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HEALTH & HUMAN RESOURCES
DIVISION OF CHILDREN AND FAMILIES

MEMORANDUM

TO: Deborah Dodrill

FROM: John C. Krivonyak, Assistant Attorney General

DATE: July 6, 2004

RE: DHHR's Obligation to Serve As Health Care Surrogate

At an earlier time, Wil and I were asked to provide a legal opinion as to whether DHHR was obligated to serve as a health care surrogate (HCS) when selected under West Virginia Code § 16-30-8, when the individual was in a mental health care facility under an involuntary commitment order.

Our preliminary response was no, the involuntary commitment order was sufficient.

However, in view of the information provided by Steve Small, Assistant Attorney General for Bureau of Health and Health Facilities, together with a reading of Chapter 27-5-1 et seq., Chapter 16-30-1 et seq., and CSR. 64-59 and 64-74, we are now of the opinion that in the event that DHHR is selected as a HCS, the Department cannot refuse to act.

There is a difference between mental illness, mental retardation and addiction covered in § 27-5-1 et seq. and incapacitation set forth in § 16-30-1 et seq. In order to understand this distinction, one must review the Code provisions together with the Legislative Rules. According to § 16-30-7 "... A person may not be presumed to be incapacitated merely by reason of advanced age or disability. With respect to a person who has a diagnosis of mental illness or mental retardation, such a diagnosis is not a presumption that the person is incapacitated. A determination that a person is incapacitated shall be made by the attending physician, a qualified physician, a qualified psychologist or an advanced practical nurse in collaboration with a physician provided that the advanced practical nurse has personally examined the person." Incapacity

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means the inability because of physical or mental impairment to appreciate the nature and implications of a health care decision, to make an informed choice regarding the alternative presented, and to communicate that choice in an unambiguous manner (§ 16-30-3).

Once a physician determines that a person is incapacitated, he or she is authorized to select a HCS, if there is no legal representative or court appointed guardian who is capable and willing to serve. This section of the Code provides a list of those who should serve as HCS, the last being "any other person or entity, including, but not limited, to public agencies . . . which the Department of Health and Human Resources may from time to time designate in rules promulgated pursuant to Chapter 29A of this Code (Legislative Rule Making) (§ 16-30-8).

In 2003, 64 CSR 86 authorized DHHR to act as a HCS for persons in state hospitals. Prior to this enactment, DHHR had acted as a HCS in several instances.

Although the provisions of Chapter 27, Article 5, provide for involuntary commitment to a mental health facility for examination and treatment, this does not allow the facility absolute control as to the type of treatment to be administered to the patient. 64 CSR 59 sets forth the rights of patients in state psychiatric facilities (including involuntary committed patients) and 64 CSR 74 sets forth the rights of behavioral health consumers in other mental health facilities. These rights include the right to refuse treatment, especially medications. CSR 64-59-8, 64-74-8.

During periods of holding and detention, upon consent of the individual or in the event of a medical or psychiatric emergency, the individual may receive treatment. Psychiatric emergency in this section (§ 27-5-2) means an incident during which an individual loses control and behaves in a manner that poses substantial likelihood of physical harm to himself, herself or others.

There are differences between the two policies. Private mental health facilities cannot treat a patient unless it receives an informed written consent (§ 64-74-6). State hospitals may provide treatment absent informed consent under certain circumstances (§ 64-59-7.9.1) In addition if a patient affirmatively refuses treatment, the private mental health facility must comply with that refusal (absent psychiatric or medical emergencies) previously described above. A state hospital has a last resort procedure which allows treatment notwithstanding patient refusal under certain circumstances (§ 64-59-8-5).

Hope this opinion clears up the confusion. If more information is needed, please contact the undersigned.

JCK/sej