



Considerations in Managing Psychiatric Boarding Patients Post *In re the Detention of DW*

In *In re the Detention of DW*, the Washington Supreme Court found the use of single bed certifications to warehouse involuntarily detained patients in emergency departments to avoid overcrowding certified evaluation and treatment facilities, while not providing meaningful evaluation and treatment services, to be a violation of a patients' civil rights. Even with the court's stay of the issuance of the mandate in the case until December 26, 2014, and a new emergency rule on single bed certifications issued by the Department of Social and Health Services, there are many ambiguities for hospitals.

Hospitals should plan now for the following situations:

- 1) Management of psychiatric patients in an instance where a Designated Mental Health Professional (DMHP) finds the patient meets detention criteria, but declines to detain the patient due to no availability of a treatment bed;
- 2) Development of a process for the hospital if/when a DMPH determines a patient could be detained pursuant to the new single bed certification rule, but the hospital does not believe it can provide evaluation and treatment services as required by the new rule and court decision.

In a recent call with members, WSHA's outside counsel, Barbara Shickich of Riddell Williams, PS offered a summary of factors hospitals should consider as they respond in these situations. We hope this summary is helpful to hospitals as they prepare, and strongly encourage each hospital to consult legal counsel as it develops its plan.

Summary of Considerations:

- **Consider the EMTALA overlay.** Even in the context of a ruling from the Washington State Supreme Court, a hospital cannot ignore its obligations under the federal Emergency Medical Treatment and Active Labor Act (EMTALA). Under EMTALA, a hospital is required to screen and stabilize or appropriately transfer a patient that comes to the emergency department seeking care. A hospital may be faced with a DMHP's decision not to detain a patient or even a situation where the DMHP wants to detain and the hospital cannot meet evaluation and treatment services criteria and therefore cannot be "willing" to provide services under the new rule. Despite these circumstances under state law, the hospital may have a continuing obligation to provide treatment to stabilize the patient's emergency medical condition under EMTALA. Reconciling these two legal obligations puts the hospital in a difficult situation.
- **Designate a team.** If it has not done so already, the hospital should designate of team of individuals - available on each shift - to respond in a circumstance where a DMHP

declines to detain but the patient presents an imminent risk of harm to him/herself or others, or is gravely disabled or if the DMHP determines a patient could be detained pursuant to the new single bed certification rule, but the hospital does not believe it can provide evaluation and treatment services as required by the new rule. Individuals on the team may include clinicians, a lawyer or risk manager, and the administrator-on-call. It may be necessary to revise current emergency department processes for dealing with psychiatric patients to incorporate this team.

- **Reach out to other key players.** Many agencies and individuals are involved in the single bed certification process. Reaching out to some of the key players in advance can help avoid surprises. WSHA recommends making contact with the local regional support network, DMHPs, and law enforcement. WSHA also recommends reaching out to the hospital's professional liability carrier to discuss contingencies that may arise.
- **Educate your administrative and clinical staff.** Identify and work to educate your administrative and clinical teams who will be interacting with the new single bed certification rule for mental health patients who are in crisis.
- **Weigh the facts and circumstances of each individual case.** While it would be ideal to set up a protocol for managing patients in these challenging situations, given the focus of the court's decision on individual patient needs and individual rights, it would be inadvisable to do so. Instead, the hospital should demonstrate that it has weighed the individual needs and safety of each patient and acted accordingly in its decision-making.
- **Consider capacity of the patient.** As the hospital is determining whether to hold a patient that would otherwise be released by a DMHP due to a lack of a certified evaluation and treatment bed it should consider the capacity of the patient to engage in decision-making. This is particularly true if the patient insists on leaving against medical advice – does the patient have the capacity to make such a decision?
- **Access the Court System.** In some instances the hospital's best available recourse may be to seek a court order to detain the patient. The hospital may benefit from planning in advance where it will receive legal assistance in seeking a court order, especially if it requires engagement of outside counsel.
- **Evaluate the use of restraints.** In all instances where patients are detained, the hospital should be sure to follow Medicare Conditions of Participation regarding use of seclusion and restraint, which requires use of the least restrictive intervention effective to protect the patient, staff member, or others from harm. See 42 CFR 482.13.
- **Document the hospital's steps.** As the hospital navigates the complexities of a given patient's situation, it should ensure its decisions are supported with appropriate documentation. The DMHP's determination whether the patient meets detention criteria,

the DMHP's decision to detain or not to detain, and the basis for the decision, should be noted in the chart. For the hospital's part, the patient's clinical condition, particularly conclusions about whether the patient presents an imminent risk of harm to him/herself or others or is gravely disabled, should be well described, along with the patient's decision-making capacity. The hospital's ultimate decision whether or not to detain the patient, and the basis for the decision, as well as any use of restraints, should also be documented. Finally, the documentation should demonstrate that whatever the decision, it was made in good faith and without gross negligence. A hospital's decision about admitting or discharging a psychiatric patient, when made in good faith and without gross negligence, is exempt from liability under both statute and case law. See RCW 71.05.120; *Poletti v Overlake*, 175 Wash. App. 828 (2013).

- **Consider expanding psychiatric services.** In the wake of the Supreme Court's decision, several hospitals have approached WSHA about adding additional psychiatric treatment beds. WSHA wishes to support these efforts and will be working in the state legislature to advocate for additional capital and resources.

BAS/TB September 23, 2014