

## HB19-1044: ADVANCE BEHAVIORAL HEALTH ORDERS TREATMENT

Concerning advance behavioral health orders determining the scope of treatment an adult wishes to receive under certain behavioral health circumstances

### Details

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<b>Bill Sponsors:</b>	House – <i>Kraft-Tharp (D) and Landgraf (R)</i> Senate – <i>Todd (D) and Coram (R)</i>
<b>Committee:</b>	House Public Health Care & Human Services Senate Health & Human Services
<b>Bill History:</b>	1/4/2019- Introduced in House 1/23/2019- House Public Health Care & Human Services Refer Amended to House Committee of the Whole 1/25/2019- House Second Reading Passed with Amendments 1/28/2019- House Third Reading Passed, No Amendments 1/29/2019- Introduced in Senate 2/21/2019- Senate Health & Human Services Committee Refer Amended to Senate Committee of the Whole
<b>Next Action:</b>	Second Reading in Senate Committee of the Whole
<b>Fiscal Note:</b>	<u>1/11/2019 Version</u>

### Bill Summary

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This bill creates a behavioral health order for scope of treatment, similar to the established advance medical orders for scope of treatment, so an adult can communicate their behavioral health history, decisions, and preferences.

### Issue Summary

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#### Behavioral Health Crisis Treatment in Colorado

In state fiscal year 2017, more than 60,000 crisis services such as walk-in, mobile, respite care, and care at crisis stabilization units were provided across the state of Colorado.<sup>1</sup> Of these, 8,627 services were provided in the region serviced by Northeast Behavioral Health. During the same fiscal year, at least 40,234 individuals were placed on an involuntary, 72-hour mental health holds, also known as an M-1 hold.<sup>2</sup> Of these, 66.2 percent were considered a danger to themselves, 16.4 percent were gravely disabled<sup>3</sup>, and 7 percent were a danger to others or a combination of danger to self and others. One in five of these involuntary holds resulted in the hold being dropped and the individual being discharged from the health facility. In 2018, there were 1,702 emergency commitments<sup>4</sup> in Larimer County, an average of 141 per month.<sup>5</sup>

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<sup>1</sup> Office of Behavioral Health (May 1, 2018). *Expansion of the Colorado Crisis System Report (C.R.S. 27-60-103 (6)(c))*. Retrieved from [https://drive.google.com/file/d/1hS19E0hAcuSdR6Wq\\_fUtKGzDslgFRiqu/view](https://drive.google.com/file/d/1hS19E0hAcuSdR6Wq_fUtKGzDslgFRiqu/view)

<sup>2</sup> 9News (2018). M-1 Holds. *Data from Office of Behavioral Health*. Retrieved from [https://datastudio.google.com/reporting/1qVKdoJM\\_2Vsi29FUIGISHkrdWsgMT\\_5s/page/JT3Q](https://datastudio.google.com/reporting/1qVKdoJM_2Vsi29FUIGISHkrdWsgMT_5s/page/JT3Q)

<sup>3</sup> A result of mental illness, the individual is in danger of serious harm due to an inability to care for themselves.

<sup>4</sup> An individual can be placed and detained in a licensed detoxification program without the individual's consent for up to five days if an "Application for Emergency Commitment" is completed by a responsible person and approved by a detoxification program's administrator or designee.

<sup>5</sup> Data from North Range Behavioral Health

### Advance Directives in Colorado

Advance directives typically include a living will and a durable power of attorney; other documents can be incorporated to supplement these two elements.<sup>6</sup> A living will states how an individual wants to be treated by a medical provider if he/she is dying, permanently unconscious, or otherwise unable to make decisions. This document can include procedures that can be done and those that the person does not want done. The durable power of attorney designates a health care proxy, or someone that makes decisions for a person that cannot make decisions for themselves. Colorado law does not explicitly exclude or include behavioral health care as a type of health care that a medical durable power of attorney may make decisions about or follow directives from the individual.<sup>7,8</sup> The state does not have a specific statute regarding behavioral health or mental health advance directives.

### Advance Directives for Behavioral Health in Other States

As of 2017, more than half of states (28) have a specific statute for a psychiatric advance directive (PAD), while 8 states specifically ban the use of advance directives for psychiatric care in a stand-alone document.<sup>8</sup> In Hawaii, state law allows for individuals to write instructions for psychiatric treatment if the person is unable to make or communicate those instructions, which can include choices about medications and treatment or the refusal of consent.<sup>9</sup> In Illinois, the provisions are narrower and allow individuals to document choices regarding psychiatric medications, electroconvulsive therapy, and psychiatric hospitalization for less than 17 days.<sup>10</sup> New Mexico has a standard form to complete an “advance directive for mental health treatment,” which allows an individual to write instructions for psychiatric treatment in the case that they are incapable for making or communicating those instructions.<sup>11</sup> In North Dakota, under statute health care providers may decline to follow the psychiatric treatment instructions of an individual if they feel that they are unable to comply due to reasons of conscience or other conflict, belief that the instructions are against reasonable medical standards, or the individual is considered to require comfort, care, or alleviation of pain that is in conflict with their instructions.<sup>12</sup> Notably, most states do not have a specific statute, rule, or policy regarding substance use disorders and advance directives.

### This Legislation

The bill declares that the creation of behavioral health orders will provide a process for timely discussion between adults, health providers, and authorized agents about behavioral health treatment and will ensure that the preferences are clearly and unequivocally documented.

In the context of this bill, an adult is a person over the age of 18. An “agent” is defined as a person over the age of 18 who is authorized by an adult to make decisions concerning behavioral health treatment, medication, and alternative treatment for the adult, to the extent authorized by the adult. The bill defines “behavioral health orders for scope of treatment,” “behavioral health orders form,” or “psychiatric advance directive” to mean a written instruction, concerning behavioral health treatment, medication, and alternative treatment decisions, preferences, and history to be made on behalf of the adult who provided the instruction. Behavioral health treatment is defined as the provision, or withdrawal, of any behavioral health examination, service, procedure, or medication. A “disinterested witness” is an adult that is not the

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<sup>6</sup> National Institute on Aging, National Institutes of Health (May 2017). *Advance Care Planning: Healthcare Directives*. Retrieved from <https://www.nia.nih.gov/health/advance-care-planning-healthcare-directives>.

<sup>7</sup> C.R.S. 15-14-506

<sup>8</sup> Florida Department of Children and Families (Jan. 1, 2017). *Report on the use of advance directives for substance use disorders*. Retrieved from <http://www.dcf.state.fl.us/programs/samh/publications/S16-008008.Advance%20Directive%20Workgroup%20Report%20with%20attachments.pdf>

<sup>9</sup> HRS § 327G. Retrieved from

[https://www.capitol.hawaii.gov/HRS/search?IW\\_INDEX=Hawaii%20Revised%20Statutes&IW\\_FIELD\\_WEB\\_STYLE=327G](https://www.capitol.hawaii.gov/HRS/search?IW_INDEX=Hawaii%20Revised%20Statutes&IW_FIELD_WEB_STYLE=327G)

<sup>10</sup> 755 ILCS 43. Retrieved from <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2112&ChapterID=60>

<sup>11</sup> NMSA 2018, § 24-7B. Retrieved from <http://public.nmcompcomm.us/NMPublic/gateway.dll/?f=templates&fn=default.htm>

<sup>12</sup> N.D.C.C. ch. 23-06.5. Retrieved from <https://www.legis.nd.gov/cencode/t23c06-5.pdf>

individual's spouse, civil partner, domestic partner, romantic partner, child, parent, sibling, grandchild, grandparent, health care provider, or a person that has any claim to a portion of the individual's estate. The disinterested witness can attest that the individual that is executing the behavioral health orders form was of sound mind and free of coercion when they signed the form. Emergency medical service personnel includes an emergency medical service provider that is licensed by the Colorado Department of Public Health and Environment (CDPHE), an emergency medical responder, or a crisis response system contractor. For the purpose of this bill, a health facility includes: a hospital, a hospice inpatient residence, a nursing facility, a dialysis treatment facility, an assisted living residence, an entity that provides home-based and community-based services, a hospice or home health care agency, the Colorado mental health institutes at Fort Logan or Pueblo, or another facility that provides or contracts to provide health services, which is licensed, certified, or lawfully authorized by law to provide medical treatment. A health care provider includes physicians, other professionals authorized by law to provide medical treatment (i.e. physician assistant, nurse practitioner), psychologists, social workers, marriage and family therapists, licensed professional counselors, addiction counselors, registered psychotherapists, or any other provider that is regulated by the state when engaged in assisting consumers with behavioral health care access and coverage issues. The bill defines "sound mind" as the ability to provide informed consent to or refusal of behavioral health treatment or the ability to make an informed behavioral health care benefit decision.

A behavioral health orders form must include the following information about the adult whose behavioral health treatment is the subject of the form:

- Name, date of birth, gender, eye color, hair color, race or ethnic background
- Instructions concerning behavioral health treatment, medication (primary and alternative instructions), and alternative treatment
- Instructions concerning appointing an agent, or not. If the adult wants to appoint an agent they must include the agent's name, address, and telephone number as well as the agent's scope of authority. This scope can either be limited to executing the instructions detailed on the form or the authority to make decisions on these issues on behalf of the adult
- The adult's signature or mark and the date the document was signed
- Signatures from two disinterested witnesses and the date the document was signed
- The agent's signature or mark and the date the document was signed
- The name, address, and telephone number of the adult's health care provider, if applicable
- The name of the health facility in which the adult is enrolled, if applicable

As soon as the form complies with the above requirements, a behavioral health orders form is effective. Nothing allows an adult to include in their behavioral health orders form an instruction that exempts them from an involuntary emergency procedure or commitment that is authorized in state law.

The bill allows for the orders to be admissible in a hearing for short-term or long-term treatment in order to establish the adult's treatment, medication, and alternative treatment history, decisions, and preferences to be made for the adult during involuntary emergency procedure or commitment. This does not mean that an adult with behavioral health orders has waived their right to a hearing or consented to a petition for involuntary administration of medication.

The adult can amend or revoke all or part of their behavioral health orders form at any time. In order for an amendment or revocation to be valid the adult must execute a new behavioral health orders form or mark the existing orders form in a manner that clearly communicates the intent to amend or revoke all or part of the orders. In order for the amendment or revocation to be valid, it must include the adult's signature or mark and the date, the signatures or marks of two disinterested parties and the date, and the signature or mark of the agent and the date. The agent's signature is not required if the behavioral health orders form is being amended to remove that individual as the agent. Emergency medical service (EMS) personnel, health providers, or agents who become aware of a new, amended, or revoked behavioral health orders form are to

promptly communicate that fact to the provider that is providing care to the applicable adult. Any new, amended, or revoked behavioral health orders form that is properly executed is to replace any previously executed form.

The individual, their agent, and their health provider are to make a good-faith effort to locate and incorporate the behavioral health treatment, medication, and alternative treatment decisions, preferences, or history into the adult's behavioral health orders form. In the case that there is a conflict between an individual's behavioral health orders form and their advance medical directive, whichever document that was most recently executed is to be adhered to in regards to behavioral health treatment, medication, or alternative treatment decision at question. An agent or health provider cannot revoke or amend an adult's previously executed advance medical directive regarding artificial nutrition or hydration. An agent cannot revoke a preexisting CPR directive unless it was originally executed by the agent. An agent that is also a proxy decision-maker may authorize the withdrawal of artificial nutrition or hydration in accordance with current law.

EMS personnel, a health provider, or health facility is to comply with an adult's executed behavioral health orders form that has been executed in Colorado or another state, is apparent and immediately available, and satisfies the requirements listed above (bullet list on page 3). The EMS personnel, health provider, or health facility is to comply with the behavioral health orders form unless the adult's instructions on the form will cause substantial harm to the adult. If these instructions cause substantial harm to the adult, the EMS personnel, health provider, or health facility is to make a good faith effort to consult with the agent, if applicable, and offer alternative course of treatment.

If there is a conflict between the behavioral health orders form and the adult's request for behavioral health treatment, medication, or alternative treatment, the behavioral health orders form controls for the treatment decision or preference that is at issue.

EMS personnel, health providers, health facilities, or any other person who complies with a legally executed behavioral health orders form that is apparent and immediately available and that they believe to be the most current version is not subject to civil or criminal liability or regulatory sanction for such compliance. The compliance by EMS personnel, health providers, or health facilities with a behavioral health orders form must not affect the criminal prosecution of a person that has been charged with the commission of a criminal act.

Nothing in this bill modifies any generally accepted ethics, standards, protocols, or laws for EMS personnel, health providers, or health facilities, which includes the provisions in law concerning euthanasia and mercy killing. A behavioral health orders form does not compel or authorize EMS personnel, health providers, or health facilities to administer any behavioral health treatment that is prohibited by state or federal law.

If an adult with a properly executed behavioral health orders form is being transferred from one provider or facility to another, the transferring provider or facility is to communicate the existence of the form to the receiving entity before the transfer occurs. The transferring facility or provider is to ensure that the form or a copy of the form accompanies the person upon admission to or discharge from a facility.

Nothing in this bill allows an adult to include an instruction in their behavioral health orders form that exempts them from involuntary emergency procedure or commitment that is authorized under state law. Any such instruction to do so is void. Even if there is an instruction to exempt the individual from an involuntary emergency procedure or commitment, any person that is authorized by state to perform a procedure or commitment and complies with the requirements of those events is not subject to civil or criminal liability or regulatory sanction.

A health facility or provider cannot require an adult to have executed a behavioral health orders form as a condition of being admitted to, or receiving behavioral health treatment or medication from the facility or provider.

The bill states that an insurer cannot refuse to insure, refuse to continue to insure, limit the amount, extent, or kind of health or life insurance available to an individual, or charge the individual a different rate for the same coverage solely because they have or have not executed a behavioral health orders form. Those individuals who have executed a behavioral health orders form must be subject to the same standards of actuarial principles or actual/reasonably anticipated experience as those who have not.

The bill states that an insurer cannot refuse to insure, refuse to continue to insure, limit the amount, extent, or kind of health or life insurance available to an individual, or charge the individual a different rate for the same coverage solely because they have or have not executed a medical orders for scope of treatment form. Those individuals who have executed a medical orders for scope of treatment form must be subject to the same standards of actuarial principles or actual/reasonably anticipated experience as those who have not.

The bill is effective August 2, 2019 is the last day of session is May 3, 2019, unless a referendum petition is filed against the bill.

### Reasons to Support

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Colorado could lead the states in establishing a comprehensive behavioral health advance directive rather than just a psychiatric advance directive. This is important to those individuals that have co-occurring mental health and substance use disorder conditions. These orders may promote autonomy for those with behavioral health conditions. Additionally, they may foster communication between patients and treatment providers about a patient's behavioral health condition and increase compliance with medication. Advance behavioral health orders may lessen the severity of crises for individuals and reduce the use of involuntary treatment. These orders are intended to protect individuals with behavioral health conditions from ineffective, unwanted, or potentially harmful treatments. Finally, they may reduce involuntary treatment and criminal justice involvement.

### Supporters

- AspenPoint
- Boulder County
- Colorado Behavioral Healthcare Council
- Colorado Cross-Disability Coalition
- Colorado Organization for Latina Opportunity and Reproductive Rights
- Colorado Rural Health Center
- InnovAge
- League of Women Voters of Colorado
- Mental Health Colorado
- National Alliance on Mental Illness
- National Association of Social Workers, Colorado Chapter
- Otsuka America Pharmaceutical

### Reasons to Oppose

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If the ability to access the information is challenging, it is likely that law enforcement, EMS personnel, providers, and other medical staff would not take the time to look and see if information is available. Some may oppose the bill as in a crisis situation it may be difficult to know if the person is competent, then once the person has regained their decision-making capacity the advance behavioral health order is no longer needed or possibly legally applicable. This may make it difficult or confusing for providers to adhere to the behavioral health order. Previous studies have noted that there is a low usage rate of psychiatric advance

directives.<sup>13</sup> These orders may increase stigma if a patient has an advance behavioral health order health professionals may pre-judge a patient on what they see in the order rather than the patient presenting before them. This bill could allow for patients to refuse evidence-based medications, such as medication-assisted treatment, to treat their condition. Furthermore, it may be difficult to know whether the person was competent when the document was signed. The choices allowed on the advance behavioral health order may exacerbate the person's behavioral health condition. There is no exceptions allowed to physicians to disregard the orders if following them could lead to the harming of the patient or the patient possibly harming others.

### Opponents

- Any opposition has not been made public at this time.

### Other Considerations

If this bill passes, along with SB19-073 for the creation of a statewide registry system of advance medical directives, there is a possibility that there would not be a way to incorporate these behavioral health orders in the electronic system without further legislation. Therefore, medical providers would need to not only check the statewide electronic system for an advance medical directive but also inquire about an advance behavioral health order. Furthermore, the storage of the advance behavioral health orders must be considered in regards to following federal laws and regulations (i.e. HIPAA and 42 CFR Part 2) as well as making them readily accessible. It is important to consider how the use of these orders will be encouraged- will community-based organizations take the lead or will the state encourage their use through current programs and grants? It is also important to consider how relevant personnel will get educated on these orders- will there be training for law enforcement, emergency department staff, crisis stabilization unit staff, etc? There are a lot of outstanding questions from this bill that will need to be answered during any necessary rulemaking or possibly by further legislation as the advance behavioral health orders are utilized in the state.

### About this Analysis

This analysis was prepared by Health District of Northern Larimer County staff to assist the Health District Board of Directors in determining whether to take an official stand on various health-related issues. The Health District is a special district of the northern two-thirds of Larimer County, Colorado, supported by local property tax dollars and governed by a publicly elected five-member board. The Health District provides medical, mental health, dental, preventive and health planning services to the communities it serves. This analysis is accurate to staff knowledge as of date printed. For more information about this summary or the Health District, please contact Alyson Williams, Policy Coordinator, at (970) 224-5209, or e-mail at [awilliams@healthdistrict.org](mailto:awilliams@healthdistrict.org).

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<sup>13</sup> Zelle, H., Kemp, K., & Bonnie, R. J. (2015). Advance directives in mental health care: evidence, challenges and promise. *World psychiatry: official journal of the World Psychiatric Association (WPA)*, 14(3), 278-80. Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4592640/>