

**BAY-ARENAC BEHAVIORAL HEALTH AUTHORITY
POLICIES AND PROCEDURES MANUAL**

Chapter: 13	Corporate Compliance		
Section: 1	HIPAA		
Topic: 7	Personal Representatives		
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Policy

It is the policy of Bay-Arenac Behavioral Health Authority (BABHA), that a personal representative must be treated as the individual receiving services and may “stand in the shoes” of that individual for purposes of signing all forms and exercising all rights related to privacy and consent.

Purpose

This policy and procedure is established to set forth guidelines regarding the signatures of personal representatives for persons served as stipulated under HIPAA, the Mental Health Code, the Child Custody Act, Child Protection Law, and the Estates and Protected Individuals Code.

Education Applies to:

- All BABHA Staff
- Selected BABHA Staff, as follows:
- All Contracted Providers: Policy Only Policy and Procedure
- Selected Contracted Providers, as follows: Primary case holders
 - Policy Only Policy and Procedure
- Other:

Definitions

Child: As defined in the Child Custody Act, means a minor child and children; the Child Protection Law defines child as a person under 18 years of age. As defined in the MI Mental Health Code for mental health (MCL 330.1707) and substance use disorder services (MCL 330.1260) means an individual less than 14 years of age.

Joint Custody: Joint legal custody refers to a court ordered arrangement where the parents share decision making authority as to the important decisions affecting the welfare of the child. Joint physical custody means a child living alternatingly with each parent for specified periods of time

Minor: As defined in the MI Mental Health Code for mental health (MCL 330.1707) and substance use disorder services (MCL 330.1260) means an individual 14 or more years of age and less than 18 years of age.

Procedure

- 1) An individual who has the authority under Michigan law to act on behalf of a person receiving services for purposes of health care is considered a personal representative and shall “stand in the shoes” of the person served. This means the personal representative is treated exactly the same as the person served would be in terms of signing BABHA documents, authorizing release of

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protected health information, exercising their rights, amending their record, etc. (45 CFR §164.502(g)).

- 2) This procedure applies to non-court ordered, voluntary mental health and substance use disorder services, where consent for treatment must be obtained from the person to be served or their legal representative.
- 3) For information about what records can be accessed, see C13-S01-T16 Rights of Persons Served Regarding Protected Health Information.
- 4) **Personal Representatives for Adults**
 - a) For mental health services, if an adult is incapacitated, either a court appointed guardian, or a patient advocate (health care power of attorney) can serve as a personal representative.
 - b) For substance use disorder services, if an adult is incapacitated, only a court appointed guardian can serve as a personal representative (42 CFR Part 2 (2.15(a)(1))).
 - c) Court Appointed Guardians
 - i) A court appointed guardian for an individual with developmental disabilities must provide BABHA with a copy of the court order granting Plenary Guardianship upon request.
 - (1) If the guardianship is Plenary, the guardianship must be of the person not the estate (MCL 330.1600)
 - (2) If the guardianship is Partial, the guardianship order must define a scope of authority that encompasses medical treatment. (MCL 330.1620)
 - ii) A court appointed guardian for other adults must provide BABHA with a copy of the court order for Guardianship of an Incapacitated Person upon request. (MCL 700.5301-5319)
 - (1) If the guardianship is limited, the order must define a scope of authority that encompasses medical treatment.
 - (2) A legally incapacitated person who has a guardian with responsibility for making medical or mental health treatment decisions cannot then designate a patient advocate to make medical or mental health treatment decisions (MCL 700.5520).
 - (a)(3) A guardian of a legally incapacitated individual has the power, to the extent granted by court order, to consent to mental health treatment, with the following exception:

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(4) Per MCL 5314(c), a guardian of a legally incapacitated individual does not have the authority to give consent to or approval for inpatient hospitalization unless the court expressly grants the power in its order. If the individual objects or actively refuses mental health treatment, the guardian or other interested person must petition the court for an order to provide involuntary treatment.

- iii) When provided, BABHA staff must scan a copy of the guardianship order into the BABHA electronic health record.
- d) Patient Advocates (Power of Attorney for Health Care) (MCL 700.5506)
 - i) Michigan law requires that only a certain type of power of attorney, called a Patient Advocate Designation (or Health Care Power of Attorney) be accepted for medical and mental health treatment decisions. BABHA will only honor this type of power of attorney.
 - ii) A patient advocate must provide BABHA with a copy of a properly executed Patient Advocate Designation or Health Care Power of Attorney. A court order is not required.
 - iii) Before BABHA will honor a patient advocate designation BABHA staff will review the designation with the BABHA Privacy Office or designee to verify it has been executed consistent with Michigan law:
 - (1) The designation must identify another individual who must be 18 years of age or older, and specify they have the authority to exercise powers concerning care, custody, and medical or mental health treatment decisions for the individual making the patient advocate designation.
 - (2) The designation must be signed and dated by the individual making the patient advocate designation.
 - (3) The designation must be executed in the presence of and signed by 2 witnesses, who to the best of BABHA's knowledge are not the spouse, parent, child, grandchild, sibling, presumptive heir, known a person to whom real estate or personal property will be given at the time of the witnessing, physician, or patient advocate or an employee of a life or health insurance provider for the patient, of a health facility that is treating the patient, or of a home for the aged where the patient resides, or of a community mental health services program or hospital that is providing mental health services to the patient.

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- (4) To the best of BABHA’s knowledge the patient advocate designation must have been executed voluntarily when the patient appeared to be of sound mind and under no duress, fraud, or undue influence.
- iv) The designee can only act once the person making the designation is unable to make medical or mental health treatment decisions because of disability or incapacity.
 - (1) The person must have been determined unable to participate in mental health treatment decisions by a medical professional.
 - (2) The patient's attending physician and another physician or licensed psychologist must have determined upon examination of the patient whether the patient is unable to participate in medical treatment decisions and put the determination in writing.
 - (3) The determination must be reviewed by the person’s attending physician and another physician or licensed psychologist not less than annually.
 - (4) BABHA cannot continue to honor a patient advocate designation which has been activated but has not been medically reviewed annually as required by Michigan law.
- v) A copy of the patient advocate designation and the medical determination of incapacity must be on file in the BABHA medical record prior to implementation. The annual review must also be kept on file.

5) Personal Representatives for Minors

a) Emancipated Minors (MCL 722.1)

- i) If a minor is emancipated, he or she is treated like an adult under Michigan law and is considered emancipated if:
 - (1) He or she is validly married;
 - (2) He or she is 18 years of age;
 - (3) He or she is on active duty with the armed forces of the United States;
 - (4) There is a court order for emancipation;
 - (5) The minor is in police custody and the minor’s parent or guardian cannot be located (please note that emancipation in this context is limited to consent for routine, non-surgical medical care or emergency medical treatment);

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- (6) The minor is incarcerated, and the minor’s parent or guardian cannot be located (please note that emancipation in this context allows consent for all medical care with the exception of vasectomies or other procedures related to reproduction).
- ii) An emancipated minor has the right to authorize his or her own preventive health care, medical care, dental care, and mental health care, without parental knowledge or liability. (MCL 722.4e(g))
- b) Unemancipated Minors
 - i) For substance use disorder services (MCL 330.1260 – 1287):
 - (1) A unemancipated minor acts as their own representative for substance use disorder services provided by a hospital, clinic, or health professional authorized by law as if the minor had achieved the age of majority (42 CFR Part 2, 2.14(a)).
 - (a) A spouse, parent, guardian, or person in ‘loco parentis’, is not necessary to authorize these services to be provided to a minor.
 - (b) A BABHA prescriber or on the advice and direction of the prescriber, another health professional, for medical reasons, may, but is not obligated to, inform the spouse, parent, guardian, or person in ‘loco parentis’ as to the treatment given or needed.
 - (2) A minor's parent or a person standing in ‘loco parentis’ to a minor may request that substance use disorder services be provided to a minor by BABHA.
 - (a) If the minor does not consent to the substance use disorder services, BABHA may refer the minor for a diagnostic evaluation to determine whether the minor is physiologically dependent.
 - (b) After a diagnostic evaluation has been completed, substance use services shall not be provided unless 1 of the following occurs:
 - (i) The minor consents to substance use disorder services.
 - (ii) Services are court ordered under the Mental Health Code (see MCL 330.1266).
 - ii) For mental health services:
 - (1) Parents, guardians and a person standing in ‘loco parentis’ are the personal representatives for unemancipated minors. The same descriptions of personal representatives outlined for Children in this procedure apply to unemancipated minors.

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- (2) A minor may request and receive limited mental health services from BABHA without the consent or knowledge of the minor's personal representative (MCL 330.1707):
- (a) Not more than 12 sessions or 4 months of mental health services may be provided on an outpatient basis:
 - (i) Only outpatient services are included in this provision (e.g., case management, outpatient therapy, emergency services and /or Homebased services only);
 - (ii) Psychiatric inpatient services are not included;
 - (iii) Psychotropic drugs are not included;
 - (iv) Pregnancy termination referral services are not included.
 - (b) If psychotropic medications are requested, consent from the minor's personal representative is required and will be obtained.
 - (c) The minor's personal representative shall not be informed of the services without the consent of the minor unless:
 - (i) The mental health professional treating the minor determines that there is a compelling need for disclosure based on a substantial probability of harm to the minor or to another individual, and
 - (ii) If the minor is notified of the mental health professional's intent to inform the minor's personal representative.
 - (d) Services provided to a minor must, to the extent possible, promote the minor's relationship to the parent, guardian, or person in 'loco parentis', and will not undermine the values that the parent, guardian, or person in loco parentis has sought to instill in the minor, to the extent these values are known by BABHA staff.
 - (e) The minor's parent, guardian, or person standing in 'loco parentis' is not liable for the costs of services that are received by a minor.
 - (f) After the twelfth session or fourth month of services BABHA shall terminate the services or, with the consent of the minor, notify the parent, guardian, or person in loco parentis to obtain consent to provide further outpatient services.

6) Personal Representatives for Children

- a) The following are personal representatives for a child (and unemancipated minors) for both mental health and substance use disorder services (MCL 330.1265):

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- i) The child’s custodial parent.
- ii) The child’s noncustodial parent unless there is a court order limiting the noncustodial parents’ access to medical records. (MCL 722.30).
 - (1) The custodial parent may object to the release of mental health records to the non-custodial parent, but must provide a copy of the court order to stop the release of information.
- iii) The child’s legal guardian (MCL 700.5201-5219).
 - (1) BABHA must have direct knowledge of the appointment of a guardian, e.g., through their communications with the court or Dep’t of Human Services or must otherwise be assured that the person has the legal standing to make decisions for the child.
 - (2) Guardians must provide copies of the court order appointing them guardian upon BABHA request.
 - (3) Parents whose children have temporary guardians from DHS (as appointed by the Court; also known as temporary wards of the court) retain the normal parental rights as described in this procedure. This includes consenting to treatment and/or viewing/obtaining copies of their child’s records.
- iv) The Probate/Family Court or agency having jurisdiction over a child, where parental rights have been terminated.
 - (1) If there is a question about the risk to a child if records are provided to a parent, where the child is a temporary ward of the court, staff should consult with their supervisor and the Privacy Officer.
 - (2) If a child becomes a permanent ward of the Court and parental rights are terminated, the parent no longer has the right to consent to treatment and/or to view and/or obtain copies of their child’s records.
- v) A person standing in ‘loco parentis’ (a person who has legal or physical custody of the minor and is providing support and care for the minor and can provide proof of their standing) (MCL 330.1260), including;
 - (1) A person with whom the care of the child has been delegated by the child’s parents or guardian through a properly executed power of attorney. Before BABHA will honor such a designation (MCL 700.5103):

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- (a) BABHA staff will review the power of attorney with their Supervisor and the BABHA Privacy Officer or designee to verify it complies with Michigan law.
 - (i) The power of attorney cannot be more than 180 days old, unless the parent or guardian is serving in the armed forces of the United States and is deployed to a foreign nation, and if the power of attorney specifies it is to be honored until the thirty-first day after the end of the deployment;
 - (ii) The power of attorney must specify the parent or guardian’s powers regarding care of the minor child or ward and must be delegated to a specified individual over 18 years of age; and
 - (iii) If a guardian (i.e., not a parent) for a minor delegates care through a power of attorney, the guardian must notify the court of the designation by the within 7 days of execution as required by Michigan law.
 - (iv) To be properly executed, the power of attorney for a minor child must be signed by a notary or two witnesses.
- (b) A copy of the designation must be on file in the BABHA medical record prior to implementation.
- vi) A child care institution, or child care organization with written authority to consent to routine, nonsurgical medical care of the child.
- b) Children of Divorced Parents
 - i) This section only applies to parents who have been legally married and separated/divorced.
 - ii) Sole Custody
 - (1) If a parent indicates they have been granted sole custody by the courts, they have the authority to consent to mental health treatment.
 - (2) If a parent indicates they have sole custody but another parent disputes their authority to consent to the child receiving mental health treatment:
 - (a) BABHA staff will attempt to confirm the standing of the parent claiming sole custody, by obtaining a copy of the court order. The BABHA Records Specialist will assist staff with obtaining such court orders.

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(b) If BABHA staff are unable to confirm the sole custody of the parent, they will consult with their Supervisor and the BABHA Privacy Officer regarding how to proceed.

iii) Joint Custody

(1) While a child is living with a parent, that parent is entitled to make all ‘routine’ decisions regarding the child (MCL 722.26(a)). For important decisions, if the child’s parents have joint legal custody, legal authority rests with both parents. Per the 07/29/15 MDHHS memo on consent for mental health treatment of children, mental health care is considered ‘routine’ care, so the following procedures will be followed for joint custody situations:

- (a) If one of the two parents with joint custody is not present and/or not actively involved in the child’s life (such as parents who are incarcerated, cannot be located, and/or are non-responsive), and therefore unable and/or unwilling to respond to requests for consent, BABH will provide services with the consent of the custodial parent.
- (b) If both parents with joint custody are present and/or actively involved in the child’s life, BABH staff will obtain consent from both parents.
- (c) If one parent informs BABHA they do not consent with mental health treatment:
 - (i) BABH will advise the parent seeking mental health care for the child to file a motion with the court to resolve the disagreement.
 - (ii) In non-emergent but nonetheless urgent situations (i.e., where the delay of treatment may present a significant risk of harm to the child):
 1. With CEO approval, BABH may directly file a motion with the court; or
 2. With CEO or designee (Children’s leadership staff) approval, BABH may provide care with the consent of one of the parentsparent.
 - (iii) In a bona fide emergency, with CEO or designee approval (Children’s leadership staff), BABH may provide care without the consent of either parent.
 1. The reasons for these actions and CEO or designee approval will be documented in the child’s record

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(d) If one or more parents are involved in a domestic violence, abuse or neglect situation and staff are concerned or unclear about obtaining consent, staff will consult with their supervisor and the BABH Privacy Officer.

7) Staff should contact BABHA’s Privacy Officer, or designee, or the BABHA Customer Service Office, with any questions related to personal representatives and their standing.

Attachments

Personal Representatives-Power of Attorney for Minor Child

Related Forms

N/A

Related Materials

- MDHHS Frequently Asked Questions About Patient Advocate Designation
- MDHHS Patient Advocate Designation form (DCH-3916)
- Power of Attorney for Minor Child

References/Legal Authority

- 45 CFR §164.502(g) (HIPAA; Personal representatives)
- MCL 330.1260 – 1287 (Mental Health Code; Consent by minor -Substance Use Disorder Services)
- MCL 330.1707 (Mental Health Code; Rights of Minor)
- MCL 333.9132 (Public Health Code; Minor consent to provision of health care for their own child)
- MCL 600.2157 (Deceased’s heirs at law are personal representatives)
- MCL 700.5101-5520 (Estates and Protected Individuals Code; Article V; Protection of an Individual Under Disability and His or Her Property)
- MCL 722.1-6 (Status of Minors and Child Support)
- MCL 722.26a and 722.30 (Child Custody Act; Joint Custody; Noncustodial parent right to record)
- MCL 722.622 (Child Protection Law; Definitions).
- MCL 722.904 (Judicial waiver of consent for abortion)
- Attorney General Opinion No. 7092 (October 16, 2001) (custodial parent may object to release of mental health records to noncustodial parent).
- Attorney General Opinion No. 7149 (February 20, 2004).
- Legal opinion 2016-08-26 Dykema-Gossett ‘Joint Legal Custody’

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SUBMISSION FORM				
AUTHOR/ REVIEWER	APPROVING BODY/ COMMITTEE/ SUPERVISOR	APPROVAL/ REVIEW DATE	ACTION (Deletion, New, No Changes, Replacement or Revision)	REASON FOR ACTION If replacement, list policy to be replaced
M. Bartlett	J. Pinter	08/20/09	No changes	Reviewed
M. Wolber; D. Cranston	J. Pinter	11/25/13	Revised	Revised to comply with HIPAA requirements and update to current practices.
J. Pinter	Strategic Leadership Team	10/9/18	Revised	Revised for: MI Estates-Protected Individuals Code (Act 386 of 1998), as revised in March 2017; 42 CFR Part 2 Confidentiality of SUD records, as revised in 2018.
J. Pinter	Agency Leadership meeting; Strategic Leadership Team	Various meetings in 2021-10/14/2021	Revised	Revised to incorporate relevant content from PA 594 of 2018 and PA 595 of 2018, limiting guardian ability to consent to inpatient treatment against the patient's wishes