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TESTIMONY SUBMITTED ON BEHALF OF THE

NEW YORK STATE PSYCHIATRIC ASSOCIATION, INC.

to the

Senate Standing Committee on Mental Health and Developmental Disabilities, Chaired by Senator David Carlucci

regarding

the implementation and impact of the SAFE Act mental health requirements

May 31, 2013

My name is Glenn Martin, M.D. and I am the President of the New York State Psychiatric Association (NYSPA). NYSPA is the state-wide medical specialty organization representing over 4,000 psychiatrists practicing in New York and is the New York State division of the American Psychiatric Association. Thank you for the opportunity to provide testimony on the implementation and impact of the new SAFE ACT mental health reporting requirement.

The following is a brief overview of NYSPA's proposed changes to the SAFE Act:

- Clarify the standard for reporting
- Clarify to whom a report may be made
- Clarify the release of liability language
- Limit the reporting requirement to professionals with the appropriate scope of practice

Since the enactment of the SAFE Act, NYSPA has continued to express concerns regarding the language of the mental health reporting requirement. First, NYSPA is concerned that the statute fails to require that a potential threat be both serious and imminent before the duty to report is triggered. Second, the statute fails to authorize contemporaneous notification to local law enforcement or potential victims. However, under federal HIPAA regulations, a disclosure to mitigate a threat to health or safety may be made only if the threat is both serious and imminent and is made to law enforcement or to a potential target. 45 C.F.R. § 164.512(j). Further, New York Mental Hygiene Law §33.13(c)(6) authorizes the release of information to warn possible victims or law

enforcement if a patient presents a serious and imminent risk of harm to self or others. It is clear that the SAFE Act reporting requirement fails to conform to existing state and federal law as well as generally accepted psychiatric practice in connection with the reporting of risk of harm to self or others.

Duty of Confidentiality

One of NYSPA's threshold concerns about the SAFE Act reporting requirement is that it may adversely impact the willingness of individuals who would benefit from mental health treatment to come forward and seek out that treatment or continue with ongoing treatment. We believe that the reporting requirement as currently written improperly intrudes into the psychiatrist-patient relationship by mandating disclosure of information absent exigent circumstances. As you may know, the duty of confidentiality between a doctor and patient is one of the core guiding principals of the practice of medicine. The principle of the confidentiality of medical care is even more critical in the practice of psychiatry because psychiatry is unique among medical specialties in that patients' disclosure of their inner thoughts and feelings including angers, hostilities and resentments, is often essential to the treatment of mental illness. If patients do not feel secure that the information they provide to the psychiatrist will be kept confidential, they may be reluctant to enter into treatment or continue with ongoing treatment. In this regard, the mandatory disclosure requirements of the SAFE Act may dissuade individuals from pursuing needed treatment precisely because they feel that their confidences will not be kept confidential.

At the same time, however, organized psychiatry recognizes that the duty of confidentiality may yield to public health and safety concerns when a psychiatrist concludes that a patient presents a serious and imminent risk of harm to self or others. In that situation, a breach of confidentiality might be warranted to prevent injury or possible death. However, where appropriate hospitalization is not possible, such breach would only be justified if the disclosure is made to either the potential victim, if identifiable, or to law enforcement to attempt to prevent potential harm or injury. In addition, after any potential danger has been averted, law enforcement should work with the treating psychiatrist to decide if the patient should be brought to a hospital emergency room for evaluation to determine whether inpatient care and treatment is required.

The critical element here is that such disclosure may prevent the possible harm or injury either by notifying appropriate individuals or law enforcement authorities who are able to take immediate action, including bringing the patient in for psychiatric evaluation. As the SAFE Act is currently written, it is easy to imagine that by the time its cumbersome process works its way through the levels of bureaucracy, a tragedy will have already occurred.

As noted above, the new reporting requirement conflicts with MHL §33.13(c)(6), a longstanding provision of state law that applies to psychiatrists and psychologists working in facilities licensed or operated by the NYS Office of Mental Health and the NYS Office for People with Disabilities. Unlike the SAFE Act, MHL §33.13(c)(6) strikes the proper balance by authorizing, not mandating, disclosure and directing the disclosure to possible victims or law enforcement so that immediate action can be taken to prevent a tragedy.

NYSPA Proposed Revisions

Immediately following the passage of the SAFE Act, NYSPA, together with the professional associations for the required reporters, representatives of clinic providers and representatives of mental health advocates, developed a proposal for amendments to the SAFE Act reporting requirement that we believe would strike a balance between the need for patient confidentiality and the need to prevent or lessen a serious and imminent threat to individual health and safety. Under the current statute, a report must be made to the county or city director of community services - a government employee who has no law enforcement capabilities to intervene to prevent possible injury or harm. In turn, the local director of community services may report the information to the NYS Division of Criminal Justice Services, which will determine if the patient possesses or is seeking a license for a firearm. However, neither the local director of community services nor the NYS Division of Criminal Justice Services has the staff or authority to intervene and prevent the patient from harming self or others. In this way, the SAFE Act does not actually keep people who may be in harm's way safe – it is merely a mechanism for determining if an individual has or may have access to legal (licensed or registered) firearms.

This proposal has been incorporated in A6233-A, a bill introduced earlier this session by Assemblyman Gary Pretlow (D-Mount Vernon). Pursuant to A6233-A, the law would permit, but not mandate, disclosure and reporting should be triggered only when the treating professional concludes that there is serious and imminent danger to the patient or others. The bill provides that, in addition to a report to the local director of community services, a report would also be made to those endangered or to local law enforcement who can ascertain whether the patient has a firearm and take immediate action, if necessary. Finally, A6233-A states that, absent malice or intentional misconduct, no criminal or civil liability should attach either to the decision to report or the decision not to report.

Stigma Associated with Mental Illness

NYSPA is also concerned that the standards for SAFE Act reporting appear to include reporting on individuals based on their treatment status, i.e., involuntary hospitalization due to conduct likely to result in serious harm, without regard to whether the individual actually represents a serious and imminent threat to self or others. The omission of the requirement for imminence in SAFE Act reporting (as confirmed by OMH guidance) requires reporting even when the patient is involuntarily hospitalized and represents a threat to no one. OMH has even gone so far as to suggest reporting at the time of discharge, which clearly indicates that there is no connection between SAFE Act reporting and imminent risk of danger to self or others. In the case of patients who are being treated in a hospital for their mental illness, SAFE Act reporting is essentially triggered by their treatment status, rather than a serious harm of risk to self or others. This stigmatizes mental illness and treatment for mental illness. Further, it should be pointed out that individuals with mental illness are far more likely to be the victims of crime than the perpetrators of crime. No reporting should be required unless a patient represents a serious and imminent risk of harm to self or others.

OMH has also indicated that no report would be necessary in connection with an otherwise reportable danger when such danger is the result of alcoholism, substance abuse or pure criminal

behavior. If the true goal of the statute is to prevent harm to the public without stigmatizing persons with mental illness, then why would OMH exclude from the reporting requirement individuals with alcoholism or substance abuse or those who intend violent criminal behavior. This distinction is not present in MHL §33.13 or federal law.

HIPAA

As mentioned above, NYSPA is also concerned that the new reporting requirement conflicts with HIPAA. Under HIPAA regulations, a disclosure to mitigate a threat to health or safety may be made without patient authorization only if the threat is both serious and imminent and is made to law enforcement or to a potential target, elements that are missing from the SAFE Act. The SAFE Act reporting requirement also fails to meet the HIPAA "required by law" exception, because it is not a truly compulsory mandate. To express its concerns, NYSPA filed a complaint with the Office for Civil Rights (OCR), a division of the U.S. Department of Health and Human Services that is charged with investigating possible HIPAA violations. As NYSPA pointed out in its complaint, permitting the SAFE Act mental health reporting requirement to stand as written would place New York providers in a situation where compliance with the state statute might constitute a violation of the federal statute.

Scope of Practice Issues

The reporting requirement should apply only to those professions whose scope of practice includes the diagnosis of mental illness, including nurse practitioners and licensed psychologists. The Assembly bill appropriately amends the statute to replace nurses with nurse practitioners and psychologists with licensed psychologists.

Conclusion

NYSPA strongly endorses changes to the existing statute to secure greater confidentiality protections in connection with the treatment of mental illness. NYSPA's ultimate goal is to narrow the reporting requirement so that health care professionals are provided with clear and unambiguous guidance on when such a report is mandated. We believe that explicitly amending the statute to add imminence as well as notification to law enforcement and a potential target will enhance society's ability to protect public health and safety while balancing the need for privacy in the context of mental health treatment.