



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
Division of Health Care Quality
10 West Street, Boston, MA 02111-1212
617-753-8000

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CIRCULAR LETTER: DHCQ 03-04-433

TO: Long Term Care Facility Administrators

FROM: Paul Dreyer, Ph.D., Director

DATE: April 4, 2003

SUBJECT: Frequently Asked Questions Concerning the Use of Antipsychotic Medications in Long-term Care Facilities.

Attached for your information is a series of questions and answers concerning the use of antipsychotic medications in Massachusetts's nursing homes. Please contact Donna Allen at 617-753-8106 or Sondra Korman at (617) 624-5220 if you have questions.

FREQUENTLY ASKED QUESTIONS: TREATMENT OF LONG-TERM CARE FACILITY RESIDENTS WITH ANTIPSYCHOTIC MEDICATIONS

Introduction

Massachusetts's courts recognize a general right of all individuals to control medical treatment decisions, including the right to refuse medical treatment. This right extends to both competent as well as incompetent individuals. The laws governing the administration of anti-psychotic medications are designed to ensure that these legal principles are honored to the greatest extent possible.

Federal and state law governing long-term care facilities specifically prohibit the use of antipsychotic drug therapy for residents without the informed consent of the resident or appropriate legal decision-maker. Further, antipsychotic medication treatment may not be administered unless medically necessary to treat a specific condition and in accordance with a written treatment plan designed to discontinue the medications if possible. Consent to treatment is relatively easy to obtain when the resident is able to understand treatment choices and make an informed decision as to whether to accept antipsychotic medications. The difficult issues and potential legal problems arise when residents lack the ability to provide informed consent due to mental and/or physical impairments and facilities attempt to determine who, if anyone, is the appropriate legal decision-maker for the resident. The following outline addresses commonly asked questions and provides guidance to facilities in resolving these legal issues.

1. Can a resident's health care agent consent to treatment with antipsychotic medications?

Yes. In accordance with an Attorney General's informal opinion, the designated health care agent has the authority to make all health care decisions, including treatment with antipsychotic medications, without court intervention if:

- 1) the resident has signed a valid health care proxy;
- 2) the attending physician has determined that the resident lacks the capacity to make or communicate health care decisions, made an entry in the medical chart of that determination noting the cause and nature and extent and duration of the incapacity, and notified the agent, orally and in writing, of that determination;
- 3) the resident has not limited the agent's authority to consent to treatment with antipsychotic medications on the health care proxy form; and
- 4) the resident has not revoked or indicated a specific intent to revoke the health care proxy

Please note that a refusal to accept antipsychotic medication may indicate an intent to revoke the health care agent's authority. In such situations, the facility should take steps to obtain court authority to treat. See Question No. 5.

The following questions assume that a resident has not executed a valid health care proxy:

2. Under what circumstances can the facility administer antipsychotic medications to a resident if that resident has not been declared "incompetent" by a court of law?

The Attorney General's regulations governing long-term care facilities make it clear that the focus of the inquiry should be on the resident's ability to provide informed consent, not on whether the resident has been "adjudicated incompetent" by a court.

Case 1: If that resident has the ability to make an informed decision as to treatment with antipsychotic medication and the resident has consented to such treatment, the facility can administer antipsychotic medication to the resident in accordance with a written treatment plan.

Case 2: If a clinical determination has been made by a physician or psychiatrist that the resident lacks the ability to provide informed consent, the facility must take the necessary steps to seek court authority to treat with antipsychotic medication (even if the resident is accepting the medication).

3. Can a family member consent to treatment with antipsychotic medications on behalf of a resident who lacks decision-making capacity?

No. A specific probate court proceeding (commonly referred to as a Rogers hearing) is necessary before the facility may legally administer antipsychotic medication to an individual who lacks the ability to give informed consent. As more fully described above, court authority may not be required if the family member is the resident's health care agent. See Question No.1.

4. If the resident has a legal guardian, can the legal guardian consent to treatment with antipsychotic medications?

No. A legal guardian has the authority to consent to routine and customary (as opposed to extraordinary) medical decisions, including admissions to nursing homes and hospitals. In the 1983 Rogers v. Commissioner, Department of Mental Health decision, the Massachusetts Supreme Judicial Court ruled that the administration of antipsychotic medication is "extraordinary treatment" and that consent to such treatment can not be delegated to a resident's legal guardian. Rather, court authorization to treat with antipsychotic medications is required and typically, the court will direct the guardian to monitor such treatment ("the Rogers Monitor"). In order to determine what, if any, court action is required, the guardianship decree should be reviewed to determine whether the court has authorized treatment with antipsychotic medications.

5. How does a facility obtain specific court authority?

If a resident lacks the capacity to give informed consent and does not have a valid health care proxy, the facility must file a probate court guardianship petition seeking specific authorization to treat with antipsychotic medications. Generally, this request is combined with the initial guardianship petition. In cases where a guardian is already in place but there is no court order authorizing treatment with antipsychotic medications, the facility must seek such an order from the court through a General Petition.

The court appoints an attorney to represent the resident in this proceeding. After interested parties receive notice, the court holds a hearing to determine 1) whether the person is incompetent to make treatment decisions and, if so, 2) whether the individual would accept treatment with antipsychotic medications if he/she were competent to so choose (commonly referred to as the "substituted judgment" determination). The facility's physician is required to submit a proposed treatment plan and an affidavit which contains information on the substituted judgment factors: the expressed wishes of the resident; the resident's religious beliefs; the impact of the treatment on the resident's family; the side effects; the risks and benefits of the proposed treatment, and the prognosis with and without the treatment. If the evidence warrants treatment, the court will issue an order specifically authorizing the medical provider to treat the individual with antipsychotic medications in accordance with a written treatment plan. Generally, courts appoint the resident's legal guardian as the "monitor" of the treatment plan. The guardian/monitor has the responsibility to assess the usefulness of the treatment and may be required to report to the court regarding this treatment.

6. How long do treatment orders last?

Because the law views antipsychotic drug therapy as highly invasive treatment, each court-approved treatment order contains a court review date (generally on an annual basis) and an expiration

date. The facility must ensure that the treatment plan reviews are conducted in accordance with the court order. Additionally, the facility must request that the court amend the treatment plan if the medical provider determines that the resident requires an antipsychotic medication not listed as an alternative on the treatment plan.

SUMMARY

Antipsychotic medications may be administered in the following ways:

1. With the informed consent of the resident and in accordance with a written treatment plan; or
2. With the consent of a health care agent under the authority of a valid health care proxy; or
3. In accordance with a court-approved Rogers treatment plan, and appointment of a Rogers Monitor.

References:

Federal Law

42 CFR 483.10(a)(4)

42 CFR 483.75

42 CFR 483.25(l)(1)(2)

State Law

M.G.L.c. 201, §§6 et seq.

M.G.L.c. 201D, §§1 et seq.

105 CMR 150.002(A)(2) (Department of Public Health Licensing)

940 CMR 4.08(18)(19) (Consumer Protection--Governing Long-Term Care Facilities)

Case law

Rogers v. Commissioner of the Department of Mental Health, 390 Mass. 489, 458 N.E.2d 308 (1983)

Guardianship of Weedon, 409 Mass. 196, 565 N.E. 2d 432 (1991)

Letter from Barbara Anthony, Chief, Public Protection Bureau, Office of the Attorney General to Alex Moschella, Esq., July 24, 1997