F I S C A L I M P A C T R E P O R T

SPONSOR Papen **ORIGINAL DATE** 1-24-06 **LAST UPDATED** 2-21-06 **HB**

SHORT TITLE Mental Health Care Treatment Decisions Act **SB** 234/aSPAC/aHJC

ANALYST Collard

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	**FY07**		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 174
Duplicates HB 459

SOURCES OF INFORMATION
LFC Files

Responses Received From
Department of Health (DOH)
Human Services Department (HSD)
New Mexico Corrections Department (NMCD)
Developmental Disabilities Planning Council (DDPC)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to Senate Bill 234 adds the words "reasonably and" on page 31, line 14. The amendment changes the immunities section of the bill to state a health care provider or mental health treatment facility must act reasonably and in good faith to not be held liable for either complying or attempting to comply with a mental health treatment decision or declining to comply with a mental health treatment decision.

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to Senate Bill 234 strikes "and unsuccessfully" on page 17, line 3 and insets in lieu thereof ", unless I successfully".

DOH indicates the amendment corrects a drafting error and makes this bill consistent with House

Bill 459.

Synopsis of Original Bill

Senate Bill 234 creates the "Mental Health Care Treatment Decisions Act" to ensure appropriate care and treatment of persons with behavioral health needs in the community and empower consumers to direct decisions about their treatment. Advance directives are legal documents that tell others what an individual's treatment preferences or services needs are. Advance directives help a consumer define and recognize 'red flag' behaviors that signal impending psychiatric deterioration and enable the consumer to gain increased knowledge and control of his or her mental health condition as well as assisting others to recognize advance warnings.

This bill enacts the Mental Health Care Treatment Decisions Act to provide for two basic types of advance directives: *instruction directives* that describe treatments and services an individual does and does not want should he or she be unable to make such decisions; and *agent-driven directives* that designate someone else as agent to advocate for their stated interests. The bill contains a sample format for such advance directives.

NMCD adds this bill requires that if a patient makes or revokes advance treatment decisions, the mental health care provider must notify the treatment guardian. Additionally, if a treatment guardian makes a decision for treatment, the mental health care provider must notify the patient of the decision prior to treatment.

This bill also authorizes a patient who has capacity alter or revoke advance treatment directives.

FISCAL IMPLICATIONS

Although there is no appropriation associated with this bill, DOH will have to work with the statewide entity, Value Options, to administer the advance directives. It is anticipated the administrative fiscal implication will be minimal.

SIGNIFICANT ISSUES

Senate Bill 234 is a DOH bill. DOH indicates the value and expertise of the person who is receiving mental health services in determining what works best for them and in making treatment decisions based on his or her past experiences and wishes are recognized in the recent Institute of Medicine report, *Improving the Quality of Health Care for Mental and substance-Use Conditions* (2006). This IOM report finds several evaluation studies that show such advance directives are feasible for use even with individuals with severe and chronic mental illnesses (Peto et al., 2004; Srebnik et al., 2004)

Every state in the United States has a statute allowing advance directives for general medical purposes. During the past few years, 20 states have passed legislation specific to mental health advance directives because they found that more general laws did not address the specific treatment and recovery needs of people receiving mental health treatment.

Pennsylvania is one of 20 states to have passed laws providing for mental health advance directives. The legislative sponsor of Pennsylvania's statute testified that: "All too often, medical professionals or judges are forced to make treatment decisions for individuals in times of psychi-

atric crisis without regard to, or knowledge of the individual's past experiences or treatment preferences. Proper planning for mental health care can also help prevent and reduce psychiatric hospitalization, ultimately cutting costs within the already overburdened public health care system."

The importance of this bill is summarized in the official policy statement of the National Mental Health association, which: "envisions a just, humane and health society in which all people are accorded respect, dignity and the opportunity to achieve their full potential free from stigma and prejudice. Consistent with this philosophy, NMHA supports and promotes the use of psychiatric advance directives as a tool for the expression of an individual's free will and self-determination. NMHA believes that psychiatric advance directives are an underutilized tool for empowering individuals and offer significant potential for preventing or mitigating crisis situations."

Mental health advance directives such as those provided by these bills offer a number of benefits, including:

- promotion of individual autonomy, responsibility and empowerment in the recovery from mental illness;
- enhancement of communication between individuals and their healthcare providers, other professionals, friends and families;
- shorten hospital stays;
- reduce the costs associated with involuntary and hospital care;
- protection of persons from ineffective, unwanted and possibly harmful treatment; and
- assistance in preventing crises and highly restrictive interventions such as involuntary treatment or restraint.

The use of mental health advance directives such as those specified in these bills has generated widespread support from consumers of mental health services. Such directives allow a consumer to provide a clear, written statement of his or her wishes in case of a mental health crisis or onset of serious symptoms so that their wishes will not be assumed to be irrational and overriden by healthcare providers.

One national consumer advocate and recovery expert, Mary Ellen Copeland, advises mental health consumers that: "Having an advance directive keeps you in control even when it feels like things are out of control. The people you have chosen will take over, and do the things you want them to do, things that will help you to recover quickly."

DDPC states this bill defines the principal as having "capacity" by meaning an individual's ability to understand and appreciate the nature and consequences of proposed mental health treatment, including significant benefits and risks and alternatives to the proposed mental health treatment, and to make and communicate an informed mental health treatment decision. While the presumption of capacity should prevail, this section goes way beyond that. Depending on what treatment is being recommended by the mental health care provider (paragraph C) there could be a strong indication of incapacity. Sometimes, the mentally ill can have memories enough to deny treatment but still need the recommended treatment due to their incapacity from mental illness.

Additionally, DDPC notes there is a rather strong concern that an agent's decisions shall be consistent with any wishes or instructions the principal has expressed in their mental health power of

attorney. Many times patients do not want particular doctors or mental health care providers because they have had enough history and experience with those personnel that they cannot "fool" them with their short-term behaviors; secondly, patients may ask for providers who are unobtainable at the time to provide mental health treatment for them at the time they may need it; thirdly, patients, while "competent" may not always know what is the best form of medication for them when they are "incompetent" (whether side-effects are pleasant or not); fourthly, it should be a medical providers and agent's decision as to what intervention should be tried before hospitalization is considered, since the principal who lacks capacity cannot know or understand what treatments are best for him/her at that time of incapacity. As for restraints, there should be a policy developed universally for all patients – no matter what their disability is; and lastly, electroconvulsive therapy should be the doctor's and agent's decisions, because if that is the indicated treatment (or only last available treatment), then if the principal wants to get better – it should be used.

Preferences about who can visit, while important as to the disposition of the incapacitated individual, denies other people their rights to check on (as a check and balance system) their family member, friend, guardian, etc.

If the person is allowed to refuse to any mental treatment, DDPC indicates they will lack capacity very shortly, end up in a jail and a treatment guardian will appointed for them.

PERFORMANCE IMPLICATIONS

DOH indicates this bill is consistent with the Department of Health's Strategic Plan, Program Area 5 – Behavioral Health Services, Objective 1: Improve access, quality, and value of mental health and substance abuse services.

Best practice in delivery of mental health services includes measures that promote, as does New Mexico, the recovery and resilience of people receiving mental health services and their involvement in decisions that affect their treatment. This bill provides an important tool used by many states to further that effort and the goals of the New Mexico Behavioral Health Collaborative.

NMCD notes, if an inmate has made advance treatment directives and then paroles or discharges from a correctional facility, the mental health staff at the facility need to communicate those advance treatment directives to a mental health provider who may be treating the released inmate.

ADMINISTRATIVE IMPLICATIONS

DOH notes New Mexico's single state entity for purchasing behavioral health services already informs consumers of the value of advance directives in their consumer handbook. Further activities can be undertaken as part of the ordinary course of work of DOH's Office of Consumer Affairs, by all Behavioral Health Collaborative agencies, by local behavioral health collaboratives and by the single state entity. Many states have adopted a number of promotional and educational activities to promote the use of mental health advance directives. For example, the National Mental Health Association has developed a toolkit of resources for both mental health providers and consumers to use in promoting successful implementation of psychiatric advance directives. In New York over 15,000 advance directives have been completed as part of an advance directive training project.

DDPC indicates education of the mentally ill and the medical community as to this implications and instructions would be overwhelming and likely not followed for many years – with the exception of the institutions. It is difficult enough to get doctors to treat New Mexican's mentally ill, who are not institutionalized, and this would add an extra burden that would likely decrease the number of doctors available.

CONFLICT

Possible conflict with House Bill 174 in that, if House Bill 174 (Kendra's Law) passes, some of the provisions in this proposed legislation would be in direct conflict with that law. Additionally, Senate Bill 234 duplicates House Bill 459.

OTHER SUBSTANTIVE ISSUES

DDPC indicates all the "rights" belong to the competent principal (as they should) but those rights should not necessarily carry-over when one becomes incompetent due to mental illness. Mental illness is difficult enough to treat without the competent person making all the decisions while they are competent, which might not apply when they loose their competency to their mental illness. It's easy to call the shots before hand, but things change when people loose their competency, especially when mental illness is involved.

ALTERNATIVES

DDPC suggests the Probate Code Power of Attorney with preferences and specific requirements spelled out under the SPECIAL INSTRUCTIONS lines where the principal may give special instructions limiting or extending the powers you grant to your agent. The other alternative is to add a mental health section to the power of attorney.

KBC/mt:nt:yr