Amended Senate Bill 53

TESTIMONY OF

OHIO LEGAL RIGHTS SERVICE

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Before the Ohio House Health Committee
The Honorable John J. White, Chairman

October 3, 2007

Chairman White, members of the committee:

OLRS offers this written testimony as an interested party in consideration of Am. S.B. 53. As the protection and advocacy system for Ohioans with disabilities, including mental illness, OLRS brings a unique perspective to bear on the issues presented by Amended Senate Bill 53.[1] OLRS has provided legal representation to clients in civil commitment and related issues in hundreds of cases over the years.[2]

Under current law, a psychiatrist, licensed clinical psychologist, licensed physician, health officer, parole officer, police officer, or sheriff may take a person into custody and transport the person to a hospital if there is reason to believe that the person is a "mentally ill person subject to hospitalization by court order" and "represents a substantial risk of physical harm to self or others" if allowed to remain at liberty pending examination.

The bill adds licensed professional clinical counselors (LPCCs) to the categories of professionals listed above permitted to take custody of and to transport to a hospital a person who meets both parts of the above civil commitment criteria. The person taking another into custody is required to provide a written statement to the hospital stating why he/she believes the person is a mentally ill person subject to hospitalization by court order and represents a substantial risk to self or others, and stating the circumstances under which the person was taken into custody. Am. S.B. 53 also requires a professional permitted to take custody of and transport the mentally ill person to a hospital to transport the person within one hour of taking the person into custody.

The provision of the Ohio Revised Code in question, § 5122.10, was at the center of an issue OLRS litigated approximately fifteen years ago. In the case of *In re Miller,* 63 Ohio State 3d 99 (1992)*,* the Ohio Supreme Court found that the written statement given to a hospital when a

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[1] OLRS is chartered in state law at R.C. § 5123.60. It is designated as the protection and advocacy system in Ohio as required by the Protection and Advocacy for Mentally Ill Individuals Act, as amended, 42 U.S.C. § 10801 *et seq*. Pursuant to this Act, OLRS has authority to "...pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care and treatment in the state...." 42 U.S.C. § 10805(a)(i)(B).

[2] Representative cases include: *Steele v. Hamilton County Community Mental Health Board*, 90 Ohio St. 3d 176, 736 N.E.2d 10 (2000) cert. denied 532 U.S. 929 (2001)(amicus—court ordered medication of involuntary committees); *Heller v. Doe by Doe*, 509 U.S. 312 (1993)(amicus--counsel for organizations of people with disabilities—equal protection, involuntary commitment of people with mental retardation); *State ex rel. Ohio Legal Rights Service v. Belskis*, 85 Ohio App. 3d 59, 619 N.E. 2d 77 (Franklin Co. 1993)(jurisdiction of probate court to order involuntary electroconvulsive therapy); *In re Miller*, 63 Ohio St. 3d 99, 585 N.E. 2d 396 (1992)(amicus—applicability of physician patient privilege in involuntary commitment; due process); *Cleveland v. Ohio Department of Mental Health*, 84 Ohio App. 3d 769, 618 N.E. 2d 244 (Franklin Co. 1992)(due process challenge to involuntary medication of patients by state hospitals); *In re Boggs*, 50 Ohio St. 3d 217, 553 N.E. 2d 676 (1990)(due process in involuntary commitment); *In re Guardianship of Allen*, 50 Ohio St. 3d 142, 552 N.E. 2d 934 (1990)(amicus—right to counsel in guardianship); *In re Milton*, 29 Ohio St. 3d 20, 505 N.E. 2d 255 cert. denied 484 U.S. 220 (1987)(involuntary treatment of patient who is competent; First Amendment religious exercise).

person is taken into custody is a requirement for the initiation of an emergency involuntary commitment, in that it ensures the existence of some probable cause to support the involuntary commitment of a person who may be mentally ill and in need of court-ordered hospitalization.[3]

Similarly, in another case in which OLRS was involved*, In Re Mental Illness of Boggs*, 50 Ohio St. 3d 217 (1990), the Ohio Supreme Court reversed a civil commitment order because the factual allegations in the affidavit did not support a finding that there was probable cause to believe the appellant was a mentally ill person subject to hospitalization by court order. These and other decisions make clear that emergency hospitalization under § 5122.10 must begin with a written statement demonstrating the existence of some probable cause to support the involuntary commitment.

Since *Miller*, other events have underscored that treating professionals have significant legal tools at their disposal to warn or act should a patient present a danger to self or others. The decision in *Estate of Morgan v Fairfield Family Counseling Center*, 77 Ohio St. 3d, 673 N.E.2d 1311 (1997), established in Ohio a duty for a therapist to protect third persons, following the California decision in *Tarasoff v. Regents of the University of California* 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976). The General Assembly responded quickly by amending RC § 5122.34 and passing §2305.51, which, respectively, set out immunity from suit for a professional who participates in the commitment process and the process that is available to a reasonable professional to comply with their *Morgan* duty.

Emergency detentions are essentially a balance between a person's liberty interests and the general public's safety and welfare. As there is no judicial review prior to the involuntary detention, it is important that existing protections not be decreased piecemeal. Testimony in the House has already been presented that *all* independent licensees with the right to "diagnose and treat mental and emotional disorders" should be allowed to detain and transport persons who pose a threat of serious harm to self or others. This is sought, presumably, to meet a perceived risk of liability under *Morgan*. Expanding the list of persons who can conduct these highly sensitive determinations increases the likelihood of error affecting the rights of a population of individuals already subjected to much stigma and stereotyping. The burden should be on the proponents of this legislation to demonstrate a need to shift the balance that the law currently strikes between individual liberty concerns and the legitimate interests of the state as articulated in the involuntary commitment process.

There has been no demonstration of a need for the proposed change. LPCC's in public mental health facilities already take patients into custody and transport them if they have the title of "health officer." It is OLRS' understanding that LPCCs in private mental health

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[3] The language in Sec. 5122.10 specifies that "[a] written statement shall be given to such hospital....stating the circumstances under which such person was taken into custody and the reasons for the .....belief." The Court noted, citing *Addington v. Texas*, 441 U.S. 418, 425-426 (1979), that "[I]t is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual."

facilities currently contact local law enforcement when a patient needs to be taken into custody and transported.[4]

Although well-intentioned, Am. Senate Bill 53 addresses an extremely limited problem with a response which could lead to more errors at a critical juncture in the involuntary commitment process in Ohio. OLRS urges caution in effecting such change.

If you have any questions about this testimony you can contact:

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[4] A spokesman for the Buckeye State Sheriff's Association stated that, on average, one patient per week is transported by law enforcement personnel. Therefore the end result would be minimal.