Committee for Public Counsel Services
75 Federal Street, 6th Floor, Boston, MA 02110
Phone: (617) 988-6212 – Fax: (617) 988-8488
Direct Line: (617) 910-5719

Anthony J. Benedetti
Chief Counsel

Mark A. Larsen
Deputy Chief Counsel
Mental Health Litigation Division

Rep. Adrian C. Madoro, Chair
Joint Committee on Mental Health, Substance Use and Recovery
24 Beacon St.
Room 33
Boston, MA 02133
Email: Adrian.Madaro@mahouse.gov

Dear Chair Madoro:

The Mental Health Litigation Division of the Committee for Public Counsel Services ask the House to reject proposed Amendment 13 tot H. 4879/

This proposal is unconstitutional, unmanageable and confusing.

- It would dramatically increase costs for court appointed legal counsel and experts, it would increase expenses for petitioners, and for those overseeing the proposed, force, outpatient treatment.
- The amendment would increase demands on the courts with filing of duplicitous petitions in the District, Municipal and Probate & Family Courts.
- The proposal seriously infringes on the constitutional right of Massachusetts citizens to make healthcare decisions free from governmental involvement.
- There already are procedures under Massachusetts guardianship law that allow for treatment orders for those unable to make decision on their own.

The Mental Health Litigation Division provides counsel to citizens facing involuntary civil commitment because they may be have a mental illness and are allegedly dangerous to themselves or others. It also provides counsel to those facing guardianship because those individuals are allegedly not competent to make decisions about their care, including healthcare. Each year we provide counsel to 20,000 individuals in cases involving mental health issues. This amendment is likely to increase demand on CPCS by a significant margin at a time when the number of attorneys will to do this work is decreasing.

While there is a compelling need for increased mental health services in Massachusetts from housing and support services to outpatient care like the Roadmap for Behavioral Health Reform.[1] This amendment, which lacks any funding, will not help to address those needs, resolve treatment barriers or insure the safety of the citizens of Massachusetts.

There is a voluntary Department of Mental Health pilot program for Enhanced Outpatient Treatment that is showing positive results. This program, operating under a DMH contract, has been run by Eliot Community Human Services for the past several years in Everett. Although small in scale[2], it addresses the major concerns sought to be remedied by this amendment without court involvement. According to the Fiscal Year 2020 Report, participant involvement in all services was 100% while reducing involvement with the legal process has decreased by 91%. There has been an 83% decrease in self-harm and suicide, an 87% decrease in hospitalizations and a 70% decrease in lack of stable housing, among other positive results.

The programs provided by the EOT pilot program have the support of major mental healthcare organizations. The Bazelon Center for Mental Health Law published a fact sheet in 2019 that describes evidence based alternatives to outpatient commitment and incarceration.[3] They endorse programs like the Everett pilot program: Assertive Outpatient Treatment (not commitment), Supported Housing, Mobile Crisis Services, Supported Employment, and Peer Support Services, A similar, voluntary joint program of the Boston Municipal Court and the Boston Medical Center that started in 2021 is beginning to show similar positive results.[4] In New York a peer-run program Intensive and Sustained Engagement and Treatment (INSET) has also shown good success.[5]

This amendment is unnecessary. There already exists a well-established process under the probate code, Chapter 190B, for limited, community-based or outpatient treatment orders commonly referred to as Rogers orders. Rogers orders require one thing that this amendment does not: that the person subject to the orders must be found to be incapacitated to the extent that they cannot make their own decisions.

Massachusetts has long recognized that its citizens have a constitutional right to make decisions about their own healthcare free from government interference. This is true even if others believe the decision is unwise and dangerous. See, Supt. of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 742 (1977) ("The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination

[1] The Roadmap for Behavioral Health Reform is the multi-year plan for expanded access to treatment, more effective treatment, and improved health equity. https://www.mass.gov/service-details/roadmap-for-behavioral-health-reform

[2] In FY20 167 individuals were served.

[3] "Diversion to What? Evidence Based Mental Health Services that Prevent Needless Incarceration," Bazelon Center for Mental Health Law (September 2019) is attached.

[4] https://www.bmc.org/boat see attached summary of the program.

[5] See attached material on INSET from NY and a summary of the failures of that state's AOC.

as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.)

This amendment would be costly. Under this amendment, petitions for outpatient commitment may be filed at the time of an initial involuntary civil commitment; prior to discharge from a psychiatric facility; or while an individual is living in the community. The number of petitioners extends well beyond those who may be involved in the medical or psychiatric care of the person. This will increase costs for facilities and the Commonwealth.

More will be required of petitioners, including non-professional petitioners, who will need to include an ill-defined written treatment plan.

It is neither reasonable nor realistic to believe that counsel for the respondent will be ready for a hearing within four business days of the filing of the petition. The defense team will need to review any available records, consult with forensic mental health experts including psychiatrists, psychologists, social workers and others who are aware of available, voluntary community-based services. As in other civil commitment proceedings, the respondent is entitled to prepare a meaningful defense. See, In the Matter of N.L., 476 Mass. 672 (2017).[6]

This amendment raises new, complicated issues that are not present under existing law. Presently, the main issue that is litigated at the time of an initial commitment or in a probate court substituted judgment proceeding is competence and the use of antipsychotic medications. Under this amendment, counsel will have to consult with both the client and an expert about the details of proposed treatment plans, the violation of which could result in further court hearings, detention for evaluation and an involuntary commitment to a behavioral health facility. Because of the complicated issues presented, the need for experts knowledgeable in behavioral health and community mental health services will increase. More than four days will be needed to investigate all of the potential treatment options. Four days is barely enough time to find an expert. It is not conceivable that competent experts will be found who can review historical records, meet with the client and develop alternative treatment plans in four days.

Treatment options that will be litigated include what, where and by whom the behavioral health, health, and social services are provided in a community setting; whether the person will be required to take medications other than antipsychotics; where and with whom the person must seek treatment; and a myriad of other programmatic and therapeutic options. Left unaddressed by this amendment are a myriad of issues including who is going to

[6] The opinion is attached to his statement.

provide and pay for overseeing the implementation of the plan. What is not included is any way to identify such an agency and who is going to bear the cost of the service.

This amendment violates constitutional standards. It is rife with Due Process violations. There is no requirement of notice to the person who is the subject of the petition or their guardian. There is no provision that the person can retain experts. The time to prepare is unreasonable. The burden of proof is only a clear and convincing evidence when the burden should be beyond a reasonable doubt since the infringement on liberty is extensive. The order may obligate the person to pay for treatment that is unwanted and unneeded. The length of the order is substantial: one full year.

While the amendment provides for the "supervising mental health professional in charge of a patient's assisted outpatient program" to determine that the person is not complying with the terms of the order or that the order may no longer be appropriate and allows the court to enter additional orders, there is no provision for the person to ask that the order be amended or vacated. Remarkably, there is no provision for a hearing on any request to modify the plan. A similar problem exits with regard a decision that the person refuses to comply with the plan. No petition, notice or hearing is provided for in the amendment. In spite of this deficit, the amendment allows the court to issue a writ of apprehension to law enforcement ordering that the person be brought to "an agency specified for inpatient treatment."

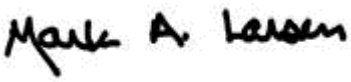
Unlike the provisions of other sections of Chapter 123, there is no limit on inpatient treatment or a requirement that the treatment occur in a facility licensed or operated by the Department of Mental Health. While there is a reference to a right to "judicial review" it is unclear what is meant by judicial review or when it occurs.

Significantly, the amendment proposes a dramatic change in involuntary commitment. Instead of the standards set for the in other sections of Chapter 123 that "that the failure to hospitalize in strict security would create a likelihood of serious harm by reason of mental illness," the amendment allows for a petition for inpatient commitment by the "supervising mental health professional" based on their belief that the person "has failed to comply with the terms of the outpatient treatment plan and outpatient plan no longer remains appropriate." Again there is no provision for notice to the person, appointment of counsel, or a hearing. The length of a commitment under this amendment is unlimited and the quantum of proof unspecified.

Costs will increase not just for CPCS, but also for treatment providers who will need to draft, implement, and oversee amend treatment plans. More experts will be needed and they will need to be knowledgeable in more areas including the availability of community treatment, housing and supportive services. There will more and longer hearings, increasing the costs for the courts.

Massachusetts has long recognized the right of individuals to make major decisions about their care free from government intrusion. Autonomy in healthcare should be held inviolate. The costs of this amendment both for individuals and the Commonwealth is too great especially when cost-effective, evidence-based non-coercive options can be made available. This amendment should not receive this committee's support.

Sincerely,



Mark Larsen, Deputy Chief Counsel

Mental Health Litigation Division

Committee for Public Counsel Services