

## **Answers to opposition by Mental Hygiene Directors to Closing Cracks in Kendra's Law prepared by Mental Illness Policy Org. (5/1/12)**

The NYS Conference of Mental Hygiene Directors is objecting to provisions in A6987 that would improve Kendra's Law (See att.). This is not surprising. Kendra's Law not only allows judges to involuntarily commit the most seriously ill patients to receive care, it allows judges to involuntarily commit the mental health system to providing it.

Localities currently receive over \$2 billion in locality funds from or through the state, yet claim there is not enough to serve the most symptomatic. Meanwhile, they use these state funds to "improve mental health" (make people happier) and on "fighting stigma" (public relations campaigns). As worthy as those efforts are, serving the most seriously ill should be the core mission of all mental health departments. A6987/S4881 would help facilitate that.

Failure to prioritize services for the most seriously mentally ill not only puts the ill at risk, it puts the public at risk. Following are responses to the CLMHD concerns.

### **Monitoring expiring court orders to determine if they should be renewed or not.**

CLMHD opposes this but it is exceedingly important. Currently orders may expire without a review of appropriateness. Mentally Ill Bennedy Abreu who stabbed Officers William Fair and Phillip White in the Bronx was on a Kendra's Law Order. But it was allowed to expire. As community mental health directors have not put systems in place to do monitor expirations, state oversight is needed.

### **Receive reports of mentally ill who are being released from jails, prisons or involuntary commitment after being found to be 'danger to self or others'.**

CLMD opposes receiving reports on those mentally ill who were involuntarily committed because they were danger to self or others and about to be released and those mentally ill who are incarcerated as a result of untreated mental illness and are about to be released. These are the most important populations to evaluate. Someone should be evaluating them as they present the biggest risk to their own and public safety. Currently, no one is. Terrence Hale who stabbed Officer Loor was mentally ill and released from incarceration without anyone evaluating his ability to live safely in community and potential need for Kendra's Law.

### **Investigate reports of dangerous mentally ill that are received from family members.**

CLMHD claims they do monitor reports received from family members while simultaneously opposes the requirement to do so. Research by NAMI/NYS shows reports of family members about potentially dangerous mentally ill sons and daughters are routinely ignored. The Staten Island parents of mentally ill Eric Bellucci lived in fear of him and continually reported his dangerous behavior to mental health authorities. Their reports were ignored. Last year, Eric killed both parents before fleeing to Israel where he was caught.

### **Providing medication or symptom management training, financial management services non-clinical services and random testing for drugs or alcohol as listed potential services to be included in AOT.**

CLMHD opposes this and claims 'constitutional concerns'. Drug testing may already be included in a court order, the bill just specifies it can be "random". This issue of non-clinical and financial management services has already been decided by the courts (In the Matter of William C.). Acknowledging that the statute does not specifically authorize the appointment of a representative payee, **the court concluded that "[i]t cannot be seriously disputed that money management is a service which would assist a mentally ill person in "living and functioning" as a productive member of the community."** This case suggests that other traditionally non-clinical services may be included in an AOT treatment plan to the extent that such services are essential to the ultimate goal of the treatment plan – for the patient to remain safely in the community.

### **Making a reasonable effort to seek information from family members**

CLMHD opposes. While HIPPA precludes disclosing information to families without permission, it does not prevent receiving it. According to OMH, "New York State Mental Hygiene Law not only allows but requires the involvement of an authorized representative of the patient (which can include family members) in treatment planning, because it is presumed that such involvement has important therapeutic benefits." Unfortunately this policy is ignored for Kendra's Law enrollees where it is most important.

### **Increasing maximum allowable period under Kendra's Law from six months to one year.**

CLMHD opposes. 79% of those in AOT have been in it more than the current maximum of 6 months. By allowing the maximum period to extend up to a year, it would reduce needless costs of court hearings for the renewal. More importantly, the Duke Study commissioned by the legislature found strong evidence that services of one year or longer have sustained benefits, while services delivered for only six months are less likely to do so. Extending the maximum allowable time frame (especially in light of CLMHD opposition to thoughtfully considering if renewal petitions should be filed) would deliver greater improvement and reduce costs.

**LINK TO NYS Conference of Mental Hygiene Directors objections.**



New York State Conference of Local Mental Hygiene Directors, Inc.  
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S. 4881 - Young

**Memorandum in Opposition – A6987 (Gunther)**

*AN ACT to amend the mental hygiene law and the correction law,  
in relation to enhancing the assisted outpatient treatment program*

The Conference of Local Mental Hygiene Directors (the Conference) **strongly opposes** A6987 which makes significant changes in the NY Assisted Outpatient Treatment law.

The Conference is a statutory organization established pursuant to Section 41.10 of the Mental Hygiene law consisting of the Directors of Community Services for the 57 counties and the City of New York. Chapter 408 of the Laws of 1999 creates a statutory framework for court-ordered Assisted Outpatient Treatment (AOT), to ensure that individuals with mental illness and a history of hospitalizations and difficulties following a treatment plan participate in community-based services appropriate to their needs. The law attempts to ensure that services are received by those consumers least likely to pursue them and most likely to be dropped from other services because they present a unique challenge. This law establishes a procedure for obtaining court orders for certain individuals with mental illness to receive and accept outpatient treatment. Our members are in a unique position to judge the effectiveness of AOT since it is our members, the Directors of Community Services who are charged with the front line duty of helping to create and oversee the treatment plans which are the backbone of the law. We supported a five-year extension of this law in 2010 in order to study the implementation of AOT further, and we strongly disagree with the significant changes that this bill seeks to make; some of which we feel could invalidate the entire law as unconstitutional.

The independent study conducted by Duke University which was required by the first extension of this law answered the specific questions asked by the Legislature and concluded that the AOT Program improves a range of important outcomes for its recipients. However, the report also found that the results and uses of AOT differ substantially around the State and specifically said that "**further study is necessary**" to explore the differences in uses of AOT in different parts of the state. Most importantly, as the report indicated that the "introduction of New York's AOT Program was accompanied by a significant infusion of new service dollars" and is therefore "a critical test of how a comprehensively implemented and **well-funded program** of assisted outpatient treatment can perform." Since the time frame which was evaluated in the report, all state funding has been significantly reduced so we are currently reevaluating the use of AOT in a different financial environment, per the five year extension granted by the Legislature in 2010. The report also indicated that an "important difference among regions [is in] the use of enhanced voluntary service (EVS) agreements (sometimes referred to as "enhanced services") in lieu of a formal AOT court order." Under a voluntary agreement, the recipient signs a statement that he or she will adhere to a prescribed community treatment plan. Far more study is necessary before a final decision can be reached as to whether or how the use of such voluntary contracts may be factored into the overall Assisted Outpatient process.

Finally and critically, New York is in the midst of a major restructuring of the operation and funding of all Article 31 mental health clinics. We are facing the unknowns of how Federal Healthcare Reform is going to impact our public mental health system. We are

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faced with the findings in the Duke report that in its early years, the AOT Program reduced access to services for non-AOT recipients and that "lack of continued growth of new service dollars will likely increase competition for access to services once again." It is imperative that we see how all these stars will align before the legislature can make a reasoned decision regarding any substantial restructuring of the AOT statute.

**Some of the changes this bill seeks to effect do not make sense and may be unconstitutional.**

1. The bill seeks to amend Mental Hygiene Law (MHL) 7.17 (f) to require that AOT program coordinators monitor local programs concerning expiring AOT orders which fundamentally changes the role of the program coordinator from one of monitoring and oversight to one of operational responsibility. Currently health care professionals make these decisions on the local level. This change would mean that a State employee without having seen the patient would be overseeing clinical decisions made by health care professionals on the local level. We strongly oppose any such usurpation of local clinical decision making.
2. The bill seeks to amend MHL 9.47 (b) to require that a director of community services' responsibility to investigate reports of persons who may be in need of AOT applies to reports received from family and community members, as well as written reports received from hospital directors. This requirement appears to give family members, whose motivation may not be the best interests of the patient, statutory authority to limit the professional discretion of the DCS. Mental Illness often causes dysfunction in families and DCSs currently receive such reports and have the discretion to, and do investigate as deemed appropriate.
3. The bill seeks to amend MHL 9.48 to require that AOT program directors' quarterly reports to program coordinators include information on any expired AOT court orders, including the determination made as to whether to petition for renewal, the basis for such determination, and the court's disposition of the renewal petition. This would almost create a statutory presumption in favor of AOT extensions without showing any clinical need or value. It once again requires the program coordinator to second guess clinical decisions by local health care professionals. Since the renewal decision is solely within the county's discretion, there is no point to this provision other than to create conflict without benefit, and it will ultimately be a disincentive to original AOT petitions.
4. The bill seeks to add medication or symptom management training, financial management services, and random testing for drugs or alcohol as listed potential services to be included in AOT and specifies that other services which may be included in an individualized treatment plan need not be clinical in nature. This results in two problems. Local mental hygiene departments are simply not in a position to offer non clinical services such as financial management training to AOT patients. The second is the legality. If the recipient is in need of an Article 81 guardianship then that is the correct proceeding. Attempting to bypass the criteria of Article 81 in an AOT order presents constitutional issues. As the Court of Appeals stated in Matter of K.L., "[t]he determination by a court that a patient is in need of assisted outpatient treatment shall not be construed as or deemed to be a determination that such patient is incapacitated pursuant to article eighty-one" of the Mental Hygiene Law.
5. The bill attempts to create a major unfunded mandate on the locality by requiring the DCS to receive and investigate reports by hospital directors discharging patients who were initially admitted on an involuntary basis in cases when the hospital director does not petition for an AOT order upon release and also requires DCS investigation of AOT need for inmates released from hospitals serving prisoners with mental illness. In counties with State hospitals or prisons this could result in numerous additional reviews of cases where the treating professional has already determined that the AOT order is not necessary.
6. The bill seeks to amend the statute to specifically require examining physicians to make "reasonable effort" to obtain information from the family members of the subject of an AOT petition. Again in appropriate cases a physician developing the treatment would certainly make reasonable efforts to obtain relevant information which may include family input when appropriate. This provision might

require such input in every case creating rights accruing to family members which do not otherwise exist under the statute.

7. The bill would allow the increase of the maximum length of initial order to one year. This again would change the due process equation upheld by the Matter of K.L., and will certainly result in new constitutional challenges to the entire law.
8. A major problem with the bill is that it establishes a **presumption** that a person with an assisted outpatient treatment order should be removed to a hospital to determine his or her need for admission merely based on his or her failure to take medication, submit to blood testing or urinalysis, or comply with drug or alcohol treatment. This not only creates a serious limitation on clinical judgment in the removal decision but also creates a major likelihood of constitutional challenges to the statute. The Court of Appeals has held that: "If an assisted outpatient later fails or refuses to comply with treatment as ordered by the court; if efforts to solicit voluntary compliance are made without success; and if in the clinical judgment of a physician, the patient may be in need of either involuntary admission to a hospital or immediate observation, care and treatment pursuant to standards set forth in the Mental Hygiene Law, then the physician can seek the patient's temporary removal to a hospital for examination to determine whether hospitalization is required." Removal of most of those criteria clearly undermines the legislature's careful consideration of constitutional issues in the original drafting of the law.

In Matter of K.L., the court said "The restriction on a patient's freedom effected by a court order authorizing assisted outpatient treatment is minimal, inasmuch as the coercive force of the order lies solely in the compulsion generally felt by law-abiding citizens to comply with court directives. For although the Legislature has determined that the existence of such an order and its attendant supervision increases the likelihood of voluntary compliance with necessary treatment, a violation of the order, standing alone, ultimately carries no sanction. Rather, the violation, when coupled with a failure of efforts to solicit the assisted outpatient's compliance, simply triggers heightened scrutiny on the part of the physician, who must then determine whether the patient may be in need of involuntary hospitalization." This bill seeks to substantially change that equation and we respectfully contend that no such action should be taken without very careful study of the impacts and legality of such changes.

We thank you for your consideration of these critical concerns and respectfully oppose this legislation.