

MENTAL HEALTH LEGAL ADVISORS COMMITTEE

The Commonwealth of Massachusetts

Supreme Judicial Court

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Testimony of Mental Health Legal Advisors Committee

before the Joint Committee on Mental Health and Substance Abuse

H. 1945/S. 743

September 23, 2009

I am testifying on behalf of Mental Health Legal Advisors Committee, an agency within the Supreme Judicial Court that represents low-income persons with mental disabilities and that provides information on mental health legal matters to health care providers, family members, the general public and, of course, the legislature. MHLAC strongly supports H. 1945/S. 743 and suggests some modifications to enhance its ability to achieve the goal of protecting the rights embodied in the statute known as the Act to Protect the Five Fundamental Rights, Mass. G. L. ch. 123, § 23. Please note that these modifications are meant to strengthen H. 1945/S. 743, but that we would be pleased to see any significant improvement over the present absence of effective enforcement.

MHLAC was intimately involved in crafting and obtaining the passage of the Bill to Protect Five Fundamental Rights. This legislation is the product of lengthy negotiations between the Department of Mental Health and the Bill of Rights Coalition, aimed at ensuring that persons with mental illness are not denied basic rights within the context of mental health treatment. The bill protects:

- *the right to reasonable use of the telephone
- *the right to send and receive uncensored mail
- *the right to visit with persons of one's own choosing
- *the right to privacy, including privacy while toileting
- *the right to access to legal advocates

The legislation before you adds the right to daily access to fresh air and the outdoors. Like the rights previously memorialized in Chapter 123, this right is fundamental. Locking persons with mental illness up away from view of the public should be relegated to historic annals. It is grounded in stigma and contrary to best medical practices.

The rights embodied in the bill are not without limits and are sculpted by the language of reasonableness. The rights apply to both public and private settings, which is vitally necessary given the privatization of the Massachusetts mental health system. When the Act was passed in 1997, advocates were concerned that there was no real enforcement mechanism within the bill. They knew that licensing and certifying agencies, like the Department of Mental Health's licensing division, are too understaffed, have too long a list of criteria covering such things as staffing levels and capital improvements, and visit too infrequently to provide effective remedies for the individual who is denied visitation with her family, been humiliated without clothing in front of staff of the opposite sex, or been deprived of a telephone call.

That concern has materialized into persons with mental illness frequently in many instances being without the ability to effectively remedy a violation of these basic rights. That is why we strongly support the ability to have an administrative hearing and ultimately court remedy as envisioned by H. 1945/S. 743.

The Department of Mental Health complaint process, while useful, is often far too

lengthy, taking months to resolve. DMH regulations require that most complaints concerning violations of the Five Fundamental Rights be directed to and investigated by the very facility that is the subject of the complaint. When, as is usually the case, the facility affirms its decision, the consumer can appeal to the Area Director or Assistant Commissioner. The total time this process takes is regularly more than two months.

H. 1945/S. 743 bypasses the fruitless step of directing complaints to the violating facility and, as such, would be a big improvement over the current complaint process. H. 1945/S. 743 also provides for judicial review, again a huge advance in enforcement of these rights. However, we suggest the bill be strengthened by adding an expedited appeal process, equitable allocation of the burden of proof, and an independent right of action.

Expedited Appeals Process

Though H. 1945/S. 743 abbreviates the potential time to corrective action, it still leaves many without an effective remedy. H. 1945/S. 743 allows the hearing to be set up to 30 *business* days after the receipt of a request for a hearing. Following the hearing, the decision may take another 30 days to be issued. Most people will be out of the hospital or facility within two weeks. Managed care and the privatization of MassHealth behavioral health services see to that. The last numbers I have for the Massachusetts Behavioral Health Partnership – FY05 – show a length of stay for all inpatient services of between 10 and 12 days (more for children, less for adults).^{*} More recent national and local figures show even shorter stays.^{**} So, for example, a

^{*} Over the past several years, the vast majority of our clients who have complained about violations of the rights set out in Mass. G.L. ch. 123 § 23 are in private facilities that traditionally have had a much shorter length of stay than DMH-operated public facilities.

hearing on whether or not a consumer could see her children or make or receive phone calls would have as its subject a moot issue unless there is an expedited procedure.

MHLAC recommends there be a means to access an expedited process. While DMH may not be able to hold a hearing within 48 hours, DMH should be able to do an initial investigation (contact complainant and hospital) and issue its preliminary findings in that time period. This is not an unreasonable requirement. Insurers must make initial decisions concerning authorization within two working days for a new service/admission and one working day for an ongoing service. Mass. Gen. L. ch. 1760 § 12(b). Under ch. 1760 § 13(b), private insurers have to respond to appeals of authorization denials within 48 hours if an expedited process is requested.

An expedited preliminary investigation may obviate the need for a hearing. The mere fact of DMH contacting hospitals in a timely manner may correct some of the more egregious violations of rights. If the preliminary finding does not produce a result to the satisfaction of the complainant, a hearing should be scheduled within the next five days. Again, this is a reasonable time line. Commitment hearings must be held within four days of the filing of a petition to commit.

Burden of Proof and Independent Right of Action

H. 1985/S. 743 provides that the hearing officer's decision may be appealed to superior court. MHLAC is pleased that there will be access to the courts. However, we believe that mental health consumers should have more access to the courts than that afforded by the 30A

** See, e.g., Massachusetts General Hospital Patient Care Services: Psychiatry Blake 11. http://www2.massgeneral.org/pcs/psych_sum.asp (last accessed 9-22-09); Saba, D.K. (Thomson Reuters), Levit, K.R. (Thomson Reuters), and Elixhauser, A. (AHRQ), *Hospital Stays Related to Mental Health, 2006*, HCUP Statistical Brief #62 (October 2008).

appeal process. We would be interested in working with the Committee to fashion a private right of action with remedies in addition to an administrative procedure** or an appeal process that more accurately reflects the relative resources of the parties involved.

Administrative (30A) appeals are difficult at best. The standards reversing a hearing officer's decision are exceedingly difficult to meet. For example, one basis is that the decision is arbitrary and capricious. Another basis is that the hearing officer committed an error of law. With a hospital as a defendant that can garner testimony from clinicians and hire lawyers, a mental health consumer has almost no chance of prevailing. And although "against the substantial weight of the evidence" is another basis for reversal, courts are loath to consider it, claiming that the appellant is trying to reargue the evidence. If H. 1945/S. 743 is not amended to include such an independent right of action with injunctive relief and monetary consequences for egregious violations,*** the burden of proof at both the hearing level and for reversal on appeal to superior court should be placed on the defendant after the complainant makes a prima facie case. This is in keeping with the general premise behind burden shifting to the party that is in a better position to garner evidence.

While MHLAC would like to see the above changes, we are in support of the legislation as written. Clearly, persons in private facilities should have the ability to remedy violations of

** For example, the Equal Opportunity Commission issues a right to sue level if it fails to take action in a timely manner, is unable to obtain a settlement agreeable to the parties, or finds no cause. Another option is the right to a de novo hearing in court following exhaustion of administrative proceedings.

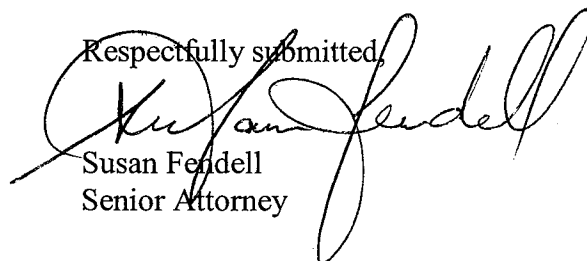
*** The administrative process in H. 1945/S. 743 provides for correction of rights violations. However, individuals need an independent right of action to redress violations. For example, monetary damages should be available if an

fundamental rights.

The need for remedies is exemplified by the following abuses that persons who contact our agency have reported.

- A 49 year-old woman voluntarily admitted herself in an acute inpatient psychiatric unit for depression and anxiety, and was retained by the hospital for emergency care. During that time, the client was going through a divorce and the rest of her entire immediate family resided outside the United States. Initially the client's brother was able to contact her via hospital phone, but nurses later refused to transfer him to his sister despite repeated attempts. The family later found out from the client's husband that the client's psychiatrist and doctors, with the husband's tacit consent, were pursuing electroconvulsive treatment. Despite the client's objections and without the support or input from the family with whom she was not having conflict, the client was administered the shock treatment, which she had a known record of refusing. Without telephone communication with her supportive family, this woman could not discuss or amend her treatment plan and suffered the side effects of the treatment.
- A client was brought to a psychiatric inpatient unit at the hospital. While there, he was denied visitation with his mother. After pleading with the doctors, he was eventually allowed to receive visits from his mother on a "pass system." This abridgements of the visitation rights of parents and adult children is not unique. Our agency has fielded other calls of a similar nature.
- A 27 year-old client was involuntarily admitted to a hospital psychiatric ward. While there, the staff prevented her from using the phone, even to call legal representation. While at the hospital, she was dismissed from medical school for a failure to keep up with her course of studies, a problem she could have prevented with adequate communication with counsel and her school.
- A female client was involuntarily admitted to a hospital psychiatric unit. She was administered medication and restrained without a proper psychiatric examination. Furthermore, she was presented a voluntary commitment form to sign while under the influence of that medication. When she asked for a neutral patient advocate, the hospital refused, and denied her the right to a legal advocate in a timely manner.

MHLAC hopes that, if not now, in the near future, persons in private facilities are able to effectively enforce the rights given them in the Act to Protect Five Fundamental Rights.

Respectfully submitted,

Susan Feidell
Senior Attorney

individual is wrongly denied the ability to see out-of-town visitors.