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**MENTAL ILLNESS POLICY.ORG COMMENTS ON
CHANGES TO PEI REGULATIONS
PROPOSED BY MHSA ON APRIL 24, 2015**

MentalIllnessPolicy.org (MIPO) respectfully submits the following comments to the changes that the Mental Health Services Act Oversight and Accountability Commission (MHSA) is proposing to make to its proposed Prevention and Early Intervention (PEI) Regulations, as set forth in its Notice of Modifications to Proposed Regulations dated April 24, 2015.

MIPO is a national, non-profit think tank founded to provide unbiased information about serious mental illness to policymakers and the media. Its constituents are mostly individuals with severe mental illness and their family members, thus fitting the statutory directive that “[t]he commission shall ensure that the perspective and participation of members and others suffering from severe mental illness and their family members is a significant factor in all of its decisions and recommendations.” Welfare & Institutions Code (WIC) § 5847(d).

I. MHSA’s Proposed Regulations Continue to Reverse the “Shalls” and “Mays” in the Mental Health Services Act

Despite MHSA’s proposed revisions, regulation 3720 continues to reverse the “shalls” and “mays” in the Mental Health Services Act (MHSA). The MHSA’s most important mandate remains discretionary in proposed subsection 3720(d). Conversely,

the programs required by MHSOAC's proposed regulation are either illegal, as MIPO previously argued, or at best, discretionary.¹ And, even assuming they are discretionary, they exclude what the statute explicitly requires.

II. MHSOAC's Revised Regulations Continue to Ignore the MHSA's Mandate For Relapse Prevention/Early Intervention Programs for the Severely Mentally Ill

The PEI provisions in the MHSA require that programs for relapse prevention be provided to individuals who are already severely mentally ill. This mandate is set forth in WIC section 5840, as follows:

The Department of Health Care Services, in coordination with counties, *shall* establish a program designed to prevent mental illnesses from becoming severe and disabling. . . . (c) The program . . . *shall also* include components similar to programs that have been successful in reducing the duration of untreated *severe mental illnesses* and assisting people in quickly *regaining* productive lives.

Despite this statutory mandate, MHSOAC's proposed regulation 3720, as revised, continues to make relapse prevention programs merely discretionary, by using the permissive "may" in subsection (d):

(a) The County *shall* offer at least one Prevention Program as defined in this section. . . . (d) Prevention program services *may* include relapse prevention for individuals in recovery from a serious mental illness.

Commission staff at the most recent Commission meeting represented that this deficiency was addressed in proposed section 3710. Staff's representation is not correct. Proposed regulation 3710 mandates relapse prevention only for a tiny fraction of the severely mentally ill – the tiny fraction that does not need it. MHSOAC's proposed section 3710 makes early intervention programs available to individuals in *onset* of a "mental illness." There is no requirement that the mental illness be "severe," as

¹ MIPO is not waiving this argument but will not repeat it. See Comment No. 6 and Comment dated September 26, 2014, at pp. 28, 88 and 94 of MIPO's Compilation of Comments

specified in the MHSA.² Early intervention under proposed section 3710 is also severely time limited. Proposed section 3710 reads as follows:

- (a) The County shall offer at least one Early Intervention program as defined in this section.
- (b) “Early Intervention program” means treatment and other services and interventions, including relapse prevention, to address and promote recovery and related functional outcomes **for a mental illness early in its emergence** .
- (c) Early Intervention program services **shall not exceed eighteen months** unless the individual receiving service is identified as experiencing **first onset of a serious mental illness** or emotional disturbance with psychotic features, in which case early intervention services shall not exceed **four years**.

...

By definition, this proposed regulation does not provide for the vast majority of those who are severely mentally ill. Severe mental illnesses (SMIs) are lifetime conditions that usually manifest in children or young adults. Assuming an average 40-year duration of a typical SMI (which is conservative), only 1/40th of those with an SMI are in onset at any time. Further, relapse prevention services are premature for individuals who are in onset with an SMI, as they may not even yet have an accurate diagnosis of their illness. The job of early intervention programs is to diagnose and stabilize these individuals so their illnesses don’t worsen. In contrast, relapse prevention programs are to help them in “*regaining productive lives,*” later in the course of their lifetime illnesses.

Because it ignores 39 out of 40 of those with SMIs and serves only a small fraction of the rest, proposed section 3710 does not comply with the MHSA’s mandate that the programs include components similar to programs that have been successful “in reducing the duration of untreated *severe mental illnesses* and assisting people in

² MIPO does not waive its earlier objection that the proposed early intervention regulations are contrary to statute, because “early intervention” under the MHSA is only for people in onset of “severe mental illness.” See MIPO Comment No. 5 and Comment dated September 26, 2014, pp. 21 and 90 of the MIPO Compilation of Comments. MHSA simply does not reach onset of the trivial conditions that MHSOAC defines as “mental illnesses” in the Regulation.

quickly *regaining* productive lives.” Requiring relapse prevention programs for people who don’t yet need them and may never need them – which is what section 3710 currently proposes – helps no one.

By contrast, effective prevention/early intervention programs save lives and reduce suffering and danger for *all* the severely mentally ill people, and the public generally. For those with SMIs, the PEI provision is arguably the most important in the MHSA. Without PEI programs, family members are forced by state law to wait until their loved ones are dangerous to themselves or others before seeking help.³ If lucky, those with SMI’s end up in a locked mental ward or a jail cell. If not, they end up dead.

A. Section 3720 – The Proposed Regulation Defining Prevention Programs – Ignores The Statutory Mandate And Instead Requires Programs That Are Illegal Or At Best Permissive

As the Office of Administrative Law (OAL) is aware, the MHSA mandates Prevention programs that keep “mental illnesses” from becoming “severe *and* disabling.” See WIC § 5840(a). Despite changes, however, MHSOAC’s proposed Prevention regulation, set forth in relevant part below, does not attempt to prevent “mental illnesses” from becoming “severe and disabling.” By reading the italicized language below, one can see how counties will continue the past practice of excluding the mentally ill entirely from PEI programs by targeting individuals who are not and will never be mentally ill, in violation of the statutory mandate quoted above.⁴ All proposed language, including the cross-outs, are in the current proposed version:

Section 3720. Prevention Program

³ Welfare and Institutions Code Section 5150.

⁴ As MIPO demonstrated in Comment No.1, p. 1 and n. 13, Exh. E in the Compilation of Comments, MHSOAC’s previous “policies” (which were really “underground” regulations and pseudo-regulations) actually prohibited anyone with a mental illness diagnosis from benefiting from the PEI provisions. Thus, for ten years, millions of dollars were misallocated to individuals outside the ambit of the statute.

(a) The County ~~may~~ shall offer at least one or more Prevention Programs as defined in this section.

(b) "Prevention Program" means a set of related activities to *reduce risk factors* for developing a *potentially serious mental illness* and to build protective factors. The *goal* of this program is to *bring about mental health* including reduction of the applicable negative outcomes listed in Welfare and Institutions Code Section 5840, subdivision (d) as a result of untreated mental illness for individuals and members of groups or populations whose risk of developing a serious mental illness is ~~significantly higher~~ greater than average and, as applicable, their parents, caregivers, and other family members.

(c) "Risk factors for mental illness" means conditions or experiences that are associated with a ~~higher~~ greater than average risk of developing a *potentially serious mental illness*. Risk factors include, but are not limited to, biological including family history and neurological, behavioral, social/economic, and environmental.

(1) Examples of risk factors include, but are not limited to, a serious chronic medical condition, *adverse childhood experiences*, experience of severe trauma, *ongoing stress*, exposure to drugs or toxins including in the womb, *poverty*, *family conflict* or domestic violence, experiences of racism and social inequality, prolonged isolation, traumatic loss (e.g. complicated, multiple, prolonged, severe), having a previous mental illness, a previous suicide attempt, or having a family member with a serious mental illness.

As currently drafted, this regulation is not about preventing severe mental illness at all. It is about "risk factors" for "mental illnesses" that are "*potentially serious*." No mental illness diagnosis is required for participation in a Prevention Program. All mental illnesses are "*potentially serious*." For example, all people experience depression at some point, including people who have experienced the enumerated "risk factors," such as "adverse childhood experiences," "ongoing stress" and/or "family conflict." Because depression is a "*potentially serious mental illness*," the proposed regulation authorizes counties to address simple unhappiness in people with risk factors but no formal diagnosis. Historically, counties have used PEI funding to underwrite happy-making activities for people who are not mentally ill and probably never will be, including such activities as yoga, line dancing, drumming circles, a hip-hop carwash,

Halloween and Cinco de Mayo celebrations, etc., etc.⁵ There is no evidence whatever that such activities prevent mental illness, much less severe mental illness. But counties can and will continue this practice, under the regulation as currently proposed.

Meanwhile, the mentally ill who are at risk of severe mental illness—the individuals whom the statute actually addresses—can and will be ignored if the regulation is permitted to become final as drafted.

MIPO does not waive its argument that these “risk factor” programs are illegal. See MIPO Comment No. 6 and Comments dated 9/26/14 and 1/6/14, at pp.28, 88 and 94 of the MIPO Compilation of Comments. However, assuming *arguendo* that they are permissive, a properly constituted regulation would look like this:

Section 3720. Prevention Program. (a) The County ~~may~~ shall offer at least one or more Prevention Programs as defined in this section.

(b) “Prevention Program” means mental health services similar to those provided under other programs effective in preventing mental illnesses from becoming severe. The goal of this program is to bring about mental health including reduction of the applicable negative outcomes listed in Welfare and Institutions Code Section 5840, subdivision (d) as a result of untreated mental illness. Prevention programs shall target persons with mental illness who are at greater than average risk of severe mental illness.

(c) Prevention program services ~~may~~ shall also include relapse prevention/early intervention for individuals in recovery from a serious mental illness.

(d) Prevention programs may include a set of related activities to reduce risk factors for developing a ~~potentially~~ serious mental illness and to build protective factors. The goal of this program is to bring about ~~mental health including~~ reduction of the applicable negative outcomes listed in Welfare and Institutions Code Section 5840, subdivision (d) as a result of untreated mental illness for individuals and members of groups or populations whose risk of developing a serious mental illness is ~~significantly higher~~ greater than average and, as applicable, their parents, caregivers, and other family members.

⁵ See p. 4, n. 7 in the MIPO Compilation of Comments and <http://mentalillnesspolicy.org/states/california/mhsa/mhsa.prop63.baitswitch.fullreport.pdf> pp. 13- 18. for additional examples of misuse of PEI funds.

(e) (1) “Risk factors for serious mental illness” means conditions or experiences that are associated with a higher greater than average risk of developing a ~~potentially~~ serious mental illness. Risk factors include, but are not limited to, biological including family history and neurological, behavioral, social/economic, and environmental. ~~(1)~~ Examples of risk factors include, but are not limited to, ~~a serious chronic medical condition, adverse childhood experiences, experience of severe trauma, ongoing stress, exposure to drugs or toxins including in the womb, poverty, family conflict or domestic violence, experiences of racism and social inequality, prolonged isolation, traumatic loss (e.g. complicated, multiple, prolonged, severe),~~ having a previous mental illness, a previous suicide attempt, or having a family member with a serious mental illness.

Parenthetically, MIPO also objects to the use of the undefined term “*potentially* serious mental illness,” not only in the regulation 3720 quoted above, but throughout the regulations that are addressed in MHSOAC’s current Notice. All mental illnesses are “potentially serious.” By adding the word “potentially,” the regulatory language becomes imprecise and meaningless. The effect is to change “serious mental illness” into “mental illness.” MHSOAC should therefore be directed to remove “potentially” wherever it occurs next to serious mental illness. In the instances that we could find in the provisions covered by this Notice, this deletion would clarify the regulations and brings them closer to achieving statutory intent. Thus:

3755(c)(2)(C): Brief description of how each participant’s early onset of a ~~potentially~~ serious mental illness will be determined.

3755(c)(3) ~~(2)~~ Identification of the type(s) of problem(s) and need(s) for which the program will be directed and the activities to be included in the program that are intended to bring about ~~mental health and related functional outcomes including~~ reduction of the negative outcomes referenced in Welfare and Institutions Code Section 5840, subdivision (d) for individuals with early onset of ~~potentially~~ serious mental illness.

3755(c)(5)(B): How the risk of a ~~potentially~~ serious mental illness will be defined and determined, i.e. what criteria and process the County will use to establish that the intended beneficiaries of the Program have a greater than average risk of developing a ~~potentially~~ severe mental illness.

3755(e)(3) ~~(2)~~ Specify the methods to be used to reach out and engage potential responders and the methods to be used for potential responders and public mental health service providers to learn together about how to identify and

respond supportively to signs and symptoms of ~~potentially~~ serious mental illness.

III. The MHSOAC Definition of “Serious/Severe” Mental Illness Remains Inconsistent with the Statute.

MIPO will not reiterate its previous Comments demonstrating that MHSOAC’s attempt to create its own definition of “serious/severe” mental illness violates MHSA. The MHSA already defines serious or severe mental illness in both children and adults by incorporating by reference the very detailed definitions in WIC section 5600.3.⁶ MHSOAC’s most recent changes still do not solve the problem: Section 5600.3, for example, explicitly excludes primary substance abuse as a “severe mental illness” for both adults and children, not simply for children as set forth in MHSOAC’s current proposed regulation. This is one of many examples where the proposed regulatory definition remains at odds with the statutory definition.

MHSOAC is obligated to follow the statute, which is easy enough to do by simply incorporating WIC section 5600.3 in its regulations. If MHSOAC insists on using the non-statutory term, “serious,” then the regulatory definition must equate it with the statutory term, “severe.” That is all that is necessary, and all that the law allows. When a statute already contains definitions as detailed and precise as those set forth in WIC section 5600.3 there is no room for agency interpretation. Moreover, because counties are already completely familiar with the definitions in section 5600.3, there is also no necessity for clarification. Indeed, MHSOAC’s proposed definition will simply cause confusion.

IV. Other MHSOAC Changes Have Promoted Confusion and Ambiguity, Not Clarity

MIPO will not reiterate points already made in earlier Comments. Late changes

⁶ See MIPO Comments dated October 30, 2014 and January 6, 2015 at pp. 100–122 of the Compilation of Comments

made by MHSOAC are, however, subject to this 15 day notice and some of them are inconsistent with the regulatory definitions and the OAL “clarity” standard.

Specifically, the definition of “Program” is now full of confusing, undefined jargon and even misspells the word “discrete.” It should read as follows:

(b) (a) “Program” as used in the Prevention and Early Intervention regulations means a stand-alone organized and planned work, action or approach that meets the “evidence-based” or “promising practice” standards as well as the standards for the applicable individual Program set forth herein at Sections 3710 through 3730. ~~evidence indicates is likely to bring about positive mental health outcomes either for individuals and families with or at risk of serious mental illness or for the mental health system.~~ A program is a stand-alone, ~~discreet~~ discrete unit of service delivery.

V. Conclusion

The voters enacted Proposition 63 to help people who are either sick (mentally ill) or very, very sick (severely mentally ill). They did not vote to tax themselves to help people who are not sick. Nonetheless, for ten years, MHSOAC has been directing PEI funds away from the sick and very, very sick, in favor of people who *might* be sick at some point in the future, in violation of the plain language of the MHSA as well as voter intent expressed in the MHSA’s Findings, Declarations, Purpose and Intent provisions. If MHSOAC fails to make the necessary changes to conform its regulations to the statute, then OAL must require it to do so. Even assuming MHSOAC’s proposed Prevention program is a good idea (which it is not), it is nonetheless contrary to statute.

Dated: May ___, 2015

Respectfully submitted,

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