

Mental Health Emergency Services Guidelines

Under the MHPA Section 301(a) (50 P.S. § 7301(a)), only a person who "is severely mentally disabled and in need of immediate treatment, ... may be made subject to involuntary emergency examination and treatment." An individual "is severely mentally disabled when, as a result of mental illness, his capacity to exercise self-control, judgment, and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a clear and present danger of harm to self or others."

For purposes of involuntary emergency treatment, the requisite underlying "mental illness" must be a disorder that is listed in the current Diagnostic and Statistical Manual (DSM). (55 Pa.Code § 5100.2.) Mental illness does **not** include intellectual disabilities, drug or alcohol dependence, or dementia in the absence of a co-occurring mental health disorder unless there is a "reasonable probability that upon examination such diagnosis will be established." (55 Pa.Code § 5100.3(c).)

Establishing Clear and Present Danger to Others

A clear and present danger to others can be established by showing that any **one** of three criteria are met:

1. *The individual inflicted serious bodily harm on another person and is likely to repeat the behavior.* "Within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and there is reasonable probability that the conduct will be repeated." (MHPA Section 301(b)(1).)
2. *The individual attempted to inflict serious bodily harm on another and is likely to repeat the behavior.* "Within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and there is reasonable probability that the conduct will be repeated." (MHPA Section 301(b)(1).)
3. *The individual threatened another person and took a step towards carrying out the threat.* "For the purpose of this section, a clear and present danger of harm to others may be demonstrated by proof that the person has made threats of harm and has committed acts in furtherance of the threat to commit harm." (MHPA Section 301(b)(1).)

Decisions by the Pennsylvania Superior Court interpreting this section of the MHPA provide examples of behaviors that have been deemed to meet the standard of "clear and present danger" to others through threats and acts in furtherance of those threats. The court found that an individual who threatened to shoot his wife committed acts in furtherance of the threat by "carrying and displaying guns in the presence" of the person who was target of the threat, accompanied by his aggressive behavior, and by purchasing a rifle scope. (*In re Woodside*, 699 A.2d 1293, 1297 (Pa. Super. 1997).) In another case, the court found that an elderly woman who made a threat against a boarding home staff member committed an act in furtherance of her threat by raising her cane and therefore satisfied these criteria for clear and present danger. (*In re R.D.*, 739 A.2d 548, 558 (Pa. Super. 1999).) In another case, a man threatened his girlfriend

with bodily harm after she refused to allow him to drive the car that they and their child were riding in and proceeded to kick the dashboard, push his seat into the child's carseat behind him, then remove the keys from the car's ignition and smash a window with a baton he carried on his person. (Commonwealth v. Jackson, 62 A.3d 433, 436-437 (Pa. Super. 2012).) The court found that these numerous acts of "physically violent conduct" constituted overt acts in furtherance of his threat and that the "mere act of removing the weapon from his person can be viewed as an overt act in furtherance of his verbal threat." (Id. at 440.) Significantly, the Jackson court noted that "the overt act requirement does not require proximity or the immediate ability to carry out the threat." (Id.)

Similarly, 55 Pa.Code § 5100.84(d) provides that "[t]he standards of clear and present danger may be met when a person has made a threat of harm to self or others; has made a threat to commit suicide; or has made a threat to commit an act of mutilation and has committed acts in furtherance of any such threats" and therefore threats to harm another, like other threats, must be accompanied by overt actions in furtherance of the threat to meet the standard for "clear and present danger." Verbal threats alone are insufficient to meet this standard. Threats to harm another accompanied by actions in furtherance of the threats meeting the "clear and present danger" standard under the regulation could include: a person shouting threats to harm an individual outside the individual's home and pounding violently on the front door with his fists; a person threatening to kill his or her spouse with a hunting knife and then purchasing a hunting knife; a person threatening to harm another person who is in the same room and then taking several steps in that individual's direction with his fists raised.

Establishing Clear and Present Danger to Self

A clear and present danger to self can be established by showing that any one of three criteria are met:

1. *The individual is unable to independently meet his own basic needs.* Within the past 30 days, "the person has acted in such a manner that he would be unable, without care, supervision and the continued assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety, and that there is reasonable probability that death, serious bodily injury or serious physical debilitation would ensue within 30 days unless adequate treatment were afforded." (MHPA § 301(b)(2)(i).)

Decisions by the Pennsylvania Superior Court interpreting this section of the MHPA provide examples of behaviors that have been deemed to meet this standard for "clear and present danger." The court found that an individual who refused to eat and take her psychotropic medication for several days met the § 301(b)(2)(i) criteria. (In re R.D., 739 A.2d 548, 559 (Pa. Super. 1999).) Another individual was found to meet this requirement after she darted in and out of traffic on busy Philadelphia streets, lived in an abandoned house without utilities and lost several toes to frostbite and resisted attempts to help her. (In re S.O., 492 A.2d 717, 736 (Pa. Super. 1985).) Further, the court has interpreted the provision that "serious physical debilitation would ensue within

30 days" to mean that it is not necessary that a physical disability become permanent within 30 days. Instead, it is enough that an individual's "serious physical debilitation became more serious with each passing day and at some determinable point in the future was likely to progress to permanent disability" if the individual continued to refuse medical treatment. (*In re T.T.*, 875 A.2d 1123 (Pa. Super. 2005).) However, the Pennsylvania Supreme Court found that some failures to comply with medical treatment may not meet these criteria, finding an involuntary commitment improper where a person's "occasional failure to take [psychotropic] medication did not threaten his life or well-being. There was no evidence to show that his behavior changed as a result of missed doses of the drug." (*Commonwealth ex rel. Gibson v. Di Giacinto*, 439 A.2d 105, 107 (Pa. 1981).).

Regulations at 55 Pa.Code § 5100.84(f) elaborate upon this analysis, providing that "clinical or other testimony may be considered which demonstrates that the person's judgment and insight is so severely impaired that he or she is engaging in uncontrollable behavior which is so grossly irrational or grossly inappropriate to the situation that such behavior prevents him from satisfying his need for reasonable nourishment, personal care, medical care, shelter or self-protection and safety, and that serious physical debilitation, serious bodily injury or death may occur within 30 days unless adequate treatment is provided on an involuntary basis." Within the context of § 5100.84(f), "uncontrollable behavior" refers to behavior that is persistent, despite an effort to reason with the individual, and cannot be managed immediately outside of an inpatient setting. Further, the "uncontrollable behavior" need not be overt actions, but may instead be failures to act, such as steadfast refusal to take necessary medication or eat. In addition, "grossly irrational" and "grossly inappropriate" behavior is more than simply irrational or inappropriate for the situation; it is behavior that is so far outside the norm that it reasonably leads the delegate to conclude that the individual is likely to suffer serious injury or debilitation if adequate treatment is not provided within the next 30 days.

2. *The individual is likely to complete suicide.* "The individual attempted suicide within the past 30 days and there is reasonable probability of suicide unless adequate treatment is afforded." Alternatively, "clear and present danger may be demonstrated by the proof that the person has made threats to commit suicide and has committed acts in furtherance of the threat to commit suicide." (MHPA Section 301(b)(2)(ii)).

Decisions by Pennsylvania courts interpreting this section of the MHPA are informative as to behaviors that have been deemed to meet this standard for "clear and present danger." The court found that that an individual who used the Internet to research suicide methods and phoned a suicide hotline to gather further information on the subject committed "acts in furtherance of" his threat to complete suicide sufficient to meet the "clear and present danger" requirement. (*In re R.E.*, 914 A.2d 907, 915 (Pa. Super. 2006).) The court also found that an individual who sent 12 instant messages to his sister stating that he wished to end his own life committed acts in furtherance of the threat by researching painless methods of suicide online. (*Commonwealth v. Smerconish*, 112 A.3d 1260, 1264 (Pa. Super. 2015).) Notably, the court found that a woman with no prior history of suicide attempts who texted her mother and had a conversation with her mother about wanting to kill herself did not meet this criteria

because she had taken no actions in furtherance of her threat. (Commonwealth v. Fleet, 114 A.3d 840, 847 (Pa. Super. 2015).)

For purposes of these criteria, regulations at 55 Pa.Code § 5100.84(g) provide that “an attempt...occurs: (1) when a person clearly articulates or demonstrates an intention to commit suicide...and has committed an overt action in furtherance of the intended action; or (2) when the person has actually performed such acts.” Within the context of § 5100.84(g), an “overt action” is an act beyond the words of a threat to commit suicide. For example, a person who merely posts his or her intention to complete suicide on his or her social networking profile has not met the standard because the threat and the act (posting the threat to social media) are one and the same. However, if that person subsequently posts a suicide/goodbye note, or purchases materials to be used in completing suicide, an overt action in furtherance of the threat has occurred sufficient to meet the requirements of § 5100.84(g).

3. *The individual is likely to self-mutilate.* The person has substantially mutilated himself or attempted to mutilate himself within the past 30 days and there is reasonable probability of mutilation unless adequate treatment is afforded. Clear and present danger can be established by proof that the person has made threats to commit mutilation and has committed acts in furtherance of the threat to commit mutilation. (MHPA § 301(b)(2)(iii)).

The Pennsylvania Superior Court stated that an act of “substantial mutilation” requires “the real and permanent destruction of a part of the patient’s body.” (Zator v. Coachi, 939 A.2d 349, 354 (Pa. Super. 2007).) Further, the court found that when a person threatens to commit self-mutilation and commits acts in furtherance of the threat, the MHPA requires that the mutilation that is threatened also be “substantial”. (*Id.* at 353.) The court noted that a man who punched himself in the face and head and repeatedly and forcefully struck his head on a porch post and expressed suicidal ideation “intended the real and permanent destruction of a part of his body, i.e., his head, and that he had taken steps to achieve it by repeatedly striking his head on the porch post.” (*Id.* at 354.)

For purposes of these criteria, regulations at 55 Pa.Code § 5100.84(g) provide that “an attempt...occurs: (1) when a person clearly articulates or demonstrates an intention to...mutilate himself and has committed an overt action in furtherance of the intended action; or (2) when the person has actually performed such acts.” Within the context of § 5100.84(g), “mutilation” refers to actions that severely injure or permanently disfigure a portion of the body. Severe injuries and permanent disfigurement need not be life-threatening to constitute mutilation, but must be of a serious nature. Further, multiple acts of mutilation may in combination be serious where any single act may not be. For instance, a person who has a history of intentionally cutting herself on her upper legs, actions which over time have left her with many visible scars, threatens to start cutting herself again and buys a razor for this purpose meets the clear and present danger criteria under 5100.84(g) because her particular cutting behavior has a serious cumulative effect of permanent disfiguration.

Mandatory Factors in Determining the Necessity of Emergency Examination/Treatment

55 Pa.Code § 5100.84(c) provides that "[t]he determination of whether the standards of clear and present danger are met should always include a consideration of the person's probable behavior if adequate treatment is not provided on either an emergency or subsequent basis." Section 5100.85(1) requires that the application of the standards for emergency commitment in the MHPA be based "at least upon" several factors:

1. "There is a definite need for mental health intervention without delay to assist a ~~4~~ person on an emergency basis; and
2. The clear and present danger is so imminent that mental health intervention without delay is required to prevent injury or harm from occurring;" and
3. There is a "reasonable probability" that if "mental health intervention is unduly delayed" either
 - a. "the severity of the clear and present danger will increase" or
 - b. "the person, with his presently available supports cannot continue to adequately meet his own needs."

In the context of this section, meeting "his own needs" refers to a person's basic needs for "nourishment, personal or medical care, shelter or self-protection, and safety" in accordance with MHPA Section 301(b)(2)(i). When the situation is so dire that both of the first two factors are satisfied, a delegate need only find one of the options in the third factor in order to issue a warrant. Therefore, when there is a definite need for intervention on an emergency basis, and the danger is so imminent that intervention must be provided without delay to prevent injury or harm, it is not necessary that danger to the person will likely increase if the person cannot adequately meet his own needs. Conversely, when the person is able to adequately meet his or her own needs, the delegate must be able to determine that it is reasonably probable that the danger to the person will increase if intervention is delayed.

Due Process Protections

The due process clause of the 5th Amendment to the U.S. Constitution protects individuals from actions by the government that deprive them of their liberty interests without a fair procedure. The 14th Amendment applies this due process protection to individuals against action by state governments. The Pennsylvania Constitution, under Article I, Section 8, also guarantees due process protection against unreasonable state government action. The U.S. Supreme Court has consistently held that:

"civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual." (Addington v. Texas, 441 U.S. 418, 425-26 (1979)).

Due process requires that an individual be **both** currently dangerous and currently suffering from a mental health disability to be subject to involuntary commitment. (Foucha v.

Louisiana, 504 U.S. 71, 78 (1992); See also In re R.G., 11 A.3d 513, 513 (Pa. Super. 2010).) The U.S. Supreme Court stated succinctly that: "a State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends". (O'Connor v. Donaldson, 442 U.S. 563, 575 (1975).) Similarly, Pennsylvania courts have consistently held that "it is not enough to find that [a person] was truly in need of the services offered by [the] mental health system. Unless one or more of the requirements of section 301 is met, involuntary commitment is not lawful." (Commonwealth v. Blaker, 446 A.2d 976, 980 (Pa. Super. 1981).)

However, due process is a flexible standard demanding varying safeguards which "are determined in particular instances by identifying and accommodating the interests of the individual and society." (O'Connor v. Donaldson, 442 U.S. 563, 585-86, (1975).) The Pennsylvania Supreme Court held that "it is clear that the scheme adopted by the legislature envisions that more extensive procedural or 'due process' protections will apply as the amount of time a person may be deprived of liberty increases above a bare minimum. For treatment not exceeding seventy-two hours, **minimal procedural safeguards are available.**" (In the Matter of Sylvia Seeqrist, 539 A.2d 799, 802 (Pa. 1988); See also In re J.M., 726 A.2d 1041, 1047 (Pa. 1997).)

For purposes of issuing a Section 302 warrant for emergency examination and treatment, due process is satisfied if the procedures of MHPA Section 302(a) are followed to obtain a valid warrant. To result in a valid warrant, the application must contain information providing "reasonable grounds to believe that a person is severely mentally disabled and in need of immediate treatment" as required by the MHPA Section 302(a)(1). (Commonwealth v. Jackson, 62 A.3d at 439.) The intent of the MHPA is to provide treatment, not punishment. (In re J.M., 726 A.2d at 1047.) The warrant, therefore, need not meet the criminal "probable cause" standard. Instead, "The guiding inquiry is whether, when reviewing the surrounding facts and circumstances, a reasonable person in the position of the applicant for a Section 302 warrant could have concluded that an individual was severely mentally disabled and in need of immediate treatment." (Id.; See also In re J.M., 726 A.2d 1041, 1046 (Pa. 1999).)

Obtaining a Warrant

Section 302(a)(1) of the MHPA provides that "[upon] written application by a physician or other responsible party setting forth facts constituting reasonable grounds to believe a person is severely mentally disabled and in need of immediate treatment, the county administrator may issue a warrant requiring a person authorized by him, or any peace officer, to take such person to the facility specified in the warrant." However, the Pennsylvania Commonwealth Court upheld the validity of emergency warrants taken over the telephone, rather than in a "written application," stating that "as a matter of common sense, an Act designed to respond to emergency, life-threatening situations would have little value if the decision-makers did not have the flexibility to act based upon information which they received over the telephone." (Uram v. County of Allegheny, 567 A.2d 753, 756 (Pa. Commw. 1989).)

Because Section 302 warrants may not be issued unless a person is "severely mentally disabled," and the person is a "clear and present danger" due to "mental illness," the warrant application must contain factual allegations to support all of these factors. Therefore, the application must contain information showing that the person has a current mental illness, such

as the person's diagnosis, treatment involvement or behaviors that are symptoms of mental illness. In addition, the application must contain facts supporting the particular "clear and present danger" criteria upon which it is based. For instance, if a warrant is sought because the individual threatened to harm someone and acted in furtherance of that threat, the application must include facts concerning both the threat and the act taken in furtherance of the threat. There must also be sufficient information to establish that the "clear and present danger" behaviors occurred within the past 30 days.

Mental health delegates are not required to "investigate the veracity of each statement made to them prior to the filing of the application for a warrant... Such a requirement would only serve to frustrate the very purpose of the emergency evaluation and treatment sections of the MHPA, which is to render immediate assistance to those persons who are in need." (*In re J.M.*, 726 A.2d at 1048; see also *R.H.S. v. Allegheny County Dept. of Human Services*, 936 A.2d 1218, 1224-25 (Pa. Commw. 2007).) Further, a 302 "warrant may be based on hearsay in light of the emergency nature, therapeutic purpose and short duration of a Section 302 commitment." (*Jackson*, 62 A.3d at 439.¹) An applicant for a warrant may provide information gathered from several sources. In addition, crisis staff or other mental health workers may help the applicant complete the warrant application. Mental health delegates should consider all relevant and reliable information and the context in which it arises in order to make the most informed decision possible.

Because of the very serious potential consequences of an erroneous decision not to grant a warrant for emergency examination, delegates should take special care in reviewing information. Delegates may wish to speak to the applicant to obtain additional information, particularly when he or she is a family member or someone with whom the individual resides, because it is important to understand the individual's circumstances, available supports, and limitations of those supports. Delegates should consult with their supervisors and/or the agency solicitors if there are any questions about the application of the requirements of the MHPA to a particular individual and situation.

Voluntary treatment is always preferable. Therefore the delegate may wish to inquire about the person's capacity to understand and willingness to cooperate with emergency examination and treatment and any efforts made to encourage the person to voluntarily participate in examination and treatment. (See MHPA sections 102 and 201.)

¹ Hearsay is typically defined for court proceedings as an out-of-court statement, repeated in court, that is offered for the truth of the matter asserted in the statement. As a general matter, hearsay is impermissible evidence in court proceedings unless it meets an exception. There is no hearsay exclusion in the context of emergency 302 warrant applications. Therefore, the delegate may consider all information that is provided by the applicant, even if the applicant did not observe it firsthand. For example, the delegate may consider a statement of intent by the person for whom the warrant was sought to engage in dangerous behavior such as swallowing pills, and may do so even if the threat was relayed to the applicant by another person. The delegate may also consider threats of harm to persons, even if the applicant does not hear the threat directly.

