TREATMENT DECISIONS –
DEPARTURES FROM PROFESSIONAL JUDGMENT

THE "DUE DEFERENCE" STANDARD

In general, the **treatment decisions of professionals** are given **due deference** by **other professionals** and by the **courts**. However, if a treatment decision "**departs from professional judgment**", the patient's rights may have been violated and professional and personal liability may arise.

WHAT IS DEPARTURE FROM "PROFESSIONAL JUDGMENT"?

1. Where the evidence demonstrates that **no judgment at all** was exercised.

   Examples: Residents regularly leave a facility without anyone knowing they are gone. Failure to take away a lighter from a patient with a prior self-burning history who warned staff she was afraid she would harm herself.

   A defense to an accusation that no judgment was exercised is that a **decision to take no action** was reached after **professional deliberation**. However, the mere fact that professionals make a decision is not enough to escape accountability if the decision is made for impermissible reasons.

2. Where an **unqualified individual** made the decision.

   a. **Non-professionals**: What constitutes a "professional" raises many questions that are not easily answered. For instance, what if a doctor makes a decision and an administrator overrules that decision? Is someone a professional merely by being given that title? Are line staff held to professional standards or is it their supervisors? Many of these questions have not yet been answered satisfactorily by the courts.

   b. **Unqualified professionals make the decision**: When is a professional "competent" to make a decision? Does a title alone make one "competent"? Are supervisors liable for "harboring" incompetent doctors?

3. Where a decision is made on an **impermissible basis**.

   a. **Punishment**: A decision made for the purpose of **punishing** a patient is not legitimate. But how does "aversive therapy" or "behavior modification" fit in? The use of punishment as treatment continues to raise controversy. It is noted that many medical treatments cause pain or discomfort. Does this make them punishment? Probably not, if there is a **valid consent** form signed by the patient.

It is noted that **some actions** by mental health professionals are **intended as treatment** but are **experienced as punishment by the patient**.

b. **Departure from guidelines and regulations**: Failure of a professional to follow a facility's or department's **guidelines and policies** can constitute a breach of professional judgment. But just because a facility follows its own guidelines does not necessarily mean a rights violation may not occur.

c. **Failure to individualize decisions**: Indiscriminate application of policies, **regardless of individual patient needs**, which result in denials of rights or exacerbation of an individuals' mental illness, have led to court findings against service providers. What happens, though, if staff keep a patient in seclusion longer than necessary due to staff shortages? The more understaffed and overcrowded a unit is, the more likely a finding of departure from professional judgment is in cases where individuals end up spending more time in restrictions than necessary. If an inpatient ward is operated and staffed substantially in accordance with professional standards, then decisions to impose seclusion and restraint are more likely to represent a valid exercise of professional judgment.

ADVICE FOR STAFF:

Staff should consider themselves professionals and **act accordingly**. They should be ready to back up their decisions with appropriate **documentation**. They also need to follow standards set by the service provider and its overseers (facility rules, JCAHO, CMS, etc.).

Staff need to make decisions in ***their own area of expertise*** and **refer other decisions** to those qualified to make them. Staff also need to foster **team decision-making**.

For decisions involving **risks**, they should "go up the chain of command". The degree to which to take things up the chain of command depends on the **risks involved** in making the decision.

- From Client Rights Office training materials

CASES

1. A patient had several complaints that stemmed from her alleged misdiagnosis by one of the provider's doctors. The patient was diagnosed with bi-polar II, which allegedly caused her to stop trying to conceive a child due to the

medication that she was prescribed, to be denied for life insurance and to be denied for international adoption. **The patient alleged that the misdiagnosis of her condition amounted to inadequate treatment**. The patient had to show that it was more likely that not that the doctor failed to meet established professional standards of psychiatry to meet her burden of proof. **Doctors and treatment team decisions are given due deference in the grievance process.** The patient must submit evidence that shows a departure from professional judgement. No such departure was evidenced or even alleged. There was no violation of the patient's right to adequate treatment in this case. (Level III decision in 12-SGE-0006 decided on 11/14/2012)

2. A parent filed a complaint based on her belief that her daughter was being over-medicated by a County doctor. The County did not appeal the Level III decision's findings of rights violations for the lack of informed consent and for inadequate documentation. Nor did the County provide any reply to the grievant appeal to Level IV. Thus, "mootness" was the only issue decided at Level IV. The Level III decision analyzed the grieving party's allegation that the County doctor should have provided better documentation of his reasons for initiating a medication and adjusting the patient's dosage. On two occasions, the County doctor failed to provide any reason or justification for increasing the dosage, including to a dosage that appeared to be double the approved dosage. Doctors' decisions regarding medication were given significant deference in the grievance process. However, **doctors were still required to articulate the specific reasons for such decisions. This requirement took on even greater importance when a doctor may be deviating from accepted guidelines.** The required documentation not only protects the patient; it also protects the doctor and the County in the event concerns are later raised and the doctor's judgment is scrutinized. The County doctor's lack of proper documentation on at least two dates violated the patient's right to have clear documentation for the reason for the use of medication and for changes to the medication regimen. (Level IV decision in Case No. 12 SGE-0011 decided on 05/09/2013)

3. A patient with a history of anxiety, major depression, prior suicide attempts and substance abuse was admitted into the hospital's inpatient psychiatry unit. She was put on one of the least restrictive precautionary treatment levels despite the fact that she had attempted to commit suicide in the past and had overdosed within the 48 hours prior to admission. **The patient was given a butter knife with a meal and stabbed herself in the abdomen.** The grieving party alleged that the patient's right to safety was violated when she was given metal utensils. It was found that the provider also has the obligation to provide the least restrictive treatment and conditions. Also, treatment decisions of professionals are entitled to due deference. However, if a treatment decision departs from professional judgement a patient's right to treatment may have been violated. **Here, a doctor made the decision to place the patient in the least restrictive level. Evidence would need to show that it was more**

probable than not that the doctor departed from professional judgement, exercised no judgement was not qualified to make the decision or made it on an impermissible basis. No second opinion was required in this case because no diagnosis, prescription or similar medical decision was made. **There were facts tending to show that there were factors that may have caused the doctor to place the client on a lower safety level, thus it is not more probable than not that the doctor departed from professional judgement.** (Level III decision in 13-SGE-0004 decided on 11/5/2013)

4. A patient experienced unwanted sexual side effects from a medication. The patient alleged that his doctor laughed and said the side effects were in his head when he reported sexual side effects of eight weeks duration to his doctor. The patient was weaned off of the medication and the side effects dissipated. There must be sufficient evidence to show that it was more probable than not that a doctor departed from professional judgement in prescribing medication to a patient to show that a patient was given unnecessary or excessive medication. Such evidence could come in the form of a second opinion from a professional of equal or greater standing than the doctor. A **second doctor recommending medication changes does not in and of itself demonstrate that the first doctor departed from professional judgement. Here, no evidence showed that it was more probable than not that the patient's doctor departed from professional judgement** when he prescribed the medications or when he discontinued them. In the present case the grievant's side effects were not initially reported to be significant; the doctor did discuss the case with staff; the dose was, at its highest, half that of the maximum recommended dosage and the doctor discontinued the medication within a reasonable amount of time. No violation was found. (Level IV decision in 14-SGE-0001 decided on 12/22/2014)

5. A patient alleged that his rights to adequate treatment and to be free from arbitrary decisions were violated when his therapist failed to provide medication that he requested. Due deference must be given to treatment professionals in making decisions regarding a patient's treatment plan. Such decisions will not be found to violate a patient's rights unless it is more probable than not that the determination was inappropriate. In **order to meet this burden of proof a patient must show that it was more likely than not that the treatment team failed to meet established professional standards of psychiatry when determining the patient's treatment recommendations.** The patient did not meet this burden. There was insufficient evidence to show it was more likely than not that the grievant's treatment team failed to meet established professional standards. In fact, evidence in the grievant's treatment record shows that the medical staff made a considered professional judgement to deny pain medications to the grievant. No violation of the patient's right to adequate treatment was found. (Level III decision in 14-SGE-0003 decided on 6/26/2015)

6. A patient alleged that his right to be free from arbitrary decisions was violated when his therapist failed to provide medication that he requested. **A decision about a client must be based on a legitimate treatment, management or security interest to be non-arbitrary**. **The burden is on the patient to provide sufficient evidence that it was more probable that not that the decision was a departure from professional judgement to support a finding that a treatment decision is arbitrary.** Such evidence has to be in the form of a second opinion from a professional of equal or greater standing than the doctor. No such evidence was provided by the patient. On the contrary, the record in this case reflects that the treatment team documented legitimate treatment reasons not to provide the patient with his requested pain medications. Namely, **the doctor expressed concern that the grievant has unaddressed mental health and substance abuse issues that should be evaluated prior to prescribing pain medication. No violation of the patient's right to be free from arbitrary decisions was found.** (Level III decision in 14-SGE-0003 decided on 6/26/2015)

7. A client, who was a special education teacher, **regularly referred students to her therapist (who was also the director of the provider). The referral of new patients was problematic.** The provider's ability to make treatment decisions objectively may be clouded if the provider becomes invested in the receipt of new clients from the patient. (Level III decision in Case No. 15-SGE-0002 on 01/29/2016)

8. A therapist requested that a patient sign **two releases of information so that the Director's wife (who was also an employee of the provider) could prove something to her friend**. The provider admitted that the patient lost trust in him upon his request for the second release of information. The requests were inappropriate and the loss of trust was an indication that the client/therapist relationship was jeopardized. The releases to speak to the therapist's wife and her friend about things shared during therapy sessions demonstrated a conflict of interest that compromised the therapist's objectivity in treating the grievant. **A violation of the grievant's right to adequate treatment was found**. (Level III decision in Case No. 15-SGE-0002 on 01/29/2016)

9. A grievant claimed that a strip search conducted without warning upon her admission was improperly performed by staff at an inpatient psychiatric hospital. **A patient has a right to be free from arbitrary treatment decisions. A decision about a patient must be based on legitimate treatment, management or security interests.** There must be a reason for the decision that makes sense under the circumstances. Due deference must be given to treatment professionals while determining if the decision makes sense. However, if a treatment decision "departs from professional judgement" a patient's rights may have been violated. In this case the

legitimate management and security reasons for a search upon admission were obvious. Searches limit the risk of people bringing weapons or drugs into an inpatient unit. **Patients on inpatient units have a right to a safe environment, therefore strip searches are allowable. This rational may not be used to support extreme measures. The right to a safe environment must be balanced against other applicable client rights.** The balancing should result in searches being completed in accord with Trauma Informed Care practices because such practices are part of adequate treatment. Here, the patient's right to be free from arbitrary decisions was not violated because the policy was a valid management and security decision created via professional judgement by qualified staff for permissible reasons. (Level III decision in Case No. 15-SGE-0008 on 6/16/2016)

10. A Grievant was **working on his Driver Safety Plan and receiving outpatient AODA services through the county to have his driver's license reinstated**. He attended a portion of his safety plan, but did not finish it. Evidence submitted by the grievant's doctor showed that the patient was disabled and had severe restrictions on his ability to walk or travel long distances in a vehicle, which the grievant alleged made him **unable to transport himself to the clinic**. His requests for telephonic services were denied. Providers must not make arbitrary decisions about patients. **In order to be non-arbitrary, a decision about a client must be rationally based on a legitimate treatment, management or security interest,** meaning that a given provider decision must make sense under the specific circumstances of a given case. In order to be arbitrary, a treatment decision must depart from professional judgement by the provider in order to overcome the due deference that treatment professionals are accorded. Although the grievant made a convincing case as to the extent of his medical issues, he failed to offer any evidence that tended to show any departure from professional judgement in deciding not to offer services remotely. The provider identified significant security and management issues that prevented in home AODA services including the difficulty of in home drug testing, ensuring the safety of unaccompanied staff entering the homes of known substance users, some of whom own firearms or accompanied staff violating the confidentiality of clients. It was held that the client's right to be free from arbitrary treatment decisions was not violated. (Level IV decision in Case No. 16-SGE-01 on 12/15/2016)

11. A patient claimed that she was **denied a shot of vivitrol** after she was wrongfully discharged from treatment following her alleged violation of program requirements based on inaccurate positive results for use of heroin, cocaine and morphine. The decisions of doctors are entitled to due deference by peers and the courts. However, if a treatment decision departs from professional judgement a violation of the patient's right to treatment may be found. A professional's departure from professional judgement may be

shown in any of three ways: (i) evidence that suggests that the professional exercised no judgement at all; (ii) evidence that suggests that the individual was not qualified to make the judgement; or (iii) evidence that suggests that the judgement was made on an impermissible basis. In the case at hand, the patient had been discharged. **Generally, patients must be actively involved in AODA programming to receive a vivitrol shot.** The treating doctor then determined that one more shot along with 30 days of emergency service was appropriate. No violation of the patient's right to adequate treatment was found because the case became moot when the grievant received the shot. (Level IV decision in Case No. 16-SGE-0006 on 10/23/2017)

12. A patient's mother acted on her daughter's behalf and claimed that services received through the Treatment Alternative and Diversion program run by the County violated her daughter's patient rights. The Grievant claimed that her right to be from arbitrary treatment decisions was violated when the treatment team discharged the patient based on inaccurate lab results showing positive results for use of heroin, cocaine and morphine. **Tests from six separate dates came up positive for drugs, most frequently cocaine. The tests were found to be accurate.** Furthermore, evidence showed that the patient was struggling in treatment, had a negative attitude and was undermining and defensive when confronted on her behaviors by staff. In general, treatment decisions of professionals are afforded "due deference." A patient's right to non-arbitrary treatment decisions may have been violated *only* if a treatment decision departs from professional judgement. Nothing presented evidenced that the patient's treatment team failed to use proper judgment, were unqualified or discharged the patient as punishment or for any other impermissible reason. **Based on the determination that the lab results were reliable and on the fact that the discharge decision was based on diminishing participation in treatment and ongoing refusal of recommended services in addition to positive drug screens, no violation of the patient's right to be free from arbitrary treatment decisions was found.** (Level IV decision in "Case No. 16-SGE-0006 on 10/23/2017)

13. A patient committed suicide and the State Grievance Examiner chose to **investigate whether the therapist treating the patient was within the professional standards for therapists who work with patients that are suicidal.** It was determined that the **therapist had not missed signals that the patient may be at imminent risk, nor did the therapist make assumptions that clouded the therapist's treatment decisions**. Since treatment decisions made by professionals are given due deference, and it was not found to be more probable than not that the therapist departed from professional standards, the concerns did not rise to the level of a rights violation. (Level III Grievance Decision in Case No. 18-SGE-01)

14. A patient's family grieved on behalf of the patient when a **caregiver drove the patient, who is non-verbal and has severe autism and epilepsy, to an unplanned, undisclosed location for personal reasons** for approximately one hour. The caregiver defensively informed the family that he took the patient to the grocery store, but told the provider that he was talking with a friend while the patient stayed in the car. The provider chose to believe that the patient was in the car while the caregiver talked with a friend in the driveway, and acknowledged that this was inappropriate and unprofessional. However, the provider did not find a rights violation, as they believed that the patient was not unsupervised during that time. It cannot be determined the exact details as the caregiver's integrity is questionable. Further, the patient could have been in severe danger or subject to abuse at the undisclosed location. It was determined that **the caregiver departed from professional judgement by taking a highly vulnerable individual to an unknown location for personal reasons, not having the authority to take the client to an undisclosed location, and violating rules of employment;** therefore violating the patient's right to prompt and adequate treatment. Additionally, the patient's right to a safe and humane environment and to dignity and respect were violated as this put the patient in unnecessary danger and the caregiver did not consult with the guardians if this "errand" would be beneficial to the patient. (Level III Grievance Decision in Case No. 18-SGE-06)

15. A patient complained when the provider discharged him from Outpatient and Prescriber services, changed his primary psychiatric diagnosis, and altered his Quetiapine dosage. It was determined that these treatment decisions were not in violation of the patient's right to adequate treatment as these decisions are given "due deference" in the grievance procedure and there was no evidence to suggest the staff decisions "depart[ed] from professional judgement." There were documented treatment reasons for the decisions made on behalf of the client. (Stage III Decision in Case No. 19-SGE-04, upheld at Stage IV)

16. A patient grieved when her **new Prescriber would not refill her prescription without further diagnostic testing.** The testing the Prescriber was requesting could not be completed with the provider, and the grievant was unable to find a different provider that would be able to complete the test. The grievant therefore did not get her prescription refilled. It was found to not be a violation of the patient's rights as the **Prescriber was within professional standards, adequately documented the reasons why he did not refill the prescription, and informed the grievant of this decision.** (Level III Grievance Decision in Case No. 20-SGE-01)

17. A patient complained to Conditional Release when his **psychotropic medication regimen changed while he was residing in the county jail**.

Conditional Release is responsible for coordinating services and communicating with all parties involved what the treatment plan is, but the **treatment decisions are left to those that are qualified to make the treatment decision.** There was no evidence to suggest that the treatment decisions made on behalf of the grievant necessitated intervention from Conditional Release. The grievant's rights were not violated. (Level III grievance decision in Case No. 20-SGE-04).

18. An individual filed a complaint on behalf of his wife, alleging that the patient's **psychiatrist failing to formally evaluate the patient for ADHD** violated the patient's right to participate in the planning of her treatment and care. The treating psychiatrist was consulted, and in his opinion, based upon the information in her treatment record and his experience with the patient, there was not sufficient concern to refer the patient for formal neuropsychological testing for ADHD. The psychiatrist also opined that stimulant medications used to treat ADHD could pose a risk to the patient. **While the wishes and opinions of patients must be considered, deference is given to the clinical judgment and impressions of treatment professionals.** There was no violation of the patient's right to participate in the planning of her treatment and care. (Level III decision in case number 21-SGE-07)

19. A patient complained that she was **misdiagnosed by the Attending Physician (AP) upon admission to an inpatient psychiatric hospital. The grievant alleged the AP used out-of-date information, which caused her to receive damaging treatment by other staff members,** including a nurse and a Psychologist. The evidence presented showed that staff's clinical impressions were formed by the patient's past treatment record and through interview with the patient. Further, as past Community Grievance cases hold, medical professionals are afforded deference in allegations of ineffective care. While it was carefully considered that the patient did not agree with the AP and Psychologist's perceptions of her treatment needs nor the way in which treatment was provided, it is difficult to prove that the treatment was not adequate, or further, harmful, based on the available facts. There was no evidence that the patient's right to receive prompt and adequate care was violated by her DSM-5 diagnoses. (Level III decision in 21-SGE-008)

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