

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
and ALASKA MENTAL HEALTH BOARD

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November 4, 2011

Thomas Obermeyer, Legislative Aide
Office of Senator Bettye Davis
716 West 4th Avenue, Suite 400
Anchorage, Alaska 99501

BY FIRST CLASS MAIL, EMAIL

Re: Mental Health Patient Grievance Procedure Bill, Work Draft 10/10/11

Dear Mr. Obermeyer,

Thank you for requesting written comment on the current draft of a bill Senator Davis is considering regarding psychiatric patient grievances. The members of the Alaska Mental Health Board are committed to ensuring that mental health consumers have access to a fair and equitable patient grievance process. **We are grateful for your commitment to protecting mental health consumers' security and dignity.**

We agree that patients who have lost the right to make health care decisions themselves and who are forced to accept mental health treatment under Title 47 require additional protections to ensure their dignity and safety. We do not support the imposition of a single grievance procedure on both hospital based involuntary psychiatric treatment and community based voluntary mental health services. The treatment environments are unique, as are the levels of patients' personal authority. This draft of the bill continues to impose the same statutory grievance procedure on community mental health providers as on involuntary hospital services.

As we have commented on all the previous drafts, we again recommend that the bill be amended to state: **"Sec 47.30.847. Patient grievance procedure.** (a) A person undergoing evaluation or treatment at a designated treatment facility has the right at any time to. . ." (page 2 line 31) or that the application to patients receiving services pursuant to AS 47.30.700 – A.S. 47.30.795 be explicit in the language of the bill.

The definition of "facility" (page 7 line 22) is better, but we still advise that, to be very clear about the scope and applicability of the bill, it be clarified to state "'designated treatment facility' is defined as a hospital, clinic, institution, center or other health care facility that has been designated by the department for the treatment or rehabilitation of mentally ill persons under AS 47.30.670 - 47.30.915 but does not include correctional institutions."

I. Grievances Defined

Thank you for defining a "grievance" (page 7 line 24) as a "complaint" and removing the language including "concerns" and "suggestions." This definition limits grievances to complaints made via a "form."

As with previous versions, this draft bill goes into great detail about what must be in the form. This leads to the construction that the statute prohibits a patient from making a grievance in person, by telephone, by email, or through a family member or designated representative/advocate. As we commented on earlier drafts, this actually narrows the procedure from what currently exists. This section contains so many specific requirements, it seems to contradict the earlier requirement that a grievance be processed on “a single form” (page 3 line 24). We recommend that this discrepancy be corrected so the law, if enacted, can be applied appropriately by treatment providers.

II. Crimes Against the Disabled

We renew our concern that, as proposed, AS 47.30.847(c)(8) (page 6 lines 6-17) minimizes serious crimes committed against our constituents. This section provides an “urgent level of review” for grievances involving sexual or physical abuse, denial of “lifesaving” medical care, or denial of “basic care or human rights.” Were these acts to be committed against a patient by anyone (including a mental health treatment provider), they would be criminal acts. As such, they should not be minimized or reduced to “grievances.” They should be considered crimes and reported to law enforcement immediately for investigation and prosecution if appropriate. Crimes against persons with disabilities often go unaddressed. Either the victim is blamed or they are undervalued to the point where crimes committed against them no longer matter. To codify this attitude in statute is unacceptable.

III. The Impact of Duplication

Providers of Medicaid-reimbursed services must comply with the grievance procedure requirements established by CMS. Hospitals accredited by the Joint Commission must also comply with grievance procedure standards. It is important that legislation address gaps without adding complexity. We recommend that the bill be reviewed in the context of these other requirements, and amended to provide uniformity across the grievance procedure requirements. The cross walk previously prepared for you and your staff is again attached for your reference.

IV. Call Center

The Alaska Mental Health Board does not support the creation of a “call center.” This is an added level of complexity for patients and cost to the system. Trained patient advocates as called for by AS 47.30.847(d) provide this support and assistance to patients.

V. Hearing and Decision

AS 47.30.847(c)(5)(B) (page 5 line 11 *et seq.*) refers to review of a grievance by the “commissioner’s designee” (line 14). The Commissioner of Health and Social Services cannot designate a hearing officer within a private hospital or other designated treatment facility – and since all of the providers of involuntary psychiatric treatment are private non-profit organizations except for API, this does not make sense.

We also again point out that administrative review of grievances against non-state entities, such as the private non-profit hospitals providing psychiatric treatment to Title 47 patients, is not possible. The administrative appeal process is limited to review of administrative actions – actions taken by

governmental agencies. Thus, the third level of review (page 5 lines 20-26) is irrelevant to all but API patients.

Having had no additional information about whether a third level of review by an administrative hearing officer results in additional burden on the attorneys appointed to represent individuals in Title 47 commitment hearings, we renew our concerns/questions on this section:

1. Are patients who are receiving care involuntarily (and therefore have been found unable to make important decisions for themselves) able to represent themselves at these hearings?
2. Must counsel be appointed to ensure that the individual has meaningful access to the administrative appeal process?

Since the bill requires the Department of Health and Social Services to intervene in all grievances that reach this level of review (page 7 line 6), there will be an assistant attorney general appearing on the agency's behalf. There will be either an administrator or attorney appearing on the hospital's behalf. So it would only seem fair that the patient have counsel.

1. If that counsel is required, who pays for it?
2. How is counsel appointed?
3. Can an administrative hearing officer even appoint counsel?

On the issue of the required intervention in level three grievance reviews by the Department of Health and Social Services, it is patently unfair to require (or even permit) such intervention in those instances involving grievances against API. That would create an imbalanced proceeding where two parties -- represented by attorneys -- stand against a (potentially *pro se*) patient.

As with previous versions, this draft of AS 47.30.847(g) shifts the burden of proof to the treatment provider. This contradicts the usual course of these sorts of proceedings. This draft still denies the treatment providers due process, by limiting them to proving "compliance or remedial action" (page 7 lines 3-4) — presupposing that the facts alleged in all grievances are true.

We remind you of our caution that the financial ramifications of having patient grievances (at least as so broadly defined in the current draft) heard by the office of administrative hearings will require a DHSS fiscal note of not inconsequential size, and potentially a fiscal note for Public Defender and/or Office of Public Advocacy services. That should in no way prevent attempts to improve the grievance process for psychiatric patients, but should be something for which the sponsor is prepared.

VI. Timelines

We appreciate the effort to alter the grievance process in AS 47.30.847(c)(5)(A) to create a timeline to better fit the context of a treatment model that is designed to stabilize the patient and either transition him home or to a more appropriate acute care setting within a very short timeframe. However, the five (5) day deadline set by AS 47.30.847(d) for a response to a grievance conflicts with the former sections requirement of "immediate" review (page 5 line 6). This conflict should be resolved to ensure that patient grievances are resolved prior to discharge.

VII. Errata

The draft bill still refers to a “Alaska Department of Health and Social Services, Division of Mental Health, Grievance Reporting Form.” As we have commented in the past, there is no such division. Page 4, lines 3-4 should be amended to state “Alaska Department of Health and Social Services, Division of Behavioral Health, Grievance Reporting Form.”

AS 47.30.847 does not define a mental health “facility,” so the reference in the draft AS 47.30.855(d) to this section as a source of clarification of what a facility is under this statute is not helpful. I think a more appropriate reference is AS 47.30.915(4).

VIII. Conclusion

We thank you again for the opportunity to continue to work with you and Senator Davis on this issue. This draft bill has been improved greatly, thanks to your hard work, and we look forward to continuing dialogue on the aspects we have identified herein.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Kate Burkhart", with a long horizontal flourish extending to the right.

J. Kate Burkhart
Executive Director

Enclosure: Procedural Crosswalk

cc: members, Alaska Mental Health Board (by email)
 Melissa Stone, Director Division of Behavioral Health (by email)
 Kimberli Poppe-Smart, Deputy Commissioner DHSS (by email)
 Wilda Laughlin, Special Assistant to the Commissioner of DHSS (by email)

A Cross-Walk of Patient Grievance Procedure Requirements in Alaska
prepared by the Alaska Mental Health Board, February 2009

	API (policy)	JCAHO	CMS (CFR)
Notice of patient rights	<p>Provided at admission/intake P& P PRE030-03 Policy ¶ II</p> <p>Written copies posted and available in each program area P& P PRE 030-03 Policy ¶ II. A.</p> <p>Notice communicated in manner best understood by patient P&P PRE 030-03 Policy ¶ II.B.</p> <p>Notice provided at new patient orientation, community meetings, individual meetings P&P 030-03 Procedure ¶ I.C.</p>	<p>Provided upon admission RI 2.10, EP 1-4</p>	<p>Hospital must inform of rights before providing care (when possible) 42 CFR §482.13(a)</p> <p>Rights must be communicated in a language/manner patient can understand <i>Interpretative Guidelines</i> §482.13(a)(1)</p>
Procedure required	<p>Yes (subject to federal/state law and accrediting requirements)</p>	<p>Yes RI 2.120, EP 1-5</p>	<p>Hospital must establish a process for prompt resolution of patients grievances 42 CFR §482.13 (a)(2)</p>
Grievance defined			<p>Written or oral complaint (when not resolved at the time complaint is made by staff person present) re: “patient’s care, abuse or neglect, issues related to the hospital’s compliance with the CMS Hospital CoP, or a Medicare beneficiary billing</p>

	API (policy)	JCAHO	CMS (CFR)
Other complaints, concerns, suggestions	<p>Complaints of abuse, harassment, unlawful conduct by employees reported to authorities for investigation P&P 030-03 Procedure ¶ II. B.</p>	<p>Complaints of abuse should be referred to proper authority for investigation RI 2.150, EP 2</p>	<p>complaint” <i>Interpretive Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p> <p>All written complaints re: care, abuse/neglect, compliance or Medicare billing are formal grievances <i>Interpretive Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p> <p>“change in bedding, housekeeping of a room, and serving preferred food and beverages may be made relatively quickly and would not usually be considered a ‘grievance’” <i>Interpretive Guidelines</i> 42 CFR 482.13(a)(2)</p> <p>Complaints not related to patient care or within definition above are not grievances <i>Interpretive Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p>
Patient Advocate Required	<p>Yes, assists with grievances & other complaints P&P 030-03 ¶ III. Notice given of outside advocates (DLC, etc.) P&P 030-03 ¶ II.</p>		

	API (policy)	JCAHO	CMS (CFR)
Resolution defined			<p>Patient is satisfied with remedial action <i>Interpretive Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p> <p>If hospital has taken appropriate & reasonable action and patient remains unsatisfied, hospital may close grievance but must maintain documentation of efforts to resolve and compliance with CMS requirements <i>Interpretive Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p>
Records/ data re: grievances	<p>Tracking, trending, and continuous performance improvement by Patient Rights and Ethics Team P& P PRE030-03 Procedure ¶ VI. D.</p>	<p>Data is collected, analyzed, displayed and compared, internally and externally, using statistical techniques. PI 2.10, EPI-5 Data collection and monitoring areas include patient satisfaction and quality control. PI 1.10, EPI-8, 10, 12-18, 29</p>	<p>Must be maintained, incorporated in Quality Assessment and Performance Improvement Program <i>Interpretive Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p>

Grievance Procedure Requirements

	API (policy)	JCAHO	CMS (CFR)
Notice of Procedure	<p>Provided at admission/intake P& P PRE030-03 Policy ¶ II</p> <p>Written copies posted and available in each program area P& P PRE 030-03 Policy ¶ II. A.</p> <p>Notice communicated in manner best understood by patient P&P PRE 030-03 Policy ¶ II.B.</p> <p>Notice provided at new patient orientation, community meetings, individual meetings P&P 030-03 Procedure ¶ I.C.</p>	<p>Provided upon admission RI 2.10, EP 1-4</p>	<p>Hospital must inform of rights before providing care (when possible) 42 CFR §482.13(a)</p>
Notice of Advocate or Contact for Grievances	<p>Provided at admission/intake P& P PRE030-03 Policy ¶ II</p>		<p>Notice required 42 CFR §482.13(a)(2)</p>
Form of Grievance	<p>Grievance form (assistance available from advocate) P&P PRE 030-03 Policy ¶ IV.</p>		<p>Written or oral 42 CFR §482.13 (a)(2)(i)</p>
Timeframe	<p>Level I: 5 days Level II: 5 days Urgent: review day of receipt, resolved in 3 days P&P PRE 030-03 Procedure ¶IV.</p>		<p>Required 42 CFR §482.13(a)(2)(ii)</p>

	API (policy)	JCAHO	CMS (CFR)
			<p>Grievances re: neglect/abuse reviewed immediately <i>Interpretative Guidelines</i> §482.13(a)(2)(iii)</p> <p>For others, “7 days for the provision of a response would be considered appropriate.” Response can be that grievance investigation or remedial action is ongoing. <i>Interpretative Guidelines</i> §482.13(a)(2)(iii)</p> <p>“The expectation is that the facility will have a process to comply with a relatively minor request in a more timely manner” (i.e. less than 7 days) <i>Interpretative Guidelines</i> §482.13(a)(2)</p> <p>Governing body or committee must review and resolve grievances <i>Interpretative Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p> <p>If delegated to grievance committee, must be more than 1 person <i>Interpretative Guidelines</i> §482.13(a)(2) (8/18/05 revision)</p>
Resolution Process	<p>Level 1: discussion between advocate and patient; proposed resolution to patient in writing by 5th day P&P PRE 030-03 Procedure ¶ III.</p> <p>Level 2: CEO investigates grievance or delegates to member of Sr. Management; written response within 5 days P&P PRE 030-03 Procedure ¶ V.</p>		

	API (policy)	JCAHO	CMS (CFR)
Written Decision Required	<p>Urgent grievances are reviewed by patient advocate the day of receipt and immediately referred to CEO/Medical Director or designee P&P PRE030-03 Procedure ¶ IV.</p> <p>Patients not satisfied with resolution can file a grievance with DLC, JCAHO, or Court P&P PRE 030-03 Procedure ¶ VI.</p> <p>Yes (all levels) P&P 030-03 ¶ V. P&P PRE 030-03 Procedure ¶III-V.</p>		<p>For formal grievance, with name of contact person, steps taken to investigate, resolution, and date 42 CFR §482.13 (a)(2)(iii) Response must include adequate information to address each item required by 42 CFR §482.13 (a)(2)(iii) <i>Interpretive Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p> <p>In language patient understands <i>Interpretive Guidelines</i> §482.13(a)(2)(iii)</p> <p>If grievance is made by email, response can be provided by</p>

	API (policy)	JCAHO	CMS (CFR)
Oversight	<p>Patient Rights and Ethics Team P & P PRE030-03 Procedure ¶ VI. D.</p>	<p>Governing body oversees quality and patient safety LD 1.20, EP6</p>	<p>email <i>Interpretive Guidelines</i> §482.13(a)(2) (8/18/05 revision and clarification)</p> <p>Not for informal complaints (see above) <i>Interpretive Guidelines</i> §482.13(a)(2)</p> <p>Hospital governing body (or grievance committee) 42 CFR §482.13(a)(2)</p>