

26:2H-102

LEGISLATIVE HISTORY CHECKLIST

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LAWS OF: 2005 **CHAPTER:** 233

NJSA: 26:2H-102 ("New Jersey Advance Directives for Mental Health Care Act")

BILL NO: S2369 (Substituted for A3833)

SPONSOR(S): Codey and others

DATE INTRODUCED: March 1, 2005

COMMITTEE: **ASSEMBLY:**

SENATE: Health, Human Services and Senior Citizens

AMENDED DURING PASSAGE: Yes

DATE OF PASSAGE: **ASSEMBLY:** June 30, 2005

SENATE: June 27, 2005

DATE OF APPROVAL: September 22, 2005

FOLLOWING ARE ATTACHED IF AVAILABLE:

[FINAL TEXT OF BILL](#) (2nd reprint enacted)

S2369

[SPONSOR'S STATEMENT:](#) (Begins on page 16 of original bill) [Yes](#)

COMMITTEE STATEMENT: **ASSEMBLY:** No

[SENATE:](#) [Yes](#)

[FLOOR AMENDMENT STATEMENT:](#) [Yes](#)

LEGISLATIVE FISCAL ESTIMATE: No

A3833

[SPONSOR'S STATEMENT:](#) (Begins on page 16 of original bill) [Yes](#)

COMMITTEE STATEMENT: [ASSEMBLY:](#) [Yes](#)

SENATE: No

FLOOR AMENDMENT STATEMENT: Yes [5/16/05](#)
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LEGISLATIVE FISCAL ESTIMATE: No

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Title 26.
Chapter 2H.
VI. - Advance
Directives for Mental
Health Care
§§1-16, 18-25 -
C.26:2H-102 to
26:2H-125
§17 - C.30:4-177.59
§26 - Note to §§1-26

P.L. 2005, CHAPTER 233, *approved September 22, 2005*
Senate, No. 2369 (*Second Reprint*)

1 **AN ACT** concerning advance directives for mental health care and
2 supplementing Titles 26 and 30 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. This act shall be known and may be cited as the "New Jersey
8 Advance Directives for Mental Health Care Act."

9

10 2. The Legislature finds and declares that:

11 a. This State recognizes, in its law and public policy, a patient's
12 right to make voluntary, informed choices to accept, reject, or choose
13 among alternative courses of medical and surgical treatment, and
14 specifically for a competent adult to plan ahead for health care
15 decisions through the execution of an advance directive for health
16 care, otherwise known as a living will or durable power of attorney for
17 health care, and to have the wishes expressed therein respected,
18 subject to certain limitations;

19 b. Advance directives for health care provide a vehicle for
20 competent adults to operationalize their fundamental legal right to
21 accept or refuse medical treatment in the event that they are rendered
22 unable to make decisions and communicate with a health care provider
23 about their treatment options because of serious illness, injury or
24 permanent loss of mental capacity;

25 c. The issues affecting persons with mental illness and their
26 psychiatric needs warrant enactment of a separate statute governing
27 advance directives for these individuals, who: find their civil rights
28 and due process protections frequently compromised; often lack the
29 resources, societal supports and self-esteem needed to make advance
30 directives for health care work for them; and are disadvantaged by
31 ¹[ignorance on the part of] the fact that¹ many physicians and
32 attorneys ¹are unaware¹ of the specific issues that typically enter into

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Senate SHH committee amendments adopted May 23, 2005.

² Senate floor amendments adopted June 23, 2005.

1 the decisions that a person with mental illness may make for himself
2 when in crisis;

3 d. The provision by statute of advanced directives for mental health
4 care will assure respect for the rights of patients with mental illness
5 with respect to the provision of mental health services and their
6 decision-making in regard thereto; and

7 e. In order to permit a person with mental illness to execute an
8 advance directive that specifies preferences for mental health services
9 in the event that the declarant is subsequently determined to lack
10 decision-making capacity, the Legislature hereby enacts the "New
11 Jersey Advance Directives for Mental Health Care Act."

12

13 3. As used in this act:

14 "Adult" means an individual 18 years of age or older.

15 "Advance directive for mental health care" or "advance directive"
16 means a writing executed in accordance with the requirements of this
17 act. An "advance directive" may include a proxy directive or an
18 instruction directive, or both.

19 ¹["Attending mental health care professional" means a licensed
20 psychiatrist or psychologist selected by, or assigned to, the patient
21 who has primary responsibility for the care and treatment of the
22 patient.]¹

23 "Decision-making capacity" means a patient's ability to understand
24 and appreciate the nature and consequences of mental health care
25 decisions, including the benefits and risks of each, and alternatives to
26 any proposed mental health care, and to reach an informed decision.
27 A patient's decision-making capacity is evaluated relative to the
28 demands of a particular mental health care decision.

29 "Declarant" means a competent adult who executes an advance
30 directive for mental health care.

31 "Domestic partner" means a domestic partner as defined in section
32 3 of P.L.2003, c.246 (C.26:8A-3).

33 "Instruction directive" means a writing which provides instructions
34 and direction regarding the declarant's wishes for mental health care
35 in the event that the declarant subsequently lacks decision-making
36 capacity.

37 "Mental health care decision" means a decision to accept or refuse
38 any treatment, service or procedure used to diagnose, treat or care for
39 a patient's mental condition. "Mental health care decision" also means
40 a decision to accept or refuse the services of a particular mental health
41 care professional or psychiatric facility, including a decision to accept
42 or to refuse a transfer of care.

43 "Mental health care professional" means an individual licensed ¹or
44 certified¹ by this State to provide or administer mental health care in
45 the ordinary course of business or practice of a profession.

46 "Mental health care representative" means the individual designated

1 by a declarant pursuant to the proxy directive part of an advance
2 directive for mental health care for the purpose of making mental
3 health care decisions on the declarant's behalf, and includes an
4 individual designated as an alternate mental health care representative
5 who is acting as the declarant's mental health care representative in
6 accordance with the terms and order of priority stated in an advance
7 directive for mental health care.

8 "Patient" means an individual who is under the care of a mental
9 health care professional.

10 "Proxy directive" means a writing which designates a mental health
11 care representative in the event that the declarant subsequently lacks
12 decision-making capacity.

13 "Psychiatric facility" means a State psychiatric facility listed in
14 R.S.30:1-7, a county psychiatric hospital or the psychiatric unit of a
15 county hospital, ¹[or]¹ a short-term care facility, special psychiatric
16 hospital or psychiatric unit of a general hospital or other health care
17 facility licensed by the Department of Health and Senior Services
18 pursuant to P.L.1971, c.136 (C.26:2H-1 et seq.)¹, or a hospital or
19 community-based mental health center or other entity licensed or
20 funded by the Department of Human Services to provide
21 community-based mental health services¹.

22 ¹"Responsible mental health care professional" means a person
23 licensed or certified by the State to provide or administer mental health
24 care who is selected by, or assigned to, the patient and has primary
25 responsibility for the care and treatment of the patient.¹

26 "State" means a state, territory, or possession of the United States,
27 the District of Columbia, or the Commonwealth of Puerto Rico.

28
29 4. a. A declarant may execute¹, reaffirm, modify, revoke or
30 suspend¹ an advance directive for mental health care at any time²,
31 except as provided in subsection f. of section 5 of this act².

32 (1) The advance directive shall be signed and dated by, or at the
33 direction of, the declarant in the presence of at least one subscribing
34 adult witness, who shall attest that the declarant is of sound mind and
35 free of duress and undue influence.

36 (2) The advance directive may be supplemented by a video or
37 audio tape recording.

38 b. The following persons shall not act as a witness to the execution
39 of an advance directive for mental health care:

40 (1) a designated mental health care representative; and

41 (2) the ¹[attending] responsible¹ mental health care professional
42 responsible for, or directly involved with, the patient's care at the time
43 that the advance directive is executed.

44 c. A person shall not act as a sole witness to the execution of an
45 advance directive for mental health care if that person is:

46 (1) related to the declarant by blood, marriage or adoption, or is

1 the declarant's domestic partner or otherwise shares the same home
2 with the declarant; ¹[or]¹

3 (2) entitled to any part of the declarant's estate by will or by
4 operation of law at the time that the advance directive is executed¹; or

5 (3) an operator, administrator or employee of a rooming or
6 boarding house or a residential health care facility in which the
7 declarant resides¹.

8

9 5. a. (1) An advance directive for mental health care shall be
10 deemed to be valid for an indefinite period of time if it does not
11 include an expiration date, subject to a declarant's right to modify,
12 revoke or suspend the advance directive in accordance with the
13 provisions of this section.

14 (2) If an advance directive includes an expiration date that occurs
15 during a period of time in which the declarant has been determined by
16 the ¹[attending] responsible¹ mental health care professional to lack
17 the capacity to make a particular mental health care decision, the
18 advance directive shall remain in effect until the declarant is
19 determined by the ¹[attending] responsible¹ mental health care
20 professional to have regained the capacity to make a particular mental
21 health care decision.

22 b. ¹[(1)]¹ A declarant may state in an advance directive for mental
23 health care, including a proxy directive or an instruction directive, or
24 both, whether the declarant wishes to be able to modify, revoke or
25 suspend the advance directive after it has become operative pursuant
26 to section 7 of this act¹ [.

27 (2) If a declarant does not¹; however, the failure to¹ include ¹such¹
28 a statement ¹[as described in paragraph (1) of this subsection]¹ in the
29 advance directive¹ [, the advance directive]¹ shall not be ¹[subject to
30 the patient's modification, revocation or suspension] construed to
31 prevent the declarant from modifying, revoking or suspending the
32 advance directive¹ under the circumstances described in ¹[that
33 paragraph] this subsection¹.

34 c. A declarant may reaffirm or modify an advance directive for
35 mental health care, including a proxy directive or an instruction
36 directive, or both, subject to the provisions of subsection b. of this
37 section. The reaffirmation or modification shall be made in accordance
38 with the requirements for execution of an advance directive for mental
39 health care pursuant to section 4 of this act.

40 d. A declarant may revoke an advance directive for mental health
41 care, including a proxy directive or an instruction directive, or both,
42 subject to the provisions of subsection b. of this section, by the
43 following means:

44 (1) notification, orally or in writing, to the mental health care
45 representative or mental health care professional, or other reliable

1 witness, or by any other act evidencing an intent to revoke the
2 document; or

3 (2) execution of a subsequent proxy directive or instruction
4 directive, or both, in accordance with section 4 of this act.

5 e. Designation of the declarant's spouse as mental health care
6 representative shall be revoked upon divorce or legal separation, and
7 designation of the declarant's domestic partner as mental health care
8 representative shall be revoked upon termination of the declarant's
9 domestic partnership, unless otherwise specified in the advance
10 directive.

11 f. ²[An ¹[incompetent]incapacitated¹ patient] An inpatient in a
12 psychiatric facility² may ²modify, revoke or ²suspend an advance
13 directive for mental health care, including a proxy directive or an
14 instruction directive, or both, by any of the means stated in paragraph
15 (1) of subsection d. of this section², unless a responsible mental health
16 professional determines, in accordance with the provisions of section
17 8 of this act, that the patient lacks decision-making capacity to make
18 the decision to modify, revoke or suspend the advance directive².

19 ²[An ¹[incompetent] incapacitated¹]A² patient who has ²modified,
20 revoked or² suspended an advance directive may reinstate that
21 advance directive by oral or written notification to the mental health
22 care representative or mental health care professional of an intent to
23 reinstate the advance directive. g. Reaffirmation, modification¹[.,]
24 or¹ revocation ¹[or suspension]¹ of an advance directive for mental
25 health care is effective upon communication to any person capable of
26 transmitting the information, including the mental health care
27 representative or mental health care professional responsible for the
28 patient's care.

29

30 6. a. A declarant may execute a proxy directive, pursuant to the
31 requirements of section 4 of this act, designating a competent adult to
32 act as the declarant's mental health care representative.

33 (1) A competent adult, including, but not limited to, a declarant's
34 spouse, domestic partner, adult child, parent or other family member,
35 friend, religious or spiritual advisor, or other person of the declarant's
36 choosing, may be designated as a mental health care representative.

37 (2) An operator, administrator or employee of a psychiatric facility
38 in which the declarant is a patient or resident shall not serve as the
39 declarant's mental health care representative unless the operator,
40 administrator or employee is related to the declarant by blood,
41 marriage, domestic partnership or adoption.

42 This restriction shall not apply to a mental health care professional
43 if that individual does not serve as the patient's ¹[attending]
44 responsible¹ mental health care professional or other provider of
45 mental health care services to the patient and the patient's mental
46 health care representative at the same time.

1 (3) A declarant may designate one or more alternate mental health
2 care representatives, listed in order of priority. In the event that the
3 primary designee is unavailable, unable or unwilling to serve as mental
4 health care representative, or is disqualified from such service pursuant
5 to this section or any other law, the next designated alternate shall
6 serve as mental health care representative. In the event that the
7 primary designee subsequently becomes available and able to serve as
8 mental health care representative, the primary designee may, insofar
9 as then practicable, serve as mental health care representative.

10 (4) A declarant may direct the mental health care representative to
11 consult with specified individuals, including alternate designees, family
12 members and friends, in the course of the decision-making process.

13 (5) A declarant shall state the limitations, if any, to be placed upon
14 the authority of the mental health care representative.

15 (6) If a declarant explicitly authorizes the mental health care
16 representative to consent to the declarant's admission to a psychiatric
17 facility, the declarant shall separately initial each paragraph in which
18 that authorization is granted at the time that the proxy directive is
19 signed and witnessed.

20 b. A declarant may execute an instruction directive, pursuant to the
21 requirements of section 4 of this act, which specifies preferences for
22 mental health services in the event that the declarant is subsequently
23 determined to lack decision-making capacity.

24 (1) The instruction directive may include: a statement of the
25 declarant's general mental health care philosophy and objectives; the
26 declarant's specific wishes regarding the provision, withholding or
27 withdrawal of any form of mental health care; or both.

28 (2) The declarant's specific wishes regarding the provision,
29 withholding or withdrawal of any form of mental health care may
30 include:

31 (a) the identification of mental health care professionals and
32 programs and psychiatric facilities that the declarant would prefer to
33 provide mental health services;

34 (b) consent to admission to a psychiatric facility for up to a
35 specified number of days;

36 (c) a refusal to accept specific types of mental health treatment,
37 including medications;

38 (d) a statement of medications preferred by the declarant for
39 mental health treatment;

40 (e) a statement of the preferred means of crisis intervention or other
41 preferences for mental health treatment; and

42 (f) additional instructions or information concerning mental health
43 care.

44 (3) An instruction directive may, but need not, be executed
45 contemporaneously with, or be attached to, a proxy directive.

- 1 7. a. An advance directive for mental health care shall become
2 operative:
- 3 (1) when it is transmitted to the ¹[attending] responsible¹ mental
4 health care professional or the psychiatric facility; and it is determined
5 pursuant to section 8 of this act that the patient lacks capacity to make
6 a particular mental health care decision; or
- 7 (2) at an earlier date if stipulated by the declarant in the advance
8 directive.
- 9 b. Treatment decisions pursuant to an advance directive for mental
10 health care shall not be made and implemented until there has been a
11 reasonable opportunity to establish, and where appropriate confirm, a
12 reliable diagnosis and prognosis for the patient.
- 13
- 14 8. a. The ¹[attending] responsible¹ mental health care professional
15 shall determine whether the patient lacks the capacity to make a
16 particular mental health care decision. The determination shall: be
17 stated in writing; include the ¹[attending] responsible¹ mental health
18 care professional's opinion concerning the nature, cause, extent and
19 probable duration of the patient's incapacity; and be made a part of the
20 patient's medical records.
- 21 b. ¹[(1)] ¹The ¹[attending] responsible ¹mental health care
22 professional's determination of a lack of decision-making capacity shall
23 be confirmed by one or more mental health care professionals. The
24 opinion of the confirming mental health care professional shall be
25 stated in writing and made a part of the patient's medical records in the
26 same manner as that of the ¹[attending] responsible¹ mental health
27 care professional.
- 28 ¹[(2)] Notwithstanding the provisions of paragraph (1) of this
29 subsection to the contrary, confirmation of a lack of decision-making
30 capacity is not required when the patient's lack of decision-making
31 capacity is clearly apparent, and the attending mental health care
32 professional and the mental health care representative agree that
33 confirmation is unnecessary.]¹
- 34 c. A mental health care professional designated by the patient's
35 advance directive as a mental health care representative shall not make
36 the determination of a lack of decision-making capacity.
- 37 d. The ¹[attending] responsible¹ mental health care professional
38 shall inform the patient, if the patient has any ability to comprehend
39 that he has been determined to lack decision-making capacity, and the
40 mental health care representative that:
- 41 (1) the patient has been determined to lack decision-making
42 capacity to make a particular mental health care decision;
- 43 (2) each has the right to contest this determination; and
- 44 (3) each may have recourse to the dispute resolution process
45 established by the psychiatric facility pursuant to section 14 of this act.
- 46 Notice to the patient and the mental health care representative shall

1 be documented in the patient's medical records.

2 e. A determination of lack of decision-making capacity under this
3 act shall be solely for the purpose of implementing an advance
4 directive for mental health care in accordance with the provisions of
5 this act, and shall not be construed as a determination of a patient's
6 incapacity or incompetence for any other purpose.

7 f. For the purposes of this section, a determination that a patient
8 lacks decision-making capacity shall be based upon, but need not be
9 limited to, an evaluation of the patient's ability to understand and
10 appreciate the nature and consequences of a particular mental health
11 care decision, including the benefits and risks of, and alternatives to,
12 the proposed ¹mental health¹ care ¹[or treatment]¹, and to reach an
13 informed decision.

14 ²g. For the purposes of this section, "mental health care decision"
15 includes a decision to modify, revoke or suspend an advance directive
16 for mental health care as provided in subsection f. of section 5 of this
17 act.²

18

19 9. a. If it has been determined that the patient lacks decision-
20 making capacity, a mental health care representative shall have
21 authority to make ¹mental¹ health care decisions on behalf of the
22 patient.

23 (1) The mental health care representative shall act in good faith and
24 within the bounds of the authority granted by the advance directive for
25 mental health care and by this act.

26 (2) The mental health care representative may consent to the
27 patient's admission to a psychiatric facility only as authorized pursuant
28 to paragraph (6) of subsection a. of section 6 of this act.

29 b. If a different individual has been appointed as the patient's legal
30 guardian, the mental health care representative shall retain legal
31 authority to make mental health care decisions on the patient's behalf,
32 unless the terms of the legal guardian's court appointment or other
33 court decree provide otherwise.

34 c. The conferral of legal authority on the mental health care
35 representative shall not be construed to impose liability upon that
36 person for any portion of the patient's health care costs.

37 d. An individual designated as a mental health care representative
38 or as an alternate mental health care representative may decline to
39 serve in that capacity.

40 e. The mental health care representative shall exercise the patient's
41 right to be informed of the patient's mental health condition, prognosis
42 and treatment options, and to give informed consent to, or refusal of,
43 health care.

44 f. In the exercise of these rights and responsibilities, the mental
45 health care representative shall seek to make the mental health care
46 decision that the patient would have made if the patient possessed

1 decision-making capacity under the circumstances, or, when the
2 patient's wishes cannot adequately be determined, shall make a mental
3 health care decision in the best interests of the patient.

4 ¹g. Departure from the decisions of a mental health care
5 representative shall be permitted only if the responsible mental health
6 care professional determines that compliance with those decisions
7 would:

8 (1) violate the accepted standard of mental health care or treatment
9 under the circumstances of the patient's mental health condition;

10 (2) require the use of a form of care or treatment that is not
11 available to the mental health care professional responsible for the
12 provision of mental health services to the patient;

13 (3) violate a court order or provision of statutory law; or

14 (4) endanger the life or health of the patient or another person.¹
15

16 10. In addition to any rights and responsibilities recognized or
17 imposed by or pursuant to this act, or by any other law, a mental
18 health care professional shall have the following responsibilities:

19 a. The ¹[attending] responsible¹ mental health care professional
20 shall make an affirmative inquiry of the patient, the patient's family or
21 others, as appropriate under the circumstances, concerning the
22 existence of an advance directive for mental health care. The
23 ¹[attending] responsible¹ mental health care professional shall note in
24 the patient's medical records whether or not an advance directive
25 exists, and the name of the patient's mental health care representative,
26 if any, and shall attach a copy of the advance directive to the patient's
27 medical records. The ¹[attending] responsible¹ mental health care
28 professional shall document in the same manner the reaffirmation,
29 modification, revocation or suspension of an advance directive, if he
30 has knowledge of such action.

31 b. In the event of a transfer of a patient's care:

32 (1) The ¹[attending] responsible¹ mental health care professional
33 shall assure the timely transfer of the patient's medical records,
34 including a copy of the patient's advance directive for mental health
35 care; and

36 (2) A mental health care professional other than the ¹[attending]
37 responsible¹ mental health care professional, who is responsible for the
38 patient's care, shall cooperate in effecting an appropriate, respectful
39 and timely transfer of care, and to assure that the patient is not
40 abandoned or treated disrespectfully.

41
42 11. a. (1) The ¹[attending] responsible¹ mental health care
43 professional, ¹the patient to the extent possible, the¹ mental health
44 care representative, and, when appropriate, any additional mental
45 health care professional responsible for the patient's care, shall discuss
46 the nature and consequences of the patient's mental health condition,

1 and the risks, benefits and burdens of the proposed mental health care
2 and its alternatives. Except as provided in paragraph (2) of subsection
3 b. of this section, the ¹[attending] responsible¹ mental health care
4 professional shall obtain informed consent for, or refusal of, health
5 care from the mental health care representative.

6 (2) The decision-making process shall allow, as appropriate under
7 the circumstances, adequate time for the mental health care
8 representative to understand and deliberate about all relevant
9 information before a treatment decision is implemented.

10 b. (1) ¹[Following a determination that a patient lacks decision-
11 making capacity, the mental health care representative and the
12 attending mental health care professional shall, to a reasonable extent,
13 discuss the treatment options with the patient, and seek to involve the
14 patient as a participant in the decision-making process.]¹ The mental
15 health care representative and the ¹[attending] responsible¹ mental
16 health care professional shall seek to promote the patient's capacity for
17 effective participation ¹[and shall take the patient's expressed wishes
18 into account in the decision-making process]¹.

19 (2) Once decision-making authority has been conferred upon a
20 mental health care representative pursuant to an advance directive for
21 mental health care, if the patient is subsequently found to possess
22 adequate decision-making capacity with respect to a particular mental
23 health care decision, the patient shall ¹[retain] have¹ legal authority
24 to make that decision. In those circumstances, the mental health care
25 representative may continue to participate in the decision-making
26 process in an advisory capacity, unless the patient objects.

27 c. If a mental health care representative is authorized to consent to
28 the patient's admission to a psychiatric facility pursuant to paragraph
29 (6) of subsection a. of section 6 of this act and the ¹[attending]
30 responsible¹ mental health care professional has obtained informed
31 consent for admission from the mental health care representative, the
32 ¹[attending] responsible¹ mental health professional may admit the
33 patient based upon the ¹[attending] responsible¹ mental health
34 professional's:

35 (1) thorough investigation of the patient's psychiatric and
36 psychological history, diagnosis and need for care or treatment, and
37 expressed wishes;

38 (2) written determination that the patient is in need of an inpatient
39 evaluation or would benefit from the care or treatment of a mental,
40 emotional or other personality disorder in an inpatient setting, and that
41 the evaluation, care or treatment cannot be accomplished in a less
42 restrictive setting; and

43 (3) documentation in the patient's medical records of the
44 ¹[attending] responsible¹ mental health professional's findings and
45 recommendations with regard to the patient's care or treatment.

1 d. In acting to implement a patient's wishes pursuant to an advance
2 directive for mental health care, the mental health care representative
3 shall give priority to the patient's instruction directive, and may also
4 consider, as appropriate and necessary, the following forms of
5 evidence of the patient's wishes:

6 (1) the patient's contemporaneous expressions, including nonverbal
7 expressions;

8 (2) other reliable sources of information, including the mental
9 health care representative's personal knowledge of the patient's values,
10 preferences and goals; and

11 (3) reliable oral or written statements previously made by the
12 patient, including, but not limited to, statements made to other
13 persons.

14 e. If the instruction directive, in conjunction with other evidence
15 of the patient's wishes, does not provide, in the exercise of reasonable
16 judgment, clear direction as applied to the patient's mental health
17 condition and the treatment alternatives, the mental health care
18 representative shall exercise reasonable discretion, in good faith, to
19 effectuate the provisions, intent, and spirit of the instruction directive
20 and other evidence of the patient's wishes.

21 f. Subject to the provisions of this act, and unless otherwise stated
22 in the advance directive, if the patient's wishes cannot be adequately
23 determined, then the mental health care representative shall make a
24 mental health care decision in the patient's best interests.

25
26 12. a. If the patient has executed an instruction directive but has
27 not designated a mental health care representative, or if neither the
28 designated mental health care representative or any alternate designee
29 is able or available to serve, the instruction directive shall be legally
30 operative. If the instruction directive provides clear and unambiguous
31 guidance under the circumstances, it shall be honored in accordance
32 with its specific terms by a legally appointed guardian, if any, family
33 member, mental health care professional and psychiatric facility
34 involved with the patient's mental health care, and any other person
35 acting on the patient's behalf, except as provided in subsection c. of
36 this section.

37 b. If the instruction directive is, in the exercise of reasonable
38 judgment, not specific to the patient's mental health condition and the
39 treatment alternatives, the ¹[attending] responsible¹ mental health
40 care professional, in consultation with a legally appointed guardian, if
41 any, family member, or other person acting on the patient's behalf,
42 shall exercise reasonable judgment to effectuate the wishes of the
43 patient, giving full weight to the terms, intent and spirit of the
44 instruction directive.

45 c. Departure from the specific provisions of the instruction
46 directive shall be permitted only if the ¹[attending] responsible¹

1 mental health care professional determines that compliance with those
2 terms or provisions would:

- 3 (1) violate the accepted standard of mental health care or treatment
4 under the circumstances of the patient's mental health condition;
- 5 (2) require the use of a form of care or treatment that is not
6 available to the mental health care ¹[professionals] professional ¹
7 responsible for the provision of mental health services to the patient;
- 8 (3) violate a court order or provision of statutory law; or
- 9 (4) endanger the life or health of the patient or another person.

10

11 13. In addition to any rights and responsibilities recognized or
12 imposed by or pursuant to this act, or any other law, a psychiatric
13 facility shall have the following responsibilities:

14 a. A psychiatric facility shall adopt such policies and practices as
15 are necessary to provide for routine inquiry, at the time of admission,
16 and at such other times as are appropriate under the circumstances,
17 concerning the existence and location of an advance directive for
18 mental health care.

19 b. A psychiatric facility shall adopt such policies and practices as
20 are necessary to provide appropriate informational materials
21 concerning advance directives for mental health care to all interested
22 patients and their families and mental health care representatives, and
23 to assist patients interested in discussing and executing an advance
24 directive for mental health care.

25 c. In situations in which a transfer of care is necessary, including
26 a transfer for the purpose of effectuating a patient's wishes pursuant
27 to an advance directive for mental health care, a psychiatric facility
28 shall, in consultation with the ¹[attending] responsible¹ mental health
29 care professional, take all reasonable steps to effect the appropriate,
30 respectful and timely transfer of the patient to the care of an
31 alternative mental health care professional or psychiatric facility, as
32 necessary, and shall assure that the patient is not abandoned or treated
33 disrespectfully. In those circumstances, a psychiatric facility shall
34 assure the timely transfer of the patient's medical records, including a
35 copy of the patient's advance directive for mental health care.

36 d. A psychiatric facility shall establish procedures and practices for
37 dispute resolution in accordance with section 14 of this act.

38 e. A psychiatric facility shall adopt such policies and practices as
39 are necessary to: inform mental health care professionals of their
40 rights and responsibilities under this act; assure that those rights and
41 responsibilities are understood; and provide a forum for discussion and
42 consultation regarding the requirements of this act.

43

44 14. a. In the event of disagreement among the patient, mental
45 health care representative and ¹[attending] responsible¹ mental health
46 care professional concerning the patient's decision-making capacity or

1 the appropriate interpretation and application of the provisions of an
2 advance directive for mental health care to the patient's course of
3 treatment, the parties may seek to resolve the disagreement by means
4 of procedures and practices established by the psychiatric facility,
5 including but not limited to, consultation with an institutional ethics
6 committee, or with a person designated by the psychiatric facility for
7 this purpose, or may seek resolution by a court of competent
8 jurisdiction.

9 b. A mental health care professional involved in the patient's care,
10 other than the ¹[attending] responsible¹ mental health care
11 professional, or an administrator of a psychiatric facility may also
12 invoke the dispute resolution process established by the psychiatric
13 facility to seek to resolve a disagreement concerning the patient's
14 decision-making capacity or the appropriate interpretation and
15 application of the provisions of an advance directive for mental health
16 care.

17

18 15. The provisions of this act shall not be construed to supersede
19 any court order relating to, or the provisions of any other statute
20 governing, commitment or admission to a psychiatric facility or the
21 provision of mental health care ¹[treatment] ¹, including, but not
22 limited to, P.L.1987, c.116 (C.30:4-27.1 et seq.). Any conflict
23 between a court order or the provisions of another statute and the
24 provisions of an advance directive for mental health care, which
25 renders those provisions of the advance directive invalid, shall not be
26 deemed to invalidate any other provisions of the advance directive that
27 do not conflict with the court order or statute.

28

29 16. In accordance with the "Administrative Procedure Act,"
30 P.L.1968, c.410 (C.52:14B-1 et seq.), the Commissioner of Health and
31 Senior Services, in consultation with the Commissioner of Human
32 Services, shall adopt rules and regulations, with respect to psychiatric
33 facilities licensed by the Department of Health and Senior Services,
34 to:

35 a. provide for the annual reporting by those psychiatric facilities to
36 the Department of Health and Senior Services, and the gathering of
37 such additional data, as is reasonably necessary to oversee and
38 evaluate the implementation of this act; except that the commissioner
39 shall seek to minimize the burdens of record-keeping imposed by the
40 rules and regulations and ensure the appropriate confidentiality of
41 patient records; and

42 b. require those psychiatric facilities to adopt policies and practices
43 designed to:

44 (1) make routine inquiry, at the time of admission and at such other
45 times as are appropriate under the circumstances, concerning the
46 existence and location of an advance directive for mental health care;

47 (2) provide appropriate informational materials concerning advance

1 directives for mental health care¹, including information about the
2 registry of advance directives for mental health care established or
3 designated pursuant to section 17 of this act.¹ to all interested patients
4 and their families and mental health care representatives, and to assist
5 patients interested in discussing and executing an advance directive for
6 mental health care¹, as well as to encourage declarants to periodically
7 review their advance directives for mental health care as needed¹;

8 (3) inform mental health care professionals of their rights and
9 responsibilities under this act, to assure that the rights and
10 responsibilities are understood, and to provide a forum for discussion
11 and consultation regarding the requirements of this act; and

12 (4) otherwise comply with the provisions of this act.

13
14 17. In accordance with the "Administrative Procedure Act,"
15 P.L.1968, c.410 (C.52:14B-1 et seq.), the Commissioner of Human
16 Services, in consultation with the Commissioner of Health and Senior
17 Services, shall¹;

18 a.¹ adopt rules and regulations, with respect to psychiatric facilities
19 operated by the Department of Human Services, to:

20 ¹[a.] (1)¹ provide for the annual reporting by those psychiatric
21 facilities to the Department of Human Services, and the gathering of
22 such additional data, and the sharing of such reported information and
23 additional data by the Department of Human Services with the
24 Department of Health and Senior Services, as is reasonably necessary
25 to oversee and evaluate the implementation of P.L. , c. (C.)
26 (pending before the Legislature as this bill); except that the
27 commissioner shall seek to minimize the burdens of record-keeping
28 imposed by the rules and regulations and ensure the appropriate
29 confidentiality of patient records; and

30 ¹[b.] (2)¹ require those psychiatric facilities to adopt policies and
31 practices designed to:

32 ¹[(1)] (a)¹ make routine inquiry, at the time of admission and at
33 such other times as are appropriate under the circumstances,
34 concerning the existence and location of an advance directive for
35 mental health care;

36 ¹[(2)] (b)¹ provide appropriate informational materials concerning
37 advance directives for mental health care¹, including information about
38 the registry of advance directives for mental health care established or
39 designated pursuant to subsection b. of this section.¹ to all interested
40 patients and their families and mental health care representatives, and
41 to assist patients interested in discussing and executing an advance
42 directive for mental health care¹, as well as to encourage declarants to
43 periodically review their advance directives for mental health care as
44 needed¹;

45 ¹[(3)] (c)¹ inform mental health care professionals of their rights
46 and responsibilities under P.L. , c. (C.)(pending before the
47 Legislature as this bill), to assure that the rights and responsibilities are

1 understood, and to provide a forum for discussion and consultation
2 regarding the requirements of P.L. , c. (C.)(pending before the
3 Legislature as this bill); and

4 ¹[(4)] (d)¹ otherwise comply with the provisions of P.L. , c.
5 (C.) (pending before the Legislature as this bill).

6 ¹b. adopt rules and regulations to establish or designate a registry
7 of advance directives for mental health care, which rules and
8 regulations include procedures for accessing the registry¹.

9
10 18. The Department of Health and Senior Services and the
11 Department of Human Services shall jointly evaluate the
12 implementation of this act and report to the Governor and the
13 Legislature, including recommendations for any changes deemed
14 necessary, within five years after the effective date of this act.

15
16 19. a. A mental health care representative shall not be subject to
17 criminal or civil liability for any actions performed in good faith and in
18 accordance with the provisions of this act to carry out the terms of an
19 advance directive for mental health care.

20 b. A mental health care professional shall not be subject to criminal
21 or civil liability, or to discipline by the psychiatric facility or the
22 respective State licensing board for professional misconduct, for any
23 actions performed to carry out the terms of an advance directive for
24 mental health care in good faith and in accordance with: the
25 provisions of this act; any rules and regulations adopted by the
26 Commissioner of Health and Senior Services or the Commissioner of
27 Human Services pursuant to this act; and accepted professional
28 standards.

29 c. A psychiatric facility shall not be subject to criminal or civil
30 liability for any actions performed in good faith and in accordance with
31 the provisions of this act to carry out the terms of an advance directive
32 for mental health care.

33
34 20. Nothing in this act shall be construed to impair the legal force
35 and effect of an advance directive for health care executed pursuant to
36 P.L.1991, c.201 (C.26:2H-53 et seq.) either prior to or after the
37 enactment of this act.

38
39 21. The absence of an advance directive for mental health care shall
40 create no presumption with respect to a patient's wishes regarding the
41 provision, withholding or withdrawing of any form of health care. The
42 provisions of this act shall not apply to persons who have not executed
43 an advance directive for mental health care.

44
45 22. The execution of an advance directive for mental health care
46 pursuant to this act shall not in any manner affect, impair or modify the
47 terms of, or rights or obligations created under, any existing policy of

1 health insurance, life insurance or annuity, or governmental benefits
2 program. No health care provider, and no health benefits plan, insurer
3 or governmental authority, shall exclude from health care services or
4 deny coverage to any individual because that individual has executed
5 or has not executed an advance directive for mental health care. The
6 execution, or non-execution, of an advance directive for mental health
7 care shall not be made a condition of coverage under any policy of
8 health insurance, life insurance or annuity, or governmental benefits
9 program.

10
11 23. An advance directive for mental health care executed under the
12 laws of another state in compliance with the laws of that state or the
13 State of New Jersey is validly executed for the purposes of this act.
14 An advance directive for mental health care executed in a foreign
15 country in compliance with the laws of that country or the State of
16 New Jersey, and not contrary to the public policy of this State, is
17 validly executed for the purposes of this act.

18
19 24. a. (1) To the extent that any of the provisions of this act are
20 inconsistent with P.L.2000, c.109 (C.46:2B-8.1 et seq.) concerning the
21 designation of a mental health care representative, the provisions of
22 this act shall have priority over those of P.L.2000, c.109.

23 (2) Durable powers of attorney for health care executed pursuant
24 to P.L.2000, c.109 prior to the effective date of this act shall have the
25 same legal force and effect as if they had been executed in accordance
26 with the provisions of this act.

27 b. Nothing in this act shall be construed to impair the rights of
28 emancipated minors under existing law.

29
30 25. a. A mental health care professional who intentionally fails to
31 act in accordance with the requirements of this act is subject to
32 discipline for professional misconduct pursuant to section 8 of
33 P.L.1978, c.73 (C.45:1-21).

34 b. A psychiatric facility that intentionally fails to act in accordance
35 with the requirements of this act shall be subject to a fine of not more
36 than \$1,000 for each offense. For the purposes of this subsection,
37 each violation shall constitute a separate offense. Penalties for
38 violations of this act shall be recovered in a summary civil proceeding,
39 brought in the name of the State in a court of competent jurisdiction
40 pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274
41 (C.2A:58-10 et seq.).

42 c. It shall be a crime of the fourth degree for a person to:

43 (1) willfully conceal, cancel, deface, obliterate or withhold personal
44 knowledge of an advance directive for mental health care, or a
45 modification, revocation or suspension thereof, without the declarant's
46 consent;

1 (2) falsify or forge an advance directive for mental health care of
2 another person, or a modification, revocation or suspension thereof;

3 (3) coerce or fraudulently induce the execution of an advance
4 directive for mental health care, or a modification, revocation or
5 suspension, thereof; or

6 (4) require or prohibit the execution of an advance directive for
7 mental health care, or a modification, revocation or suspension
8 thereof, as a condition of coverage under any policy of health
9 insurance, life insurance or annuity, or governmental benefits program,
10 or as a condition of the provision of health care.

11 d. The sanctions provided in this section shall not be construed to
12 repeal any sanctions applicable under other law.

13

14 26. This act shall take effect on the 180th day after enactment,
15 except that the Commissioners of Health and Senior Services and
16 Human Services may take such anticipatory administrative action in
17 advance as shall be necessary for the implementation of the act.

18

19

20

21

22 "New Jersey Advance Directives for Mental Health Care Act."

SENATE, No. 2369

STATE OF NEW JERSEY
211th LEGISLATURE

INTRODUCED MARCH 1, 2005

Sponsored by:

Senator RICHARD J. CODEY

District 27 (Essex)

Senator GERALD CARDINALE

District 39 (Bergen)

Co-Sponsored by:

Senators Allen and B.Smith

SYNOPSIS

"New Jersey Advance Directives for Mental Health Care Act."

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 5/13/2005)

1 AN ACT concerning advance directives for mental health care and
2 supplementing Titles 26 and 30 of the Revised Statutes.

3
4 **BE IT ENACTED** *by the Senate and General Assembly of the State*
5 *of New Jersey:*

6
7 1. This act shall be known and may be cited as the "New Jersey
8 Advance Directives for Mental Health Care Act."

9
10 2. The Legislature finds and declares that:

11 a. This State recognizes, in its law and public policy, a patient's
12 right to make voluntary, informed choices to accept, reject, or choose
13 among alternative courses of medical and surgical treatment, and
14 specifically for a competent adult to plan ahead for health care
15 decisions through the execution of an advance directive for health
16 care, otherwise known as a living will or durable power of attorney for
17 health care, and to have the wishes expressed therein respected,
18 subject to certain limitations;

19 b. Advance directives for health care provide a vehicle for
20 competent adults to operationalize their fundamental legal right to
21 accept or refuse medical treatment in the event that they are rendered
22 unable to make decisions and communicate with a health care provider
23 about their treatment options because of serious illness, injury or
24 permanent loss of mental capacity;

25 c. The issues affecting persons with mental illness and their
26 psychiatric needs warrant enactment of a separate statute governing
27 advance directives for these individuals, who: find their civil rights
28 and due process protections frequently compromised; often lack the
29 resources, societal supports and self-esteem needed to make advance
30 directives for health care work for them; and are disadvantaged by
31 ignorance on the part of many physicians and attorneys of the specific
32 issues that typically enter into the decisions that a person with mental
33 illness may make for himself when in crisis;

34 d. The provision by statute of advanced directives for mental health
35 care will assure respect for the rights of patients with mental illness
36 with respect to the provision of mental health services and their
37 decision-making in regard thereto; and

38 e. In order to permit a person with mental illness to execute an
39 advance directive that specifies preferences for mental health services
40 in the event that the declarant is subsequently determined to lack
41 decision-making capacity, the Legislature hereby enacts the "New
42 Jersey Advance Directives for Mental Health Care Act."

43
44 3. As used in this act:

45 "Adult" means an individual 18 years of age or older.

1 "Advance directive for mental health care" or "advance directive"
2 means a writing executed in accordance with the requirements of this
3 act. An "advance directive" may include a proxy directive or an
4 instruction directive, or both.

5 "Attending mental health care professional" means a licensed
6 psychiatrist or psychologist selected by, or assigned to, the patient
7 who has primary responsibility for the care and treatment of the
8 patient.

9 "Decision-making capacity" means a patient's ability to understand
10 and appreciate the nature and consequences of mental health care
11 decisions, including the benefits and risks of each, and alternatives to
12 any proposed mental health care, and to reach an informed decision.
13 A patient's decision-making capacity is evaluated relative to the
14 demands of a particular mental health care decision.

15 "Declarant" means a competent adult who executes an advance
16 directive for mental health care.

17 "Domestic partner" means a domestic partner as defined in section
18 3 of P.L.2003, c.246 (C.26:8A-3).

19 "Instruction directive" means a writing which provides instructions
20 and direction regarding the declarant's wishes for mental health care
21 in the event that the declarant subsequently lacks decision-making
22 capacity.

23 "Mental health care decision" means a decision to accept or refuse
24 any treatment, service or procedure used to diagnose, treat or care for
25 a patient's mental condition. "Mental health care decision" also means
26 a decision to accept or refuse the services of a particular mental health
27 care professional or psychiatric facility, including a decision to accept
28 or to refuse a transfer of care.

29 "Mental health care professional" means an individual licensed by
30 this State to provide or administer mental health care in the ordinary
31 course of business or practice of a profession.

32 "Mental health care representative" means the individual designated
33 by a declarant pursuant to the proxy directive part of an advance
34 directive for mental health care for the purpose of making mental
35 health care decisions on the declarant's behalf, and includes an
36 individual designated as an alternate mental health care representative
37 who is acting as the declarant's mental health care representative in
38 accordance with the terms and order of priority stated in an advance
39 directive for mental health care.

40 "Patient" means an individual who is under the care of a mental
41 health care professional.

42 "Proxy directive" means a writing which designates a mental health
43 care representative in the event that the declarant subsequently lacks
44 decision-making capacity.

45 "Psychiatric facility" means a State psychiatric facility listed in
46 R.S.30:1-7, a county psychiatric hospital or the psychiatric unit of a

1 county hospital, or a short-term care facility, special psychiatric
2 hospital or psychiatric unit of a general hospital or other health care
3 facility licensed by the Department of Health and Senior Services
4 pursuant to P.L.1971, c.136 (C.26:2H-1 et seq.).

5 "State" means a state, territory, or possession of the United States,
6 the District of Columbia, or the Commonwealth of Puerto Rico.

7
8 4. a. A declarant may execute an advance directive for mental
9 health care at any time.

10 (1) The advance directive shall be signed and dated by, or at the
11 direction of, the declarant in the presence of at least one subscribing
12 adult witness, who shall attest that the declarant is of sound mind and
13 free of duress and undue influence.

14 (2) The advance directive may be supplemented by a video or audio
15 tape recording.

16 b. The following persons shall not act as a witness to the execution
17 of an advance directive for mental health care:

18 (1) a designated mental health care representative; and

19 (2) the attending mental health care professional responsible for, or
20 directly involved with, the patient's care at the time that the advance
21 directive is executed.

22 c. A person shall not act as a sole witness to the execution of an
23 advance directive for mental health care if that person is:

24 (1) related to the declarant by blood, marriage or adoption, or is the
25 declarant's domestic partner or otherwise shares the same home with
26 the declarant; or

27 (2) entitled to any part of the declarant's estate by will or by
28 operation of law at the time that the advance directive is executed.

29
30 5. a. (1) An advance directive for mental health care shall be
31 deemed to be valid for an indefinite period of time if it does not
32 include an expiration date, subject to a declarant's right to modify,
33 revoke or suspend the advance directive in accordance with the
34 provisions of this section.

35 (2) If an advance directive includes an expiration date that occurs
36 during a period of time in which the declarant has been determined by
37 the attending mental health care professional to lack the capacity to
38 make a particular mental health care decision, the advance directive
39 shall remain in effect until the declarant is determined by the attending
40 mental health care professional to have regained the capacity to make
41 a particular mental health care decision.

42 b. (1) A declarant may state in an advance directive for mental
43 health care, including a proxy directive or an instruction directive, or
44 both, whether the declarant wishes to be able to modify, revoke or
45 suspend the advance directive after it has become operative pursuant
46 to section 7 of this act.

1 (2) If a declarant does not include a statement as described in
2 paragraph (1) of this subsection in the advance directive, the advance
3 directive shall not be subject to the patient's modification, revocation
4 or suspension under the circumstances described in that paragraph.

5 c. A declarant may reaffirm or modify an advance directive for
6 mental health care, including a proxy directive or an instruction
7 directive, or both, subject to the provisions of subsection b. of this
8 section. The reaffirmation or modification shall be made in accordance
9 with the requirements for execution of an advance directive for mental
10 health care pursuant to section 4 of this act.

11 d. A declarant may revoke an advance directive for mental health
12 care, including a proxy directive or an instruction directive, or both,
13 subject to the provisions of subsection b. of this section, by the
14 following means:

15 (1) notification, orally or in writing, to the mental health care
16 representative or mental health care professional, or other reliable
17 witness, or by any other act evidencing an intent to revoke the
18 document; or

19 (2) execution of a subsequent proxy directive or instruction
20 directive, or both, in accordance with section 4 of this act.

21 e. Designation of the declarant's spouse as mental health care
22 representative shall be revoked upon divorce or legal separation, and
23 designation of the declarant's domestic partner as mental health care
24 representative shall be revoked upon termination of the declarant's
25 domestic partnership, unless otherwise specified in the advance
26 directive.

27 f. An incompetent patient may suspend an advance directive for
28 mental health care, including a proxy directive or an instruction
29 directive, or both, by any of the means stated in paragraph (1) of
30 subsection d. of this section. An incompetent patient who has
31 suspended an advance directive may reinstate that advance directive
32 by oral or written notification to the mental health care representative
33 or mental health care professional of an intent to reinstate the advance
34 directive.

35 g. Reaffirmation, modification, revocation or suspension of an
36 advance directive for mental health care is effective upon
37 communication to any person capable of transmitting the information,
38 including the mental health care representative or mental health care
39 professional responsible for the patient's care.

40
41 6. a. A declarant may execute a proxy directive, pursuant to the
42 requirements of section 4 of this act, designating a competent adult to
43 act as the declarant's mental health care representative.

44 (1) A competent adult, including, but not limited to, a declarant's
45 spouse, domestic partner, adult child, parent or other family member,
46 friend, religious or spiritual advisor, or other person of the declarant's

1 choosing, may be designated as a mental health care representative.

2 (2) An operator, administrator or employee of a psychiatric facility
3 in which the declarant is a patient or resident shall not serve as the
4 declarant's mental health care representative unless the operator,
5 administrator or employee is related to the declarant by blood,
6 marriage, domestic partnership or adoption.

7 This restriction shall not apply to a mental health care professional
8 if that individual does not serve as the patient's attending mental health
9 care professional or other provider of mental health care services to
10 the patient and the patient's mental health care representative at the
11 same time.

12 (3) A declarant may designate one or more alternate mental health
13 care representatives, listed in order of priority. In the event that the
14 primary designee is unavailable, unable or unwilling to serve as mental
15 health care representative, or is disqualified from such service pursuant
16 to this section or any other law, the next designated alternate shall
17 serve as mental health care representative. In the event that the
18 primary designee subsequently becomes available and able to serve as
19 mental health care representative, the primary designee may, insofar
20 as then practicable, serve as mental health care representative.

21 (4) A declarant may direct the mental health care representative to
22 consult with specified individuals, including alternate designees, family
23 members and friends, in the course of the decision-making process.

24 (5) A declarant shall state the limitations, if any, to be placed upon
25 the authority of the mental health care representative.

26 (6) If a declarant explicitly authorizes the mental health care
27 representative to consent to the declarant's admission to a psychiatric
28 facility, the declarant shall separately initial each paragraph in which
29 that authorization is granted at the time that the proxy directive is
30 signed and witnessed.

31 b. A declarant may execute an instruction directive, pursuant to the
32 requirements of section 4 of this act, which specifies preferences for
33 mental health services in the event that the declarant is subsequently
34 determined to lack decision-making capacity.

35 (1) The instruction directive may include: a statement of the
36 declarant's general mental health care philosophy and objectives; the
37 declarant's specific wishes regarding the provision, withholding or
38 withdrawal of any form of mental health care; or both.

39 (2) The declarant's specific wishes regarding the provision,
40 withholding or withdrawal of any form of mental health care may
41 include:

42 (a) the identification of mental health care professionals and
43 programs and psychiatric facilities that the declarant would prefer to
44 provide mental health services;

45 (b) consent to admission to a psychiatric facility for up to a
46 specified number of days;

1 (c) a refusal to accept specific types of mental health treatment,
2 including medications;

3 (d) a statement of medications preferred by the declarant for
4 mental health treatment;

5 (e) a statement of the preferred means of crisis intervention or other
6 preferences for mental health treatment; and

7 (f) additional instructions or information concerning mental health
8 care.

9 (3) An instruction directive may, but need not, be executed
10 contemporaneously with, or be attached to, a proxy directive.

11

12 7. a. An advance directive for mental health care shall become
13 operative:

14 (1) when it is transmitted to the attending mental health care
15 professional or the psychiatric facility; and it is determined pursuant
16 to section 8 of this act that the patient lacks capacity to make a
17 particular mental health care decision; or

18 (2) at an earlier date if stipulated by the declarant in the advance
19 directive.

20 b. Treatment decisions pursuant to an advance directive for mental
21 health care shall not be made and implemented until there has been a
22 reasonable opportunity to establish, and where appropriate confirm, a
23 reliable diagnosis and prognosis for the patient.

24

25 8. a. The attending mental health care professional shall determine
26 whether the patient lacks the capacity to make a particular mental
27 health care decision. The determination shall: be stated in writing;
28 include the attending mental health care professional's opinion
29 concerning the nature, cause, extent and probable duration of the
30 patient's incapacity; and be made a part of the patient's medical
31 records.

32 b. (1) The attending mental health care professional's determination
33 of a lack of decision-making capacity shall be confirmed by one or
34 more mental health care professionals. The opinion of the confirming
35 mental health care professional shall be stated in writing and made a
36 part of the patient's medical records in the same manner as that of the
37 attending mental health care professional.

38 (2) Notwithstanding the provisions of paragraph (1) of this
39 subsection to the contrary, confirmation of a lack of decision-making
40 capacity is not required when the patient's lack of decision-making
41 capacity is clearly apparent, and the attending mental health care
42 professional and the mental health care representative agree that
43 confirmation is unnecessary.

44 c. A mental health care professional designated by the patient's
45 advance directive as a mental health care representative shall not make
46 the determination of a lack of decision-making capacity.

1 d. The attending mental health care professional shall inform the
2 patient, if the patient has any ability to comprehend that he has been
3 determined to lack decision-making capacity, and the mental health
4 care representative that:

5 (1) the patient has been determined to lack decision-making
6 capacity to make a particular mental health care decision;

7 (2) each has the right to contest this determination; and

8 (3) each may have recourse to the dispute resolution process
9 established by the psychiatric facility pursuant to section 14 of this act.

10 Notice to the patient and the mental health care representative shall
11 be documented in the patient's medical records.

12 e. A determination of lack of decision-making capacity under this
13 act shall be solely for the purpose of implementing an advance
14 directive for mental health care in accordance with the provisions of
15 this act, and shall not be construed as a determination of a patient's
16 incapacity or incompetence for any other purpose.

17 f. For the purposes of this section, a determination that a patient
18 lacks decision-making capacity shall be based upon, but need not be
19 limited to, an evaluation of the patient's ability to understand and
20 appreciate the nature and consequences of a particular mental health
21 care decision, including the benefits and risks of, and alternatives to,
22 the proposed care or treatment, and to reach an informed decision.

23
24 9. a. If it has been determined that the patient lacks decision-
25 making capacity, a mental health care representative shall have
26 authority to make health care decisions on behalf of the patient.

27 (1) The mental health care representative shall act in good faith and
28 within the bounds of the authority granted by the advance directive for
29 mental health care and by this act.

30 (2) The mental health care representative may consent to the
31 patient's admission to a psychiatric facility only as authorized pursuant
32 to paragraph (6) of subsection a. of section 6 of this act.

33 b. If a different individual has been appointed as the patient's legal
34 guardian, the mental health care representative shall retain legal
35 authority to make mental health care decisions on the patient's behalf,
36 unless the terms of the legal guardian's court appointment or other
37 court decree provide otherwise.

38 c. The conferral of legal authority on the mental health care
39 representative shall not be construed to impose liability upon that
40 person for any portion of the patient's health care costs.

41 d. An individual designated as a mental health care representative
42 or as an alternate mental health care representative may decline to
43 serve in that capacity.

44 e. The mental health care representative shall exercise the patient's
45 right to be informed of the patient's mental health condition, prognosis

1 and treatment options, and to give informed consent to, or refusal of,
2 health care.

3 f. In the exercise of these rights and responsibilities, the mental
4 health care representative shall seek to make the mental health care
5 decision that the patient would have made if the patient possessed
6 decision-making capacity under the circumstances, or, when the
7 patient's wishes cannot adequately be determined, shall make a mental
8 health care decision in the best interests of the patient.

9

10 10. In addition to any rights and responsibilities recognized or
11 imposed by or pursuant to this act, or by any other law, a mental
12 health care professional shall have the following responsibilities:

13 a. The attending mental health care professional shall make an
14 affirmative inquiry of the patient, the patient's family or others, as
15 appropriate under the circumstances, concerning the existence of an
16 advance directive for mental health care. The attending mental health
17 care professional shall note in the patient's medical records whether or
18 not an advance directive exists, and the name of the patient's mental
19 health care representative, if any, and shall attach a copy of the
20 advance directive to the patient's medical records. The attending
21 mental health care professional shall document in the same manner the
22 reaffirmation, modification, revocation or suspension of an advance
23 directive, if he has knowledge of such action.

24 b. In the event of a transfer of a patient's care:

25 (1) The attending mental health care professional shall assure the
26 timely transfer of the patient's medical records, including a copy of the
27 patient's advance directive for mental health care; and

28 (2) A mental health care professional other than the attending
29 mental health care professional, who is responsible for the patient's
30 care, shall cooperate in effecting an appropriate, respectful and timely
31 transfer of care, and to assure that the patient is not abandoned or
32 treated disrespectfully.

33

34 11. a. (1) The attending mental health care professional, mental
35 health care representative, and, when appropriate, any additional
36 mental health care professional responsible for the patient's care, shall
37 discuss the nature and consequences of the patient's mental health
38 condition, and the risks, benefits and burdens of the proposed mental
39 health care and its alternatives. Except as provided in paragraph (2)
40 of subsection b. of this section, the attending mental health care
41 professional shall obtain informed consent for, or refusal of, health
42 care from the mental health care representative.

43 (2) The decision-making process shall allow, as appropriate under
44 the circumstances, adequate time for the mental health care
45 representative to understand and deliberate about all relevant
46 information before a treatment decision is implemented.

1 b. (1) Following a determination that a patient lacks decision-
2 making capacity, the mental health care representative and the
3 attending mental health care professional shall, to a reasonable extent,
4 discuss the treatment options with the patient, and seek to involve the
5 patient as a participant in the decision-making process. The mental
6 health care representative and the attending mental health care
7 professional shall seek to promote the patient's capacity for effective
8 participation and shall take the patient's expressed wishes into account
9 in the decision-making process.

10 (2) Once decision-making authority has been conferred upon a
11 mental health care representative pursuant to an advance directive for
12 mental health care, if the patient is subsequently found to possess
13 adequate decision-making capacity with respect to a particular mental
14 health care decision, the patient shall retain legal authority to make
15 that decision. In those circumstances, the mental health care
16 representative may continue to participate in the decision-making
17 process in an advisory capacity, unless the patient objects.

18 c. If a mental health care representative is authorized to consent to
19 the patient's admission to a psychiatric facility pursuant to paragraph
20 (6) of subsection a. of section 6 of this act and the attending mental
21 health care professional has obtained informed consent for admission
22 from the mental health care representative, the attending mental health
23 professional may admit the patient based upon the attending mental
24 health professional's:

25 (1) thorough investigation of the patient's psychiatric and
26 psychological history, diagnosis and need for care or treatment, and
27 expressed wishes;

28 (2) written determination that the patient is in need of an inpatient
29 evaluation or would benefit from the care or treatment of a mental,
30 emotional or other personality disorder in an inpatient setting, and that
31 the evaluation, care or treatment cannot be accomplished in a less
32 restrictive setting; and

33 (3) documentation in the patient's medical records of the attending
34 mental health professional's findings and recommendations with regard
35 to the patient's care or treatment.

36 d. In acting to implement a patient's wishes pursuant to an advance
37 directive for mental health care, the mental health care representative
38 shall give priority to the patient's instruction directive, and may also
39 consider, as appropriate and necessary, the following forms of
40 evidence of the patient's wishes:

41 (1) the patient's contemporaneous expressions, including nonverbal
42 expressions;

43 (2) other reliable sources of information, including the mental health
44 care representative's personal knowledge of the patient's values,
45 preferences and goals; and

46 (3) reliable oral or written statements previously made by the

1 patient, including, but not limited to, statements made to other
2 persons.

3 e. If the instruction directive, in conjunction with other evidence
4 of the patient's wishes, does not provide, in the exercise of reasonable
5 judgment, clear direction as applied to the patient's mental health
6 condition and the treatment alternatives, the mental health care
7 representative shall exercise reasonable discretion, in good faith, to
8 effectuate the provisions, intent, and spirit of the instruction directive
9 and other evidence of the patient's wishes.

10 f. Subject to the provisions of this act, and unless otherwise stated
11 in the advance directive, if the patient's wishes cannot be adequately
12 determined, then the mental health care representative shall make a
13 mental health care decision in the patient's best interests.

14
15 12. a. If the patient has executed an instruction directive but has
16 not designated a mental health care representative, or if neither the
17 designated mental health care representative or any alternate designee
18 is able or available to serve, the instruction directive shall be legally
19 operative. If the instruction directive provides clear and unambiguous
20 guidance under the circumstances, it shall be honored in accordance
21 with its specific terms by a legally appointed guardian, if any, family
22 member, mental health care professional and psychiatric facility
23 involved with the patient's mental health care, and any other person
24 acting on the patient's behalf, except as provided in subsection c. of
25 this section.

26 b. If the instruction directive is, in the exercise of reasonable
27 judgment, not specific to the patient's mental health condition and the
28 treatment alternatives, the attending mental health care professional,
29 in consultation with a legally appointed guardian, if any, family
30 member, or other person acting on the patient's behalf, shall exercise
31 reasonable judgment to effectuate the wishes of the patient, giving full
32 weight to the terms, intent and spirit of the instruction directive.

33 c. Departure from the specific provisions of the instruction
34 directive shall be permitted only if the attending mental health care
35 professional determines that compliance with those terms or provisions
36 would:

37 (1) violate the accepted standard of mental health care or treatment
38 under the circumstances of the patient's mental health condition;

39 (2) require the use of a form of care or treatment that is not
40 available to the mental health care professionals responsible for the
41 provision of mental health services to the patient;

42 (3) violate a court order or provision of statutory law; or

43 (4) endanger the life or health of the patient or another person.

44

45 13. In addition to any rights and responsibilities recognized or
46 imposed by or pursuant to this act, or any other law, a psychiatric

1 facility shall have the following responsibilities:

2 a. A psychiatric facility shall adopt such policies and practices as
3 are necessary to provide for routine inquiry, at the time of admission,
4 and at such other times as are appropriate under the circumstances,
5 concerning the existence and location of an advance directive for
6 mental health care.

7 b. A psychiatric facility shall adopt such policies and practices as
8 are necessary to provide appropriate informational materials
9 concerning advance directives for mental health care to all interested
10 patients and their families and mental health care representatives, and
11 to assist patients interested in discussing and executing an advance
12 directive for mental health care.

13 c. In situations in which a transfer of care is necessary, including
14 a transfer for the purpose of effectuating a patient's wishes pursuant
15 to an advance directive for mental health care, a psychiatric facility
16 shall, in consultation with the attending mental health care
17 professional, take all reasonable steps to effect the appropriate,
18 respectful and timely transfer of the patient to the care of an
19 alternative mental health care professional or psychiatric facility, as
20 necessary, and shall assure that the patient is not abandoned or treated
21 disrespectfully. In those circumstances, a psychiatric facility shall
22 assure the timely transfer of the patient's medical records, including a
23 copy of the patient's advance directive for mental health care.

24 d. A psychiatric facility shall establish procedures and practices for
25 dispute resolution in accordance with section 14 of this act.

26 e. A psychiatric facility shall adopt such policies and practices as
27 are necessary to: inform mental health care professionals of their
28 rights and responsibilities under this act; assure that those rights and
29 responsibilities are understood; and provide a forum for discussion and
30 consultation regarding the requirements of this act.

31

32 14. a. In the event of disagreement among the patient, mental
33 health care representative and attending mental health care
34 professional concerning the patient's decision-making capacity or the
35 appropriate interpretation and application of the provisions of an
36 advance directive for mental health care to the patient's course of
37 treatment, the parties may seek to resolve the disagreement by means
38 of procedures and practices established by the psychiatric facility,
39 including but not limited to, consultation with an institutional ethics
40 committee, or with a person designated by the psychiatric facility for
41 this purpose, or may seek resolution by a court of competent
42 jurisdiction.

43 b. A mental health care professional involved in the patient's care,
44 other than the attending mental health care professional, or an
45 administrator of a psychiatric facility may also invoke the dispute
46 resolution process established by the psychiatric facility to seek to

1 resolve a disagreement concerning the patient's decision-making
2 capacity or the appropriate interpretation and application of the
3 provisions of an advance directive for mental health care.

4
5 15. The provisions of this act shall not be construed to supersede
6 any court order relating to, or the provisions of any other statute
7 governing, commitment or admission to a psychiatric facility or the
8 provision of mental health care treatment, including, but not limited to,
9 P.L.1987, c.116 (C.30:4-27.1 et seq.). Any conflict between a court
10 order or the provisions of another statute and the provisions of an
11 advance directive for mental health care, which renders those
12 provisions of the advance directive invalid, shall not be deemed to
13 invalidate any other provisions of the advance directive that do not
14 conflict with the court order or statute.

15
16 16. In accordance with the "Administrative Procedure Act,"
17 P.L.1968, c.410 (C.52:14B-1 et seq.), the Commissioner of Health and
18 Senior Services, in consultation with the Commissioner of Human
19 Services, shall adopt rules and regulations, with respect to psychiatric
20 facilities licensed by the Department of Health and Senior Services,
21 to:

22 a. provide for the annual reporting by those psychiatric facilities to
23 the Department of Health and Senior Services, and the gathering of
24 such additional data, as is reasonably necessary to oversee and
25 evaluate the implementation of this act; except that the commissioner
26 shall seek to minimize the burdens of record-keeping imposed by the
27 rules and regulations and ensure the appropriate confidentiality of
28 patient records; and

29 b. require those psychiatric facilities to adopt policies and practices
30 designed to:

31 (1) make routine inquiry, at the time of admission and at such other
32 times as are appropriate under the circumstances, concerning the
33 existence and location of an advance directive for mental health care;

34 (2) provide appropriate informational materials concerning advance
35 directives for mental health care to all interested patients and their
36 families and mental health care representatives, and to assist patients
37 interested in discussing and executing an advance directive for mental
38 health care;

39 (3) inform mental health care professionals of their rights and
40 responsibilities under this act, to assure that the rights and
41 responsibilities are understood, and to provide a forum for discussion
42 and consultation regarding the requirements of this act; and

43 (4) otherwise comply with the provisions of this act.

44
45 17. In accordance with the "Administrative Procedure Act,"
46 P.L.1968, c.410 (C.52:14B-1 et seq.), the Commissioner of Human

1 Services, in consultation with the Commissioner of Health and Senior
2 Services, shall adopt rules and regulations, with respect to psychiatric
3 facilities operated by the Department of Human Services, to:

4 a. provide for the annual reporting by those psychiatric facilities to
5 the Department of Human Services, and the gathering of such
6 additional data, and the sharing of such reported information and
7 additional data by the Department of Human Services with the
8 Department of Health and Senior Services, as is reasonably necessary
9 to oversee and evaluate the implementation of P.L. , c. (C.)
10 (pending before the Legislature as this bill); except that the
11 commissioner shall seek to minimize the burdens of record-keeping
12 imposed by the rules and regulations and ensure the appropriate
13 confidentiality of patient records; and

14 b. require those psychiatric facilities to adopt policies and practices
15 designed to:

16 (1) make routine inquiry, at the time of admission and at such other
17 times as are appropriate under the circumstances, concerning the
18 existence and location of an advance directive for mental health care;

19 (2) provide appropriate informational materials concerning advance
20 directives for mental health care to all interested patients and their
21 families and mental health care representatives, and to assist patients
22 interested in discussing and executing an advance directive for mental
23 health care;

24 (3) inform mental health care professionals of their rights and
25 responsibilities under P.L. , c. (C.)(pending before the Legislature
26 as this bill), to assure that the rights and responsibilities are
27 understood, and to provide a forum for discussion and consultation
28 regarding the requirements of P.L. , c. (C.)(pending before the
29 Legislature as this bill); and

30 (4) otherwise comply with the provisions of P.L. , c. (C.)
31 (pending before the Legislature as this bill).

32

33 18. The Department of Health and Senior Services and the
34 Department of Human Services shall jointly evaluate the
35 implementation of this act and report to the Governor and the
36 Legislature, including recommendations for any changes deemed
37 necessary, within five years after the effective date of this act.

38

39 19. a. A mental health care representative shall not be subject to
40 criminal or civil liability for any actions performed in good faith and in
41 accordance with the provisions of this act to carry out the terms of an
42 advance directive for mental health care.

43 b. A mental health care professional shall not be subject to criminal
44 or civil liability, or to discipline by the psychiatric facility or the
45 respective State licensing board for professional misconduct, for any
46 actions performed to carry out the terms of an advance directive for

1 mental health care in good faith and in accordance with: the
2 provisions of this act; any rules and regulations adopted by the
3 Commissioner of Health and Senior Services or the Commissioner of
4 Human Services pursuant to this act; and accepted professional
5 standards.

6 c. A psychiatric facility shall not be subject to criminal or civil
7 liability for any actions performed in good faith and in accordance with
8 the provisions of this act to carry out the terms of an advance directive
9 for mental health care.

10

11 20. Nothing in this act shall be construed to impair the legal force
12 and effect of an advance directive for health care executed pursuant to
13 P.L.1991, c.201 (C.26:2H-53 et seq.) either prior to or after the
14 enactment of this act.

15

16 21. The absence of an advance directive for mental health care shall
17 create no presumption with respect to a patient's wishes regarding the
18 provision, withholding or withdrawing of any form of health care. The
19 provisions of this act shall not apply to persons who have not executed
20 an advance directive for mental health care.

21

22 22. The execution of an advance directive for mental health care
23 pursuant to this act shall not in any manner affect, impair or modify the
24 terms of, or rights or obligations created under, any existing policy of
25 health insurance, life insurance or annuity, or governmental benefits
26 program. No health care provider, and no health benefits plan, insurer
27 or governmental authority, shall exclude from health care services or
28 deny coverage to any individual because that individual has executed
29 or has not executed an advance directive for mental health care. The
30 execution, or non-execution, of an advance directive for mental health
31 care shall not be made a condition of coverage under any policy of
32 health insurance, life insurance or annuity, or governmental benefits
33 program.

34

35 23. An advance directive for mental health care executed under the
36 laws of another state in compliance with the laws of that state or the
37 State of New Jersey is validly executed for the purposes of this act.
38 An advance directive for mental health care executed in a foreign
39 country in compliance with the laws of that country or the State of
40 New Jersey, and not contrary to the public policy of this State, is
41 validly executed for the purposes of this act.

42

43 24. a. (1) To the extent that any of the provisions of this act are
44 inconsistent with P.L.2000, c.109 (C.46:2B-8.1 et seq.) concerning the
45 designation of a mental health care representative, the provisions of
46 this act shall have priority over those of P.L.2000, c.109.

1 (2) Durable powers of attorney for health care executed pursuant
2 to P.L.2000, c.109 prior to the effective date of this act shall have the
3 same legal force and effect as if they had been executed in accordance
4 with the provisions of this act.

5 b. Nothing in this act shall be construed to impair the rights of
6 emancipated minors under existing law.

7
8 25. a. A mental health care professional who intentionally fails to
9 act in accordance with the requirements of this act is subject to
10 discipline for professional misconduct pursuant to section 8 of
11 P.L.1978, c.73 (C.45:1-21).

12 b. A psychiatric facility that intentionally fails to act in accordance
13 with the requirements of this act shall be subject to a fine of not more
14 than \$1,000 for each offense. For the purposes of this subsection,
15 each violation shall constitute a separate offense. Penalties for
16 violations of this act shall be recovered in a summary civil proceeding,
17 brought in the name of the State in a court of competent jurisdiction
18 pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274
19 (C.2A:58-10 et seq.).

20 c. It shall be a crime of the fourth degree for a person to:

21 (1) willfully conceal, cancel, deface, obliterate or withhold personal
22 knowledge of an advance directive for mental health care, or a
23 modification, revocation or suspension thereof, without the declarant's
24 consent;

25 (2) falsify or forge an advance directive for mental health care of
26 another person, or a modification, revocation or suspension thereof;

27 (3) coerce or fraudulently induce the execution of an advance
28 directive for mental health care, or a modification, revocation or
29 suspension, thereof; or

30 (4) require or prohibit the execution of an advance directive for
31 mental health care, or a modification, revocation or suspension
32 thereof, as a condition of coverage under any policy of health
33 insurance, life insurance or annuity, or governmental benefits program,
34 or as a condition of the provision of health care.

35 d. The sanctions provided in this section shall not be construed to
36 repeal any sanctions applicable under other law.

37
38 26. This act shall take effect on the 180th day after enactment,
39 except that the Commissioners of Health and Senior Services and
40 Human Services may take such anticipatory administrative action in
41 advance as shall be necessary for the implementation of the act.

42
43
44 STATEMENT

45
46 This bill, which is designated the "New Jersey Advance Directives
47 for Mental Health Care Act," provides explicit statutory authorization

1 for a competent adult to execute an advance directive for mental
2 health care that specifies preferences for mental health services in the
3 event that the declarant is subsequently determined to lack decision-
4 making capacity.

5 Specifically, the bill provides as follows:

6 C An advance directive for mental health care may include:
7 -- a proxy directive for mental health services, which designates a
8 competent adult to act as the declarant's mental health care
9 representative; or

10 -- an instruction directive, which specifies preferences for mental
11 health services in the event that the declarant is subsequently
12 determined to lack decision-making capacity (and which may, but need
13 not, be executed contemporaneously with, or be attached to, a proxy
14 directive).

15 C An advance directive is to be signed and dated by, or at the
16 direction of, the declarant in the presence of at least one subscribing
17 adult witness, who must attest that the declarant is of sound mind
18 and free of duress and undue influence.

19 C A declarant may state in an advance directive for mental health
20 care, including a proxy directive or an instruction directive, or both,
21 whether the declarant wishes to be able to modify, revoke or
22 suspend the advance directive after it has become operative. If a
23 declarant does not include such a statement in the advance
24 directive, the advance directive is not subject to the patient's
25 modification, revocation or suspension after it becomes operative.

26 C A competent adult designated by a declarant to act as the
27 declarant's mental health care representative, by means of a proxy
28 directive, may include any person of the declarant's choosing;
29 except that an operator, administrator or employee of a psychiatric
30 facility in which the declarant is a patient or resident is prohibited
31 from serving as the declarant's mental health care representative
32 unless the operator, administrator or employee is related to the
33 declarant by blood, marriage, domestic partnership or adoption.

34 C An instruction directive may include: a statement of the declarant's
35 general mental health care philosophy and objectives; the declarant's
36 specific wishes regarding the provision, withholding or withdrawal
37 of any form of mental health care; or both.

38 C An advance directive for mental health care becomes operative:
39 -- when it is transmitted to the attending mental health care
40 professional or the psychiatric facility; and it is determined pursuant
41 to the bill that the patient lacks capacity to make a particular mental
42 health care decision; or

43 -- at an earlier date if stipulated by the declarant in the advance
44 directive.

45 C The attending mental health care professional is to determine in
46 writing whether the patient lacks the capacity to make a particular

- 1 mental health care decision. The determination is to: include the
2 attending mental health care professional's opinion concerning the
3 nature, cause, extent and probable duration of the patient's
4 incapacity; be made a part of the patient's medical records; and be
5 confirmed in writing by one or more mental health care
6 professionals.
- 7 C A determination of lack of decision-making capacity under the bill
8 is solely for the purpose of implementing an advance directive for
9 mental health care, and is not to be construed as a determination of
10 a patient's incapacity or incompetence for any other purpose.
- 11 C If it has been determined that the patient lacks decision-making
12 capacity, a mental health care representative is to have authority to
13 make health care decisions on behalf of the patient pursuant to the
14 provisions of the advance directive for mental health care and this
15 bill.
- 16 C The conferral of legal authority on the mental health care
17 representative is not to be construed to impose liability upon that
18 person for any portion of the patient's health care costs.
- 19 C The mental health care representative is to seek to make the mental
20 health care decision that the patient would have made if the patient
21 possessed decision-making capacity under the circumstances, or,
22 when the patient's wishes cannot adequately be determined, to make
23 a mental health care decision in the best interests of the patient.
- 24 C The attending mental health care professional is required to:
25 -- make an affirmative inquiry of the patient, the patient's family or
26 others, as appropriate under the circumstances, concerning the
27 existence of an advance directive for mental health care and include
28 this information in the patient's medical records.
- 29 C If a mental health care representative is authorized to consent to the
30 patient's admission to a psychiatric facility pursuant to the bill and
31 the attending mental health care professional has obtained informed
32 consent for admission from the mental health care representative,
33 the attending mental health care professional may admit the patient
34 based upon the attending mental health care professional's findings
35 and recommendations.
- 36 C If the instruction directive, in conjunction with other evidence of
37 the patient's wishes, does not provide, in the exercise of reasonable
38 judgment, clear direction as applied to the patient's mental health
39 condition and the treatment alternatives, the mental health care
40 representative is to exercise reasonable discretion, in good faith, to
41 effectuate the provisions, intent and spirit of the instruction
42 directive and other evidence of the patient's wishes.
- 43 C A psychiatric facility is required to adopt policies and practices as
44 necessary to: provide for routine inquiry, at the time of admission,
45 and at other times as appropriate under the circumstances,
46 concerning the existence and location of an advance directive for

- 1 mental health care; and provide appropriate informational materials
2 concerning advance directives for mental health care to all
3 interested patients and their families and mental health care
4 representatives.
- 5 -- adopt policies and practices as necessary to inform mental health
6 care professionals of their rights and responsibilities under the bill.
- 7 C The provisions of the bill are not to be construed to supersede any
8 court order relating to, or the provisions of any other statute
9 governing, commitment or admission to a psychiatric facility or the
10 provision of mental health care treatment. Any conflict between a
11 court order or the provisions of another statute and the provisions
12 of an advance directive for mental health care, which renders those
13 provisions of the advance directive invalid, is not to be deemed to
14 invalidate any other provisions of the advance directive that do not
15 conflict with the court order or statute.
- 16 C The Commissioners of Health and Senior Services and Human
17 Services, in consultation with each other, are to adopt rules and
18 regulations, with regard to the psychiatric facilities under their
19 respective regulatory jurisdictions, to provide for the annual
20 reporting by psychiatric facilities to the Department of Health and
21 Senior Services, and the gathering of such additional data, as is
22 reasonably necessary to oversee and evaluate the implementation of
23 the bill.
- 24 C The Departments of Health and Senior Services and Human
25 Services are to jointly evaluate the implementation of the bill and
26 report to the Governor and the Legislature, including
27 recommendations for any changes deemed necessary, within five
28 years after its effective date.
- 29 C The bill provides immunity from criminal or civil liability to a
30 mental health care representative, mental health care professional
31 or psychiatric facility for actions performed in good faith and in
32 accordance with the provisions of the bill.
- 33 C Nothing in the bill is to be construed to impair the legal force and
34 effect of an advance directive for health care executed pursuant to
35 the "New Jersey Advance Directives for Health Care Act"
36 (N.J.S.A.26:2H-53 et seq.) either prior to or after the enactment of
37 this bill.
- 38 C An advance directive for mental health care that is validly executed
39 under the laws of another jurisdiction and complies with New
40 Jersey law is validly executed for the purposes of this bill.
- 41 C The bill provides for penalties for a violation of its provisions by a
42 mental health care professional or psychiatric facility, and makes it
43 a crime of the fourth degree (punishable by imprisonment for up to
44 18 months or a fine of up to \$10,000, or both) for a person to:
45 willfully conceal, cancel, deface or obliterate an advance directive
46 for mental health care without the declarant's consent; falsify an

1 advance directive for mental health care; coerce or fraudulently
2 induce the execution of an advance directive; or require or prohibit
3 the execution of an advance directive as a condition of coverage
4 under an insurance policy or government program, or as a condition
5 of providing health care.
6 C The bill takes effect on the 180th day after enactment, but
7 authorizes the Commissioners of Health and Senior Services and
8 Human Services to take anticipatory administrative action in
9 advance as necessary for its implementation.

SENATE HEALTH, HUMAN SERVICES AND SENIOR
CITIZENS COMMITTEE

STATEMENT TO

SENATE, No. 2369

with committee amendments

STATE OF NEW JERSEY

DATED: MAY 23, 2005

The Senate Health, Human Services and Senior Citizens Committee reports favorably and with committee amendments Senate Bill No. 2369.

This bill, which is designated the "New Jersey Advance Directives for Mental Health Care Act," provides explicit statutory authorization for a competent adult to execute an advance directive for mental health care that specifies preferences for mental health services in the event that the declarant is subsequently determined to lack decision-making capacity.

Specifically, the bill provides as follows:

- C An advance directive for mental health care may include either or both of the following:
 - a proxy directive for mental health services, which designates a competent adult to act as the declarant's mental health care representative; and
 - an instruction directive, which specifies preferences for mental health services in the event that the declarant is subsequently determined to lack decision-making capacity (and which may, but need not, be executed contemporaneously with, or be attached to, a proxy directive).
- C An advance directive is to be signed and dated by, or at the direction of, the declarant in the presence of at least one subscribing adult witness, who must attest that the declarant is of sound mind and free of duress and undue influence.
- C A declarant may state in an advance directive for mental health care whether the declarant wishes to be able to modify, revoke or suspend the advance directive; however, the failure to include such a statement in the advance directive shall not be construed to prevent the declarant from modifying, revoking or suspending the advance directive after it becomes operative.
- C A declarant may designate any competent adult to act as the declarant's mental health care representative by means of a proxy directive; except that an operator, administrator or employee of a

psychiatric facility in which the declarant is a patient or resident is prohibited from serving as the declarant's mental health care representative unless the person is related to the declarant by blood, marriage, domestic partnership or adoption.

- C An instruction directive may include: a statement of the declarant's general mental health care philosophy and objectives; the declarant's specific wishes regarding the provision, withholding or withdrawal of any form of mental health care; or both.
- C An advance directive for mental health care becomes operative:
 - when it is transmitted to the responsible mental health care professional or the psychiatric facility; and it is determined that the patient lacks capacity to make a particular mental health care decision; or
 - at an earlier date if stipulated by the declarant in the advance directive.
- C The responsible mental health care professional is to determine in writing whether the patient lacks the capacity to make a particular mental health care decision. The determination is to: include the responsible mental health care professional's opinion concerning the nature, cause, extent and probable duration of the patient's incapacity; be made a part of the patient's medical records; and be confirmed in writing by one or more mental health care professionals.
- C A determination of lack of decision-making capacity under the bill is solely for the purpose of implementing an advance directive for mental health care, and is not to be construed as a determination of a patient's incapacity or incompetence for any other purpose.
- C If it has been determined that the patient lacks decision-making capacity, a mental health care representative is to have authority to make health care decisions on behalf of the patient.
- C The conferral of legal authority on the mental health care representative is not to be construed to impose liability upon that person for any portion of the patient's health care costs.
- C The mental health care representative is to seek to make the mental health care decision that the patient would have made if the patient possessed decision-making capacity under the circumstances, or, when the patient's wishes cannot adequately be determined, to make a mental health care decision in the best interests of the patient.
- C Departure from the decisions of a mental health care representative is permitted only if the responsible mental health care professional determines that compliance with those decisions would:
 - violate the accepted standard of mental health care or treatment under the circumstances of the patient's mental health condition;
 - require the use of a form of care or treatment that is not available to the mental health care professionals responsible for the provision of mental health services to the patient;
 - violate a court order or provision of statutory law; or

- endanger the life or health of the patient or another person.
- C The responsible mental health care professional is required to make an affirmative inquiry of the patient, the patient's family or others, as appropriate under the circumstances, concerning the existence of an advance directive for mental health care and include this information in the patient's medical records.
- C If a mental health care representative is authorized to consent to the patient's admission to a psychiatric facility and the responsible mental health care professional has obtained informed consent for admission from the mental health care representative, the responsible mental health care professional may admit the patient based upon the responsible mental health care professional's findings and recommendations.
- C If the patient has executed an instruction directive but has not designated a mental health care representative, or if neither the designated mental health care representative or any alternate designee is able or available to serve, the instruction directive shall be legally operative.
- C If the instruction directive, in conjunction with other evidence of the patient's wishes, does not provide, in the exercise of reasonable judgment, clear direction as applied to the patient's mental health condition and the treatment alternatives, the mental health care representative is to exercise reasonable discretion, in good faith, to effectuate the provisions, intent and spirit of the instruction directive and other evidence of the patient's wishes.
- C A psychiatric facility is required to adopt policies and practices as necessary to: provide for routine inquiry, at the time of admission, and at other times as appropriate under the circumstances, concerning the existence and location of an advance directive for mental health care; provide appropriate informational materials concerning advance directives for mental health care to all interested patients and their families and mental health care representatives; and adopt policies and practices as necessary to inform mental health care professionals of their rights and responsibilities under the bill.
- C The provisions of the bill are not to be construed to supersede any court order relating to, or the provisions of any other statute governing, commitment or admission to a psychiatric facility or the provision of mental health care treatment. Any conflict between a court order or the provisions of another statute and the provisions of an advance directive for mental health care, which renders those provisions of the advance directive invalid, is not to be deemed to invalidate any other provisions of the advance directive that do not conflict with the court order or statute.
- C The Commissioners of Health and Senior Services and Human Services, in consultation with each other, are to adopt rules and regulations with regard to the psychiatric facilities under their respective regulatory jurisdictions to: provide for the annual

reporting by psychiatric facilities to the Department of Health and Senior Services; and require the psychiatric facilities to adopt policies and practices to carry out the purposes of the bill.

- C The Commissioner of Human Services, in consultation with the Commissioner of Health and Senior Services shall, by regulation, establish or designate a registry of advance directives for mental health care.
- C The Departments of Health and Senior Services and Human Services are to jointly evaluate the implementation of the bill and report to the Governor and the Legislature, including recommendations for any changes deemed necessary, within five years after its effective date.
- C The bill provides immunity from criminal or civil liability to a mental health care representative, mental health care professional or psychiatric facility for actions performed in good faith and in accordance with the provisions of the bill.
- C Nothing in the bill is to be construed to impair the legal force and effect of an advance directive for health care executed pursuant to the "New Jersey Advance Directives for Health Care Act" (N.J.S.A.26:2H-53 et seq.) either prior to or after the enactment of this bill.
- C An advance directive for mental health care that is validly executed under the laws of another jurisdiction and complies with New Jersey law is validly executed for the purposes of this bill.
- C The bill provides for penalties for a violation of its provisions by a mental health care professional or psychiatric facility, and makes it a crime of the fourth degree (punishable by imprisonment for up to 18 months or a fine of up to \$10,000, or both) for a person to: willfully conceal, cancel, deface or obliterate an advance directive for mental health care without the declarant's consent; falsify an advance directive for mental health care; coerce or fraudulently induce the execution of an advance directive; or require or prohibit the execution of an advance directive as a condition of coverage under an insurance policy or government program, or as a condition of providing health care.
- C The bill takes effect on the 180th day after enactment, but authorizes the Commissioners of Health and Senior Services and Human Services to take anticipatory administrative action in advance as necessary for its implementation.

The Senate Health, Human Services and Senior Citizens Committee reports favorably and with committee amendments Senate Bill No. 2369.

Committee amendments:

The committee amended the bill to:

- C Substitute the term "responsible mental health care professional" for "attending mental health care professional" throughout the bill; and define the former to mean "a person licensed or certified by the State to provide or administer mental health care who is selected

- by, or assigned to, the patient and has primary responsibility for the care and treatment of the patient" (section 3);
- C Expand the definition of "psychiatric facility" to include a hospital or community-based mental health center or other entity licensed or funded by the Department of Human Services to provide community-based mental health services (section 3);
 - C Clarify that a declarant may execute, reaffirm, modify, revoke or suspend an advance directive for mental health care at any time (section 4);
 - C Add to the list of persons who are not permitted to act as a sole witness to the execution of an advance directive for mental health care, the following: an operator, administrator or employee of a rooming or boarding house or a residential health care facility in which the declarant resides (section 4);
 - C Substitute the term "incapacitated patient" for "incompetent patient" (section 5);
 - C Provide that a declarant's failure to include a statement in an advance directive for mental health care as to whether the declarant wishes to be able to modify, revoke or suspend the advance directive after it has become operative is not to be construed to prevent the declarant from modifying, revoking or suspending the advance directive (section 5);
 - C Delete language which provides that confirmation of a lack of decision-making capacity is not required when the patient's lack of decision-making capacity is clearly apparent, and the attending mental health care professional and the mental health care representative agree that confirmation is unnecessary (section 8);
 - C Specify the circumstances under which departure from the decisions of a mental health care representative is permitted (section 9);
 - C Provide that the patient, to the extent possible, is to discuss with the responsible mental health care professional, the mental health care representative, and, when appropriate, any additional mental health care professional responsible for the patient's care, the nature and consequences of the patient's mental health condition, and the risks, benefits and burdens of the proposed mental health care and its alternatives (section 11);
 - C Require the Commissioner of Human Services, in consultation with the Commissioner of Health and Senior Services, to establish or designate by regulation a registry of advance directives for mental health care (section 17); and
 - C Require that the informational materials concerning advance directives for mental health care given to all interested patients and their families and mental health care representatives by psychiatric facilities include information about the registry of advance directives for mental health care, and encourage declarants to periodically review their advance directives for mental health care, as needed (sections 16 and 17).

As amended by committee, this bill is similar to Assembly Bill No. 3833 (1R) (Fisher/Conaway/Weinberg/Greenstein), which is pending before the General Assembly.

STATEMENT TO
[First Reprint]
SENATE, No. 2369

with Senate Floor Amendments
(Proposed By Senator CARDINALE)

ADOPTED: JUNE 23, 2005

This amendment clarifies that an inpatient in a psychiatric facility may modify, revoke or suspend an advance directive for mental health care, including a proxy directive or an instruction directive, or both, unless a responsible mental health professional determines, in accordance with the provisions of the bill, that the patient lacks decision-making capacity to make the decision to modify, revoke or suspend the advance directive. The process for determining if a patient lacks decision-making capacity, with respect to mental health care decisions, is specified in section 8 of the bill.

ASSEMBLY, No. 3833

STATE OF NEW JERSEY 211th LEGISLATURE

INTRODUCED FEBRUARY 24, 2005

Sponsored by:

Assemblyman DOUGLAS H. FISHER

District 3 (Salem, Cumberland and Gloucester)

Assemblyman HERBERT CONAWAY, JR.

District 7 (Burlington and Camden)

Assemblywoman LORETTA WEINBERG

District 37 (Bergen)

Assemblywoman LINDA R. GREENSTEIN

District 14 (Mercer and Middlesex)

Co-Sponsored by:

Assemblywoman Oliver, Assemblymen Connors, Barnes, Assemblywoman Stender, Assemblymen Diegnan, Green, Assemblywoman Voss, Assemblyman Cryan, Assemblywoman Cruz-Perez, Assemblyman Sires, Assemblywoman Quigley, Assemblymen Hackett, Stack, Wisniewski, Vas, Caraballo, Gusciora, Assemblywoman Watson Coleman, Assemblymen Scalera, Prieto, Gordon and McKeon

SYNOPSIS

"New Jersey Advance Directives for Mental Health Care Act."

CURRENT VERSION OF TEXT

As introduced.

(Sponsorship Updated As Of: 5/3/2005)

1 AN ACT concerning advance directives for mental health care and
2 supplementing Titles 26 and 30 of the Revised Statutes.

3
4 **BE IT ENACTED** *by the Senate and General Assembly of the State*
5 *of New Jersey:*

6
7 1. This act shall be known and may be cited as the "New Jersey
8 Advance Directives for Mental Health Care Act."

9
10 2. The Legislature finds and declares that:

11 a. This State recognizes, in its law and public policy, a patient's
12 right to make voluntary, informed choices to accept, reject, or choose
13 among alternative courses of medical and surgical treatment, and
14 specifically for a competent adult to plan ahead for health care
15 decisions through the execution of an advance directive for health
16 care, otherwise known as a living will or durable power of attorney for
17 health care, and to have the wishes expressed therein respected,
18 subject to certain limitations;

19 b. Advance directives for health care provide a vehicle for
20 competent adults to operationalize their fundamental legal right to
21 accept or refuse medical treatment in the event that they are rendered
22 unable to make decisions and communicate with a health care provider
23 about their treatment options because of serious illness, injury or
24 permanent loss of mental capacity;

25 c. The issues affecting persons with mental illness and their
26 psychiatric needs warrant enactment of a separate statute governing
27 advance directives for these individuals, who: find their civil rights
28 and due process protections frequently compromised; often lack the
29 resources, societal supports and self-esteem needed to make advance
30 directives for health care work for them; and are disadvantaged by
31 ignorance on the part of many physicians and attorneys of the specific
32 issues that typically enter into the decisions that a person with mental
33 illness may make for himself when in crisis;

34 d. The provision by statute of advanced directives for mental health
35 care will assure respect for the rights of patients with mental illness
36 with respect to the provision of mental health services and their
37 decision-making in regard thereto; and

38 e. In order to permit a person with mental illness to execute an
39 advance directive that specifies preferences for mental health services
40 in the event that the declarant is subsequently determined to lack
41 decision-making capacity, the Legislature hereby enacts the "New
42 Jersey Advance Directives for Mental Health Care Act."

43

44 3. As used in this act:

45 "Adult" means an individual 18 years of age or older.

46 "Advance directive for mental health care" or "advance directive"

1 means a writing executed in accordance with the requirements of this
2 act. An "advance directive" may include a proxy directive or an
3 instruction directive, or both.

4 "Attending mental health care professional" means a licensed
5 psychiatrist or psychologist selected by, or assigned to, the patient
6 who has primary responsibility for the care and treatment of the
7 patient.

8 "Decision-making capacity" means a patient's ability to understand
9 and appreciate the nature and consequences of mental health care
10 decisions, including the benefits and risks of each, and alternatives to
11 any proposed mental health care, and to reach an informed decision.
12 A patient's decision-making capacity is evaluated relative to the
13 demands of a particular mental health care decision.

14 "Declarant" means a competent adult who executes an advance
15 directive for mental health care.

16 "Domestic partner" means a domestic partner as defined in section
17 3 of P.L.2003, c.246 (C.26:8A-3).

18 "Instruction directive" means a writing which provides instructions
19 and direction regarding the declarant's wishes for mental health care
20 in the event that the declarant subsequently lacks decision-making
21 capacity.

22 "Mental health care decision" means a decision to accept or refuse
23 any treatment, service or procedure used to diagnose, treat or care for
24 a patient's mental condition. "Mental health care decision" also means
25 a decision to accept or refuse the services of a particular mental health
26 care professional or psychiatric facility, including a decision to accept
27 or to refuse a transfer of care.

28 "Mental health care professional" means an individual licensed by
29 this State to provide or administer mental health care in the ordinary
30 course of business or practice of a profession.

31 "Mental health care representative" means the individual designated
32 by a declarant pursuant to the proxy directive part of an advance
33 directive for mental health care for the purpose of making mental
34 health care decisions on the declarant's behalf, and includes an
35 individual designated as an alternate mental health care representative
36 who is acting as the declarant's mental health care representative in
37 accordance with the terms and order of priority stated in an advance
38 directive for mental health care.

39 "Patient" means an individual who is under the care of a mental
40 health care professional.

41 "Proxy directive" means a writing which designates a mental health
42 care representative in the event that the declarant subsequently lacks
43 decision-making capacity.

44 "Psychiatric facility" means a State psychiatric facility listed in
45 R.S.30:1-7, a county psychiatric hospital or the psychiatric unit of a
46 county hospital, or a short-term care facility, special psychiatric

1 hospital or psychiatric unit of a general hospital or other health care
2 facility licensed by the Department of Health and Senior Services
3 pursuant to P.L.1971, c.136 (C.26:2H-1 et seq.).

4 "State" means a state, territory, or possession of the United States,
5 the District of Columbia, or the Commonwealth of Puerto Rico.

6

7 4. a. A declarant may execute an advance directive for mental
8 health care at any time.

9 (1) The advance directive shall be signed and dated by, or at the
10 direction of, the declarant in the presence of at least one subscribing
11 adult witness, who shall attest that the declarant is of sound mind and
12 free of duress and undue influence.

13 (2) The advance directive may be supplemented by a video or audio
14 tape recording.

15 b. The following persons shall not act as a witness to the execution
16 of an advance directive for mental health care:

17 (1) a designated mental health care representative; and

18 (2) the attending mental health care professional responsible for, or
19 directly involved with, the patient's care at the time that the advance
20 directive is executed.

21 c. A person shall not act as a sole witness to the execution of an
22 advance directive for mental health care if that person is:

23 (1) related to the declarant by blood, marriage or adoption, or is the
24 declarant's domestic partner or otherwise shares the same home with
25 the declarant; or

26 (2) entitled to any part of the declarant's estate by will or by
27 operation of law at the time that the advance directive is executed.

28

29 5. a. (1) An advance directive for mental health care shall be
30 deemed to be valid for an indefinite period of time if it does not
31 include an expiration date, subject to a declarant's right to modify,
32 revoke or suspend the advance directive in accordance with the
33 provisions of this section.

34 (2) If an advance directive includes an expiration date that occurs
35 during a period of time in which the declarant has been determined by
36 the attending mental health care professional to lack the capacity to
37 make a particular mental health care decision, the advance directive
38 shall remain in effect until the declarant is determined by the attending
39 mental health care professional to have regained the capacity to make
40 a particular mental health care decision.

41 b. (1) A declarant may state in an advance directive for mental
42 health care, including a proxy directive or an instruction directive, or
43 both, whether the declarant wishes to be able to modify, revoke or
44 suspend the advance directive after it has become operative pursuant
45 to section 7 of this act.

46 (2) If a declarant does not include a statement as described in

1 paragraph (1) of this subsection in the advance directive, the advance
2 directive shall not be subject to the patient's modification, revocation
3 or suspension under the circumstances described in that paragraph.

4 c. A declarant may reaffirm or modify an advance directive for
5 mental health care, including a proxy directive or an instruction
6 directive, or both, subject to the provisions of subsection b. of this
7 section. The reaffirmation or modification shall be made in accordance
8 with the requirements for execution of an advance directive for mental
9 health care pursuant to section 4 of this act.

10 d. A declarant may revoke an advance directive for mental health
11 care, including a proxy directive or an instruction directive, or both,
12 subject to the provisions of subsection b. of this section, by the
13 following means:

14 (1) notification, orally or in writing, to the mental health care
15 representative or mental health care professional, or other reliable
16 witness, or by any other act evidencing an intent to revoke the
17 document; or

18 (2) execution of a subsequent proxy directive or instruction
19 directive, or both, in accordance with section 4 of this act.

20 e. Designation of the declarant's spouse as mental health care
21 representative shall be revoked upon divorce or legal separation, and
22 designation of the declarant's domestic partner as mental health care
23 representative shall be revoked upon termination of the declarant's
24 domestic partnership, unless otherwise specified in the advance
25 directive.

26 f. An incompetent patient may suspend an advance directive for
27 mental health care, including a proxy directive or an instruction
28 directive, or both, by any of the means stated in paragraph (1) of
29 subsection d. of this section. An incompetent patient who has
30 suspended an advance directive may reinstate that advance directive
31 by oral or written notification to the mental health care representative
32 or mental health care professional of an intent to reinstate the advance
33 directive.

34 g. Reaffirmation, modification, revocation or suspension of an
35 advance directive for mental health care is effective upon
36 communication to any person capable of transmitting the information,
37 including the mental health care representative or mental health care
38 professional responsible for the patient's care.

39

40 6. a. A declarant may execute a proxy directive, pursuant to the
41 requirements of section 4 of this act, designating a competent adult to
42 act as the declarant's mental health care representative.

43 (1) A competent adult, including, but not limited to, a declarant's
44 spouse, domestic partner, adult child, parent or other family member,
45 friend, religious or spiritual advisor, or other person of the declarant's
46 choosing, may be designated as a mental health care representative.

1 (2) An operator, administrator or employee of a psychiatric facility
2 in which the declarant is a patient or resident shall not serve as the
3 declarant's mental health care representative unless the operator,
4 administrator or employee is related to the declarant by blood,
5 marriage, domestic partnership or adoption.

6 This restriction shall not apply to a mental health care professional
7 if that individual does not serve as the patient's attending mental health
8 care professional or other provider of mental health care services to
9 the patient and the patient's mental health care representative at the
10 same time.

11 (3) A declarant may designate one or more alternate mental health
12 care representatives, listed in order of priority. In the event that the
13 primary designee is unavailable, unable or unwilling to serve as mental
14 health care representative, or is disqualified from such service pursuant
15 to this section or any other law, the next designated alternate shall
16 serve as mental health care representative. In the event that the
17 primary designee subsequently becomes available and able to serve as
18 mental health care representative, the primary designee may, insofar
19 as then practicable, serve as mental health care representative.

20 (4) A declarant may direct the mental health care representative to
21 consult with specified individuals, including alternate designees, family
22 members and friends, in the course of the decision-making process.

23 (5) A declarant shall state the limitations, if any, to be placed upon
24 the authority of the mental health care representative.

25 (6) If a declarant explicitly authorizes the mental health care
26 representative to consent to the declarant's admission to a psychiatric
27 facility, the declarant shall separately initial each paragraph in which
28 that authorization is granted at the time that the proxy directive is
29 signed and witnessed.

30 b. A declarant may execute an instruction directive, pursuant to the
31 requirements of section 4 of this act, which specifies preferences for
32 mental health services in the event that the declarant is subsequently
33 determined to lack decision-making capacity.

34 (1) The instruction directive may include: a statement of the
35 declarant's general mental health care philosophy and objectives; the
36 declarant's specific wishes regarding the provision, withholding or
37 withdrawal of any form of mental health care; or both.

38 (2) The declarant's specific wishes regarding the provision,
39 withholding or withdrawal of any form of mental health care may
40 include:

41 (a) the identification of mental health care professionals and
42 programs and psychiatric facilities that the declarant would prefer to
43 provide mental health services;

44 (b) consent to admission to a psychiatric facility for up to a
45 specified number of days;

1 (c) a refusal to accept specific types of mental health treatment,
2 including medications;

3 (d) a statement of medications preferred by the declarant for
4 mental health treatment;

5 (e) a statement of the preferred means of crisis intervention or other
6 preferences for mental health treatment; and

7 (f) additional instructions or information concerning mental health
8 care.

9 (3) An instruction directive may, but need not, be executed
10 contemporaneously with, or be attached to, a proxy directive.

11

12 7. a. An advance directive for mental health care shall become
13 operative:

14 (1) when it is transmitted to the attending mental health care
15 professional or the psychiatric facility; and it is determined pursuant
16 to section 8 of this act that the patient lacks capacity to make a
17 particular mental health care decision; or

18 (2) at an earlier date if stipulated by the declarant in the advance
19 directive.

20 b. Treatment decisions pursuant to an advance directive for mental
21 health care shall not be made and implemented until there has been a
22 reasonable opportunity to establish, and where appropriate confirm, a
23 reliable diagnosis and prognosis for the patient.

24

25 8. a. The attending mental health care professional shall determine
26 whether the patient lacks the capacity to make a particular mental
27 health care decision. The determination shall: be stated in writing;
28 include the attending mental health care professional's opinion
29 concerning the nature, cause, extent and probable duration of the
30 patient's incapacity; and be made a part of the patient's medical
31 records.

32 b. (1) The attending mental health care professional's determination
33 of a lack of decision-making capacity shall be confirmed by one or
34 more mental health care professionals. The opinion of the confirming
35 mental health care professional shall be stated in writing and made a
36 part of the patient's medical records in the same manner as that of the
37 attending mental health care professional.

38 (2) Notwithstanding the provisions of paragraph (1) of this
39 subsection to the contrary, confirmation of a lack of decision-making
40 capacity is not required when the patient's lack of decision-making
41 capacity is clearly apparent, and the attending mental health care
42 professional and the mental health care representative agree that
43 confirmation is unnecessary.

44 c. A mental health care professional designated by the patient's
45 advance directive as a mental health care representative shall not make
46 the determination of a lack of decision-making capacity.

1 d. The attending mental health care professional shall inform the
2 patient, if the patient has any ability to comprehend that he has been
3 determined to lack decision-making capacity, and the mental health
4 care representative that:

5 (1) the patient has been determined to lack decision-making
6 capacity to make a particular mental health care decision;

7 (2) each has the right to contest this determination; and

8 (3) each may have recourse to the dispute resolution process
9 established by the psychiatric facility pursuant to section 14 of this act.

10 Notice to the patient and the mental health care representative shall
11 be documented in the patient's medical records.

12 e. A determination of lack of decision-making capacity under this
13 act shall be solely for the purpose of implementing an advance
14 directive for mental health care in accordance with the provisions of
15 this act, and shall not be construed as a determination of a patient's
16 incapacity or incompetence for any other purpose.

17 f. For the purposes of this section, a determination that a patient
18 lacks decision-making capacity shall be based upon, but need not be
19 limited to, an evaluation of the patient's ability to understand and
20 appreciate the nature and consequences of a particular mental health
21 care decision, including the benefits and risks of, and alternatives to,
22 the proposed care or treatment, and to reach an informed decision.

23
24 9. a. If it has been determined that the patient lacks decision-
25 making capacity, a mental health care representative shall have
26 authority to make health care decisions on behalf of the patient.

27 (1) The mental health care representative shall act in good faith and
28 within the bounds of the authority granted by the advance directive for
29 mental health care and by this act.

30 (2) The mental health care representative may consent to the
31 patient's admission to a psychiatric facility only as authorized pursuant
32 to paragraph (6) of subsection a. of section 6 of this act.

33 b. If a different individual has been appointed as the patient's legal
34 guardian, the mental health care representative shall retain legal
35 authority to make mental health care decisions on the patient's behalf,
36 unless the terms of the legal guardian's court appointment or other
37 court decree provide otherwise.

38 c. The conferral of legal authority on the mental health care
39 representative shall not be construed to impose liability upon that
40 person for any portion of the patient's health care costs.

41 d. An individual designated as a mental health care representative
42 or as an alternate mental health care representative may decline to
43 serve in that capacity.

44 e. The mental health care representative shall exercise the patient's
45 right to be informed of the patient's mental health condition, prognosis

1 and treatment options, and to give informed consent to, or refusal of,
2 health care.

3 f. In the exercise of these rights and responsibilities, the mental
4 health care representative shall seek to make the mental health care
5 decision that the patient would have made if the patient possessed
6 decision-making capacity under the circumstances, or, when the
7 patient's wishes cannot adequately be determined, shall make a mental
8 health care decision in the best interests of the patient.

9

10 10. In addition to any rights and responsibilities recognized or
11 imposed by or pursuant to this act, or by any other law, a mental
12 health care professional shall have the following responsibilities:

13 a. The attending mental health care professional shall make an
14 affirmative inquiry of the patient, the patient's family or others, as
15 appropriate under the circumstances, concerning the existence of an
16 advance directive for mental health care. The attending mental health
17 care professional shall note in the patient's medical records whether or
18 not an advance directive exists, and the name of the patient's mental
19 health care representative, if any, and shall attach a copy of the
20 advance directive to the patient's medical records. The attending
21 mental health care professional shall document in the same manner the
22 reaffirmation, modification, revocation or suspension of an advance
23 directive, if he has knowledge of such action.

24 b. In the event of a transfer of a patient's care:

25 (1) The attending mental health care professional shall assure the
26 timely transfer of the patient's medical records, including a copy of the
27 patient's advance directive for mental health care; and

28 (2) A mental health care professional other than the attending
29 mental health care professional, who is responsible for the patient's
30 care, shall cooperate in effecting an appropriate, respectful and timely
31 transfer of care, and to assure that the patient is not abandoned or
32 treated disrespectfully.

33

34 11. a. (1) The attending mental health care professional, mental
35 health care representative, and, when appropriate, any additional
36 mental health care professional responsible for the patient's care, shall
37 discuss the nature and consequences of the patient's mental health
38 condition, and the risks, benefits and burdens of the proposed mental
39 health care and its alternatives. Except as provided in paragraph (2)
40 of subsection b. of this section, the attending mental health care
41 professional shall obtain informed consent for, or refusal of, health
42 care from the mental health care representative.

43 (2) The decision-making process shall allow, as appropriate under
44 the circumstances, adequate time for the mental health care
45 representative to understand and deliberate about all relevant
46 information before a treatment decision is implemented.

1 b. (1) Following a determination that a patient lacks decision-
2 making capacity, the mental health care representative and the
3 attending mental health care professional shall, to a reasonable extent,
4 discuss the treatment options with the patient, and seek to involve the
5 patient as a participant in the decision-making process. The mental
6 health care representative and the attending mental health care
7 professional shall seek to promote the patient's capacity for effective
8 participation and shall take the patient's expressed wishes into account
9 in the decision-making process.

10 (2) Once decision-making authority has been conferred upon a
11 mental health care representative pursuant to an advance directive for
12 mental health care, if the patient is subsequently found to possess
13 adequate decision-making capacity with respect to a particular mental
14 health care decision, the patient shall retain legal authority to make
15 that decision. In those circumstances, the mental health care
16 representative may continue to participate in the decision-making
17 process in an advisory capacity, unless the patient objects.

18 c. If a mental health care representative is authorized to consent to
19 the patient's admission to a psychiatric facility pursuant to paragraph
20 (6) of subsection a. of section 6 of this act and the attending mental
21 health care professional has obtained informed consent for admission
22 from the mental health care representative, the attending mental health
23 professional may admit the patient based upon the attending mental
24 health professional's:

25 (1) thorough investigation of the patient's psychiatric and
26 psychological history, diagnosis and need for care or treatment, and
27 expressed wishes;

28 (2) written determination that the patient is in need of an inpatient
29 evaluation or would benefit from the care or treatment of a mental,
30 emotional or other personality disorder in an inpatient setting, and that
31 the evaluation, care or treatment cannot be accomplished in a less
32 restrictive setting; and

33 (3) documentation in the patient's medical records of the attending
34 mental health professional's findings and recommendations with regard
35 to the patient's care or treatment.

36 d. In acting to implement a patient's wishes pursuant to an advance
37 directive for mental health care, the mental health care representative
38 shall give priority to the patient's instruction directive, and may also
39 consider, as appropriate and necessary, the following forms of
40 evidence of the patient's wishes:

41 (1) the patient's contemporaneous expressions, including nonverbal
42 expressions;

43 (2) other reliable sources of information, including the mental health
44 care representative's personal knowledge of the patient's values,
45 preferences and goals; and

46 (3) reliable oral or written statements previously made by the

1 patient, including, but not limited to, statements made to other
2 persons.

3 e. If the instruction directive, in conjunction with other evidence
4 of the patient's wishes, does not provide, in the exercise of reasonable
5 judgment, clear direction as applied to the patient's mental health
6 condition and the treatment alternatives, the mental health care
7 representative shall exercise reasonable discretion, in good faith, to
8 effectuate the provisions, intent, and spirit of the instruction directive
9 and other evidence of the patient's wishes.

10 f. Subject to the provisions of this act, and unless otherwise stated
11 in the advance directive, if the patient's wishes cannot be adequately
12 determined, then the mental health care representative shall make a
13 mental health care decision in the patient's best interests.

14

15 12. a. If the patient has executed an instruction directive but has
16 not designated a mental health care representative, or if neither the
17 designated mental health care representative or any alternate designee
18 is able or available to serve, the instruction directive shall be legally
19 operative. If the instruction directive provides clear and unambiguous
20 guidance under the circumstances, it shall be honored in accordance
21 with its specific terms by a legally appointed guardian, if any, family
22 member, mental health care professional and psychiatric facility
23 involved with the patient's mental health care, and any other person
24 acting on the patient's behalf, except as provided in subsection c. of
25 this section.

26 b. If the instruction directive is, in the exercise of reasonable
27 judgment, not specific to the patient's mental health condition and the
28 treatment alternatives, the attending mental health care professional,
29 in consultation with a legally appointed guardian, if any, family
30 member, or other person acting on the patient's behalf, shall exercise
31 reasonable judgment to effectuate the wishes of the patient, giving full
32 weight to the terms, intent and spirit of the instruction directive.

33 c. Departure from the specific provisions of the instruction
34 directive shall be permitted only if the attending mental health care
35 professional determines that compliance with those terms or provisions
36 would:

37 (1) violate the accepted standard of mental health care or treatment
38 under the circumstances of the patient's mental health condition;

39 (2) require the use of a form of care or treatment that is not
40 available to the mental health care professionals responsible for the
41 provision of mental health services to the patient;

42 (3) violate a court order or provision of statutory law; or

43 (4) endanger the life or health of the patient or another person.

44

45 13. In addition to any rights and responsibilities recognized or
46 imposed by or pursuant to this act, or any other law, a psychiatric

1 facility shall have the following responsibilities:

2 a. A psychiatric facility shall adopt such policies and practices as
3 are necessary to provide for routine inquiry, at the time of admission,
4 and at such other times as are appropriate under the circumstances,
5 concerning the existence and location of an advance directive for
6 mental health care.

7 b. A psychiatric facility shall adopt such policies and practices as
8 are necessary to provide appropriate informational materials
9 concerning advance directives for mental health care to all interested
10 patients and their families and mental health care representatives, and
11 to assist patients interested in discussing and executing an advance
12 directive for mental health care.

13 c. In situations in which a transfer of care is necessary, including
14 a transfer for the purpose of effectuating a patient's wishes pursuant
15 to an advance directive for mental health care, a psychiatric facility
16 shall, in consultation with the attending mental health care
17 professional, take all reasonable steps to effect the appropriate,
18 respectful and timely transfer of the patient to the care of an
19 alternative mental health care professional or psychiatric facility, as
20 necessary, and shall assure that the patient is not abandoned or treated
21 disrespectfully. In those circumstances, a psychiatric facility shall
22 assure the timely transfer of the patient's medical records, including a
23 copy of the patient's advance directive for mental health care.

24 d. A psychiatric facility shall establish procedures and practices for
25 dispute resolution in accordance with section 14 of this act.

26 e. A psychiatric facility shall adopt such policies and practices as
27 are necessary to: inform mental health care professionals of their
28 rights and responsibilities under this act; assure that those rights and
29 responsibilities are understood; and provide a forum for discussion and
30 consultation regarding the requirements of this act.

31
32 14. a. In the event of disagreement among the patient, mental
33 health care representative and attending mental health care
34 professional concerning the patient's decision-making capacity or the
35 appropriate interpretation and application of the provisions of an
36 advance directive for mental health care to the patient's course of
37 treatment, the parties may seek to resolve the disagreement by means
38 of procedures and practices established by the psychiatric facility,
39 including but not limited to, consultation with an institutional ethics
40 committee, or with a person designated by the psychiatric facility for
41 this purpose, or may seek resolution by a court of competent
42 jurisdiction.

43 b. A mental health care professional involved in the patient's care,
44 other than the attending mental health care professional, or an
45 administrator of a psychiatric facility may also invoke the dispute
46 resolution process established by the psychiatric facility to seek to

1 resolve a disagreement concerning the patient's decision-making
2 capacity or the appropriate interpretation and application of the
3 provisions of an advance directive for mental health care.

4
5 15. The provisions of this act shall not be construed to supersede
6 any court order relating to, or the provisions of any other statute
7 governing, commitment or admission to a psychiatric facility or the
8 provision of mental health care treatment, including, but not limited to,
9 P.L.1987, c.116 (C.30:4-27.1 et seq.). Any conflict between a court
10 order or the provisions of another statute and the provisions of an
11 advance directive for mental health care, which renders those
12 provisions of the advance directive invalid, shall not be deemed to
13 invalidate any other provisions of the advance directive that do not
14 conflict with the court order or statute.

15
16 16. In accordance with the "Administrative Procedure Act,"
17 P.L.1968, c.410 (C.52:14B-1 et seq.), the Commissioner of Health and
18 Senior Services, in consultation with the Commissioner of Human
19 Services, shall adopt rules and regulations, with respect to psychiatric
20 facilities licensed by the Department of Health and Senior Services,
21 to:

22 a. provide for the annual reporting by those psychiatric facilities to
23 the Department of Health and Senior Services, and the gathering of
24 such additional data, as is reasonably necessary to oversee and
25 evaluate the implementation of this act; except that the commissioner
26 shall seek to minimize the burdens of record-keeping imposed by the
27 rules and regulations and ensure the appropriate confidentiality of
28 patient records; and

29 b. require those psychiatric facilities to adopt policies and practices
30 designed to:

31 (1) make routine inquiry, at the time of admission and at such other
32 times as are appropriate under the circumstances, concerning the
33 existence and location of an advance directive for mental health care;

34 (2) provide appropriate informational materials concerning advance
35 directives for mental health care to all interested patients and their
36 families and mental health care representatives, and to assist patients
37 interested in discussing and executing an advance directive for mental
38 health care;

39 (3) inform mental health care professionals of their rights and
40 responsibilities under this act, to assure that the rights and
41 responsibilities are understood, and to provide a forum for discussion
42 and consultation regarding the requirements of this act; and

43 (4) otherwise comply with the provisions of this act.

44
45 17. In accordance with the "Administrative Procedure Act,"
46 P.L.1968, c.410 (C.52:14B-1 et seq.), the Commissioner of Human

1 Services, in consultation with the Commissioner of Health and Senior
2 Services, shall adopt rules and regulations, with respect to psychiatric
3 facilities operated by the Department of Human Services, to:

4 a. provide for the annual reporting by those psychiatric facilities to
5 the Department of Human Services, and the gathering of such
6 additional data, and the sharing of such reported information and
7 additional data by the Department of Human Services with the
8 Department of Health and Senior Services, as is reasonably necessary
9 to oversee and evaluate the implementation of P.L. , c.

10 (C.)(pending before the Legislature as this bill); except that the
11 commissioner shall seek to minimize the burdens of record-keeping
12 imposed by the rules and regulations and ensure the appropriate
13 confidentiality of patient records; and

14 b. require those psychiatric facilities to adopt policies and practices
15 designed to:

16 (1) make routine inquiry, at the time of admission and at such other
17 times as are appropriate under the circumstances, concerning the
18 existence and location of an advance directive for mental health care;

19 (2) provide appropriate informational materials concerning advance
20 directives for mental health care to all interested patients and their
21 families and mental health care representatives, and to assist patients
22 interested in discussing and executing an advance directive for mental
23 health care;

24 (3) inform mental health care professionals of their rights and
25 responsibilities under P.L. , c. (C.)(pending before the
26 Legislature as this bill), to assure that the rights and responsibilities are
27 understood, and to provide a forum for discussion and consultation
28 regarding the requirements of P.L. , c. (C.)(pending before
29 the Legislature as this bill); and

30 (4) otherwise comply with the provisions of P.L. , c.
31 (C.)(pending before the Legislature as this bill).

32

33 18. The Department of Health and Senior Services and the
34 Department of Human Services shall jointly evaluate the
35 implementation of this act and report to the Governor and the
36 Legislature, including recommendations for any changes deemed
37 necessary, within five years after the effective date of this act.

38

39 19. a. A mental health care representative shall not be subject to
40 criminal or civil liability for any actions performed in good faith and in
41 accordance with the provisions of this act to carry out the terms of an
42 advance directive for mental health care.

43 b. A mental health care professional shall not be subject to criminal
44 or civil liability, or to discipline by the psychiatric facility or the
45 respective State licensing board for professional misconduct, for any
46 actions performed to carry out the terms of an advance directive for

1 mental health care in good faith and in accordance with: the
2 provisions of this act; any rules and regulations adopted by the
3 Commissioner of Health and Senior Services or the Commissioner of
4 Human Services pursuant to this act; and accepted professional
5 standards.

6 c. A psychiatric facility shall not be subject to criminal or civil
7 liability for any actions performed in good faith and in accordance with
8 the provisions of this act to carry out the terms of an advance directive
9 for mental health care.

10

11 20. Nothing in this act shall be construed to impair the legal force
12 and effect of an advance directive for health care executed pursuant to
13 P.L.1991, c.201 (C.26:2H-53 et seq.) either prior to or after the
14 enactment of this act.

15

16 21. The absence of an advance directive for mental health care shall
17 create no presumption with respect to a patient's wishes regarding the
18 provision, withholding or withdrawing of any form of health care. The
19 provisions of this act shall not apply to persons who have not executed
20 an advance directive for mental health care.

21

22 22. The execution of an advance directive for mental health care
23 pursuant to this act shall not in any manner affect, impair or modify the
24 terms of, or rights or obligations created under, any existing policy of
25 health insurance, life insurance or annuity, or governmental benefits
26 program. No health care provider, and no health benefits plan, insurer
27 or governmental authority, shall exclude from health care services or
28 deny coverage to any individual because that individual has executed
29 or has not executed an advance directive for mental health care. The
30 execution, or non-execution, of an advance directive for mental health
31 care shall not be made a condition of coverage under any policy of
32 health insurance, life insurance or annuity, or governmental benefits
33 program.

34

35 23. An advance directive for mental health care executed under the
36 laws of another state in compliance with the laws of that state or the
37 State of New Jersey is validly executed for the purposes of this act.
38 An advance directive for mental health care executed in a foreign
39 country in compliance with the laws of that country or the State of
40 New Jersey, and not contrary to the public policy of this State, is
41 validly executed for the purposes of this act.

42

43 24. a. (1) To the extent that any of the provisions of this act are
44 inconsistent with P.L.2000, c.109 (C.46:2B-8.1 et seq.) concerning the
45 designation of a mental health care representative, the provisions of
46 this act shall have priority over those of P.L.2000, c.109.

1 (2) Durable powers of attorney for health care executed pursuant
2 to P.L.2000, c.109 prior to the effective date of this act shall have the
3 same legal force and effect as if they had been executed in accordance
4 with the provisions of this act.

5 b. Nothing in this act shall be construed to impair the rights of
6 emancipated minors under existing law.

7
8 25. a. A mental health care professional who intentionally fails to
9 act in accordance with the requirements of this act is subject to
10 discipline for professional misconduct pursuant to section 8 of
11 P.L.1978, c.73 (C.45:1-21).

12 b. A psychiatric facility that intentionally fails to act in accordance
13 with the requirements of this act shall be subject to a fine of not more
14 than \$1,000 for each offense. For the purposes of this subsection,
15 each violation shall constitute a separate offense. Penalties for
16 violations of this act shall be recovered in a summary civil proceeding,
17 brought in the name of the State in a court of competent jurisdiction
18 pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274
19 (C.2A:58-10 et seq.).

20 c. It shall be a crime of the fourth degree for a person to:

21 (1) willfully conceal, cancel, deface, obliterate or withhold personal
22 knowledge of an advance directive for mental health care, or a
23 modification, revocation or suspension thereof, without the declarant's
24 consent;

25 (2) falsify or forge an advance directive for mental health care of
26 another person, or a modification, revocation or suspension thereof;

27 (3) coerce or fraudulently induce the execution of an advance
28 directive for mental health care, or a modification, revocation or
29 suspension, thereof; or

30 (4) require or prohibit the execution of an advance directive for
31 mental health care, or a modification, revocation or suspension
32 thereof, as a condition of coverage under any policy of health
33 insurance, life insurance or annuity, or governmental benefits program,
34 or as a condition of the provision of health care.

35 d. The sanctions provided in this section shall not be construed to
36 repeal any sanctions applicable under other law.

37
38 26. This act shall take effect on the 180th day after enactment,
39 except that the Commissioners of Health and Senior Services and
40 Human Services may take such anticipatory administrative action in
41 advance as shall be necessary for the implementation of the act.

42
43
44 STATEMENT

45
46 This bill, which is designated the "New Jersey Advance Directives

1 for Mental Health Care Act," provides explicit statutory authorization
2 for a competent adult to execute an advance directive for mental
3 health care that specifies preferences for mental health services in the
4 event that the declarant is subsequently determined to lack decision-
5 making capacity.

6 Specifically, the bill provides as follows:

7 C An advance directive for mental health care may include:

8 -- a proxy directive for mental health services, which designates a
9 competent adult to act as the declarant's mental health care
10 representative; or

11 -- an instruction directive, which specifies preferences for mental
12 health services in the event that the declarant is subsequently
13 determined to lack decision-making capacity (and which may, but need
14 not, be executed contemporaneously with, or be attached to, a proxy
15 directive).

16 C An advance directive is to be signed and dated by, or at the
17 direction of, the declarant in the presence of at least one subscribing
18 adult witness, who must attest that the declarant is of sound mind
19 and free of duress and undue influence.

20 C A declarant may state in an advance directive for mental health
21 care, including a proxy directive or an instruction directive, or both,
22 whether the declarant wishes to be able to modify, revoke or
23 suspend the advance directive after it has become operative. If a
24 declarant does not include such a statement in the advance
25 directive, the advance directive is not subject to the patient's
26 modification, revocation or suspension after it becomes operative.

27 C A competent adult designated by a declarant to act as the
28 declarant's mental health care representative, by means of a proxy
29 directive, may include any person of the declarant's choosing;
30 except that an operator, administrator or employee of a psychiatric
31 facility in which the declarant is a patient or resident is prohibited
32 from serving as the declarant's mental health care representative
33 unless the operator, administrator or employee is related to the
34 declarant by blood, marriage, domestic partnership or adoption.

35 C An instruction directive may include: a statement of the declarant's
36 general mental health care philosophy and objectives; the declarant's
37 specific wishes regarding the provision, withholding or withdrawal
38 of any form of mental health care; or both.

39 C An advance directive for mental health care becomes operative:

40 -- when it is transmitted to the attending mental health care
41 professional or the psychiatric facility; and it is determined pursuant
42 to the bill that the patient lacks capacity to make a particular mental
43 health care decision; or

44 -- at an earlier date if stipulated by the declarant in the advance
45 directive.

46 C The attending mental health care professional is to determine in

- 1 writing whether the patient lacks the capacity to make a particular
2 mental health care decision. The determination is to: include the
3 attending mental health care professional's opinion concerning the
4 nature, cause, extent and probable duration of the patient's
5 incapacity; be made a part of the patient's medical records; and be
6 confirmed in writing by one or more mental health care
7 professionals.
- 8 C A determination of lack of decision-making capacity under the bill
9 is solely for the purpose of implementing an advance directive for
10 mental health care, and is not to be construed as a determination of
11 a patient's incapacity or incompetence for any other purpose.
- 12 C If it has been determined that the patient lacks decision-making
13 capacity, a mental health care representative is to have authority to
14 make health care decisions on behalf of the patient pursuant to the
15 provisions of the advance directive for mental health care and this
16 bill.
- 17 C The conferral of legal authority on the mental health care
18 representative is not to be construed to impose liability upon that
19 person for any portion of the patient's health care costs.
- 20 C The mental health care representative is to seek to make the mental
21 health care decision that the patient would have made if the patient
22 possessed decision-making capacity under the circumstances, or,
23 when the patient's wishes cannot adequately be determined, to make
24 a mental health care decision in the best interests of the patient.
- 25 C The attending mental health care professional is required to:
26 -- make an affirmative inquiry of the patient, the patient's family or
27 others, as appropriate under the circumstances, concerning the
28 existence of an advance directive for mental health care and include
29 this information in the patient's medical records.
- 30 C If a mental health care representative is authorized to consent to the
31 patient's admission to a psychiatric facility pursuant to the bill and
32 the attending mental health care professional has obtained informed
33 consent for admission from the mental health care representative,
34 the attending mental health care professional may admit the patient
35 based upon the attending mental health care professional's findings
36 and recommendations.
- 37 C If the instruction directive, in conjunction with other evidence of
38 the patient's wishes, does not provide, in the exercise of reasonable
39 judgment, clear direction as applied to the patient's mental health
40 condition and the treatment alternatives, the mental health care
41 representative is to exercise reasonable discretion, in good faith, to
42 effectuate the provisions, intent and spirit of the instruction
43 directive and other evidence of the patient's wishes.
- 44 C A psychiatric facility is required to adopt policies and practices as
45 necessary to: provide for routine inquiry, at the time of admission,
46 and at other times as appropriate under the circumstances,

- 1 concerning the existence and location of an advance directive for
2 mental health care; and provide appropriate informational materials
3 concerning advance directives for mental health care to all
4 interested patients and their families and mental health care
5 representatives.
- 6 -- adopt policies and practices as necessary to inform mental health
7 care professionals of their rights and responsibilities under the bill.
- 8 C The provisions of the bill are not to be construed to supersede any
9 court order relating to, or the provisions of any other statute
10 governing, commitment or admission to a psychiatric facility or the
11 provision of mental health care treatment. Any conflict between a
12 court order or the provisions of another statute and the provisions
13 of an advance directive for mental health care, which renders those
14 provisions of the advance directive invalid, is not to be deemed to
15 invalidate any other provisions of the advance directive that do not
16 conflict with the court order or statute.
- 17 C The Commissioners of Health and Senior Services and Human
18 Services, in consultation with each other, are to adopt rules and
19 regulations, with regard to the psychiatric facilities under their
20 respective regulatory jurisdictions, to provide for the annual
21 reporting by psychiatric facilities to the Department of Health and
22 Senior Services, and the gathering of such additional data, as is
23 reasonably necessary to oversee and evaluate the implementation of
24 the bill.
- 25 C The Departments of Health and Senior Services and Human
26 Services are to jointly evaluate the implementation of the bill and
27 report to the Governor and the Legislature, including
28 recommendations for any changes deemed necessary, within five
29 years after its effective date.
- 30 C The bill provides immunity from criminal or civil liability to a
31 mental health care representative, mental health care professional
32 or psychiatric facility for actions performed in good faith and in
33 accordance with the provisions of the bill.
- 34 C Nothing in the bill is to be construed to impair the legal force and
35 effect of an advance directive for health care executed pursuant to
36 the "New Jersey Advance Directives for Health Care Act"
37 (N.J.S.A.26:2H-53 et seq.) either prior to or after the enactment of
38 this bill.
- 39 C An advance directive for mental health care that is validly executed
40 under the laws of another jurisdiction and complies with New
41 Jersey law is validly executed for the purposes of this bill.
- 42 C The bill provides for penalties for a violation of its provisions by a
43 mental health care professional or psychiatric facility, and makes it
44 a crime of the fourth degree (punishable by imprisonment for up to
45 18 months or a fine of up to \$10,000, or both) for a person to:
46 willfully conceal, cancel, deface or obliterate an advance directive

1 for mental health care without the declarant's consent; falsify an
2 advance directive for mental health care; coerce or fraudulently
3 induce the execution of an advance directive; or require or prohibit
4 the execution of an advance directive as a condition of coverage
5 under an insurance policy or government program, or as a condition
6 of providing health care.
7 C The bill takes effect on the 180th day after enactment, but
8 authorizes the Commissioners of Health and Senior Services and
9 Human Services to take anticipatory administrative action in
10 advance as necessary for its implementation.

ASSEMBLY HEALTH AND HUMAN SERVICES COMMITTEE

STATEMENT TO

ASSEMBLY, No. 3833

STATE OF NEW JERSEY

DATED: FEBRUARY 28, 2005

The Assembly Health and Human Services Committee reports favorably Assembly Bill No. 3833.

This bill, which is designated the "New Jersey Advance Directives for Mental Health Care Act," provides explicit statutory authorization for a competent adult to execute an advance directive for mental health care that specifies preferences for mental health services in the event that the declarant is subsequently determined to lack decision-making capacity.

Specifically, the bill provides as follows:

- C An advance directive for mental health care may include:
 - a proxy directive for mental health services, which designates a competent adult to act as the declarant's mental health care representative; or
 - an instruction directive, which specifies preferences for mental health services in the event that the declarant is subsequently determined to lack decision-making capacity (and which may, but need not, be executed contemporaneously with, or be attached to, a proxy directive).
- C An advance directive is to be signed and dated by, or at the direction of, the declarant in the presence of at least one subscribing adult witness, who must attest that the declarant is of sound mind and free of duress and undue influence.
- C A declarant may state in an advance directive for mental health care, including a proxy directive or an instruction directive, or both, whether the declarant wishes to be able to modify, revoke or suspend the advance directive after it has become operative. If a declarant does not include such a statement in the advance directive, the advance directive is not subject to the patient's modification, revocation or suspension after it becomes operative.
- C A competent adult designated by a declarant to act as the declarant's mental health care representative, by means of a proxy directive, may include any person of the declarant's choosing; except that an operator, administrator or employee of a psychiatric facility in which the declarant is a patient or resident is prohibited from serving as the declarant's mental health care representative unless the operator, administrator or employee is related to the declarant by blood, marriage, domestic partnership or adoption.

- C An instruction directive may include: a statement of the declarant's general mental health care philosophy and objectives; the declarant's specific wishes regarding the provision, withholding or withdrawal of any form of mental health care; or both.
- C An advance directive for mental health care becomes operative:
 - when it is transmitted to the attending mental health care professional or the psychiatric facility; and it is determined pursuant to the bill that the patient lacks capacity to make a particular mental health care decision; or
 - at an earlier date if stipulated by the declarant in the advance directive.
- C The attending mental health care professional is to determine in writing whether the patient lacks the capacity to make a particular mental health care decision. The determination is to: include the attending mental health care professional's opinion concerning the nature, cause, extent and probable duration of the patient's incapacity; be made a part of the patient's medical records; and be confirmed in writing by one or more mental health care professionals.
- C A determination of lack of decision-making capacity under the bill is solely for the purpose of implementing an advance directive for mental health care, and is not to be construed as a determination of a patient's incapacity or incompetence for any other purpose.
- C If it has been determined that the patient lacks decision-making capacity, a mental health care representative is to have authority to make health care decisions on behalf of the patient pursuant to the provisions of the advance directive for mental health care and this bill.
- C The conferral of legal authority on the mental health care representative is not to be construed to impose liability upon that person for any portion of the patient's health care costs.
- C The mental health care representative is to seek to make the mental health care decision that the patient would have made if the patient possessed decision-making capacity under the circumstances, or, when the patient's wishes cannot adequately be determined, to make a mental health care decision in the best interests of the patient.
- C The attending mental health care professional is required to make an affirmative inquiry of the patient, the patient's family or others, as appropriate under the circumstances, concerning the existence of an advance directive for mental health care and include this information in the patient's medical records.
- C If a mental health care representative is authorized to consent to the patient's admission to a psychiatric facility pursuant to the bill and the attending mental health care professional has obtained informed consent for admission from the mental health care representative, the attending mental health care professional may

admit the patient based upon the attending mental health care professional's findings and recommendations.

- C If the instruction directive, in conjunction with other evidence of the patient's wishes, does not provide, in the exercise of reasonable judgment, clear direction as applied to the patient's mental health condition and the treatment alternatives, the mental health care representative is to exercise reasonable discretion, in good faith, to effectuate the provisions, intent and spirit of the instruction directive and other evidence of the patient's wishes.
- C A psychiatric facility is required to adopt policies and practices as necessary to:
 - provide for routine inquiry, at the time of admission, and at other times as appropriate under the circumstances, concerning the existence and location of an advance directive for mental health care;
 - provide appropriate informational materials concerning advance directives for mental health care to all interested patients and their families and mental health care representatives; and
 - inform mental health care professionals of their rights and responsibilities under the bill.
- C The provisions of the bill are not to be construed to supersede any court order relating to, or the provisions of any other statute governing, commitment or admission to a psychiatric facility or the provision of mental health care treatment. Any conflict between a court order or the provisions of another statute and the provisions of an advance directive for mental health care, which renders those provisions of the advance directive invalid, is not to be deemed to invalidate any other provisions of the advance directive that do not conflict with the court order or statute.
- C The Commissioners of Health and Senior Services and Human Services, in consultation with each other, are to adopt rules and regulations, with regard to the psychiatric facilities under their respective regulatory jurisdictions, to provide for the annual reporting by psychiatric facilities to the Department of Health and Senior Services, and the gathering of such additional data, as is reasonably necessary to oversee and evaluate the implementation of the bill.
- C The Departments of Health and Senior Services and Human Services are to jointly evaluate the implementation of the bill and report to the Governor and the Legislature, including recommendations for any changes deemed necessary, within five years after its effective date.
- C The bill provides immunity from criminal or civil liability to a mental health care representative, mental health care professional or psychiatric facility for actions performed in good faith and in accordance with the provisions of the bill.
- C Nothing in the bill is to be construed to impair the legal force and effect of an advance directive for health care executed pursuant to the "New Jersey Advance Directives for Health Care Act"

(N.J.S.A.26:2H-53 et seq.) either prior to or after the enactment of this bill.

- C An advance directive for mental health care that is validly executed under the laws of another jurisdiction and complies with New Jersey law is validly executed for the purposes of this bill.
- C The bill provides for penalties for a violation of its provisions by a mental health care professional or psychiatric facility, and makes it a crime of the fourth degree (punishable by imprisonment for up to 18 months or a fine of up to \$10,000, or both) for a person to: willfully conceal, cancel, deface or obliterate an advance directive for mental health care without the declarant's consent; falsify an advance directive for mental health care; coerce or fraudulently induce the execution of an advance directive; or require or prohibit the execution of an advance directive as a condition of coverage under an insurance policy or government program, or as a condition of providing health care.
- C The bill takes effect on the 180th day after enactment, but authorizes the Commissioners of Health and Senior Services and Human Services to take anticipatory administrative action in advance as necessary for its implementation.

STATEMENT TO
ASSEMBLY, No. 3833

with Assembly Floor Amendments
(Proposed By Assemblyman FISHER)

ADOPTED: MAY 16, 2005

These amendments do the following:

- C Substitute the term "responsible mental health care professional" for "attending mental health care professional" throughout the bill; and define the former to mean "a person licensed or certified by the State to provide or administer mental health care who is selected by, or assigned to, the patient and has primary responsibility for the care and treatment of the patient" (section 3);
- C Expand the definition of "psychiatric facility" to include a hospital or community-based mental health center or other entity funded by the Department of Human Services to provide community-based mental health services (section 3);
- C Add to the list of persons who are not permitted to act as a sole witness to the execution of an advance directive for mental health care, the following: an operator, administrator or employee of a rooming or boarding house or a residential health care facility in which the declarant resides;
- C Clarify that a declarant may execute, reaffirm, modify, revoke or suspend an advance directive for mental health care at any time (section 4);
- C Substitute the term "incapacitated patient" for "incompetent patient" (section 5);
- C Provide that a declarant's failure to include a statement in an advance directive for mental health care as to whether the declarant wishes to be able to modify, revoke or suspend the advance directive after it has become operative is not to be construed to prevent the declarant from modifying, revoking or suspending the advance directive under those circumstances (section 5);
- C Delete language which provides that confirmation of a lack of decision-making capacity is not required when the patient's lack of decision-making capacity is clearly apparent, and the attending mental health care professional and the mental health care representative agree that confirmation is unnecessary (section 8);
- C Provide that departure from the decisions of a mental health care representative is permitted only if the responsible mental health care professional determines that compliance with those decisions would:
 - violate the accepted standard of mental health care or treatment

under the circumstances of the patient's mental health condition;

- require the use of a form of care or treatment that is not available to the mental health care professionals responsible for the provision of mental health services to the patient;

- violate a court order or provision of statutory law; or

- endanger the life or health of the patient or another person (section 9);

C Provide that the patient, to the extent possible, is to discuss with the responsible mental health care professional, the mental health care representative, and, when appropriate, any additional mental health care professional responsible for the patient's care, the nature and consequences of the patient's mental health condition, and the risks, benefits and burdens of the proposed mental health care and its alternatives (section 11);

C Require the Commissioner of Health and Senior Services to establish or designate by regulation a registry of advance directives for mental health care, including procedures for accessing the registry, in consultation with the Commissioner of Human Services (section 16); and

C Require that the informational materials concerning advance directives for mental health care given to all interested patients and their families and mental health care representatives by psychiatric facilities include information about the registry of advance directives for mental health care that the Commissioner of Health and Senior Services is required to establish or designate in consultation with the Commissioner of Human Services, and encourage declarants to periodically review their advance directives for mental health care as needed (sections 16 and 17).

STATEMENT TO

[First Reprint]

ASSEMBLY, No. 3833

with Assembly Floor Amendments
(Proposed By Assemblyman FISHER)

ADOPTED: JUNE 23, 2005

This amendment clarifies that an inpatient in a psychiatric facility may modify, revoke or suspend an advance directive for mental health care, including a proxy directive or an instruction directive, or both, unless a responsible mental health professional determines, in accordance with the provisions of the bill, that the patient lacks decision-making capacity to make the decision to modify, revoke or suspend the advance directive. The process for determining if a patient lacks decision-making capacity, with respect to mental health care decisions, is specified in section 8 of the bill.