



# MENTAL HEALTH BULLETIN

COMMONWEALTH OF PENNSYLVANIA •

DEPARTMENT OF PUBLIC WELFARE

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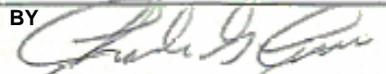
NUMBER

SMH-96-02

SUBJECT

Implementation of Act 28 of 1995  
In OMH operated Long Term Care Units  
and South Mountain Restoration Center

BY

  
Deputy Secretary for Mental Health

## SCOPE:

Restoration Center, State Mental Hospital Long Term Care Units,

## PURPOSE:

To provide guidance to the Restoration Center and the long-term care units of state mental hospitals in the implementation of Act 28, relating to neglect of care dependent persons.

## BACKGROUND:

Act 28 of 1995, attached, amends Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes to make neglect of a care dependent person by a caretaker a criminal offense (18 Pa CS Section. 2713). As defined by this Act, neglect occurs if a caretaker:

"intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care dependent person for whom he is responsible to provide care."

or

"intentionally, or knowingly uses a physical restraint or chemical restraint or medication on a care dependent person or isolates a care dependent person contrary to law or regulation such that bodily injury or serious bodily injury results."

A care dependent person is defined as:

"Any adult who, due to physical or cognitive disability or impairment, requires assistance to meet his needs for food, shelter, clothing, personal care or health care."

**COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:**

Bonnie Hardenstine, Bureau of Adult Services, Office of Mental Health, DPW,  
Room 502 Health 6 Welfare Building, Harrisburg, PA 17120 (717) 783-8067

A caretaker is defined as:

"an owner, operator, manager or employee of a nursing home, personal care home, domiciliary care home, community residential facility, adult daily living center, home health agency or home health service provider whether licensed or unlicensed."

Caretaking, as defined by the Act may occur in the above referenced facilities or the care dependent person's home. DPW's legal staff has determined that the only office of Mental Health operated-facilities covered by Act 28 are South Mountain Restoration Center and the long term care nursing units operated on state mental hospital grounds. The Act is NOT applicable to the state mental hospital general psychiatric population.

According to DPW legal counsel, the Act creates the "rebuttable presumption" that all persons receiving services and treatment in covered facilities and programs are incompetent to refuse necessary services, when such refusal may result in physical harm. Under 18 Pa C.S. Section 2713 of the Crimes Code, a caretaker may defend himself against criminal charges filed pursuant to this Act only when the caretaker, individual or facility can prove by a preponderance of the evidence that the alleged violations resulted directly from the caretaker, facility's or individual's :

1. " lawful compliance with a care-dependent persons advance directive for health care as provided in 20 Pa C.S. Chapter 54 ...
2. lawful compliance with the care-dependent person's written, signed and witnessed instructions, composed when the care-dependent person is competent as to the treatment he wishes to receive;. . .
3. lawful compliance with the direction of the care dependent person's attorney-in-fact acting pursuant to a lawful durable power of attorney; or
4. lawful compliance with a "Do-Not-Resuscitate" order written and signed by the care-dependent person's attending physician. "

Staff in facilities and programs covered by the Act who honor a patient's refusal of necessary treatment may be criminally prosecuted if failure to administer the treatment or service results in the patient's injury. If such injury occurs, the caretaker bears the burden of proof, by a preponderance of the evidence, that one of the circumstances enumerated above is applicable.

It has historically been the position of the Office of Mental Health that persons under the Commonwealth's care are presumed competent to make decisions regarding their medical care unless it has been determined that they are not competent. Thus, the presumption of patient incompetence created by Act 28 presents a dilemma for treatment staff.

### 3.

The following procedures have been developed to protect staff from criminal charges resulting from the performance of their duties, while protecting the right of competent patients to make decisions regarding the medical services and treatments they do not wish to receive.

The Act also imposes an obligation on the Departments of Public Welfare, Health and Aging to report to the Office of the Attorney General or the local District Attorneys when, in the course of regulatory or investigatory activities, staff of these Departments have reasonable cause to believe that a care dependent person has suffered serious bodily injury as a result of neglect, as defined by Act 28 and quoted above, or has been unlawfully restrained. [Direction and training regarding the reporting requirements mandated by Act 28 are forthcoming from the Office of the Attorney General, and are not addressed in this Bulletin.]

#### **POLICY:**

It is the Office of Mental Health's obligation to adhere to this Act in its covered facilities. However, the rights of patients to participate in decisions about their care shall continue to be honored to the extent possible by employing the practices described in this Bulletin.

Each long term care unit and South Mountain Restoration Center shall immediately develop or revise internal policies and procedures to permit implementation of the procedures outlined in this bulletin. The hospital/center superintendent/ director and the hospital/center clinical director shall approve these policies and procedures in writing.

#### **PROCEDURES:**

##### **A. CIRCUMSTANCES UNDER WHICH TREATMENT REFUSAL CAN BE DEFENSIBLY HONORED**

###### **1. TREATMENT REFUSAL BY PATIENTS WHO ARE TERMINALLY ILL**

A terminal condition is defined by 20 PA C.S., Chapter 54 Section 5402, as "an incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness which will, in the in the opinion of the attending physician, to a reasonable degree of medical certainty, result in death regardless of the continued application of life sustaining treatment."

4.

Treatment refusal by any terminally ill patient is permissible when the refusal is consistent with:

- a. a lawfully executed advance directive for health care as provided for in 20 Pa C.S. Ch. 54; or
- b. written, signed and witnessed instructions composed by the patient when the patient is competent; or
- c. the direction of a care dependent person's attorney-in-fact, acting pursuant to a lawful, durable power of attorney; or
- d. a "Do-Not-Resuscitate" order written and signed by the patient's attending physician.

## **2. TREATMENT REFUSAL BY PATIENTS WHO ARE NOT TERMINALLY ILL**

Treatment refusal by a patient who is not terminally ill is permissible when the refusal is consistent with:

- a. written, signed and witnessed instructions composed by the care-dependent person when the patient is competent, or
- b. the direction of the care-dependent person's attorney-in-fact pursuant to a lawful durable power of attorney.

## **B. PROCEDURES TO FOLLOW WHEN A PATIENT REFUSES NECESSARY TREATMENT IN THE ABSENCE OF A RELEVANT ADVANCE DIRECTIVE, DIRECTIONS FROM THE PATIENT'S ATTORNEY-OF-FACT, OR A DO-NOT RESUSCITATE ORDER**

In the absence of a relevant advanced directive, a lawful Do-Not-Resuscitate order, or directions from the attorney-of-fact, the following actions shall be taken when any patient refuses a necessary treatment or service:

### **1. DETERMINATION OF COMPETENCY TO REFUSE NECESSARY TREATMENT**

- a. Staff responsible for administering the treatment or service shall request a physician's written determination of the patient's competency to refuse the necessary treatment or service. (Please be aware that the greater the potential for physical harm, the more imminent that potential harm, and the greater the severity of the potential harm, the greater the patient's competence must be when determining whether or not to honor the patient's refusal of services or treatment.)

5.

b. The physician shall document the finding of competence or incompetence to refuse this specific treatment and the reasons for this finding in the patient record.

## **2. TREATMENT REFUSAL BY A PATIENT BELIEVED TO BE COMPETENT**

When the physician determines that the patient is competent to refuse the necessary treatment, the following actions shall be taken:

- a. Staff responsible for administration of the treatment or service must secure a witnessed, written refusal of treatment signed by the patient. Verbal refusal is not defensible under the Act.
- b. The above events shall be documented in the medical record by the responsible parties.
- c. The physician ordering the treatment or service shall be notified that the patient has lawfully refused the treatment or service.

## **3. TREATMENT REFUSAL BY PATIENTS BELIEVED TO BE INCOMPETENT TO REFUSE THE TREATMENT OR SERVICE:**

When the physician finds that the patient is not competent to refuse the necessary service, staff responsible for providing or administering the service shall notify the physician who ordered the service or treatment that the patient has refused treatment, and request that the prescribing physician indicate the next steps to be taken. Such steps could include, but are not limited to :

- a. delaying onset of the treatment/service for a specified time while counseling is provided to obtain patient consent;
- b. offering the service or treatment in another form;
- c. providing the service or treatment over patient objections using a specific technique or method, including the use of restraint as is reasonably necessary to provide the necessary treatment or service.

6.

d. cancellation or modification of the order or prescription with written indication that the service or treatment is not "necessary" to the maintenance of the patient's health, safety or welfare. (Obviously, the decision made by the patient's physician will depend on the severity of the risk and the imminence of physical harm the patient will incur by delaying implementation, cancelling or modifying the order.)

Any verbal direction received from the physician should be documented in the medical record by the person(s) receiving such direction.

#### **4. REQUESTS MADE BY A PATIENT'S NEXT OF KIN**

If an incompetent patient who is not terminally ill refuses a service or treatment, and the patient's next of kin asks caretaking staff to honor the patient's refusal in the absence of an advance directive, a Do-Not-Resuscitate order, directions from the patient's attorney-of-fact, or written, signed, and witnessed instructions composed by the patient when he was competent, the family's request may not be honored unless the physician cancels or modifies the order owing to a redetermination of medical necessity.

However, if the attending physician has determined that the patient is terminally ill, family refusal of life sustaining treatment is permissible.

#### **C. INTERPRETATION OF ACT 28**

Administration and interpretation of Act 28 does not fall under the jurisdiction of the Department of Public Welfare, but under the jurisdiction of the Office of the Attorney General and the county District Attorneys.

However, specific situations may arise in which assistance in implementation of the Act with specific patients in specific circumstances will be needed. When such guidance is necessary, the long term care unit or restoration center is advised to promptly consult DPW legal counsel.