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DISABILITY RIGHTS NEW JERSEY

ADVANCING JUSTICE. ADVOCATING INCLUSION.

GWEN ORLOWSKI, EXECUTIVE DIRECTOR

August 10, 2021

Glenn A. Grant, J.A.D
Acting Administrative Director of the Courts
Comments on the Future of Court Operations
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625 – 0037

Re: Future of Court Operations: Remote and In-Person Proceedings
Publication for Comment

Dear Judge Grant:

Disability Rights New Jersey is the designated protection and advocacy system in New Jersey. We advocate for the legal, human and civil rights for individuals with disabilities. We appreciate the opportunity to comment on the proposed future of court operations regarding remote and in-person proceedings. Although we appreciate the court's efforts to use video technology to streamline the court system, we oppose the proposed requirement that all involuntary civil commitment hearings be done remotely absent a specific application based upon the nature of the case.

1. The Deprivation of Liberty in an Involuntary Civil Commitment Requires Due Process

Depriving individuals of in-person civil commitment hearings infringes upon their due process rights putting their liberty interests and opportunity for effective treatment at risk. Individuals involuntarily civilly committed have a constitutional right to a hearing, as well as periodic review hearings once committed to ensure that they do not remain unnecessarily remain in psychiatric facilities. *O'Connor v. Donaldson*, 422 US 563, 573-574 (1975). "There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *Id.* at 580 (citations omitted). Additionally, "many of the safeguards of the criminal process are not present in civil commitment," and "to the extent that" the theory of rehabilitative treatment "may be read to permit a State to confine an individual simply because it is willing to provide treatment...raises the gravest of constitutional problems." *Id.* at 584. "Where claims that the State is acting in the best interests of an individual are said to justify reduced procedural and substantive safeguards, this Court's decisions require that they be candidly appraised," and "in so doing judges are not free to read their private notions of public policy or public health into the Constitution." *Id.* at 585 (citations omitted). These

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procedural due process protections are crucial for individuals facing civil commitment, a vulnerable population facing a significant liberty deprivation. *Id.*

New Jersey has long recognized the importance of ensuring procedural fairness at civil commitment hearings. Since 1987, state law guarantees individuals the opportunity to appear at their commitment hearing, present evidence, cross examine witnesses, and have a hearing closed to the general public, or “in camera”. N.J.S.A. 30:4-27.14. Court rules demonstrate that an individual’s right to appear at the hearing is a physical presence in the courtroom that can only be denied by the patient’s conduct. See N.J.R. 4:74-7(e). Additionally, the “in camera” requirement “preserves [an individual’s] privacy, their dignity, and is thought by some to afford a greater likelihood of a more candid evaluation and a lesser likelihood of the hearing interfering with future psychiatric treatment.” *In re Edward S.*, 118 N.J. 118, 126 (1990). Because of the significant liberty interest at stake, the civil commitment process must be, “narrowly circumscribed because of the extraordinary degree of state control it exerts over a citizen’s autonomy.” *In re S.L.*, 94 NJ 128, 139 (1983).

2. The Proposed Rules Treat the Deprivation of Constitutional Rights for Individuals with Mental Illness Differently than Other Individuals Facing a Deprivation of their Constitutional Rights

Under the proposed rules, other similarly situated hearings involving the deprivation of constitutional rights are treated differently than involuntary commitment hearings. As set forth in proposed rule 2(b)(v), these proceedings include termination of parental rights trials, fact-finding and permanency hearings, and “other hearings in which constitutional interests are at stake,” but civil commitment hearings are conspicuously missing. Involuntary commitment hearings have constitutional interests at stake that mirror those in parental rights proceedings because they also involve the deprivation of a constitutional liberty interest and require due process. Both have similar procedural due process requirements, including the right to appear and testify at the hearing. *N.J. Div. of Child Protection and Permanency v. K.S.*, 445 N.J. Super. 384, 390-392 (2016). As *K.S.*, explains “the State must satisfy the fundamental requirements of procedural due process as provided in the United States and New Jersey constitutions.” *Id.* at 391. Like civil commitment proceedings, parental termination hearings require “clear and convincing” evidence to support a finding which terminates a parent’s parental rights, a fundamental liberty interest. *N.J. Div. Of Child Protection and Permanency v. R.L.M.*, 236 N.J. 123, 145 (2018). Moreover, an attorney must be provided to represent the individual whose constitutional rights are being threatened, and the party seeking to deprive the individual of their constitutional right must provide “well qualified” expert testimony. See N.J.S.A. 30:4C-15.4 (a), (c); *In re J.C.*, 129 N.J. 1, 19 (1992).

Similarly, proposed rule 2(b)(vi) permits adjudications of incapacity and appointments of permanent guardians to resume in-person unless all parties consent to a remote hearing. Like civil commitment hearings, guardianship proceedings have “drastic” implications for an individual’s liberty interest. See *In re C.F.C.*, 2013 WL 1908039 *7.

Yet, even though an involuntary commitment hearing has the same procedural protections as termination of parental rights and guardianship hearings, the court is proposing that these individuals do not have a right to an in-person hearing, while these other proceedings must be in person unless all parties consent. These differing rules discriminate against a person with mental illness and treat their constitutional rights as lesser rights than others. Civil commitment proceedings consider whether an individual may live within the community or are confined against their will in a psychiatric hospital. This substantial liberty interest must be afforded the respect of an in-person hearing that matches proceedings with similar constitutional magnitude.

3. Remote Involuntary Civil Commitment Hearings May Have Unintended Consequences

Conducting civil commitment hearings remotely infringes upon the safety, dignity, treatment quality and legal rights of patients described in *In re Edward S*. Remote hearings present technological complications and security risks. Given the highly personal nature of civil commitment hearings, remote hearings make individuals uncomfortable and reluctant to describe their mental illness. Throughout the Public Health Emergency, Disability Rights NJ has received calls from patients in psychiatric hospitals concerned that virtual commitment hearings violate their legal rights and asking if the court could conduct their hearing in-person. Individuals seek the opportunity to go appear in-person, before the court to present their argument. Without an in-person hearing, the individual may experience distrust of the system which may impact an individual's treatment. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). See also *Doe v. State*, 217 So.3d 1020, 1027 (1992). Clinical studies affirm this relationship and explain that procedural consistency and fairness can prevent distrust. Finally, without an in-person hearing, the factfinder is unable to adequately assess non-verbal cues and make credibility determinations regarding the individual.

While we understand the need for remote hearings during the public health emergency, it is important that individuals who are experiencing a potential loss of liberty and their constitutional rights have access to their full due process hearing rights. We believe that involuntary commitment hearings should be treated equally to other hearings in which a person is being deprived of their constitutional rights and that a person facing civil commitment has the right to an in-person hearing unless all parties consent to a remote hearing.

Sincerely,

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Executive Director

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By: _____
Mary Ciccone
Director of Policy

cc: Carl J. Herman, Esq., Director, Division of Mental Health Advocacy
The Honorable Stuart Rabner, Chief Justice, The Supreme Court of the State of New Jersey