

Vaccinating Children in State Care: What Happens to the Rights of Biological Parents to Consent?

Elisa Reiter and Daniel Pollack | October 8, 2021



An uproar was recently triggered in New York regarding whether the state may vaccinate teenagers in state custody without their parents' or guardians' consent. Historically, minors were not legally permitted to make medical decisions simply because of their age and presumed immaturity. Consent resided with the parent or guardian. Considerable constitutional case law has endorsed this position. Yet, this presumption has gradually been revisited and revised. In today's COVID-19

environment, under what circumstances can the state preempt the parent or guardian's medical decision-making authority regarding children regarding getting vaccinated? Does a state's interest in the general welfare of its citizens allow it to supplant the authority of the child's parent or guardian or even the wishes of the children themselves?

Even if the law allows older teenagers some ability to consent in certain situations, conclusive evidence must clearly demonstrate that they have the ability to discern and appreciate the short- and long-term risks of receiving or foregoing specific medical treatments, that they understand the alternatives, and that they are not feeling or being coerced.

In September 2021, in the Bronx, a new policy generated by the Administration for Children's Services (ACS) informed sister nonprofit agencies that such groups were authorized to have 16- and 17-year-old children in their care vaccinated against COVID-19, whether or not a parent could be located, and whether or not a parent objected to the vaccine being administered to the child in the agency's care. What is routine medical care to ACS, and how promptly must a child in the agency's care be presented for treatment?

When children in the custody of the Administration for Children's Services need medical treatment, ACS and provider agency staff must act expeditiously to obtain consent for such treatment from the appropriate individual(s). This policy sets forth conditions under which parents, provider agencies, ACS, or youth may provide consent for medical, dental, and hospital services; and identifies special situations or exceptions in which a provider agency may not provide consent.

New York does not stand alone. In May 2021, the North Carolina Department of Health and Human Services promulgated practice guidelines for youth in care and how to proceed with vaccinating those between 12 and 18. The guidelines alluded to the need for informed consent, acknowledging that informed consent must be obtained prior to anyone being presented for a COVID-19 vaccine. Leeway was given to allow for consent orally or in written form. The rationale was that NC General Statute 90-21.5 gives minors who have the ability to make decisions the right to consent to prevention, diagnosis and treatment of reportable communicable disease. COVID-19 was characterized as a reportable disease under NC General Statute 130A-135 pursuant to rules of the Public Health Commission (10A NCAC 41A .0101 and .0107). Logic then provided that NC General Statute 90-21.5 allows a minor—who has decisional capacity—to grant permission for a COVID-19 vaccine. In North Carolina, “decisional capacity is a person’s ability to understand their health and health care needs and options, and to make decisions about them. As part of normal development most youth are able to make these kinds of decisions like an adult at some point before the age of 18. There is no one age at which this always occurs; it varies from adolescent to adolescent.”

In Texas:

As of May 12, 2021, every Texan aged 12 and older is eligible to receive a COVID-19 vaccine, including youth in conservatorship. Only the Pfizer vaccine is authorized for people ages 12 to 17.

Perhaps in keeping with the governor lifting the mask mandate, Texas does not mandate that youth in care be presented for

treatment. Instead, the process is voluntary. Verbal communication with a child in care's parent is deemed adequate. TDFPS recommends that social workers attempt three calls to parents of children in the department's care to obtain the parents' consent to the child being inoculated. Pursuant to Texas Family Code Section 266.004, medical care cannot be provided to a child in foster care unless an authorized individual provides consents. Who has the ability to consent? A person designated in a court order, the child's foster parent, and/or the child's parent provided that the child's parental rights have not been terminated. An agent of TDFPS can also consent to treatment in appropriate circumstances. Physicians may rely on individuals who appear to present in good faith seeking treatment.

Does a teenager have sufficient capacity to consent to the vaccine? Would herd immunity be expedited if there were state mandates that children between 12 and 17 be inoculated? Is this an instance where we can learn from children?

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