵

HIPAA always permits the use or disclosure of PHI whenever use or disclosure is authorized or is for treatment, payment, or health care operation activities. The use or disclosure of PHI is always permitted by a covered entity, regardless of the party with whom information is being shared, when such use or disclosure (1) was authorized by the individual¹³⁶ or (2) is for the covered entity's own treatment, payment activities or health care operations¹³⁷ (except in regard to psychotherapy notes and marketing). Treatment includes the provision, coordination or management of health care and related services by one or more health care providers and by a health care provider with a third party.¹³⁸ Payment activities include determinations of eligibility, billing, and collection activities.¹³⁹ Health care operations include quality improvement activities, case management, activities relating to health insurance contracts and customer service.¹⁴⁰

¹³¹ 45 C.F.R. § 164.524(a)(3)(iii).

¹³² 45 C.F.R. § 160.202 and 164.502(g)(3)(ii).

¹³³ 45 C.F.R. § 164.502(g)(3)(iii).

¹³⁴ 45 C.F.R. § 164.502(g)(3)(ii).

¹³⁵ See PROTECTING MINORS' HEALTH INFORMATION UNDER THE FEDERAL MEDICAL PRIVACY REGULATIONS (ACLU Reproductive Freedom Project, 2003) at 9, available at <http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=12118&c=223>.

¹³⁶ 45 C.F.R. § 164.502(a)(1)(iv); 45 C.F.R. § 164.508 (requirements for a valid authorization).

¹³⁷ 45 C.F.R. § 164.506(c); 45 C.F.R. § 164.502(a)(1)(ii).

¹³⁸ 45 C.F.R. § 164.501.

¹³⁹ 45 C.F.R. § 164.501. HIPAA's authorization of disclosures for payment activities has important implications for health care providers who treat minors. Routine health plan practices such as sending explanations of benefits or billing statements to the insured may compromise the confidentiality of minors who use their parents' health insurance to seek care. See "Confidential Health Care for Adolescents: Position Paper of the Society for Adolescent Medicine" (2004) at pp. 2-3, 6, available at http://www.adolescenthealth.org/PositionPaper_Confidential_Health_Care_for_Adolescents.pdf.

¹⁴⁰ 45 C.F.R. § 164.501.

C. Mental Health Treatment Records¹⁴¹

For purposes of this manual, a mental health facility or service provider is defined as an entity providing the diagnosis, treatment, care or rehabilitation of clients with mental illness, and includes hospitals, clinics, institutions, centers, day care centers, base service units, outpatient psychiatric clinics, providers of intensive case management services, and community mental health centers.¹⁴²

1. INPATIENT MENTAL HEALTH TREATMENT RECORDS

a. Minors 14 Years of Age and Older

(1) When treatment is by consent of the minor 14 years of age and older

As described in Part I, a minor from the age of 14 through 17 may consent to voluntary inpatient mental health treatment; the consent of the minor's parent/guardian is not needed. However, when a mental health facility accepts a minor 14 years of age or older for examination and treatment, the facility's director must promptly notify the minor's parent, guardian or person standing *in loco parentis* that the minor has been admitted.¹⁴³ The notification must explain the nature of the minor's proposed treatment, and inform the minor's parent/guardian that s/he has a right to file an objection in writing with the director of the facility or the county mental health/mental retardation administrator.¹⁴⁴ The facility must inform the parent/guardian by telephone where possible, and also by delivery of a form to the parent/guardian.¹⁴⁵ If the facility director cannot locate the parent, guardian or person standing *in loco parentis*, the director shall take such action as s/he deems appropriate, including notifying appropriate child welfare agencies.¹⁴⁶ If the parent/guardian files an objection, a hearing shall be held within 72 hours.¹⁴⁷ The hearing will be held before a judge of the Court of Common Pleas or mental health review officer appointed by the court, who shall determine whether or not the voluntary inpatient treatment is in the best interest of the minor.¹⁴⁸

With the exception of the above parental notification requirement, when a minor 14 years of age and older understands the nature of the information in his/her records and the purpose for which third parties may seek the records, the minor controls the release of his/her inpatient treatment records, whether the treatment is

¹⁴¹ Information about drug or alcohol abuse or dependency, as defined by the Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.102, contained in a minor's record maintained by a mental health facility is subject to the confidentiality provisions of the Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(c) and the regulations promulgated thereunder. Mental Health Manual, 55 Pa. Code § 5100.37.

¹⁴² Mental Health Procedures Act, 50 P.S. § 7103.

¹⁴³ Mental Health Procedures Act, 50 P.S. § 7204; Mental Health Manual, 55 Pa. Code § 5100.74.

¹⁴⁴ Mental Health Procedures Act, 50 P.S. § 7204; Mental Health Manual, 55 Pa. Code § 5100.74. The Mental Health Procedures Act does not further define the term *in loco parentis*. Under Pennsylvania case law, the term *in loco parentis* describes a relationship in which an adult assumes the legal rights and duties of parenthood. *Commonwealth v. Gerstner*, 656 A.2d 108, 112 (Pa. 1995). It should be noted that Pennsylvania courts have found that when a county children and youth agency places a child with foster parents, the foster parents do not stand *in loco parentis* to the child. *In the Interest of G.C.*, 735 A.2d 1226, 1228 (Pa. 1999) (citing *In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1149 (Pa. Super. 1984)).

¹⁴⁵ Mental Health Manual, 55 Pa. Code § 5100.74(a).

¹⁴⁶ Mental Health Manual, 55 Pa. Code § 5100.74(b).

¹⁴⁷ Mental Health Procedures Act, 50 P.S. § 7204.

¹⁴⁸ Mental Health Procedures Act, 50 P.S. § 7204.

voluntary or involuntary.¹⁴⁹ In these circumstances, providers may only release the minor's records to third parties -- including the minor's parents/guardians -- with the minor's prior written consent,¹⁵⁰ or pursuant to a court order.¹⁵¹ However, if a parent consents to a future round of treatment or consents to a minor's continuation of treatment, the parent will be able to effectively reach back and authorize the release of past records to the minor's current mental health provider in accordance with the provisions of Act 147.¹⁵² When a minor 14 years of age or older lacks this understanding, any person chosen by the minor may exercise this right if the director of the facility finds that this person is acting in the minor's best interest.¹⁵³

(2) When treatment is by consent of the parent/guardian of a minor 14 years of age and older

With the passage of Act 147, a parent or legal guardian may consent to the voluntary inpatient treatment of a minor. See *Part I.C.1*. The Act also made some modifications to the law with regard to the release of mental health records of a minor 14-17 years of age when a parent has consented to treatment. Under Act 147, when a parent or legal guardian has consented to the treatment of a minor 14-17 years of age, the parent:

¹⁴⁹ Mental Health Manual, 55 Pa. Code § 5100.33(a).

¹⁵⁰ Mental Health Manual, 55 Pa. Code §§ 5100.4, 5100.33(a), 5200.2, 5200.41(c), 5221.1, 5221.52(a). The consent form must contain the following: (1) a time limit on its validity that shows starting and ending dates; (2) identification of the agency or person to whom the records are to be released; (3) a statement of the specific purposes for which the released records are to be used; (4) a statement identifying the specific relevant and timely information to be released; (5) a place for the signature of the client (or the client's parent/guardian, if the patient is under 14 years of age), following a statement that the person understands the nature of the release; (6) a place for the signature of the staff person obtaining the consent and the date; (7) a place to record a verbal consent to release information given by a person physically unable to provide his signature, and a place for the signatures of two responsible persons who witnessed that the person understood the nature of the release and freely gave his verbal consent; and (8) indication that the consent is revocable at the written request of the person giving consent. Mental Health Manual, 55 Pa. Code § 5100.34(f).

The HIPAA regulations similarly require that any consent form authorizing the release of information contain at least the following: (1) a meaningful description of the information to be disclosed; (2) the name or other specification of the person(s), or class of persons, authorized to make the disclosure; (3) the name or other specification of the person(s), or class of persons, to whom the provider may disclose the protected information; (4) an expiration date or event; (5) a statement of the client's right to revoke the consent in writing, with a description of the revocation procedure; (6) a statement that information disclosed pursuant to the consent may be subject to redisclosure by the recipient and therefore is no longer protected by the HIPAA regulations; (7) signature of the client and date (or if authorization is signed by the client's personal representative, i.e., a parent or guardian, a description of such personal representative's authority to act for the client); (8) a description of the purpose of the requested disclosure (a statement that the disclosure is at the request of the individual suffices); and (9) a statement that the individual may inspect or copy the records to be disclosed and refuse to sign the authorization. 45 C.F.R. § 164.508(c)(1) and (2).

¹⁵¹ Mental Health Manual, 55 Pa. Code § 5100.35(b). The facility may not release the records pursuant to a subpoena in the absence of an additional court order. 55 Pa. Code § 5100.35(b)(1). The facility has an obligation to inform the patient and/or the patient's attorney when a third party is seeking the patient's records. 55 Pa. Code § 5100.35(b)(3). The HIPAA regulations similarly permit a provider to disclose records to comply with a court without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i). The HIPAA regulations also would permit disclosure in response to a subpoena alone if the entity seeking the disclosure demonstrates that it has made reasonable efforts to notify the patient about the requested disclosure and/or obtain a court protective order prohibiting use of the disclosed information for any other purpose than the litigation for which the information was requested. 45 C.F.R. § 164.512(e)(1)(ii) and (v). However, as noted above, HIPAA does not preempt state laws that give consumers greater privacy protections. 45 C.F.R. § 160.203. Therefore, Pennsylvania law -- prohibiting the release of mental health records pursuant to a subpoena without an accompanying court order -- governs.

¹⁵² Minor's Consent Act, 35 P.S. 10101.2(a)(2).

¹⁵³ Mental Health Manual, 55 Pa. Code §§ 5100.4, 5100.33(a), 5200.2, 5200.41(c), 5221.1, 5221.52(a).

- has the right to information necessary for providing consent to the treatment, including symptoms and conditions to be treated, medications and other treatments to be provided, risks, benefits and expected results.
- and can consent to:
 - the release of the minor's medical record and information **to the minor's current mental health treatment provider**, including records of prior mental health treatment for which the *parent* had provided consent;
 - the release of records of prior mental health treatment for which the *minor* had provided consent **to the minor's current mental health treatment provider** if deemed pertinent by the minor's current mental health treatment provider; and
 - the release of the minor's mental health records and information **to the primary care provider** if, in the judgment of the minor's current mental health provider, such release would not be detrimental to the minor.¹⁵⁴

Thus, prior to the passage of Act 147, a minor 14-17 years of age controlled the release of all of his/her mental health treatment records to third parties, including to his/her parents, in all treatment contexts. Under the new law, when a minor 14-17 years of age receives inpatient treatment pursuant to a parent's consent, the minor still primarily controls access to his records with the limited exceptions described above.¹⁵⁵

b. Minors under the age of 14

When a minor is less than 14 years of age, the minor's parent/guardian controls the release of the minor's inpatient treatment records to third parties. Such records may only be released with the prior written consent of the minor's parent/guardian,¹⁵⁶ or pursuant to a court order upon a showing of good cause.¹⁵⁷

The facility also must allow the parent/guardian of a minor under the age of 14 to access the minor's records. The minor's parent/guardian shall only be denied access when the facility director, upon documentation by the treatment team leader, determines that: (1) disclosure of specific information will be a substantial detriment to the minor's treatment or to the parent or guardian; or (2) the disclosure will reveal the identity of persons or breach the confidentiality of persons who have provided information upon an agreement to maintain their confidentiality. The director may require that a mental health professional familiar with the minor's record be present when the parent/guardian examines the record to aid in its interpretation.¹⁵⁸ However, in no event shall privileged communications, whether written or oral, be disclosed to the parents without the minor's written consent.¹⁵⁹

2. OUTPATIENT MENTAL HEALTH TREATMENT RECORDS

a. Minors 14 years of age and older

(1) When treatment is by consent of the minor 14 years of age and older

¹⁵⁴ Minor's Consent Act, 35 P.S. § 10101.2.

¹⁵⁵ Minor's Consent Act, 35 P.S. § 10101.2(d).

¹⁵⁶ Mental Health Manual, 55 Pa. Code § 5100.33(a).

¹⁵⁷ Mental Health Manual, 55 Pa. Code § 5100.35(b). The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i).

¹⁵⁸ Mental Health Manual, 55 Pa. Code §§ 5100.31, 5100.33(a), (c), (e) and (g), 5200.2, 5200.41(c), 5221.1, 5221.52(a).

¹⁵⁹ Mental Health Procedures Act, 50 P.S. § 7111(a).

Under Act 147, when a minor ages 14-17 consents to outpatient mental health treatment the minor controls the records of that outpatient treatment to the same extent that the minor would control the records of inpatient care as set out in the MHPA and its implementing regulations.¹⁶⁰ Accordingly, when a minor 14 years of age and older consents to outpatient treatment and understands the nature of the information in his/her records and the purpose for which third parties may seek the records, the minor controls the release of those treatment records.¹⁶¹ Providers may only release the minor's records to third parties -- including the minor's parents/guardians -- with the minor's prior written consent,¹⁶² or pursuant to a court order.¹⁶³ However, if a parent consents to a future round of treatment or consents to a minor's continuation of treatment, the parent will be able to effectively reach back and authorize the release of past records to the minor's current mental health provider in accordance with the provisions of Act 147.¹⁶⁴ When a minor 14 years of age or older lacks this understanding, any person chosen by the minor may exercise this right if the director of the facility finds that this person is acting in the minor's best interest.¹⁶⁵

(2) When treatment is by consent of the parent/guardian of a minor 14 years of age and older

With the passage of Act 147, a parent or legal guardian may consent to the voluntary outpatient treatment of a minor. See *Part I.C.2*. Under Act 147, when a parent or legal guardian has consented to the treatment of a minor 14-17 years of age, the parent:

- has the right to information necessary for providing consent to the treatment, including symptoms and conditions to be treated, medications and other treatments to be provided, risks, benefits and expected results.
- and can consent to:

¹⁶⁰ Minor's Consent Act, 35 P.S. 10101.2(d).

¹⁶¹ Mental Health Manual, 55 Pa. Code § 5100.33(a).

¹⁶² Mental Health Manual, 55 Pa. Code §§ 5100.4, 5100.33(a), 5200.2, 5200.41(c), 5221.1, 5221.52(a). The consent form must contain the following: (1) a time limit on its validity that shows starting and ending dates; (2) identification of the agency or person to whom the records are to be released; (3) a statement of the specific purposes for which the released records are to be used; (4) a statement identifying the specific relevant and timely information to be released; (5) a place for the signature of the client (or the client's parent/guardian, if the patient is under 14 years of age), following a statement that the person understands the nature of the release; (6) a place for the signature of the staff person obtaining the consent and the date; (7) a place to record a verbal consent to release information given by a person physically unable to provide his signature, and a place for the signatures of two responsible persons who witnessed that the person understood the nature of the release and freely gave his verbal consent; and (8) indication that the consent is revocable at the written request of the person giving consent. 55 Pa. Code § 5100.34(f). See also footnote 150 for a description of the required elements under HIPAA for a consent form authorizing release of information.

¹⁶³ Mental Health Manual, 55 Pa. Code § 5100.35(b). The facility may not release the records pursuant to a subpoena in the absence of an additional court order. 55 Pa. Code § 5100.35(b)(1). The facility has an obligation to inform the patient and/or the patient's attorney when a third party is seeking the patient's records. 55 Pa. Code § 5100.35(b)(3). The HIPAA regulations similarly permit a provider to disclose records to comply with a court without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i). The HIPAA regulations also would permit disclosure in response to a subpoena alone if the entity seeking the disclosure demonstrates that it has made reasonable efforts to notify the patient about the requested disclosure and/or obtain a court protective order prohibiting use of the disclosed information for any other purpose than the litigation for which the information was requested. 45 C.F.R. § 164.512(e)(1)(ii) and (v). However, as noted above, HIPAA does not preempt state laws that give consumers greater privacy protections. 45 C.F.R. § 160.203. Therefore, Pennsylvania law -- prohibiting the release of mental health records pursuant to a subpoena without an accompanying court order -- governs.

¹⁶⁴ Minor's Consent Act, 35 P.S. 10101.2(a)(2).

¹⁶⁵ Mental Health Manual, 55 Pa. Code §§ 5100.4, 5100.33(a), 5200.2, 5200.41(c), 5221.1, 5221.52(a).

- the release of the minor's medical record and information **to the minor's current mental health treatment provider**, including records of prior mental health treatment for which the *parent* had provided consent;
- the release of records of prior mental health treatment for which the *minor* had provided consent **to the minor's current mental health treatment provider** if deemed pertinent by the minor's current mental health treatment provider; and
- the release of the minor's mental health records and information **to the primary care provider** if, in the judgment of the minor's current mental health provider, such release would not be detrimental to the minor.¹⁶⁶

Under the new law, when a minor 14-17 years of age receives outpatient treatment pursuant to a parent's consent, the minor still primarily controls access to his records with the limited exceptions described above.¹⁶⁷

b. Minors under the age of 14

As explained in Part I above, Pennsylvania law does not explicitly state who can consent to outpatient treatment on behalf of minors under the age of 14. However, a reading of existing law supports the interpretation that minors under the age of 14 require parental consent to obtain voluntary outpatient treatment. See *Part I.C.2*. Existing law also supports the interpretation that when the parent of a minor under the age of 14 consents to outpatient treatment for the minor, the parent controls release and access to the treatment records to the extent outlined in the MHPA. Accordingly, when a minor is less than 14 years of age, the minor's parent/guardian controls the release of the minor's outpatient treatment records to third parties. Such records may only be released with the prior written consent of the minor's parent/guardian,¹⁶⁸ or pursuant to a court order upon a showing of good cause.¹⁶⁹

3. MINORS' ACCESS TO THEIR OWN MENTAL HEALTH TREATMENT RECORDS

A provider shall give access to a minor of any age who has received or is receiving treatment to his/her records. The minor shall only be denied access to a limited portion of his/her record when the facility director, upon documentation by the treatment team leader, determines that disclosure of the specific information will be a substantial detriment to the patient's treatment, or disclosure will reveal the identity of persons or breach the confidentiality of persons who have provided information upon an agreement to maintain their confidentiality. The treatment team director or facility director may require that a mental health professional familiar with the minor's record be present when the minor examines the record to aid in its interpretation.¹⁷⁰

4. RELEASE OF MENTAL HEALTH RECORDS TO MINORS' OTHER HEALTH CARE PROVIDERS

¹⁶⁶ Minor's Consent Act, 35 P.S. § 10101.2.

¹⁶⁷ Minor's Consent Act, 35 P.S. § 10101.2(d).

¹⁶⁸ Mental Health Manual, 55 Pa. Code § 5100.33(a).

¹⁶⁹ Mental Health Manual, 55 Pa. Code §§ 5100.33(a)(7), 5100.35(b). The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i).

¹⁷⁰ Mental Health Manual, 55 Pa. Code 5100.31, 5100.33(c), (d) and (g), 5200.2, 5200.41(c), 5221.1, 5221.52(a). The HIPAA regulations provide that minor patients can access the records of any health service they receive if under state law the minor can consent to the service and the consent of no other party is required. 45 C.F.R. § 164.502(a)(2)(i) and (g)(3); 45 C.F.R. § 164.524(a). The HIPAA regulations would appear to narrow the circumstances under which a provider may deny a patient access to his/her own records, in that HIPAA only permits denial when access is reasonably likely to endanger the life or physical safety of the patient or another person, or cause substantial harm to a person referenced in the records. 45 C.F.R. §§ 164.524(a)(3).

A provider may disclose non-privileged information in the minor's record to those engaged in providing treatment to the minor without the minor's consent or, in the case of minors under the age of 14, without the consent of the minor's parent/guardian. The provider may only disclose that information which is relevant and necessary to the treatment purpose for which it is sought.¹⁷¹ The provider may also furnish the information to the professional treatment staff at another facility when the patient is being referred to that facility and the transmittal of a summary or portion of the record is necessary to ensure continuity of care.¹⁷²

5. RELEASE OF MENTAL HEALTH RECORDS TO THIRD-PARTY PAYORS/INSURERS

A provider may disclose non-privileged information in the minor's record to third-party payors designated by the minor -- or in the case of minors under the age of 14 years, the minor's parent/guardian -- without the minor's consent. The information that may be released to third-party payors without prior written consent is limited to staff names, the dates, types and costs of therapies or services, and a short description of the general purpose of each treatment session or service.¹⁷³

6. EMERGENCY SITUATIONS AND MENTAL HEALTH RECORDS

A provider may disclose non-privileged information in the minor's record without the minor's consent -- or in the case of minors under the age of 14, without the consent of the minor's parent/guardian -- in emergency medical situations when release of the information is necessary to prevent serious risk of bodily harm or death. The information that may be released is limited to that which is pertinent to the relief of the specific emergency.¹⁷⁴

7. ACKNOWLEDGMENT OF PRESENCE OF MINOR AT MENTAL HEALTH FACILITY

The presence of a person currently **involuntarily** committed at a mental health facility is not considered a record subject to the confidentiality provisions in the mental health manual, and such information may be released at the discretion of the facility director in response to legitimate inquiries from governmental agencies or when it is in the patient's best interest to do so.¹⁷⁵

¹⁷¹ Mental Health Procedures Act, 50 P.S. § 7111(a)(1); Mental Health Manual, 55 Pa. Code § 5100.32(a)(1) and (c). Similarly, under HIPAA, a provider may disclose records to another provider for treatment purposes without first obtaining written authorization. 45 C.F.R. § 164.506(c)(2).

¹⁷² Mental Health Manual, 55 Pa. Code § 5100.32(a)(1).

¹⁷³ Mental Health Manual, 55 Pa. Code §§ 5100.31, 5100.32(a)(2) and (c), 5100.33(a), 5100.34(b), 5200.2, 5200.41(c), 5221.1, 5221.52(a). Similarly, HIPAA regulations allow providers to disclose information to a third-party payor for payment purposes without obtaining prior patient consent. 45 C.F.R. § 164.506(c)(2).

¹⁷⁴ Mental Health Procedures Act, 50 P.S. § 7111(a)(1); Mental Health Manual, 55 Pa. Code §§ 5100.31, 5100.32(a)(9) and (c), 5100.33(a), 5200.2, 5200.41(c), 5221.1, 52. Pennsylvania regulations, however, do not specify to whom the information may be released in an emergency. HIPAA also allows a provider to disclose records to another provider for treatment purposes without first obtaining written authorization. 45 C.F.R. § 164.506(c)(2).

¹⁷⁵ Mental Health Manual, 55 Pa. Code § 5100.31(g). The HIPAA regulations provide that a facility may only maintain and disclose a directory of its patients if it allows the patients the opportunity to restrict or prohibit disclosure of information in the directory to third parties. 45 C.F.R. § 164.510(a).

D. Substance Abuse Treatment Records

In Pennsylvania, the confidentiality of drug and alcohol abuse (substance abuse) treatment records is governed by both state law¹⁷⁶ and implementing regulations,¹⁷⁷ as well as the federal drug and alcohol law¹⁷⁸ and accompanying regulations.¹⁷⁹ Federal regulations apply to "federally assisted" programs. The federal alcohol and drug abuse statute and accompanying regulations define "federally assisted" broadly to include programs that are supported by funds from a federal agency or department, by being either: (1) a recipient of federal financial assistance in any form, including assistance which does not directly pay for alcohol or drug abuse diagnosis, treatment or referral activities; or (2) conducted by a state or local government unit, which, through revenue sharing or other forms of assistance, receives federal funds which could be (but are not necessarily) spent for the alcohol or drug abuse program; or (3) assisted by the IRS through the allowance of income tax deductions for contributions to the program or through granting of tax-exempt status to the program.¹⁸⁰

For the purposes of this Manual, a substance abuse treatment provider is defined as an individual practitioner, entity, or program providing the diagnosis or treatment of substance abuse problems, and includes private practitioners,¹⁸¹ hospitals,¹⁸² clinics,¹⁸³ drug rehabilitation and drug treatment centers,¹⁸⁴ freestanding treatment facilities,¹⁸⁵ residential treatment and rehabilitation centers,¹⁸⁶ short-term detoxification programs,¹⁸⁷ transitional living facilities,¹⁸⁸ partial hospitalizations,¹⁸⁹ outpatient services,¹⁹⁰ health care facilities providing such services,¹⁹¹ and programs offered by county agencies (Single County Authorities).¹⁹² It should be noted that information maintained by a mental health facility, as defined in the Mental Health Procedures Act, in a minor's record that relates to drug or alcohol abuse or dependency, as defined by the Drug and Alcohol Abuse Control

¹⁷⁶ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.101 *et seq.*

¹⁷⁷ See Title 4 Chapters 255, 256 and 257; Title 28 Chapters 157, 701, 704, 709, and 711.

¹⁷⁸ 42 U.S.C.A. § 290dd-1 through 290dd-2.

¹⁷⁹ Title 42 C.F.R. Chapter 2.

¹⁸⁰ 42 C.F.R. § 2.12(b).

¹⁸¹ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(c).

¹⁸² Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(c).

¹⁸³ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(c).

¹⁸⁴ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(c).

¹⁸⁵ Title 28 Pa. Code Chapter 709.

¹⁸⁶ 28 Pa. Code § 711.53.

¹⁸⁷ 28 Pa. Code § 711.62.

¹⁸⁸ 28 Pa. Code § 711.72.

¹⁸⁹ 28 Pa. Code § 711.83.

¹⁹⁰ 28 Pa. Code § 711.93.

¹⁹¹ 28 Pa. Code § 711.43.

¹⁹² 4 Pa. Code 257.1.

Act, is also subject to the confidentiality provisions of the Drug and Alcohol Abuse Control Act, and the regulations promulgated thereunder.¹⁹³

1. GENERAL PROVISIONS REGARDING MINORS' SUBSTANCE ABUSE TREATMENT RECORDS

As explained in Part I, in Pennsylvania a minor of any age who suffers from the use of a controlled or harmful substance can consent to medical care and counseling related to diagnosis or treatment of a substance abuse problem. The consent of the minor's parents or legal guardians is not necessary to authorize medical care or counseling related to such diagnosis or treatment.¹⁹⁴ As a general rule, except in a medical emergency, a provider may only release information in the minor's records to a third-party with the minor's prior written consent,¹⁹⁵ or by an order of a court of competent jurisdiction issued upon a showing of good cause.¹⁹⁶

2. PARENTAL NOTIFICATION REGARDING MINORS' SUBSTANCE ABUSE TREATMENT

A provider who treats a minor in Pennsylvania may, **but is not obligated to**, inform the parents or legal guardian of the minor as to the substance abuse treatment given or needed.¹⁹⁷ The disclosing entity shall fully document

¹⁹³ Mental Health Manual, 55 Pa. Code § 5100.37, citing 71 P.S. § 1690.102..

¹⁹⁴ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.112.

¹⁹⁵ 71 P.S. 1690.108; 4 Pa. Code § 257.4(d) citing to 4 Pa. Code § 255.5; 28 Pa. Code § 157.23(b) citing to 4 Pa. Code §§ 255.4 and 255.5; 28 Pa. Code §§ 709.28(c)(2), 711.43(d)(2), 711.53(c)(2), 711.62(c)(2), 711.72(c)(2), 711.83(c)(2), and 711.93(c)(2); 42 U.S.C. § 290dd-2(b); 42 C.F.R. § 2.14(a) and (b). A written consent to release records must contain at least the following: (1) the name of the person, agency, or organization to whom disclosure is made; (2) the specific information to be disclosed; (3) the purpose of disclosure; (4) the dated signature of the client; (5) the dated signature of a witness; and (6) the expiration date of the consent. *Id.* A copy of the consent form shall be offered to the minor-patient, and a copy kept in the minor-patient's records. The program shall maintain a written records of all disclosures. 28 Pa. Code §§ 709.28(c)-(e), 711.43(d), 711.53(c), 711.62(c), 711.72(c), 711.83(c), and 711.93(c). See also footnote 150 for a description of the required elements under HIPAA for a consent form authorizing release of information.

¹⁹⁶ 71 P.S. 1690.108; 42 U.S.C. § 290dd-2(b)(2)(C); 42 C.F.R. §§ 2.61, 2.63-2.65. To determine good cause compelling disclosure, state law requires that the court weigh the need for the information against the possible harm of disclosure to the patient, the provider-patient relationship and the treatment services. Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(b). The court may condition the disclosure on any appropriate safeguards. *Id.* Federal law applicable to federally assisted facilities requires that courts conduct a similar weighing process to determine if good cause exists. Good cause includes the need to avert a substantial risk of death or serious bodily harm. 42 U.S.C. § 290dd-2(b)(2)(C). Under federal drug and alcohol regulations, a court order alone does not compel disclosure; a subpoena or similar legal mandate must be issued to compel disclosure. 42 C.F.R. § 2.61(a). Moreover, federal regulations further restrict the court-ordered disclosure of confidential communications contained in the patient's records. 42 C.F.R. § 2.63. Disclosures of confidential communications may only be compelled by court order if necessary: (1) to protect against an existing threat to life or serious bodily injury, including circumstances of suspected child abuse and neglect and verbal threats to third parties; or (2) to investigate serious crimes which involve serious harm to persons and threats thereof; or (3) in litigation or an administrative hearing where the patient offers evidence pertaining to the confidential communication. *Id.*

The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i). The HIPAA regulations would also permit disclosure in response to a subpoena alone if the entity seeking the disclosure demonstrates that it has made reasonable efforts to notify the patient about the requested disclosure and/or obtain a court protective order prohibiting use of the disclosed information for any other purpose than the litigation for which the information was requested. 45 C.F.R. § 164.512(e)(1)(ii) and (v). However, as noted above, HIPAA does not preempt state laws that give consumers greater privacy protections. 45 C.F.R. s. 160.203. Therefore, Pennsylvania law -- which does not provide for disclosure of drug and alcohol treatment records pursuant to a subpoena alone -- governs.

¹⁹⁷ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.112.

the disclosure in the minor's records and, at the first opportunity, shall inform the minor that the information was disclosed, for what purposes, and to whom.¹⁹⁸

However, **if the program is federally assisted**, the program may only disclose such information to the minor's parent or guardian with the minor's prior written consent, including when the disclosure of information to the minor's parent or guardian is needed for the purpose of obtaining financial reimbursement.¹⁹⁹ See *definition of federally assisted program in Part II.D above*. Federal regulations do not prohibit a program from refusing to provide treatment to the minor until the minor consents to the disclosure necessary to obtain reimbursement.²⁰⁰

3. MINORS' ACCESS TO THEIR OWN SUBSTANCE ABUSE TREATMENT RECORDS

A provider shall provide a minor with access to his/her own records. The program director may temporarily remove portions of the records prior to the minor's inspection if the director determines that the information may be detrimental if presented to the minor. Reasons for removing the sections shall be documented and kept on file. The minor has the right to appeal a decision to limit his/her access to his/her records to the director of the facility.²⁰¹

4. RELEASE OF SUBSTANCE ABUSE TREATMENT RECORDS TO MINORS' OTHER HEALTH CARE PROVIDERS

Absent a medical emergency, a provider may only disclose information regarding drug or alcohol abuse or dependence in a minor's record to medical personnel, for the purposes of diagnosis and treatment, with the minor's prior written consent.²⁰²

¹⁹⁸ 28 Pa. Code §§ 709.28(a) and (e), 711.43(d)(1) and (d)(4), 711.53(c)(1) and (c)(4), 711.62(c)(1) and (c)(4), 711.72(c)(1) and (c)(4), 711.83(c)(1) and (c)(4), and 711.93(c)(1) and (c)(4).

¹⁹⁹ 42 C.F.R. §§ 2.3(a), 2.12(b), 2.14(b). Federally-assisted substance abuse treatment programs, in addition to complying with state regulations, must use written consent forms that include at least the following information: (1) the specific name or general designation of the program or person permitted to make the disclosure; (2) the name or title of the individual or the name of the organization to which disclosure is to be made; (3) the patient's name; (4) the purpose of the disclosure; (5) how much and what kind of information is to be disclosed; (6) the patient's signature; (7) the date of consent; (8) a statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it; and (9) the date, event or condition upon which the consent will expire if not revoked before. 42 C.F.R. § 2.31(a). See footnote 150 for a description of the required elements under HIPAA for a consent form authorizing release of information.

²⁰⁰ 42 C.F.R. § 2.14(b).

²⁰¹ 28 Pa. Code § 709.30(3)-(4), 711.43(c), 711.53(b), 711.62(b), 711.72(b), 711.83(b), 711.93(b). See also 42 C.F.R. § 2.23(a) (stating that federal regulations do not prohibit a program from giving a patient access to his/her own records, including the opportunity to inspect and copy his/her records.)

The HIPAA regulations provide that minor patients can access the records of any health service they receive if under state law the minor can consent to the service and the consent of no other party is required. 45 C.F.R. § 164.502(a)(2)(i) and (g)(3); 45 C.F.R. § 164.524(a). The HIPAA regulations would appear to narrow the circumstances under which a provider may deny a patient access to his/her own records, in that HIPAA only permits denial when access is reasonably likely to endanger the life or physical safety of the patient or another person, or cause substantial harm to a person referenced in the records. 45 C.F.R. §§ 164.524(a)(3).

²⁰² Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(b) and (c); 28 Pa. Code §§ 157.23(b), 709.28(a) and (c), 711.43(d), 711.53(c), 711.62(c), 711.72(c), 711.83(c), 711.93(c); 4 Pa. Code § 255.5(c). Federal law and regulations similarly require that all federally-assisted drug and alcohol abuse programs obtain a minor's written consent prior to the disclosure of any information about the minor-patient to a third-party. Alcohol and Drug Abuse Act, 42 U.S.C. § 290dd-2(b); 42 C.F.R. §§ 2.3, 2.12, 2.13, 2.14, and 2.31.

HIPAA regulations do not require a provider to obtain prior patient consent to release records to another treatment provider. 45 C.F.R. § 164.506(c)(2). However, the requirement under Pennsylvania law that a provider obtain

(continued...)

5. RELEASE OF SUBSTANCE ABUSE TREATMENT RECORDS TO THIRD-PARTY PAYORS/INSURERS

A provider may release limited information about the minor to an insurer, health or hospital plans, or government officials for the purpose of obtaining benefits, only with the minor's written consent. The information that may be released is restricted to the following: whether the minor is or is not in treatment; the minor's prognosis; the program's nature; a brief description of the minor-patient's progress; and a short statement as to whether the minor has relapsed into drug or alcohol abuse and the frequency of such relapse.²⁰³

6. EMERGENCY SITUATIONS AND SUBSTANCE ABUSE TREATMENT RECORDS

A provider may disclose information regarding drug or alcohol abuse or dependence in the minor's records without the minor's consent in emergency medical situations where the minor's life is in immediate jeopardy. An emergency disclosure may be made only to proper medical authorities solely for the purpose of providing medical treatment to the patient. The program shall maintain written records of all disclosures, and inform the minor at the first opportunity that the information was disclosed, for what purposes and to whom.²⁰⁴

7. ACKNOWLEDGMENT OF PRESENCE OF MINOR IN SUBSTANCE ABUSE TREATMENT PROGRAM

State law and regulations do not contain any provisions specifically addressing the issue of under what circumstances a provider may acknowledge the presence of a minor at the facility. Therefore, the general rule -- that the provider must obtain the minor's prior written consent to disclose information to a third party -- also would apply to this situation.

Pursuant to federal regulations, a federally-assisted facility which is publicly identified as a place where only substance abuse diagnosis and/or treatment is provided may only acknowledge the presence of a minor

²⁰² (...continued)

authorization prior to disclosure to another provider would still apply because the HIPAA regulations do not override state laws that give consumers greater privacy protections. See 45 C.F.R. §§ 160.202, 160.203.

²⁰³ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(b) and (c); 28 Pa. Code §§ 157.23(b), 709.28(a), (c) and (d), 711.43(d)(1)-(d)(3), 711.53(c)(1)-(c)(3), 711.62(c)(1)-(c)(3), 711.72(c)(1)-(c)(3), 711.83(c)(1)-(c)(3), and 711.93(c)(1)-(c)(3); 4 Pa. Code § 255.5(a)(7), (a)(8), (a)(10), and (b). Federal law and regulations similarly require that all federally-assisted drug and alcohol abuse programs obtain a minor's written consent prior to the disclosure of any information about the minor-patient to a third party. Alcohol and Drug Abuse Act, 42 U.S.C. § 290dd-2(b); 42 C.F.R. §§ 2.3, 2.12, 2.13, 2.14, and 2.31.

HIPAA regulations allow providers to release information to a third-party payor for payment purposes without first obtaining the patient's consent. 45 C.F.R. § 164.506(c)(1). However, the requirement under Pennsylvania law that a provider obtain authorization prior to disclosure to a third-party for payment would still apply because the HIPAA regulations do not override state laws that give consumers greater privacy protections. See 45 C.F.R. §§ 160.202, 160.20.

²⁰⁴ Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108(b) and (c); 28 Pa. Code §§ 157.23(b), 709.28(a) and (c), 711.43(d), 711.53(c), 711.62(c), 711.72(c), 711.83(c), 711.93(c); 4 Pa. Code § 255.5(a)(9) and (a)(10). Federal drug and alcohol law and regulations similarly permit federally-assisted drug or alcohol abuse programs to disclose information about the minor, without the minor's consent, to the extent necessary to medical personnel who need the information for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention. Federal drug and alcohol law and regulations further require that such disclosure be documented in the minor's records, including the name of the medical personnel to whom disclosure was made, the name of the individual making the disclosure, the date and time of the disclosure, and the nature of the emergency. Alcohol and Drug Abuse Act, 42 U.S.C. § 290dd-2(b)(2)(A); 42 C.F.R. §§ 2.3, 2.12, and 2.51.

HIPAA also allows a provider to disclose records to another provider for treatment purposes without first obtaining written authorization. 45 C.F.R. § 164.506(c)(2).

in the facility with the minor's prior written consent or upon appropriate court order.²⁰⁵

E. HIV-related Records

As noted in Part I, minors may consent to testing and treatment for the HIV virus.²⁰⁶ Similarly, minors control access to their HIV-related records. Generally such records may only be released with the prior written consent of the minor²⁰⁷ or by court order upon a showing of compelling need.²⁰⁸

1. MINORS' ACCESS TO THEIR OWN HIV-RELATED RECORDS

Minors who have been tested are allowed access to their HIV-related records.²⁰⁹

2. RELEASE OF HIV-RELATED RECORDS TO MINORS' OTHER HEALTH CARE PROVIDERS

A health care provider may disclose a minor's HIV-related information, without the minor's prior written

²⁰⁵ 42 C.F.R. § 2.13(c)(1). The federal drug & alcohol regulations permit acknowledgment of the presence of an individual in a facility without such consent or court order when the facility is not publicly identified as a substance abuse diagnosis and/or treatment facility and if such acknowledgment does not reveal that the individual is a substance abuser. *Id.* The regulations do not restrict disclosure that an individual is not and never has been a patient. *Id.* at § 2.13(c)(2). The HIPAA regulations provide that a facility may only maintain and disclose a directory of its patients if it allows the patients the opportunity to restrict or prohibit disclosure of information in the directory to third parties. 45 C.F.R. § 164.510(a).

²⁰⁶ Minors' Consent Act, 35 P.S. § 10103; Disease Prevention and Control Law of 1955, 35 P.S. § 521.14a; Confidentiality of HIV-Related Information Act, 35 P.S. §§ 7602(c), 7605(a).

²⁰⁷ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(3). A written consent form authorizing disclosure of HIV-related information must contain the following: (1) the specific name or general designation of the person permitted to make the disclosure; (2) the name or title of the individual, or the name of the organization to which the disclosure is to be made; (3) the name of the subject; (4) the purpose of the disclosure; (5) how much and what kind of information is to be disclosed; (6) the signature of the subject; (7) the date on which the consent is signed; (8) a statement that the consent is subject to revocation at any time except to the extent that the person who is to make the disclosure has already acted in reliance on it; and (9) the date, event or condition upon which the consent will expire, if not earlier revoked. *Id.* at § 7607(c). See footnote 150 for a description of the required elements under HIPAA for a consent form authorizing release of information.

²⁰⁸ Confidentiality of HIV-Related Information Act, 35 P.S. §§ 7607(a)(8) and (a)(10), 7608. The Act specifically provides that no court may issue an order to allow access to confidential HIV-related information unless the court finds, upon application, that either the person seeking the information has a demonstrated compelling need for the information which cannot be accommodated by other means, or that the person seeking to disclose has a compelling need to do so. *Id.* at § 7608(a). In assessing compelling need, the court must weigh the need for disclosure against the privacy interest of the individual and the public interests which may be harmed by disclosure. *Id.* at § 7608(c). Prior to issuing an order for disclosure, the court must provide the individual whose information is to be disclosed with notice and a reasonable opportunity to be heard. *Id.* at § 7608(e).

HIPAA regulations permit disclosure in response to a subpoena alone if the entity seeking the disclosure demonstrates that it has made reasonable efforts to notify the patient about the requested disclosure and/or obtain a court protective order prohibiting use of the disclosed information for any other purpose than the litigation for which the information was requested. 45 C.F.R. § 164.512(e)(1)(iii) and (v). However, as noted above, HIPAA does not preempt state laws that give consumers greater privacy protections. 45 C.F.R. § 160.203. Therefore, Pennsylvania law -- which does not provide for disclosure of records of HIV-related information pursuant to a subpoena alone -- governs.

²⁰⁹ Confidentiality of HIV-related Information, 35 P.S. § 7607(a)(1). HIPAA regulations currently that minor patients can access the records of any health service they receive if under state law the minor can consent to the service and the consent of no other party is required. 45 C.F.R. § 164.502(a)(2)(i) and (g)(3); 45 C.F.R. § 164.524(a).

consent, to another health care provider involved in the minor's care when knowledge of the information is necessary to provide appropriate treatment to the minor.²¹⁰

3. RELEASE OF HIV-RELATED RECORDS TO THIRD-PARTY PAYORS/INSURERS

Health care providers may disclose HIV-related information about a minor in their care without the minor's prior written consent to an insurer, to the extent necessary to reimburse the provider or make payment on a claim submitted pursuant to an insured's policy.²¹¹

4. EMERGENCY SITUATIONS AND HIV-RELATED RECORDS

A health care provider may disclose a minor's HIV-related information, without the minor's prior written consent, to another health care provider involved in the minor's care, when knowledge of the information is necessary to provide emergency care.²¹²

F. Health Care Records Maintained by Schools²¹³

The confidentiality of student health records maintained by Pennsylvania public schools is protected both by the federal Family Educational Rights and Privacy Act of 1974 (FERPA),²¹⁴ and implementing regulations,²¹⁵ and Pennsylvania regulations, particularly the school code.²¹⁶ However, it is important to note that the FERPA regulations do not apply to school-based clinics that are funded and run by non-school entities, such as a local hospital.²¹⁷ Such clinics are required to abide by the other federal and state confidentiality regulations protecting health care records reviewed in this Part, including HIPAA.

Generally, public schools may only disclose the health care records of a minor under the age of 18 to a third party with the prior written consent of the minor's parent, guardian or an individual acting as a parent in

²¹⁰ Confidentiality of HIV-Related Information, 35 P.S. §§ 7607(a)(4) and (a)(6). HIPAA also allows a provider to disclose records to another provider for treatment purposes without first obtaining written authorization. 45 C.F.R. § 164.506(c)(2).

²¹¹ Confidentiality of HIV-related Information, 35 P.S. § 7607(a)(7). Similarly, HIPAA regulations allow providers to disclose information to a third-party payor for payment purposes without obtaining prior patient consent. 45 C.F.R. § 164.506(c)(1).

²¹² Confidentiality of HIV-Related Information, 35 P.S. §§ 7607(a)(4) and (a)(6). HIPAA regulations do not require a provider to obtain prior patient consent to release records to another treatment provider. 45 C.F.R. § 164.506(c)(2).

²¹³ The HIPAA regulations do not apply to health information in education records as covered by the Family Educational Right and Privacy Act, 20 U.S.C. § 1232g. 45 C.F.R. § 164.501.

²¹⁴ 20 U.S.C. § 1232g.

²¹⁵ Title 34 C.F.R. Chapter 99. The provisions of the Family Educational Rights and Privacy Act do not apply to records of a student who is 18 years of age or older or who is attending an institution of post-secondary education, and which are made or maintained by a physician, psychiatrist, psychologist or other professional in connection with treating the student and are not available to anyone other than the persons providing the treatment, except that the records can be released to a physician or other appropriate professional for review when requested by the student. 20 U.S.C.S. § 1232g(a)(4)(B)(iv); 34 C.F.R. § 99.3.

²¹⁶ See 22 Pa. Code §§ 12.12, 12.32, and 12.33 Ex. A.

²¹⁷ See "Issue Brief: Privacy Standards for Student Health Records " (National Association of School Nurses, 2004) at 2-3, available at <http://www.nasn.org/briefs/2004briefprivacy.htm>.

the absence of a parent or guardian,²¹⁸ or to comply with a court order or a subpoena.²¹⁹ When a minor under the age of 18 is in an institution of post-secondary education, the minor controls third-party access to his/her school records.²²⁰

1. PARENTS' ACCESS TO MINORS' HEALTH CARE RECORDS MAINTAINED BY SCHOOLS

Under FERPA, public schools are required to provide access to the health care records that the school maintains regarding a minor under the age of 18 to the minor's parent, guardian, or an individual acting as a parent in the absence of a parent or guardian.²²¹ However, absent the student's consent, a student's confidential communications to school personnel -- including guidance counselors, school nurses, and school psychologists -- should only be revealed to the student's parents or other third parties where "the health, welfare or safety of the student or other persons is clearly in jeopardy."²²² Schools shall not provide access to such records to the minor's parents if the minor is in an institution of post-secondary education without the prior written consent of the minor.²²³

Further it should be noted that federal confidentiality laws prohibit the disclosure of information about students under the age of 18 who seek or receive drug or alcohol abuse treatment services at school, even to the student's parents, without the student's consent.²²⁴ The federal laws and regulations governing drug and

²¹⁸ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(1) and (b)(2); 34 C.F.R. §§ 99.1, 99.3, 99.30; 24 P.S. § 14-1409; 22 Pa. Code § 12.33, Ex. A, Secs. 4.2.1, 4.3.2, and 4.4. The written consent must specify the records to be released, to whom they are to be released, and the reasons for release, and be signed and dated. The school must provide a copy of the records to be released to the minor's parents if requested, and to the minor if the parents request that the records be released to the minor. Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(2)(A); 34 C.F.R. §§ 99.30; 22 Pa. Code § 12.33 Ex. A, Sec. 4.2.1.

²¹⁹ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(2)(B); 34 C.F.R. §§ 99.31(a)(9); 22 Pa. Code § 12.33, Ex. A, Secs. 4.2.2. However, the school must notify the minor and his/her parents of the court order or subpoena prior to disclosing the records. *Id.*

²²⁰ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(d); 34 C.F.R. §§ 99.3, 99.5; 22 Pa. Code § 12.33, Ex. A, Secs. 4.2.1, 4.3.2, 4.4, 4.5, and 4.6.

²²¹ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(a)(1)(A); 34 C.F.R. §§ 99.1, 99.3, 99.4, 99.10, 99.31(12); 22 Pa. Code § 12.33, Ex. A, Secs. 2.2, 4.7. However, it is important to note that the FERPA regulations do not apply to school-based clinics that are funded and run by non-school entities, such as a local hospital. Such clinics are required to abide by the other federal and state confidentiality regulations protecting health care records reviewed in this Part.

²²² 22 Pa. Code § 12.12, citing 42 Pa.C.S. § 5945. See also *In re McClellan*, 475 A.2d 867 (Pa. Commw. 1984) (holding that conversations between assistant principal and student are not privileged unless assistant principal was acting in the role of guidance counselor). See also 22 Pa. Code § 12.33, Ex. A, Sec. 2.4 (noting that the release of records made or maintained in the course of counseling students which are in the sole possession of the professional is subject to the following: the rules in the code, rules dictated by professional ethics, the terms of the employment contract between the school and the professional, and special agreements made between the professional and individual parents and/or students); *Parents Against Abuse in Sch. v. Williamsport Area Sch. Dist.*, 594 A.2d 796, 803-04 (Pa. Commw. 1991) (holding that neither the FERPA nor Pennsylvania regulations defeated rights of parents of fourth graders to notes taken by school district psychologist in interviews with students; parents and school district permitted psychologist to interview children only on express condition that he provide information to the parents, parents and school district had agreed that psychologist would not provide students with any therapy, and school district had agreed that psychologist, as its employee, would be required to provide notes to parents).

²²³ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(d); 34 C.F.R. §§ 99.3, 99.5, 99.10; 22 Pa. Code § 12.33, Ex. A, Secs. 4.5, 4.6.

²²⁴ FORUM GUIDE TO PROTECTING THE PRIVACY OF STUDENT INFORMATION: STATE AND LOCAL EDUCATION AGENCIES (National Center for Education Statistics, 2004) at p. 20, available at <http://nces.ed.gov/pubs2004/2004330.pdf>.

alcohol abuse treatment records described in this manual, see *Part II.D.*, apply to assessment, diagnosis, counseling, group counseling, treatment or referral in most programs in which students participate, including in public and many private schools.²²⁵

2. MINORS' ACCESS TO HEALTH CARE RECORDS MAINTAINED BY SCHOOLS²²⁶

Public schools may disclose the health care records of a minor under the age of 18 to the minor with the permission of the minor's parent, guardian, or an individual acting as a parent in the absence of a parent or guardian.²²⁷ Schools shall provide access to a minor who is in an institution of post-secondary education to his or her own records.²²⁸

3. EMERGENCY SITUATIONS AND HEALTH CARE RECORDS MAINTAINED BY SCHOOLS

Public schools, to the extent that they maintain health records regarding a minor who is under the age of 18 and who is not in an institution of post-secondary education, may release such information without the prior written consent of the minor's parents to appropriate persons in connection with an emergency to protect the health or safety of the minor or other persons.²²⁹ Similarly, schools may release the records of a minor who is in an institution of post-secondary education without the prior written consent of the minor to appropriate persons in connection with an emergency to protect the health or safety of the minor or other persons.²³⁰ The school must maintain a record of all disclosures and requests for disclosures, except for those made to the parents or minors themselves or to a party with written consent from the parent or minor as is appropriate.²³¹

G. Confidentiality of Health Records of Minors in the Child Welfare System

As explained in Part I, a number of different actors become involved in a minor's life when the minor enters the child welfare system. These individuals and entities can include the county children & youth agency, private placement agencies, child residential facilities, foster parents and the dependency court. Questions

²²⁵ FORUM GUIDE TO PROTECTING THE PRIVACY OF STUDENT INFORMATION: STATE AND LOCAL EDUCATION AGENCIES (National Center for Education Statistics, 2004) at p. 20, available at <http://nces.ed.gov/pubs2004/2004330.pdf>. The federal rules under which minors control access to their drug and alcohol treatment records are in conflict with the provisions of FERPA that provide for parental access to a child's education records. FORUM GUIDE at 20. To reconcile this conflict, the U.S. Department of Education and the Substance Abuse and Mental Health Services Administration have advised schools to either require students to consent to parental access to their records as a condition of receiving school-based services or limiting the information in school records regarding student participation in the services. FORUM GUIDE at 20.

²²⁶ Federal regulations implementing the Family Educational Rights and Privacy Act of 1974 state that the Act and regulations do not prevent schools from giving students rights in addition to those given to parents. 34 C.F.R. § 99.5(b). Thus, a school may, without violating the federal act, give students under age 18 the right to inspect their own records without parental permission. However, Pennsylvania regulations only allow student access with parental consent. 22 Pa. Code § 12.33, Ex. A, 4.7.

²²⁷ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(a)(1)(A), (b)(2)(A), and (d); 34 C.F.R. §§ 99.1, 99.3, 99.4, 99.5, 99.10, 99.31(12); 22 Pa. Code § 12.33, Ex. A, Secs. 2.2, 4.7.

²²⁸ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(d); 34 C.F.R. §§ 99.3, 99.5, 99.10; 22 Pa. Code § 12.33, Ex. A, Secs. 4.5, 4.6.

²²⁹ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.1, 99.31(a)(10), 99.36.

²³⁰ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. §§ 1232g(b)(1)(I) and (d); 34 C.F.R. §§ 99.3, 99.5, 99.31(a)(10), 99.36.

²³¹ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(4); 34 C.F.R. § 99.32.

often arise as to the permitted disclosure of a minor's health care records between health care providers and these different actors, as well as among the actors themselves. Some of the confidentiality laws and regulations reviewed thus far in this Manual contemplate that minors may be involved in the foster care system; in these instances, specific provisions address the release of records to and among the above-named actors. We have laid out those specific provisions below. In many cases, however, the confidentiality laws and regulations do not specifically address disclosure to these actors; in those instances the rules discussed above regarding the release of records to third parties generally would apply.

1. COUNTY CHILDREN & YOUTH AGENCY WITH LEGAL CUSTODY

a. General Rules of Disclosure of Health Care Records **by** County Children & Youth Agency

The minor's county children & youth agency caseworker may disclose information in the minor's family case record to a health care provider without obtaining prior written consent. The provider may have access to and use this information in providing services to the minor. The caseworker may only disclose that information needed by the provider to carry out his/her responsibilities in serving the child.²³² Similarly, agency workers may release information to a minor's health care provider without obtaining prior written consent in an emergency situation.²³³

b. Disclosure of Mental Health Treatment Records **to** County Children & Youth Agency

As described in the section above on Mental Health Treatment Records, when a mental health facility accepts a minor 14 years of age or older for examination and treatment, the facility's director must promptly notify the minor's parent, guardian or person standing *in loco parentis* that the minor has been admitted.²³⁴ If the facility director cannot locate the parent, guardian or person standing *in loco parentis*, the director shall take such action as he deems appropriate, including notifying appropriate child welfare agencies.²³⁵ This is the only specific mention of disclosure of records to county children & youth agencies in the Mental Health Procedures Act.²³⁶ Therefore, the rules regarding the release of mental health records to third parties as discussed in *Part II.D.4* above also apply to county children & youth agencies.

²³² Children, Youth & Family Manual, 55 Pa. Code § 3130.44(c). See also 45 C.F.R. §§ 1340.14(h)(2)(v) and (vii). There may be instances where it would be important for a child's health care provider to know about the biological parent's health care status (i.e., if the biological parent is HIV-positive or is diabetic). However, 55 Pa. Code § 3130.44(f) states that "information from a case record may be made available only if the information released does not contain material which violates the right to privacy of another individual." This provision suggests that the county children & youth agency would have to obtain the biological parent's prior written consent to release that parent's health information to the child's health care provider.

²³³ 45 C.F.R. § 205.50(a)(2)(i)(D) and (a)(2)(iii).

²³⁴ Mental Health Procedures Act, 50 P.S. § 7204; Mental Health Manual, 55 Pa. Code § 5100.74. The Mental Health Procedures Act does not further define the term *in loco parentis*. Under Pennsylvania case law, the term *in loco parentis* describes a relationship in which an adult assumes the legal rights and duties of parenthood. *Commonwealth v. Gerstner*, 656 A.2d 108, 112 (Pa. 1995). It should be noted that Pennsylvania courts have found that when a county children & youth agency places a child with foster parents, the foster parents do **not** stand *in loco parentis* to the child. *In the Interest of G.C.*, 735 A.2d 1226, 1228 (Pa. 1999) (citing *In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1149 (Pa. Super. Ct. 1984)).

²³⁵ Mental Health Manual, 55 Pa. Code § 5100.74(b).

²³⁶ State mental health regulations also provide that when a mental health facility forwards a patient's records to another agency, that agency must provide the patient with access to his/her records in accordance with state mental health regulations. See *Part II.C.3* for description of regulations pertaining to minors' access to their own mental health treatment records.

c. Disclosure of Substance Abuse Treatment Records **to** County Children & Youth Agency

A provider shall release drug and alcohol treatment records and related information about a minor-patient who is alleged or who has been found to be dependent or delinquent to the county children & youth agency only with the consent of either the minor or the minor's parents or by order of the Court of Common Pleas.²³⁷

d. Disclosure of Substance Abuse Records **by** County Children & Youth Agency

The county children & youth agency may not disclose a minor's substance abuse records to any other person, and may only use the records to carry out the purposes of the Juvenile Act.²³⁸

e. Disclosure of HIV-Related Records **to** County Children & Youth Agency

Health care providers and other individuals who obtain HIV-related information in the course of providing health or social services may disclose HIV-related information about a minor that they obtained while providing care to the minor, without obtaining the minor's prior written consent, to employees of county children and youth agencies, if the employee: (i) is generally authorized to receive medical information; (ii) is responsible for ensuring that the minor receives appropriate health care; and (iii) has a need to know the HIV-related information in order to ensure that such care is provided.²³⁹

f. Disclosure of School Records **to** County Children & Youth Agency

Schools shall not provide access to a minor's records to the minor's county children & youth agency caseworker if the minor is in an institution of post-secondary education, without the prior written consent of the minor.²⁴⁰

g. Disclosure of HIV-Related Records **by** County Children & Youth Agency

County children & youth agencies and contracted residential providers of these agencies may disclose HIV-related information about a minor to a court during a dispositional hearing for a dependent child when the information is necessary to meet the minor's medical needs.²⁴¹

2. PRIVATE FOSTER CARE/PLACEMENT AGENCY

a. General Rules of Disclosure **by** Foster Care/Placement Agency Caseworkers

²³⁷ Juvenile Act, 42 Pa.C.S. § 6352.1. The HIPAA regulations similarly require that, absent a court order, a provider obtain the patient's prior written consent prior to disclosure to a third party; no exception is made for disclosure to county child welfare agencies. 45 C.F.R. 164.506(a), 164.512(k)(5). See footnote 150 for a description of the required elements of a consent form authorizing release of information under HIPAA.

²³⁸ 42 Pa.C.S. § 6352.1.

²³⁹ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(12). The HIPAA regulations, however, require that, absent a court order, a provider obtain the patient's prior written consent prior to disclosure to a third party; no exception is made for disclosure to county child welfare agencies. 45 C.F.R. §§ 164.506(a), 164.512(k)(5). See footnote 150 for a description of the required elements of a consent form authorizing release of information under HIPAA.

²⁴⁰ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(d); 34 C.F.R. §§ 99.3, 99.5, 99.10; 22 Pa. Code § 12.33, Ex. A, Secs. 4.5, 4.6.

²⁴¹ Confidentiality of HIV-related Information, 35 P.S. § 7607(a)(12).

The minor's foster care/placement agency caseworker may disclose otherwise confidential information in the minor's case records to a health care provider to the extent that the information is needed by the provider to carry out his/her responsibilities.²⁴²

b. Disclosure of HIV-Related Records **to** Foster Care/Placement Agency Caseworkers

Health care providers and other individuals who obtain HIV-related information in the course of providing health or social services may disclose HIV-related information about a minor that they obtained while providing care to the minor, without obtaining the minor's prior written consent, to employees of contracted residential providers of county children & youth agencies if the employee: (i) is generally authorized to receive medical information; (ii) is responsible for ensuring that the minor receives appropriate health care; and (iii) has a need to know the HIV-related information in order to ensure that such care is provided.²⁴³

3. FOSTER PARENTS WITH PHYSICAL CUSTODY

a. General Rules of Disclosure **by** Foster Parents

State regulations provide that foster families are to be provided with information from a child's case record "which is necessary to protect the child's health and safety."²⁴⁴ There is no regulation that explicitly authorizes a foster parent to disclose a foster child's health information to the child's current health care provider. However, the authority for such disclosure is implicit in the foster parent's responsibility to protect the child's health. Moreover, as a matter of practice, private agencies enter into agreements with their foster parents that require, among other duties, that the foster parents escort the children to routine medical examinations where disclosure of pertinent health information would occur.

4. CHILD RESIDENTIAL FACILITIES

a. General Rules of Disclosure **by** Child Residential Facilities

Child residential facilities, including transitional living facilities, are governed by the Title 55 Chapter 3800 regulations (the "3800 regulations").²⁴⁵ These regulations mandate that child residential facilities comply with all

²⁴² Children, Youth & Family Manual, 55 Pa. Code § 3680.35(3); 45 C.F.R. §§ 1340.14(h)(2)(v) and (vii). There may be instances where it would be important for a child's health care provider to know about the biological parent's health care status (i.e., if the biological parent is HIV-positive or is diabetic). However, 55 Pa. Code § 3680.35(5) states that "information from the case record may be made available only if the information released does not contain material which violates the right to privacy of another individual." This provision suggests that the private foster care agency would have to obtain the biological parent's prior written consent to release that parent's health information to the child's health care provider.

²⁴³ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(12). The HIPAA regulations, however, require that, absent a court order, a provider obtain the patient's prior written consent prior to disclosure to a third party; no exception is made for disclosure to contracted residential providers of county child welfare agencies. 45 C.F.R. §§ 2164.506(a), 164.512(k)(5). See footnote 150 for a description of the required elements of a consent form authorizing release of information under HIPAA.

²⁴⁴ 55 Pa. Code § 3700.38(c).

²⁴⁵ 55 Pa. Code § 3800.2.

state laws and regulations pertaining to the confidentiality of records, including those described in this Part.²⁴⁶

Where there is no other statute or regulation regarding the type of health record in question, the Chapter 3800 regulations set up the following default rules. The facility may disclose information in the minor's record without prior written consent or a court order to the following persons, upon request: the child's parent or guardian; the child's attorney; the parent's attorney; the dependency court and court services; and the county children & youth agency.²⁴⁷ When a minor is 14 years of age or older, the facility must also release information in the minor's records to the minor upon request; information may be withheld if disclosure would be harmful to the minor.²⁴⁸ The facility may also release information without obtaining prior consent or a court order to another service provider for the minor if the provider needs the information to carry out its responsibilities.²⁴⁹ Finally, if there is no statute or regulation that specifically pertains to the record in question, and the party seeking the records is not one of those individuals/entities specified in this paragraph, the facility may only release the records with the authorization of the court or the minor's parent/guardian.²⁵⁰

b. Disclosure of HIV-Related Information to Child Residential Facilities

Health care providers and other individuals who obtain HIV-related information in the course of providing health or social services may disclose HIV-related information about a minor that they obtained while providing care to the minor to contracted residential providers of county mental health/mental retardation agencies, county children and youth agencies, and county juvenile probation departments that have physical custody of a child or are contemplating taking physical custody of a child, if the employee: (i) is generally authorized to receive medical information; (ii) is responsible for ensuring that the minor receives appropriate health care; and (iii) has a need to know the HIV-related information in order to ensure that such care is provided.²⁵¹

5. MINOR'S ATTORNEY

a. Disclosure of Substance Abuse Treatment Records to Minor's Attorney

A provider of substance abuse diagnosis or treatment services may release information about the minor-patient to an attorney representing the minor-patient in a criminal, civil, or administrative proceeding, with the minor-patient's written consent.²⁵²

²⁴⁶ 55 Pa. Code § 3800.20(a). Specifically, child residential facilities are required to comply with the confidentiality provisions of the Child Protective Services Law, 23 Pa.C.S. §§ 6301-6385, and accompanying regulations, 55 Pa. Code §§ 3490.91-3490.95; the Adoption Act, 23 Pa.C.S. §§ 7101-7503; the Mental Health Procedures Act, 50 P.S. §§ 7101-7503, and accompanying regulations, 55 Pa. Code 5100.31-5100.39; the Mental Health and Mental Retardation Act, 50 P.S. § 4602(d); and the Confidentiality of HIV-Related Information Act, 35 P.S. §§ 7601-7612.

²⁴⁷ 55 Pa. Code § 3800.20(b)(2).

²⁴⁸ 55 Pa. Code § 3800.20(b)(2). When the facility withholds information from the minor 14 years of age and older, it must document the harm to be prevented in the minor's record. *Id.*

²⁴⁹ 55 Pa. Code § 3800.20(b)(3). The facility must document the need for the release of the information in the child's record. *Id.*

²⁵⁰ 55 Pa. Code § 3800.20(b)(5).

²⁵¹ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(12). The HIPAA regulations, however, require that, absent a court order, a provider obtain the patient's prior written consent prior to disclosure to a third party; no exception is made for disclosure to contracted residential providers of county child welfare agencies. 45 C.F.R. §§ 164.506(a), 164.512(k)(5). See footnote 150 for a description of the required elements of a consent form authorizing release of information under HIPAA.

²⁵² 28 Pa. Code §§ 157.23(b), 709.28(a), (c) and (d), 711.43(d)(1)-(d)(3), 711.53(c)(1)-(c)(3), 711.62(c)(1)-(c)(3), 711.72(c)(1)-(c)(3), 711.83(c)(1)-(c)(3), and 711.93(c)(1)-(c)(3); 4 Pa. Code § 255.5(a)(5). The written consent must
(continued...)

6. DEPENDENCY COURT

a. Disclosure of Mental Health Treatment Records to the Dependency Court

Absent the minor's prior written consent, or that of the minor's parent/guardian if the minor is under the age of 14, a mental health facility or service provider²⁵³ may only disclose non-privileged information to the dependency court pursuant to a court order. The provider may only disclose that information which is relevant and necessary to the purpose for which it is sought. The facility may not release the minor's records in response to a subpoena in the absence of an additional court order. In such a case, the facility is to inform the court that, under statute and regulations, the records are confidential and cannot be released without an order of the court. The facility shall also inform the patient's attorney of record for the proceedings for which the patient's records were subpoenaed about the subpoena.²⁵⁴

b. Disclosure of Substance Abuse Treatment Records to the Dependency Court

A substance abuse treatment provider shall release treatment records and related information about a minor who is alleged or who has been found to be dependent to the Court of Common Pleas only with the consent of either the minor or the minor's parents or by order of the Court of Common Pleas.²⁵⁵

c. Disclosure of HIV-Related Records to the Dependency Court

Absent the minor's prior written consent, a provider may only disclose HIV-related information to the dependency court pursuant to a court order issued upon a showing of compelling need.²⁵⁶ To issue such an order, the court must find that it has a demonstrated compelling need for the information which cannot be accommodated by other means.²⁵⁷ In assessing compelling need, the court must weigh the need for disclosure against the privacy interest of the individual and the public interests which may be harmed by disclosure.²⁵⁸ Prior to issuing an order compelling disclosure, the court must provide the individual whose information is to be disclosed with notice and a reasonable opportunity to be heard.²⁵⁹

²⁵² (...continued)

include: the name of the person, agency or organization to whom disclosure is made; the specific information disclosed; the purpose of the disclosure; the dated signature of the minor-patient; the dated signature of a witness; and the expiration date of the consent. A copy of the consent form shall be offered to the minor-patient, and a copy kept in the minor patient's records. 28 Pa. Code §§ 709.28(c)-(e), 711.43(d), 711.53(c), 711.62(c), 711.72(c), 711.83(c), and 711.93(c).

²⁵³ See Part II.C for definition of a mental health facility or service provider.

²⁵⁴ Mental Health Procedures Act, 50 P.S. § 7111(a); Mental Health Manual, 55 Pa. Code §§ 5100.31, 5100.32(a)(7) and (c), 5100.35(b), 5200.2, 5200.41(c), 5221.1, 5221.52(a). The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i). But note that under Pennsylvania law no psychiatrist or licensed psychologist may be, without the written consent of his client, compelled to testify in any civil or criminal matter as to any information acquired in the course of his professional services on behalf of such client. 42 Pa.C.S. § 5944.

²⁵⁵ Juvenile Act, 42 Pa.C.S. § 6352.1. The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i).

²⁵⁶ Confidentiality of HIV-Related Information Act, 35 P.S. §§ 7607(a)(10), 7608. The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i).

²⁵⁷ Confidentiality of HIV-Related Information Act, 35 P.S. § 7608(a).

²⁵⁸ Confidentiality of HIV-Related Information Act, 35 P.S. § 7608(c).

²⁵⁹ Confidentiality of HIV-Related Information Act, 35 P.S. § 7608(e).

County children and youth agencies, mental health/mental retardation agencies, juvenile probation offices, state or county facilities for delinquent youth, and contracted residential providers of these agencies may disclose HIV-related information about a minor to a court during a dispositional hearing for a dependent child when the information is necessary to meet the minor's medical needs.²⁶⁰

d. Disclosure of School Health Records to the Dependency Court

Public schools may disclose a minor's health care records to a delinquency or dependency court judge without the prior written consent of the minor or the minor's parents to comply with a court order. However, the school must notify the minor and his/her parents of the court order prior to disclosing the records.²⁶¹ The school must maintain a record of all disclosures and requests for disclosures.²⁶² However, absent the consent of the minor's parent/guardian, school personnel who receive information in confidence from a minor, including guidance counselors, school nurses and school psychologists, cannot be compelled to disclose such information in any legal proceeding, trial or investigation before any government unit.²⁶³

7. HEALTHCHOICES MANAGED CARE ORGANIZATIONS

a. Disclosure of Information by HealthChoices Managed Care Organizations

The Department of Public Welfare has established guidelines for the release of patient information by the HealthChoices Managed Care Organizations (MCOs) to agencies and individuals who care for children in the child welfare system.²⁶⁴ MCOs may release limited information about a child -- such as the child's member number and assigned primary care physician and dentist -- to the following agencies/individuals: the county children & youth agency with legal custody of the child; the private agency providing placement for the child; and the child's foster parents or kinship caregivers.²⁶⁵ Such information may also be released to an attorney representing the child and to court-appointed special advocates (CASAs).²⁶⁶

8. HIPAA AND THE CHILD WELFARE SYSTEM

The HIPAA regulations have implications for information-sharing by and among different entities operating within the child welfare system that are not yet fully understood. Entities within the child welfare system should seek the advice of legal counsel to determine whether they can be classified as a covered entity, a hybrid entity, or a business associate of a covered entity, see *Part II.A*, such that they are subject to HIPAA regulations. A full discussion of HIPAA's effect on information-sharing with respect to youth involved in the child welfare system is

²⁶⁰ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(12).

²⁶¹ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(2)(B); 34 C.F.R. §§ 99.31(a)(9); 22 Pa. Code § 12.33, Ex. A, Secs. 4.2.2.

²⁶² Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(4); 34 C.F.R. § 99.32.

²⁶³ 42 Pa.C.S. § 5945(A). But school personnel are not exempted or prevented from complying with the Child Protective Services Law. *Id.* at § 5945(B).

²⁶⁴ Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures," effective April 1, 1999, attached at Appendix D.

²⁶⁵ Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures," effective April 1, 1999 at pp. 2-3, 7-8, attached at Appendix D. The person requesting information must be able to provide the MCO with the child's: (1) name; (2) date of birth; and (3) social security number or MA number or MCO member number.

²⁶⁶ Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures," effective April 1, 1999, at p. 6, attached at Appendix D. Attorneys and CASAs must provide documentation of their appointment by the court to represent the child to the MCO.

beyond the scope of this manual. However, Juvenile Law Center anticipates that it will soon post on its website a white paper exploring the ramifications of HIPAA on the sharing of youth's medical records by and among actors in the child welfare system.

H. Confidentiality of Health Records of Minors in the Juvenile Justice System

As is the case with the child welfare system, a minor's entrance in the juvenile justice system (also called the delinquency system) results in the involvement of a number of actors in a child's life. These can include temporary detention centers, child residential facilities, juvenile probation officers and, of course, the delinquency court. Confusion sometimes exists as to the permitted disclosure of a minor's health care records between health care providers and these different actors, as well as among the actors themselves. Some of the confidentiality laws and regulations reviewed thus far in this manual contemplate that minors may be involved with the delinquency system. In these instances, specific provisions address the release of records to and among the above-named actors. We have laid out those specific provisions below. In many cases, however, the confidentiality laws and regulations do not specifically address disclosure to these actors; in those instances the rules discussed above regarding the release of records to third parties generally would apply.

1. SECURE DETENTION AND OTHER RESIDENTIAL FACILITIES

a. General Rules of Disclosure by Secure Detention and Other Residential Facilities

As explained in Part I, minors involved in the juvenile justice system are sometimes temporarily placed by the court in secure detention facilities. These facilities house both pre-adjudicated minors (who are awaiting trial) and post-adjudicated minors (who've had their trials and were adjudicated, and are now awaiting a permanent placement.) Delinquency court judges sometimes also place youth who have been adjudicated delinquent in private residential facilities as part of the youth's disposition. The Chapter 3800 regulations govern secure detention facilities, as well as private facilities that house minors who have been adjudicated delinquent.²⁶⁷ These regulations mandate that child residential facilities comply with the state laws and regulations pertaining to the confidentiality of records, all of which are described in this Part.²⁶⁸

Where there is no other state statute or regulation regarding the type of health record in question, the Chapter 3800 regulations set up the following default rules. The facility may disclose information in the minor's record without prior written consent or court order to the following persons, upon request: the child's parent or guardian, the child's attorney; the parent's attorney; and the delinquency court and court services, including juvenile probation.²⁶⁹ When a minor is 14 years of age or older, the facility must also release information in the minor's records to the minor upon request; information may be withheld if disclosure would be harmful to the minor.²⁷⁰ The facility may release information without obtaining prior consent or a court order to another service

²⁶⁷ 55 Pa. Code § 3800.2.

²⁶⁸ 55 Pa. Code § 3800.20(a). Specifically, child residential facilities are required to comply with the confidentiality provisions of the Child Protective Services Law, 23 Pa.C.S. §§ 6301-6385, and accompanying regulations, 55 Pa. Code §§ 3490.91-3490.95; the Adoption Act, 23 Pa.C.S. §§ 2101-2910; the Mental Health Procedures Act, 50 P.S. §§ 7101-7503, and accompanying regulations, 55 Pa. Code 5100.31-5100.39; the Mental Health and Mental Retardation Act, 50 P.S. § 4602(d); and the Confidentiality of HIV-Related Information Act, 35 P.S. §§ 7601-7612. *Id.*

²⁶⁹ 55 Pa. Code § 3800.20(b)(2).

²⁷⁰ 55 Pa. Code § 3800.20(b)(2). When the facility withholds information from the minor 14 years of age and older, it must document the harm to be prevented in the minor's record. *Id.* Similarly, under the HIPAA regulations (both those currently in effect and under the Bush administration's proposed changes), a correctional institution – which is defined to include facilities housing juveniles who are awaiting trial or have been adjudicated delinquent – may withhold health

(continued...)

provider for the minor if the provider needs the information to carry out its responsibilities.²⁷¹ Finally, if there is no statute or regulation that specifically pertains to the record in question, and the party seeking the records is not one of those individuals/entities specified in this paragraph, the facility may only release the records with the authorization of the court or the child's parent/guardian.²⁷²

b. Disclosure of HIV Information **to** Secure Detention and Other Residential Facilities

Health care providers and other individuals who obtain HIV-related information in the course of providing health or social services may disclose HIV-related information about a minor that they obtained while providing care to the minor to contracted residential providers of county children and youth agencies and county juvenile probation departments that have physical custody of a child or are contemplating taking physical custody of a child, if the employee: (i) is generally authorized to receive medical information; (ii) is responsible for ensuring that the minor receives appropriate health care; and (iii) has a need to know the HIV-related information in order to ensure that such care is provided.²⁷³

2. JUVENILE PROBATION OFFICERS

a. General Rules of Disclosure **by** Juvenile Probation Officers

Except for the general provisions of the Juvenile Act protecting the confidentiality of minors' records, there are no state laws or regulations explicitly stating under what circumstances juvenile probation officers may disclose a client's health care records to a third party. As a general practice, juvenile probation officers in Pennsylvania only disclose such records to third parties upon written parental consent or court order.

b. Disclosure of Substance Abuse Treatment Records **to** Juvenile Probation Officers

A substance abuse treatment provider shall release treatment records and related information about a minor who is alleged or who has been found to be delinquent to the juvenile probation officer only with the consent of either the minor or the minor's parents or by order of the Court of Common Pleas.²⁷⁴

c. Disclosure of Substance Abuse Treatment Records **by** Juvenile Probation Officers

²⁷⁰ (...continued)

information from the youth if obtaining such information would jeopardize the health, safety, security, custody or rehabilitation of the individual or others. 45 C.F.R. §§ 164.501, 164.524(a)(2)(ii).

²⁷¹ 55 Pa. Code § 3800.20(b)(3). The facility must document the need for the release of the information in the child's record. *Id.*

²⁷² 55 Pa. Code § 3800.20(b)(5).

²⁷³ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(12). The HIPAA regulations similarly allow providers to release such information to juvenile correctional facilities with custody of the youth. See 45 C.F.R. §§ 164.512(k)(5), 164.501.

²⁷⁴ Juvenile Act, 42 Pa.C.S. § 6352.1. The HIPAA regulations similarly require that, absent a court order, a provider obtain the patient's prior written consent prior to disclosure to a third party; no exception is made for disclosure to juvenile probation officers. 45 C.F.R. §§ 164.506(a), 164.512(k)(5). See footnote 150 for a description of the required elements of a consent form authorizing release of information under HIPAA.

Juvenile probation officers may not disclose a minor's records substance abuse records to any other person, and may only use the records to carry out the purposes of the Juvenile Act.²⁷⁵

d. Disclosure of HIV-related Information **to** Juvenile Probation Officers

Health care providers and other individuals who obtain HIV-related information in the course of providing health or social services may disclose HIV-related information about a minor that they obtained while providing care to the minor, without obtaining the minor's prior written consent, to employees of county juvenile probation departments, if the employee: (i) is generally authorized to receive medical information; (ii) is responsible for ensuring that the minor receives appropriate health care; and (iii) has a need to know the HIV-related information in order to ensure that such care is provided.²⁷⁶

e. Disclosure of HIV-related Information **by** Juvenile Probation Officers

Juvenile probation officers may disclose HIV-related information about a minor to a court during a dispositional hearing for a delinquent child when the information is necessary to meet the minor's medical needs.²⁷⁷

3. DELINQUENCY COURT

a. Disclosure of Mental Health Treatment Records **to** the Delinquency Court

Absent the minor's prior written consent, or that of the minor's parent/guardian if the minor is under the age of 14, a mental health facility or treatment provider²⁷⁸ may only disclose non-privileged information to the delinquency court pursuant to a court order. The provider may only disclose that information which is relevant and necessary to the purpose for which it is sought. The provider may not release the minor's records in response to a subpoena in the absence of an additional court order. In such a case, the provider is to inform the court that, under statute and regulations, the records are confidential and cannot be released without an order of the court. The provider shall also inform the patient's attorney of record for the proceedings for which the patient's records were subpoenaed about the subpoena.²⁷⁹

b. Disclosure of Substance Abuse Treatment Records **to** the Delinquency Court

A substance abuse treatment provider²⁸⁰ shall release treatment records and related information about a minor who is alleged or who has been found to be delinquent to the Court of Common Pleas only with the

²⁷⁵ 42 Pa.C.S. § 6352.1.

²⁷⁶ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(12). The HIPAA regulations, however, require that, absent a court order, a provider obtain the patient's prior written consent prior to disclosure to a third party; no exception is made for disclosure for juvenile probation officers. 45 C.F.R. §§ 164.506(a), 164.512(k)(5). See footnote 150 for a description of the required elements of a consent form authorizing release of information under HIPAA.

²⁷⁷ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(12).

²⁷⁸ See Part II.C for definition of a mental health facility or service provider.

²⁷⁹ Mental Health Manual, 55 Pa. Code §§ 5100.31, 5100.32(a)(7) and (c), 5100.35(b), 5200.2, 5200.41(c), 5221.1, 5221.52(a). The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i).

²⁸⁰ A provider of substance abuse diagnosis and/or treatment services includes those entities described at Part II.D.

consent of either the minor or the minor's parents or by order of the Court of Common Pleas.²⁸¹

c. Disclosure of School Health Records **to** the Delinquency Court

Public schools may disclose a minor's health care records to a delinquency court judge without the prior written consent of the minor or the minor's parents to comply with a court order. However, the school must notify the minor and his/her parents of the court order prior to disclosing the records.²⁸² The school must maintain a record of all disclosures and requests for disclosures.²⁸³ However, absent the consent of the minor's parent/guardian, school personnel who receive information in confidence from a minor, including guidance counselors, school nurses and school psychologists, cannot be compelled to disclose such information in any legal proceeding, trial or investigation before any government unit.²⁸⁴

d. Disclosure of HIV-Related Information **to** the Delinquency Court

Absent the minor's prior written consent, a provider may only disclose HIV-related information to the delinquency court with a court order issued upon a showing of compelling need.²⁸⁵ To issue such an order, the court must find that it has a demonstrated compelling need for the information which cannot be accommodated by other means.²⁸⁶ In assessing compelling need, the court must weigh the need for disclosure against the privacy interest of the individual and the public interests which may be harmed by disclosure.²⁸⁷ Prior to issuing an order compelling disclosure, the court must provide the individual whose information is to be disclosed with notice and a reasonable opportunity to be heard.²⁸⁸

Juvenile probation officers may disclose HIV-related information that they have obtained about a minor to a delinquency court during the minor's dispositional hearing when the information is necessary to meet the minor's medical needs.²⁸⁹

4. HIV TESTING AND JUVENILES ADJUDICATED DELINQUENT

In cases where a minor has been adjudicated delinquent or convicted of one of the following sex offenses – rape, statutory rape, involuntary deviate sexual intercourse, spousal sexual assault, incest, or corruption of minors if there has been sexual intercourse – and the victim of the crime has requested, under the Disease Prevention and Control Law of 1955, that the State Department of Health or the local advisory health board or local department of health test the minor for HIV, the results will be released to the person making the request IF the request is made within six weeks of the conviction or adjudication. The request is treated as if the

²⁸¹ Juvenile Act, 42 Pa.C.S. § 6352.1. The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i).

²⁸² Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(2)(B); 34 C.F.R. §§ 99.31(a)(9); 22 Pa. Code § 12.33, Ex. A, Secs. 4.2.2.

²⁸³ Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. § 1232g(b)(4); 34 C.F.R. § 99.32.

²⁸⁴ 42 Pa.C.S. § 5945(A). But school personnel are not exempted or prevented from complying with the Child Protective Services Law. *Id.* at § 5945(B).

²⁸⁵ Confidentiality of HIV-Related Information Act, 35 P.S. §§ 7607(a)(10), 7608.

²⁸⁶ Confidentiality of HIV-Related Information Act, 35 P.S. § 7608(a).

²⁸⁷ Confidentiality of HIV-Related Information Act, 35 P.S. § 7608(c).

²⁸⁸ Confidentiality of HIV-Related Information Act, 35 P.S. § 7608(e). The HIPAA regulations similarly permit a provider to disclose records to comply with a court order without first obtaining the patient's consent. 45 C.F.R. § 164.512(e)(1)(i).

²⁸⁹ Confidentiality of HIV-Related Information Act, 35 P.S. § 7607(a)(12).

minor who was adjudicated/convicted gave consent to the testing and release of results himself or herself. This provision overrides §§ 5(a) and 7(a)(3) of the Confidentiality of HIV-Related Information Act. After the six-week time frame, the test shall be administered and results released in accordance with the Confidentiality of HIV-Related Information Act.²⁹⁰

5. HEALTHCHOICES MANAGED CARE ORGANIZATIONS

a. Disclosure of Information by HealthChoices Managed Care Organizations

The Department of Public Welfare has established guidelines for the release of patient information by the HealthChoices Managed Care Organizations (MCOs) to agencies and individuals who have the responsibility of obtaining and/or coordinating health care for children involved in the juvenile justice system.²⁹¹ MCOs may release limited information about a child -- such as the child's member number and assigned primary care physician and dentist -- to juvenile probation officers and county juvenile detention centers with custody of the child.²⁹² Such information also may be released to an attorney representing the child.²⁹³

6. HIPAA AND THE JUVENILE JUSTICE SYSTEM

Facilities that hold youth involved in the juvenile justice system must seek the advice of legal counsel to determine if they are covered entities subject to the HIPAA provisions. See *Part II.A.* HIPAA provides that individually identifiable health information of inmates of correctional facilities and detainees in detention facilities is protected health information.²⁹⁴ Inmates of correctional and detention facilities are defined to include both pre-adjudicated and post-adjudicated youth held in juvenile facilities.²⁹⁵ However, a few HIPAA provisions are not applicable to inmates of correctional institutions that are otherwise covered entities under HIPAA..

For example, a covered entity that is a correctional institution or a covered health care provider acting for a correctional institution may deny, in whole or in part, an inmate's request to **obtain** a copy of protected health information, if obtaining such copy would jeopardize the health, safety, security, custody, or rehabilitation of the individual or of other inmates, or the safety of any officer, employee, or other person at the correctional institution responsible for transporting the inmate.²⁹⁶ Under this provision, the institution does not have to provide the individual an opportunity for review of the denial.²⁹⁷ This ground for denial is restricted to an inmate's request to obtain a copy of protected health information. If an inmate requests inspection of protected health

²⁹⁰ Disease Prevention and Control Law of 1955, 35 P.S. § 521.11a(b).

²⁹¹ Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures," effective April 1, 1999, attached at Appendix D.

²⁹² Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures," effective April 1, 1999, at pp. 2-3, 7-8, attached at Appendix D. The person requesting information must be able to provide the MCO with the child's: (1) name; (2) date of birth; and (3) social security number **or** MA number **or** MCO member number.

²⁹³ Office of Children, Youth and Families Bulletin No. 00-99-05, "HealthChoices Information Sharing Policies and Procedures", effective April 1, 1999, at p. 6, attached at Appendix D. Attorneys must provide documentation of their appointment by the court to represent the child to the MCO.

²⁹⁴ *Section-By-Section Description of Rule Provisions* (U.S. Department of Health and Human Services, 2000), available at www.hhs.gov/oct/part2.html; 45 C.F.R. § 160.103 ("Definitions").

²⁹⁵ See 45 C.F.R. § 164.501; see also 45 C.F.R. §§ 164.506(a)(2)(ii); 164.512(k)(5), 164.520(a)(3), and 164.524(a)(2)(ii).

²⁹⁶ 45 C.F.R. § 164.524(a)(2)(ii).

²⁹⁷ 45 C.F.R. § 164.524(a)(2).

information, the request must be granted unless one of the other ground for denial applies.²⁹⁸

However, it is important to note that under the Title 55 Chapter 3800 regulations, secure detention facilities and private residential facilities are required to comply with the confidentiality provisions of existing Pennsylvania law, which are generally more stringent than the HIPAA requirements with respect to juvenile correctional facilities. Since HIPAA does not preempt state law that is more stringent than its own provisions, the Pennsylvania state law and regulations still govern the confidentiality of records of youth in juvenile justice facilities.²⁹⁹

HIPAA also has a provision regarding disclosure of health records by health care providers or health plans to correctional institutions. HIPAA provides that a covered entity may disclose to a correctional institution or law enforcement official having lawful custody of an individual protected health information about such individual, if information is necessary for one of the following: (1) the provision of health care to the individual; (2) the health and safety of the individual or other inmates; (3) the health and safety of the individual and persons responsible for the transporting of inmates; (4) law enforcement on the premises of the correctional institution; and (5) the administration and maintenance of the safety, security and good order of the correctional institution.³⁰⁰ But, as noted above, if such health care providers or health plans are not permitted to make these disclosures under Pennsylvania law, the HIPAA regulations would not override the Pennsylvania rules.³⁰¹

²⁹⁸ *Section-By-Section Description of Rule Provisions*, available at www.hhs.gov/oct/part2.html.

²⁹⁹ See 45 C.F.R. §§ 160.202, 160.203.

³⁰⁰ 45 C.F.R. § 164.512(k)(5)(i).

³⁰¹ See 45 C.F.R. §§ 160.202, 160.203.