MAMH
Massachusetts Association for Mental Health

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April 25, 2022

Representative Michael S. Day, Chair
Joint Committee on the Judiciary
24 Beacon Street, Room 136
Boston, MA 02133

Senator James B. Eldridge, Chair
Joint Committee on the Judiciary
24 Beacon Street, Room 511-C
Boston, MA, 02133

Dear Chair Day and Chair Eldridge:

Re: Department of Correction use of Emergency Treatment Orders

On behalf of the Massachusetts Association for Mental Health, I write in support of the Disability Law Center's (DLC) statements in its April 12, 2022 letter to the Joint Committee on the Judiciary regarding conditions at Bridgewater State Hospital (BSH). In particular, I write to register our own strenuous objection to the Department of Correction (DOC) and Wellpath's use of Emergency Treatment Orders (ETOs) at that facility.

As DLC's monitoring makes clear, DOC and Wellpath's use of ETOs is inconsistent with Massachusetts law. In his April 1, 2022 letter to Chair Day, EOPSS Secretary Terrence R. Reidy disagrees, writing that "DOC and Wellpath continue to employ ETOs as treatment and not restraint." Secretary Reidy's interpretation of well settled Massachusetts is simply wrong.

The general rule in Massachusetts law is that medication may be administered only with the informed consent of the person receiving the medication. There are, however, several exceptions. First, involuntary medication may be used as a restraint of a person with mental illness in an emergency "such as the occurrence of, or serious threat of, extreme violence, personal injury or attempted suicide." General Laws c. 123, § 21. Second, if a person lacks the competency to provide informed consent, a court may authorize the administration of the medication upon a substituted judgment finding that, were the person competent, they would choose to accept the medication. This rule was first articulated in *Rogers v. Comm'r of the Dep't of Mental Health*, 390 Mass. 489 (1983) and has long since been the common accepted practice. There is one narrow exception to when medication may be administered for the purpose of treatment (not restraint) without informed consent or a court order. That is, in exercising its *parens patriae* power, the facility may administer medication involuntarily to prevent "'immediate, substantial, and irreversible deterioration of a serious mental illness,'… in cases in which 'even the smallest of avoidable delays would be intolerable.'" *Rogers*, 390 Mass. 489, 503, 511-512 (1983). In

Rogers, the SJC cautioned that the basis for invoking this exception would occur only "in rare circumstances." *Id.* at 511.[1]

Such emergency medication only may be administered to an "incompetent patient, or to one whom doctors, in the exercise of their professional judgment, believe to be incompetent." *Id.* at 512. If doctors determine that the involuntary medication should continue in order to prevent irreversible deterioration and the patient objects, "the doctors must seek an adjudication of incompetence." *Id.* If, after hearing, the judge finds the patient to be incompetent, "the judge should make a substituted judgment treatment plan determination." *Id.*

Thus, the administration of medication pursuant to this emergency exception may only occur when a number of stringent conditions have been met. Moreover, should medication be administered pursuant to this exception, those seeking to continue to medicate involuntarily must proceed to court for a judicial adjudication of incompetence and authorization of a treatment plan. That process, one would expect, would alleviate altogether the need for subsequent ETOs for that individual.

DLC's January 2022 report regarding BSH found that, from the period from June 26, 2021 through November 25, 2021, 370 ETOs were administered at BSH *in conjunction with* manual holds, mechanical restraints, or seclusion. DLC, Public Report: Efficacy of Service Delivery Reforms at Bridgewater State Hospital (BSH) and Continuity of Care for BSH Persons Serviced (Jan. 2022), https://www.dlc-ma.org/2022/02/09/disability-law-center-finds-serious-health-and-safety-concerns-at-bridgewater-state-hospital-confirming-widespread-mold-and-improper-use-of-restraint/ at 18. In addition, a "significant number of ETOs" were recorded in Person Served medical records that occurred either without manual holds or with manual holds and other restraints that were omitted from restraint packets provided to the DOC Commissioner. DLC concludes that "ETOs were widely used to control behaviors that do not justify chemical restraint, i.e., where no imminent threat of serious harm to self or others existed." p. 18-19. DLC finds that DOC and Wellpath have used ETOs to "control [Person Served] behavior and, possibly, to inflict punishment upon them for engaging in disruptive, unhygienic, and otherwise unwanted behaviors." p. 19.

As explained above, involuntary use of medication must be authorized by a court, meet the narrow exception of preventing irreversible deterioration, or be restraint. Since ETOs as used at BSH are involuntary, are not court authorized, and do not satisfy the limited parens patriae exception, the ETO either must be considered restraint (in which case they do not meet the protections against unreasonable restraint embedded in law and policy) or they are entirely contrary to law.

In calling these forced administrations of medication ETOs, DOC and Wellpath appear to be avoiding the statutory and regulatory standards for using chemical restraint (as well as the reporting requirements that ensue upon the use of restraint).[2] In doing so, DOC and Wellpath have very likely violated the law

[1] In *Rogers*, the SJC also notes that the *parens patriae* power that forms the basis for this exception is not "the broad, traditional parens patriae power invoked by a State to do what is best for its citizens despite their own wishes," but a more limited power, informed by the Court's adoption of "the substituted judgment standard as the norm." *Id.*

[2] Many of the examples of situations resulting in forced medication that DLC presents would likely not meet the standard for chemical restraint. And, restraint cannot be used for the purpose of treatment. As the Department of

regarding the use of ETOs in all, or nearly all, of these reported instances of forced medication. How can a situation that is justified in only "a rare circumstance" have arisen, and how can stringent requirements have been satisfied, well over 370 times in the period of five months at one facility? Not only logic suggests this impossibility; DLC's own review of records reveals situations that clearly do not meet the standard for use of an ETO. *See* pp. 19-22. Among other problems with their use of ETOs, any evidence of likelihood of irreversible deterioration seems absent in these cited examples, particularly in those cases in which ETOs were administered long after emergency circumstances subsided. pp. 21-22.

Secretary Reidy's April 1st letter, in which he writes that ETOs continue to be used at BSH as treatment, does nothing to allay concerns. It appears that DOC and Wellpath do not grasp the exceptionality of the *Rogers* provision that contemplates such emergency medication administration. It may be that a range of legal avenues must be pursued to address this problem. As part of that response, we urge the Joint Committee on the Judiciary to review DLC's report, including recommendations, and its April 12, 2022 letter, and consider appropriate steps.

Thank you for your consideration.

Sincerely,

Danna Mauch

Danna Mauch, Ph.D.
President & CEO

Mental Health (DMH), which has interpreted the Rogers decision language regarding the use of restraint and ETOs in its regulations regarding restraint applicable to facilities that it licenses, contracts for, and operates, explains, medication restraint does not include "involuntary administrations of medication when administered in an emergency to prevent immediate, substantial and irreversible deterioration of serious mental illness." 104 CMR 27.12(8)3.