SCOPE: Office of Mental Health Licensure Staff
South Mountain Restoration Center and
State Mental Hospital Long Term Care Units
Office of Mental Health Bureau Directors

PURPOSE:
To provide Office of Mental Health licensure and investigative staff with guidelines for the identification and reporting of suspected criminal violations of Act 28 of 1995, relating to neglect of care dependent persons.

BACKGROUND:
Act 28 of 1995 amended Title 18 (Crimes Code) of the Pennsylvania Consolidated Statutes to make caretaker neglect (as specifically defined therein), which results in bodily injury to a care dependent person, a criminal offense punishable as a first degree felony or a first degree misdemeanor according to the severity of the bodily injury sustained. Act 28 provided very specific definitions of the terms it employs, as follows:

Caretaker: "an owner, operator, manager, or employee of a nursing home, personal care home, domiciliary care house, community residential facility, adult daily living center, home health agency or home health service provider, whether licensed or unlicensed".

Care Dependent Person: "any adult who, due to physical or cognitive disability or impairment requires assistance to meet his needs for food, shelter, clothing, personal care, or health care."

Neglect: a caretaker's intentional, knowing or reckless failure to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care dependent person for whom he is responsible to provide care, or the intentional or knowing use of a physical restraint, chemical restraint, or medication on a care dependent person contrary to law or regulation, such that bodily injury or serious bodily injury results.

Bodily injury: although it is not defined by Act 28, it is legally defined by 18 Pa.C.S. Section 2301 (Crimes Code) as "Impairment of physical condition or substantial pain".

COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:
Office of Mental Health - (717) 787-6443

MH 805 – 9/95
Serious Bodily Injury: as defined by 18 Pa.C.S. Section 2301, is "Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

Act 28 also creates the rebuttable presumption that care dependent persons are incompetent to refuse necessary treatment. Such presumed incompetence may be rebutted by the caretaker who can prove through a preponderance of the evidence that the person's refusal of treatment was consistent with:

a. a lawfully executed do-not-resuscitate order signed by the patient's physician;

b. written instructions provided by the care dependent person's attorney-of-fact, pursuant to a durable power-of-attorney;

c. a care dependent person's advance directive for health care as provided for in 20 Pa.C.S., Chapter 54;

d. the care dependent person's written, signed and witnessed instructions, composed when the person is competent to determine the treatment he wishes to receive.

The caretaker who honors a patient's refusal of necessary treatment bears the burden of proving that one of these conditions existed. A current written assessment by the person's physician to the effect that the patient is competent to refuse the necessary treatment could be used by the caretaker as proof of the patient's competence; however, even physician's assessments could be conceivably challenged by other testimony, should the refusal result in bodily injury and criminal charges ensue.

Act 28 also mandates that any employee of the Departments of Public Welfare, Health or Aging engaged in regulatory or investigative activities, who has reasonable cause to believe that a crime under Act 28 has been committed, shall report the alleged neglect to local criminal justice officials or the Office of the Attorney General.

I. MH COMMUNITY PROGRAMS AND SERVICES COVERED BY ACT 28

For purposes of this Bulletin, the programs and services subject to licensure/approval by Office of Mental Health staff which are covered by Act 28 include at least the following:

- Crisis Residential Services
- Community Residential Rehabilitation Services
- Partial Hospitalization Programs
- Long Term structured residences
- Residential Inpatient Non-hospital Facilities for Adults

Psychiatric hospitals and outpatient programs are not covered. However, other services which are not regulated by the Office of Mental Health, such as supported housing, may be subject to potential scrutiny under Act 28. Were an OMH staff person assigned to conduct an investigation - in such an unlicensed/unregulated service to discover facts indicative of
an Act 28 violation, discussion with the legal office is recommended prior to reporting to criminal justice authorities. Evolving case law involving Act 28 may either broaden or limit the programs and services covered by the Act.

II. WHO IS OBLIGATED TO REPORT SUSPECTED ACT 28 VIOLATIONS TO CRIMINAL JUSTICE AUTHORITIES?

    Only Commonwealth Departments of Health, Public Welfare and Aging, who are engaged in regulatory or investigative activities, are required to report suspected Act 28 violations. County staff and provider staff have no such obligation; the Act does not preclude nor discourage them from reporting such suspected violations, however.

III. IDENTIFICATION OF ACT 28 VIOLATIONS

    OMH licensure and investigative staff shall report alleged instances of neglect under Act 28 when they have reasonable cause to believe that a care dependent person has suffered bodily injury, or serious bodily injury as a result of a caretaker's intentional, knowing or reckless failure to provide necessary treatment, goods and services, or the caretaker's unlawful restraint, isolation or medication of the person.

    In this instance, “reasonable cause to believe” means knowledge of facts and circumstances, about which the employee has reasonably trustworthy information, which would lead a person of ordinary care and prudence to believe or to entertain an honest and strong suspicion that a crime has been committed, as defined by Act 28.

    The employee is not required or expected to prove that the crime occurred, nor to conduct an independent investigation to gather evidence that a crime occurred. That is the responsibility of the prosecuting attorney and the police, not the Office of Mental Health.

    In determining whether reasonable cause exists, it is helpful to understand the definitions of the terms "recklessly", "knowingly" and "intentionally". All three terms imply that the caretaker, at the very least, knew the nature of the act he was committing or failing to commit and its likely adverse consequences to the care dependent person, and willfully and intentionally committed the act or omission despite this knowledge. This standard is thus higher than that of "negligence", which is simply failure to act with the care a reasonably careful person would take in a similar situation. While simple "negligence" is characterized by carelessness or inattention, "intentionally", "knowingly" and "recklessly" are characterized by willfulness and intent. Negligence is not the equivalent of neglect under Act 28; if a care dependent person suffers a bodily injury as a result of the caretaker's carelessness or an accident, no crime has been committed under Act 28. However, whether an injury resulted from carelessness or recklessness on the part of a caretaker may be a matter for the court to decide, not the DPW employee who reports the alleged neglect. DPW regulatory staff need not prove that the act or omission was intentional, knowing nor reckless; they need only have reasonable cause to believe that there was recklessness or worse.
In determining whether a bodily injury sustained by a care dependent person is a potential Act 28 violation, the following factors should be considered:

1. Provider Responsibilities

Licensed or approved providers can be held accountable to provide only those goods, services and treatments which the statutes, regulations or rules under which they are licensed or approved require and permit. Many programs are required to link clients to necessary services that they are not expected or permitted to provide themselves, and failure to provide such linkages could result in an Act 28 violation, should bodily injury result.

Example: LTSR staff could be criminally liable for knowingly failing to administer a prescribed medication for a physical illness with resulting patient injury, because medication administration is a function the LTSR licensure regulations include. A CRR could not be held criminally liable for failing to administer medication over a patient's objection, because they are not permitted to administer medications under CRR licensure regulations. In fact, CRR caretaker who did administer medications would be in violation of Act 28 if bodily injury resulted. However, a CRR could be held accountable under Act 28 for not informing the patient's treating physician or MH case manager that the client was refusing to self administer the prescribed medications, because such information sharing is expected under CRR Regulations.

2. Mental Health Procedures Act Requirements and Prohibitions

Act 28 makes no reference to the Mental Health Procedures Act, nor has the Department received any legal interpretation indicating that Act 28 supersedes the Mental Health Procedures Act regarding the right of persons who are not involuntarily committed to refuse psychiatric treatment, including psychotropic medication. Therefore, if the client is involuntarily committed to an LTSR or a non-hospital Residential facility, the client can and should receive psychiatric treatment over objection, following accepted protocol. Staff of programs covered by Act 28 which admit involuntarily committed patients under the authority of their licenses/approval letters, could be held criminally responsible for failing to provide necessary psychiatric treatment over an involuntary patient's objection.
However, clients admitted to programs on a voluntary commitment or a voluntary basis, where no commitment is involved, retain the right to refuse psychiatric treatment, including prescribed psychotropic medication. They do not, however, retain the right to refuse necessary, non-psychiatric medical care and treatment, unless refusal is consistent with one of the circumstances listed in Act 28: i.e., written, signed, dated instructions made when the client is competent, written instructions of the attorney-of-fact having durable power-of-attorney, a legal do-not-resuscitate order, or a lawfully executed advance directive. In brief, the MHPA governs the client's right to refuse psychiatric treatment, while Act 28 governs the client's right to refuse other goods, services and medical care while the client is receiving services from programs and facilities covered by Act 28. Again, the responsibility for treating over objection or for notifying the physician or other caregivers that the patient has refused prescribed psychiatric treatment, will vary with the responsibilities inherent in the provider's license.

2. Bodily injury:

Suspected neglect, as defined by Act 28, is reportable to criminal justice authorities only if it results in bodily injury or serious bodily injury. It is not the responsibility of reporting staff to determine the legal degree of bodily injury sustained or to determine an exact diagnosis of the injury, if such diagnosis is not documented in the patient's record. The degree and exact nature of the injury will be determined during the criminal investigation, and possibly will be debated during a trial resulting from the investigation. DPW staff making a report to criminal justice officials of alleged neglect under Act 28 need only reasonable cause to believe that injury has occurred. For example, a fracture that has not been treated, failure to administer insulin to an insulin dependent diabetic, prolonged failure to provide basic dietary needs all could be expected by a reasonable person to result in bodily injury, but the specific nature and diagnosis of the injury may be unknown to the reporter at the time the report is made.

IV. CONTENT OF REPORT TO CRIMINAL JUSTICE AUTHORITIES

Act 28 supersedes the confidentiality provisions of the Mental Health Procedures Act only to the extent required to comply with Act 28 in the specific case. As with alleged crimes committed by or against patients in state mental hospitals, staff who have reasonable cause to believe that a
crime has been committed under Act 28 against a consumer of a community mental health program or service covered by Act 28 have a legal duty to report the facts relevant to the crime to criminal justice authorities. Reportable information includes:

1. CLIENT INFORMATION
   a. client name, current address and phone number
   b. age, if applicable
   c. commitment status or lack of same
   d. injury sustained by client, and its suspected cause
   e. citations from the client's record relating to the injury and its cause
   f. medical diagnosis relating to the patient injury, if contained in the client record
   g. verbal information provided to the employee by the client, provider staff and others relating to the alleged injury and its alleged cause
   h. your observations regarding the injury described in layman's terms
   i. the presence or absence of advance directives, written instructions of the attorney-in-fact relating to refusal of treatment or services relevant to the injury, evaluations of the client's competency by a physician, signed written instructions provided by the client relating to the suspected neglect
   j. physical conditions of the patient, disabilities or chronic illnesses relating to the alleged neglect or the injury sustained as a result of the alleged neglect
   k. psychiatric impairment, described in behavioral/functional language, only as it relates to the circumstances of the alleged neglect.

2. PROVIDER INFORMATION
   a. Provider name, address, phone number
   b. type of license, title of licensure Regulations if applicable
   c. description of the relevant goods, services, and treatment mandated by the license or prohibited by the license/ conditions of approval as related to the alleged neglect
   d. other actions taken or not taken by the provider which you believe constituted the neglect

3. INFORMANT INFORMATION
   a. Name, work address and title of the Commonwealth employee reporting the alleged neglect
   b. work phone and FAX
   c. clinical credentials of informant
   d. date the alleged neglect came to your attention and the circumstances, i.e. conducting a licensure visit, providing technical assistance, etc.
4. REPORTING GUIDELINES

When citing the client's clinical record, note the date, nature and signature on the entry. When citing conversations with provider staff, visitors, family members and clients, note the date, time, and full name and title of the informant, and where that individual can be reached, if available. Use quotes whenever possible when citing the clinical record, other documents or conversations.

OMH staff should not report information about the client that is not directly related to the alleged neglect and the injury which resulted from it, If the client's psychiatric diagnosis, history, other treatment, unrelated behavior, and past or concurrent medical diagnoses have no bearing on the alleged neglect or its consequences, they should not be included in the report. The prosecuting attorney may obtain a court order to review the actual clinical record of the patient, if more information is necessary for prosecution.

In reporting information about the physical injury sustained, staff should use descriptive terms without exceeding the level of their expertise or credentials. Do not try to make your own medical diagnosis if you are not a physician. Describe what you see, believe to be true, have been told, or have read in the clinical record, citing your source, if applicable.

5. CLIENT CONSENT TO REPORTING AND PROSECUTION

It is not necessary for staff who plan to report alleged neglect under Act 28 to obtain the client's consent to release information about the alleged neglect to the criminal justice authorities, Client consent is not needed for criminal prosecution, as the provider neglect may involve actions or inactions inappropriately undertaken at the client's expressed request. The decision whether to inform the client that an allegation of neglect will be or has been made to criminal justice authorities should depend on clinical judgment of mental health staff, rather than Legal considerations.

V. REPORTING PROCEDURES:

1. Office of Mental Health employees engaged in licensure or investigative duties, who have reasonable cause to believe that neglect resulting in bodily injury has occurred in a program or service covered by Act 28, shall complete the form entitled OMH REPORT OF SUSPECTED NEGLECT OF A CARE DEPENDENT PERSON IN VIOLATION OF ACT 28. Within 72 hours of establishing that reasonable cause exists, the completed form should be faxed to the Deputy Secretary of Mental Health or any future designee, who will review the facts and inform the person making the report whether or not to proceed to notify local criminal justice authorities. State mental
hospital staff conducting investigative functions in state operated long term care centers, which are also covered by Act 28, should first report the alleged neglect to the hospital superintendent or Restoration Center Administrator who will, in turn, report to the Deputy Secretary.

2. When deemed appropriate by the Deputy Secretary or designee, a report of facts and findings shall then be made to local criminal justice authorities by the person initiating the allegation. Initial contact may be made by telephone. The report may be made to local police having jurisdiction where the alleged crime occurred, the local barracks of the state police or the District Attorney’s Office in the county where the alleged neglect occurred. As a rule of thumb, attempt to report the facts to the local police first, or to the local state police barracks having police jurisdiction in rural areas. If these agencies are unresponsive, the District Attorney’s Office should be contacted.

Police/DAs may differ in the manner in which they wish the report to be made. Staff may be asked to visit the police station or the DR’s office to provide the report, and may be asked to fill out a written complaint. Follow the instructions of the local criminal justice authorities in this regard, Staff may also be asked to aid in the investigation of the charges. Within the confines of the Mental Health Procedures Act and the 5100 Regulations, staff are expected to be fully cooperative with criminal justice authorities. If staff have concerns about what they are asked to do, prompt contact with Howard Ulan in the DPW Legal Office is advised.

3. When the Deputy Secretary or designee has determined that a report to local criminal justice authorities should be made, Headquarters Office of Mental Health Headquarters will also forward a copy of the completed reporting form to the Office of the Attorney General, which wishes to be apprised of such reports in order to ensure appropriate follow-up by local criminal justice officials. The Office of the Attorney General has prosecutorial jurisdiction over all Act 28 crimes, and may legally intercede in any case’s prosecution at its discretion.

VI. INTERACTION WITH PROVIDERS:

Providers making inquiries about Act 28 interpretation are to be referred to their own legal council. DPW has no legal authority to interpret this statute to anyone but its own personnel.

The Office of Mental Health is under no obligation to inform the provider that a report of an alleged Act 28 violation will be or has been made. In the interests of preserving evidence, it may be prudent not to inform the provider until an investigation is initiated by local criminal justice authorities. Notice to the provider may be made at the discretion of the Deputy Secretary or designee.
Reports of Act 28 violations in no way change or eliminate the obligation of the Office of Mental Health to take appropriate action regarding licensure status of the reported provider or related sanctions, the alleged neglect also involves a violation of the licensure regulations or approval standards under which the program is operated.

VII. Related Bulletins:

SMH 96-02: Implementation of Act 28 of 1995 in OMH Operated Long Term Care Units and South Mountain Restoration Center.
OFFICE OF MENTAL HEALTH
REPORT OF SUSPECTED NEGLECT OF A CARE DEPENDENT PERSON
IN VIOLATION OF ACT 28

To be faxed to the Deputy Secretary of Mental Health within 72 hours of
discovery of the alleged violation

A. CLIENT INFORMATION

1. CLIENT NAME ______________________ AKA ______________________

2. CLIENT ADDRESS ___________________________ COUNTY _________

3. CLIENT SOCIAL SECURITY NUMBER ______________________________

4. CLIENT’S BIRTHDATE ________________________ AGE ______________

5. CLIENT’S CLOSEST RELATIVE: NAME AND PHONE NUMBER, IF AVAILABLE
   ___________________________________________________________________
   ___________________________________________________________________

6. CLIENT LEGAL STATUS IN PROGRAM (CHECK ONE)

   ☐ VOLUNTARY, NOT COVERED BY MENTAL HEALTH PROCEDURES ACT

   ☐ VOLUNTARY COMMITMENT, UNDER SECTION 201 OF MENTAL HEALTH PROCEDURES ACT

   ☐ INVOLUNTARY COMMITMENT UNDER MENTAL HEALTH PROCEDURES ACT, SECTIONS 302, 303, 304, 305 (circle commitment number)

7. BODILY INJURY SUFFERED BY CLIENT: describe briefly what you observed; reference related medical documentation, and other documents available in client’s records relating to the bodily injury.
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________
8. SUSPECTED CAUSE OF BODILY INJURY IN VIOLATION OF ACT 28 (check all that apply)

☐ FAILURE TO PROVIDE NECESSARY MEDICAL CARE OR PERSONAL CARE OR TO ENSURE REFERRAL TO OTHERS FOR SUCH CARE, AS REQUIRED UNDER THE PROVIDER’S LICENSE;

☐ FAILURE TO PROVIDE FOR ADEQUATE SHELTER, NUTRITION, SAFETY OR SUPERVISION, AS REQUIRED BY THE PROVIDER’S LICENSE

☐ USE OF CHEMICAL OR PHYSICAL RESTRAINTS, ISOLATION OR ADMINISTRATION OF MEDICATION CONTRARY TO STATUTE OR REGULATION, INCLUDING THE REQUIREMENTS OF THE PROVIDERS LICENSE.

9. BRIEFLY DESCRIBE THE CIRCUMSTANCES THAT YOU BELIEVE CONSTITUTE AN ACT 28 VIOLATION WHICH RESULTED IN BODILY HARM TO THE CLIENT.

_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________

B. PROVIDER INFORMATION

1. AGENCY OR PROVIDER NAME ________________________________

2. PROVIDER ADDRESS _________________________________________

_________________________________________________________________
_________________________________________________________________

3. PROVIDER PHONE NUMBER ________________________________

4. NAME OF AGENCY DIRECTOR OR CONTACT PERSON _____________

5. TYPE OF LICENSE/APPROVAL (check one)

☐ PARTIAL HOSPITALIZATION PROGRAM

☐ LONG TERM STRUCTURED RESIDENCE

☐ COMMUNITY REHABILITATION RESIDENCE

☐ RESIDENTIAL NON-HOSPITAL INPATIENT PROGRAM FOR ADULTS

☐ CRISIS RESIDENTIAL PROGRAM NON-HOSPITAL INPATIENT PROGRAM FOR ADULTS

☐ OTHER
C. OFFICE OF MENTAL HEALTH REPORTING PROCESS

1. NAME AND TITLE OF COMMONWEALTH EMPLOYEE OBSERVING AND REPORTING POSSIBLE ACT 28 VIOLATION

___________________________________________________________________

2. WORK ADDRESS OF REPORTING EMPLOYEE

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________
___________________________________________________________________

3. WORK PHONE NUMBER OF REPORTING EMPLOYEE _________________

4. DATE ALLEGED VIOLATION OBSERVED OR DISCOVERED BY REPORTING EMPLOYEE _____________________________________________________

DATE OF REPORT ____________________________
Fax this completed page to the Deputy Secretary, Office of Mental Health, following employee communication with local criminal justice authorities, as authorized by the Deputy Secretary or designee.

D. VERIFICATION OF REPORT OF ALLEGED VIOLATION OF ACT 28 TO CRIMINAL JUSTICE AUTHORITIES

1. DATE SUSPECTED VIOLATION REPORTED TO LOCAL CRIMINAL JUSTICE AGENCY ______________________________________________

2. CRIMINAL JUSTICE AGENCY TO WHICH REPORT WAS MADE (check one)
   - STATE POLICE, LOCAL BARRACKS
   - LOCAL POLICE
   - COUNTY DISTRICT ATTORNEY

3. NAME AND TITLE OF OFFICIAL TO WHOM REPORT WAS MADE: _________________________________________________________

4. WORK ADDRESS OF OFFICIAL TO WHOM REPORT WAS MADE
  ________________________________________________________________
  ________________________________________________________________
  ________________________________________________________________
  ________________________________________________________________

5. WORK PHONE NUMBER OF OFFICIAL TO WHOM REPORT WAS MADE
  ________________________________________________________________

6. INVESTIGATORY ASSISTANCE REQUESTED BY LOCAL AUTHORITIES (describe, if applicable)
  ________________________________________________________________
  ________________________________________________________________
  ________________________________________________________________
  ________________________________________________________________

   IF REPORT TO CRIMINAL JUSTICE AUTHORITY WAS MADE IN WRITING, PLEASE ATTACH A COPY OF THAT REPORT TO THIS DOCUMENT

7. NAME AND TITLE OF EMPLOYEE REPORTING TO CRIMINAL JUSTICE OFFICIALS _________________________________________________________

8. WORK ADDRESS AND PHONE NUMBER OF REPORTING EMPLOYEE
   ___________________________________________________________________