Ethical Dilemmas: Obtaining Consent from Children

Welcome to BCSCA’s new column, Ethical Dilemmas. Each issue, we will choose an ethical dilemma that has arisen through the list serv, emails sent to the executive, or in our own practice and research some different perspectives about how to handle these situations.

This month’s dilemma reflects a question which comes up with frequency. Who is required to give consent to counselling services in children and youth? Traditionally, most districts require parental knowledge or consent for elementary aged students. Once they are in high school, the “Infant’s Act” applies, giving children who are 12 years of age and older, the right to access mental health and medical services on their own behalf without parental knowledge or consent. To my knowledge, this has never been challenged in court, but I know there are cases where access to counselling services without parental knowledge has been an issue.

According to George K. Bryce, who is the BC Association of Clinical Counsellor’s Legal Counsel, has the following points to make on the matter (Taken from BCSCA list serv post, Sept. 23, 2008 from Vol 12:2 of Insights, Summer 2000):

The Infants Act uses the term “infant” throughout. In BC, this means someone who is under the age of nineteen. However, I prefer to use the term “child” as an infant is commonly understood by most of us to be a very young child, usually a child under the age of two. The common law also has a description of a certain type of child called the “mature minor”. A child who is under the age of majority (e.g.: nineteen) can be described as a mature minor, if they have sufficient intelligence to understand the nature and consequences and reasonably foreseeable benefits and risks of a health care service or treatment. While some courts have found children as young as eight as being mature minors, this finding depends on the individual characteristics of the particular child and the nature of the health care decision they are facing. However and at the risk of over-generalizing, a mature minor is commonly understood to be a child who is 13 years of age or older and of average intelligence. But the essential feature of “mature” is the child’s capacity to understand and make the particular health care decision before them. So it is a flexible concept.

A child is permitted by common law to give legally binding consent to a clinical counsellor without the need for the counsellor to seek the consent of that child’s parent(s) or guardian(s). But before obtaining or relying on that consent, the counsellor must determine three things:
1. That the child understands and appreciates the nature of the treatment or counselling service being proposed, and any unreasonably foreseeable risks thereof. This necessarily involves the counsellor ascertaining that the child has sufficient intelligence to have such an understanding.
2. That the child has the capacity or the ability to give or express his or her consent.
3. That the proposed counselling service is in the child’s best interest.

The first precondition is not fixed. It will vary depending on the nature of the treatment or service being proposed or any associated risks. For example, if the nature of the therapy were minor or straightforward with little risk to the child, then less understanding would be required than if treatment was more complex or posed a greater risk to the child’s health.

A counsellor should carefully record in the clinical notes what process was followed to ascertain that the child understood and appreciated the services proposed and the risks, including any conclusion the counsellor reached about the child’s intelligence and capacity to understand.

The second precondition may not arise often in a counselling practice. But if a child cannot communicate consent for some reason (even if the child appears to have sufficient intelligence to understand), the counsellor should obtain consent from some other source, such as the child’s parent or court appointed guardian.

To satisfy the third precondition, a counsellor should then make inquiries to ensure that the proposed counselling service is in the child’s best interest. If the counsellor is concerned that the proposed treatment or service may not be in the child’s best interests (in a broader context than the emotional or psychological problem being addressed), the counsellor should discuss this concern with the child. The counsellor should try to ensure that the child is comfortable with any negative reaction that may be expressed by that child’s parent(s) or guardian(s). Again, the counsellor should document that type of discussion in the clinical notes. If a counsellor is satisfied that all three of these conditions have been met; the counsellor is free to provide counselling service to the child in question.

Editor’s note: Keep in mind that the above legal opinion applies to counsellors in private practice. As school counsellors, we are governed by BCTF Code of ethics, and our BCSCA code of ethics. Best practice is to work with the child and family together, involving all stakeholders in the counselling process. If that is not possible, for example, in cases of suicidal ideation, abuse or neglect, most districts have protocols to follow regarding the steps to be taken regarding informing administration and parents.

Keeping good notes is a must; understanding that your notes belong to the school district and not to you is key. As stated above, if a school counsellor can work with the child to find a possibility of dialogue with the family, this is best for all concerned in most cases. However, when that is impossible, keep good notes, make sure your client is informed about the limits of confidentiality which we all practice, and consider referral to an outside agency where possible for ongoing work. Become familiar with the protocols in your district regarding suicide, abuse and neglect. Most protocols indicate where and how parents, teachers and administrators should or should not be involved in these situations. If your district does not have clear
protocols developed to respond to this, consider working with your district
counselling person to develop some guidelines so practice is consistent. If everyone
is following the same practice, it is much easier to deal with difficult situations.

Most of all, remind yourself that you are acting in the child’s best interest. If you are
really concerned, consult with colleagues through the list serv, or contact the BCTF
legal department. They are there for you to consult with in situations where you need
legal advice about school related professional matters.