The Commonwealth of Massachusetts

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Memorandum

TO: Secretary Marylou Sudders and Section 35 Commission

FROM: Mark A. Larsen, Director
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Committee for Public Counsel Services

RE: Memo on Commitment of Individuals with Substance Use Disorders

DATE: May 23, 2019

We have received a copy of the memo addressing the question of whether the provisions of M.G.L. c. 123, § 12 (Emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness.) can be grafted on to the section 35 provisions for commitment of alcoholics or substance abusers. While it may be possible to do so, we do not believe it is wise or practical to do so.

Section 12 (a) and (b)

M.G.L. c. 123, § 12(a) authorizes the restraint of individuals in certain emergency situations for the purpose of admission to a psychiatric facility. This section has never been subjected to constitutional scrutiny by either the Appeals Court or the Supreme Judicial Court**.** However, our concerns about that section have been the subject of proposed legislation and several court cases. One concern is that section 12(a) lacks any statutory limit on the length of time a person can be detained while waiting for admission to a mental health facility. Nor is there any statutory process for mandatory judicial or other review of the basis of the detention. The result is that a person can be held in an emergency room or on a medical floor, unable to leave for days and in some cases weeks with no review beyond that conducted by those who are detaining the person. Even though there is a provision in section 12(b) for judicial review, that review is limited to determining if there has been an abuse or misuse of the section.

Neither section 12(a) nor (b) provides for an opportunity to review whether there is "reason to believe that a person presents a likelihood of serious harm by reason of mental illness." It is an unreviewable decision of the person authorizing the restraint. The only option for a section 12(a) person to challenge their detention is file a petition for a writ of habeas corpus in the superior court. But they need to know that is an option and then find a lawyer to prosecute their claim. We have assigned lawyers in a few cases where a person has contacted us for legal assistance. In every case, where we have filed for habeas corpus, the hospital has relented and released the individual.

Section 12(b) hospitalization does not require court involvement and the due process protections it includes are very limited. The facility where the person is being held must advise the person that if they make a request, the facility will contact CPCS. In every case CPCS must assign an attorney to meet with the client. If a request is made under section 12(b) the court is limited to determining if the there is an abuse or misuse of the section. The court cannot review the substance of the determination that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness. The only judicial review of that determination occurs only after the facility files a petition for long-term commitment for up to six months.

Section 12(e)

Section 12(e) has more due process protections than either sections 12(a) or (b) and is similar to section 35. It provides an alternative process for emergency hospitalization of individuals who are allegedly mentally ill and for whom failure to hospitalize would cause a likelihood of serious harm. A section 12(e) petition may be filed by any person. On the filing of a 12(e) petition the court must appoint counsel and hold a preliminary hearing. If the court finds that the condition or conduct alleged in the petition is sufficient to believe that the person is mentally ill and in need of hospitalization to avert serious harm, the court may issue a warrant of apprehension to bring the person into court. Following apprehension, the person is brought to court and evaluated. If the evaluator determines that failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the court may, after a hearing, order the person committed to a facility for a period not to exceed three days. In contrast to 12(a) and (b), section 12(e) provides for a prompt judicial review of the detention with counsel being assigned and the ability to contest whether the person is mentally ill and whether failure to hospitalize the person would cause serious harm.

Grafting section 12(a) and (b) on to section 35

While it may be conceptually true that there is no reason why the process utilized in sections 12(a) and (b) could not, after amendment, be applied to persons petitioned under section 35, there are procedural and practical concerns. The section 12 process is fraught with problems. The first being that there is no statutory limit on the length time a person can be detained. Over the past several years, Committee for Public Counsel Services, Mental Health Litigation Division has been contacted by individuals who have been detained in emergency rooms and on medical floors of hospitals for days, weeks and even months on "rolling 12(a)" restraints. In many cases we have been, through the use of petitions for writs of habeas corpus, been able to secure the release of these individuals.

Abuses of the 12(a) process have not gone without some judicial scrutiny. In Commonwealth v. Accime, 476 Mass. 469 (2017) the defendant was held, supposedly under section 12(a), in an emergency room. Although section 12(a) detentions are supposed to be documented by a "pink paper," no documentation was ever produced. Mr. Accime was restrained and threatened with being involuntarily medicated, to which he objected. Although charged with several criminal offenses, he was not convicted, in part because the detention was not in compliance with section 12. The Supreme Judicial Court noted that "the involuntary hospitalization and forcible medication of an individual on account of mental illness is not permitted unless there is compliance with the specific statutory requirements of G. L. c. 123, §§ 12 and 21. It has long been the law that medical treatment of a competent patient without his consent is a battery, and is permitted only for incompetent patients where procedural protections are followed." Commonwealth v. Accime, at 478.

In Van Buskirk v. Fitzgerald, 85 Mass.App.Ct. 1103 (2014) the plaintiff was brought to the hospital by the police and detained, without examination, based on a pre-signed section 12 "pink paper." Mr. Van Buskirk prevailed on a claim of false imprisonment and court concluded that he was detained in a direct violation of the civil commitment statute. Although the Supreme Judicial Court declined further appellate review, CPCS supported filing an amicus brief because we see violations like this on a regular basis. Our reasoning was based, in part, on Vitek v. Jones, 445 U.S. 480 (1980), where the United States Supreme Court recognized that commitment proceedings are subject to due process requirements. Justice White writing for the court stated at 445 U.S. at 491-92:

> We have recognized that for the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty.' Humphrey v. Cady, 405 U.S. 504, 509 (1972), and in consequence 'requires due process protection.' Addington v. Texas, 441 U.S. 418, 425 (1979); O'Connor v. Donaldson, 422 U.S. 563, 580 (BURGER , C.J., concurring). The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that 'whether we label this phenomena "stigma" or choose to call it something else . . . . we recognize that it can occur and that it can have a very significant impact on the individual.' Addington v. Texas, 425-426,. See also Parham v. J.R., 442 U.S. 584, 600 (1979). Also 'among the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'" Ingraham v. Wright, 430 U.S. 651, 673 (1977).

Challenges to detentions under section 12 are, however, difficult to litigate because the Supreme Judicial Court has held that there is no provision in Chapter 123 to challenge the reasons for a section 12 detention unless and until a petition for commitment is filed. Challenges under section 12(b) "do not include a challenge to the substance of the designated physician's actual "determin[ation] that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness," G.L. c. 123, § 12 (b), first par., because the Legislature has already established an appropriate time to challenge that determination, namely, at the hearing afforded

to a person when the hospital is seeking the person's continued commitment beyond the three-day hospitalization." Newton-Wellesley Hosp. v. Magrini, 451 Mass. 777, 784 (2008).
In addition to the legal flaws in the Massachusetts' approach to emergency detentions for mental illness and substance abuse, there are practical questions that include who could request an emergency detention under an amended section 35; where would the person be held; how long they will be held; held, will there be competent medical care available for those in withdrawal?

Conclusion:

Under Massachusetts law, a person diagnosed with substance use disorder may only be involuntarily hospitalized through judicial proceedings. There is, however, no legal authority for short-term, emergency hospitalization, similar to the process for commitment of mentally ill persons under M.G.L. c. 123, § 12. Creating a flawed process similar that contained in section 12, should not be considered. Any effort to expand emergency detentions under Chapter 123, must also consider the cost associated with such a process. Those cost would be both direct and indirect and include the costs of counsel, the cost imposed on hospitals and physicians who might be compelled to hold individuals under an expanded emergency detention process, the cost to law enforcement, if they are required to take individuals into custody when a section 35 "pink paper" is issued, the cost to the courts in hearing cases and the personal cost when serious deprivations of liberty occur.