

THE ISSUE OF “CONSENT” AND TESTING FOR SUBSTANCE ABUSE IN PENNSYLVANIA NURSING HOMES

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Whether a physician must advise a resident, in advance, of the purpose of a blood or urine sample when substance abuse is suspected requires a balance of the provisions of facility policies, resident rights and common law.

In light of a resident’s right to refuse treatment and be informed in advance about treatment, it is advisable to let a resident know what types of tests are being performed, unless the situation is of an emergent nature and the resident is unable to comprehend the information.

Federal regulations recognize certain resident rights. Under federal nursing home regulations, a resident has the right to:

(1) choose a personal attending physician; (2) be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the resident’s wellbeing; and (3) ... participate in planning, care and treatment or changes in care and treatment.” (Emphasis added.) 42 C.F.R. §483.10(d)(1), (2), (3).

Additionally, a facility must “promote care for residents in a manner and in an environment that maintains or enhances each resident’s dignity and respect in full recognition of his or her individuality.” The resident has a right to self-determination and to “make choices about aspects of his or her life in the facility that are significant to the resident.” 42 C.F.R. §483.15(a), (b)(3).

The resident also has the “right to refuse treatment” 42 C.F.R. §483.10(b)(4).

Under basic tort law, an unauthorized contact with a resident is, under certain circumstances, a battery. A resident who is competent to understand must be told that the sample is being taken. If the resident asks why, the health care professional should answer accurately.

In order to determine whether there is a need for treatment, a physician may order blood and/or urine testing when there is suspected drug, alcohol or other substance abuse by a resident to determine what the resident has ingested, whether the ingested substance can interact negatively with the resident’s current drug regimen, if so, what actions should be taken to counteract the possible negative effects and whether subsequent counseling should be offered to the resident.

While a blood or urine test may not be a scenario requiring formal “informed consent,” because a blood test is not typically considered to be an invasive procedure, residents have the right to refuse treatment and to be informed in advance of treatment.

Unless there is a medical concern for the health and/or safety of the resident (e.g., drugs and/or alcohol could negatively interact with the resident's prescribed drug regimen), the resident's capacity to understand is currently compromised or, in the opinion of the physician or other licensed healthcare personnel, delay is ill-advised, residents (or, if applicable, their responsible person) should be informed about the tests to be performed. This need not be done by a physician.

Some issues relating to drug and alcohol testing may be addressed proactively in admission agreements or related documents and by facility policies which prohibit resident drug and alcohol abuse. Residents must be made aware of actions the facility may take upon proof of substance abuse.

As an aside, there may be instances where the facility may consider it prudent to call law enforcement to report a resident's suspected illegal activities.

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