



The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S.C. Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

Wednesday, February 22, 2017 at 9:15 a.m.

State Capitol, Conference Room 016

By

R. Mark Browning

Senior Judge, Deputy Chief Judge

Family Court of the First Circuit

WRITTEN TESTIMONY ONLY

Bill No. and Title: Senate Bill No. 146, S.D.1, Relating to Orders for Treatment Over Objection.

Purpose: Permits an administrative order to overcome a patient's objection to psychiatric treatment.

Judiciary's Position:

The Judiciary takes no position on this bill and respectfully offers the following comments.

1. We need to be clear at the outset that the Judiciary, by these comments, takes no position on the constitutionality of this bill or any resulting act.
2. We are unaware of any existing administrative process for this kind of decision-making. Indeed, we are not aware of any existing administrative process that would apply to the general area of mental health care.



Senate Bill No.146, Relating to Orders for Treatment Over Objection
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3. Thus, we are unable to determine whether and how the Judiciary might be a participant. Any such administrative order will require access to the court on appeal. However, nothing in this bill gives any direction in this regard.

4. We are uncertain whether this bill is meant to apply only to the forensic population. All of the preamble language appears to single out the forensic population at the Hawaii State Hospital, but the proposed statutory language is written to apply to all patients at all psychiatric facilities.

5. If a new administrative process must be constructed, it might be well for the Legislature to set an effective date of, at a minimum, 9 to 12 months from the Governor's signing. This may give the Department of Health and the Department of the Attorney General time enough to set up the structure, hire the staff, and promulgate new rules, and give the Judiciary time to determine how to implement whatever appellate process is decided upon.

Thank you for the opportunity to provide testimony on this measure.



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**Testimony in SUPPORT of SB146 SD1
RELATING TO ORDERS FOR TREATMENT OVER OBJECTION**

SENATOR GILBERT S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR

Hearing Date: Wednesday, February 22, 2017

Room Number: 016

1 **Fiscal Implications:** Undetermined at this time.

2 **Department Testimony:** The Department of Health (DOH) strongly supports this
3 measure and offers proposed amendments.

4 The purpose of this bill is to provide a basis in statute for an administrative
5 mechanism to authorize treatment over objection.

6 The Hawaii State Hospital (HSH) is utilized primarily for forensic commitments
7 (99% of total admissions). There are few other state hospitals with such a high
8 proportion of forensic admissions.

9 We support this bill as it is consistent with a number of initiatives to enhance
10 patient care and to improve safe, effective and efficient operations.

11 Patients admitted to the HSH are often experiencing acute psychiatric symptoms.
12 Their conditions create risk for them and others. Starting treatment quickly reduces that
13 risk, returns the patient to pre-morbid functioning sooner, and is associated with a more
14 complete recovery. This is an essential component of humane healthcare and
15 maintaining a safe and secure therapeutic environment for all patients and staff. Recent
16 research in neuroscience has reinforced what psychiatrists commonly find in their
17 clinical practice: untreated psychosis causes damage to the brain and in the process,

1 makes it more difficult to successfully reduce symptoms once treatment is initiated after
2 a delay.

3 The current method to obtain an authorization to provide treatment over a
4 patient's objection (OTT) is via a judicial hearing. This method is not always expedient,
5 with variable time periods between filing the petition and the judicial hearing, an average
6 in 2016 of 16.8 days with the longest period being 50 days.

7 Other states have responded to the need by developing a non-judicial,
8 administrative mechanism to review and authorize requests for OTT that are
9 administered within the hospital setting. These mechanisms include provisions to
10 ensure the due process rights of patients in such circumstances and are supported by
11 United States Supreme Court case law. Current law in Hawaii does not allow for the
12 potential development of such a mechanism.

13 One section where present statute can change to create this potential is a
14 revision to HRS 334E- 2 (a) (9) that is outlined in SB146. This measure would enable
15 the DOH to subsequently develop Hawaii Administrative Rules to support a more timely
16 method for the authorization of OTT.

17 The Department of Health strongly supports this measure and offers proposed
18 amendments. With the proposed amendments, the DOH estimates a shorter timeframe
19 to obtain an OTT including an administrative process that is faster, projected to take one
20 week.

21 Thank you for the opportunity to testify.

22 **Offered Amendments:**

23 Please see attached for proposed SD2. Summary of proposed amendments to
24 SD1 are as follows:

- 1 1. Remove “or special treatment facility” as chapter 334E only pertains to
2 “psychiatric facilities.”
- 3 2. Add reference to court in addition to administrative panel to establish criteria
4 for courts to utilize in authorizing medical treatment over objection.
- 5 3. Clarify that the proposed treatment is medically appropriate.
- 6 4. Clarify that less intrusive alternatives have been considered.
- 7 5. Clarify that the administrative process described by this section is exempt
8 from the contested case requirements of chapter 91, sections -8.5
9 through -15.

A BILL FOR AN ACT

RELATING TO ORDERS FOR TREATMENT OVER OBJECTION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the initiation of
2 treatment for patients admitted to the Hawaii state hospital
3 needs to be expedient in order to address patients' psychiatric
4 symptoms and protect the safety of the patient and others. The
5 legislature further finds that the Hawaii state hospital is
6 utilized primarily for forensic commitments, and that addressing
7 patients' psychiatric symptoms quickly at the initiation of
8 treatment will help maintain a safe and secure therapeutic
9 environment for patients and staff as well as have a positive
10 impact on patients' length of stay.

11 The legislature notes that the current method to obtain an
12 authorization to provide treatment over a patient's objection is
13 by a judicial hearing. Although unpredictable, on average the
14 time between petition and judicial hearing is nearly seventeen
15 days. Other states have responded to such unpredictability and
16 delay by developing a non-judicial, administrative mechanism to
17 review and authorize requests for treatment over a patient's
18 objection.

1 The purpose of this Act is to permit an administrative
2 order to overcome a patient's objection to psychiatric
3 treatment, establish criteria for issuance of the administrative
4 order, and establish criteria for an administrative
5 authorization process to determine whether the administrative
6 order should be issued.

7 SECTION 2. Chapter 334, Hawaii Revised Statutes, is
8 amended by adding a new part to be appropriately designated and
9 to read as follows:

10 "PART . ADMINISTRATION OF TREATMENT OVER OBJECTION

11 §334-A Criteria for ~~issuance of administrative order~~
12 ~~for~~medical treatment over objection. A patient who has been
13 committed to a psychiatric facility for involuntary
14 hospitalization or who is in the custody of the director and
15 residing in a psychiatric facility ~~or special treatment facility~~
16 may be ordered to receive treatment over the patient's
17 objection, including the taking or application of medication, if
18 the court, or administrative panel ~~finds,~~ through the
19 administrative authorization process established pursuant to
20 section 334-B, finds that:

- 21 (1) The patient suffers from a physical or mental disease,
22 disorder, or defect;
- 23 (2) The patient is dangerous to self or others;

1 (3) ~~Treatment with medication~~ The proposed treatment is
2 medically appropriate; and

3 (4) ~~There is no less intrusive treatment for the patient's~~
4 ~~condition, and the treatment is essential to forestall~~
5 ~~the danger posed by the patient's~~
6 ~~condition.~~ Considering less intrusive alternatives,
7 treatment is essential to forestall the danger posed
8 by the patient.

9 §334-B Criteria for administrative authorization process.

10 (a) ~~The administrative authorization process to determine~~
11 ~~whether an administrative order for treatment over objection~~
12 ~~should be issued shall include~~ A patient who is in the custody
13 of the director of health in a psychiatric facility may be
14 ordered to receive medical treatment over objection through an
15 administrative authorization process that includes the following
16 due process safeguards:

17 (1) The facility shall give notice to the patient of the
18 authorization process and the reasons for initiating
19 the process;

20 (2) The administrative panel shall consist of three
21 members with relevant clinical training and
22 experience, and who are not involved with the current
23 treatment of the patient;

1 (3) The patient shall have the right to attend the
2 hearing, receive assistance from an advisor, ~~and~~
3 ~~contest the proposed order with testimony, exhibits,~~
4 ~~witnesses, and cross examination~~ cross examine
5 witnesses, and present testimony, exhibits, and
6 witnesses; and

7 (4) The patient shall have the right to appeal the
8 decision of the administrative panel.

9 (b) The administrative process described by this section
10 is exempt from the contested case requirements of chapter
11 91, sections -8.5 through -15.

12 ~~(b)~~ The department may adopt rules, pursuant to chapter
13 91, consistent with this part to effectuate this part."

14 SECTION 3. Section 334E-2, Hawaii Revised Statutes, is
15 amended by amending subsection (a) to read as follows:

16 "(a) Any patient in a psychiatric facility shall be
17 afforded rights; and any psychiatric facility shall provide the
18 rights to all patients; provided that when a patient is not able
19 to exercise the patient's rights, the patient's legal guardian
20 or legal representative shall have the authority to exercise the
21 same on behalf of the patient. The rights shall include, but
22 not be limited to, the following:

S.B. NO. 146

- 1 (1) Access to written rules and regulations with which the
- 2 patient is expected to comply;
- 3 (2) Access to the facility's grievance procedure or to the
- 4 department of health as provided in section 334-3;
- 5 (3) Freedom from reprisal;
- 6 (4) Privacy, respect, and personal dignity;
- 7 (5) A humane environment;
- 8 (6) Freedom from discriminatory treatment based on race,
- 9 color, creed, national origin, age, and sex;
- 10 (7) A written treatment plan based on the individual
- 11 patient;
- 12 (8) Participation in the planning of the patient's
- 13 treatment plan;
- 14 (9) Refusal of treatment except in emergency situations or
- 15 where a court order or administrative order issued
- 16 pursuant to section 334-A exists;
- 17 (10) Refusal to participate in experimentation;
- 18 (11) The choice of physician if the physician chosen
- 19 agrees;
- 20 (12) A qualified, competent staff;
- 21 (13) A medical examination before initiation of non-
- 22 emergency treatment;
- 23 (14) Confidentiality of the patient's records;

S.B. NO. 146

- 1 (15) Access to the patient's records;
- 2 (16) Knowledge of rights withheld or removed by a court or
- 3 by law;
- 4 (17) Physical exercise and recreation;
- 5 (18) Adequate diet;
- 6 (19) Knowledge of the names and titles of staff members
- 7 with whom the patient has frequent contact;
- 8 (20) The right to work at the facility and fair
- 9 compensation for work done; provided that work is
- 10 available and is part of the patient's treatment plan;
- 11 (21) Visitation rights, unless the patient poses a danger
- 12 to self or others; provided that where visitation is
- 13 prohibited, the legal guardian or legal representative
- 14 shall be allowed to visit the patient upon request;
- 15 (22) Uncensored communication;
- 16 (23) Notice of and reasons for an impending transfer;
- 17 (24) Freedom from seclusion or restraint, except:
- 18 (A) When necessary to prevent injury to self or
- 19 others; or
- 20 (B) When part of the treatment plan; or
- 21 (C) When necessary to preserve the rights of other
- 22 patients or staff;

S.B. NO. 146

1 (25) Disclosure to a court, at an involuntary civil
2 commitment hearing, of all treatment procedures which
3 have been administered prior to the hearing;

4 (26) Receipt by the patient and the patient's guardian or
5 legal guardian, if the patient has one, of this
6 enunciation of rights at the time of admission."

7 SECTION 4. In codifying the new sections added by section
8 2 of this Act, the revisor of statutes shall substitute
9 appropriate section numbers for the letters used in designating
10 the new sections in this Act.

11 SECTION 5. New statutory material is underscored.

12 SECTION 6. This Act shall take effect on July 1, 2050.

Report Title:

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Description:

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The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

DAVID Y. IGE
GOVERNOR



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No. _____

TESTIMONY ON SENATE BILL 146, SENATE DRAFT 1
RELATING TO ORDERS TO TREAT OVER OBJECTIONS

by

Nolan P. Espinda, Director
Department of Public Safety

Senate Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair

Wednesday, February 22, 2017; 9:15 a.m.
State Capitol, Conference Room 016

Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee:

The Department of Public Safety (PSD) **supports the intent** of Senate Bill (SB) 146, Senate Draft (SD) 1, which proposes to amend Section 334E-2, Hawaii Revised Statutes, to enable the Hawaii State Hospital (HSH) to provide timely treatment that will serve to improve staff and patient safety at HSH. The current method of obtaining authorization to provide treatment over a patient's objection (Orders to Treat) through judicial hearing is a slow process, and at times, results in patient decompensation.

The Department agrees that providing an administrative mechanism to review and authorize requests for Orders to Treat would expedite the treatment process. If enacted, PSD's Health Care Division will closely monitor the experience of the Department of Health in employing this administrative process, as a similar administrative process for PSD's critically acute patients would benefit PSD's patients and staff, as well. The Department would appreciate your Committee's consideration in extending the same administrative process for PSD in the next legislative session.

Thank you for the opportunity to present this testimony.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: louis@hawaiidisabilityrights.org
Subject: Submitted testimony for SB146 on Feb 22, 2017 09:15AM
Date: Thursday, February 16, 2017 5:21:47 PM

SB146

Submitted on: 2/16/2017

Testimony for JDL on Feb 22, 2017 09:15AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Comments Only	No

Comments: This proposal represents a radical departure from Hawaii's jurisprudence and public policy. Orders for involuntary medication have always been entered by a Judge after a judicial process. While mental health professionals would render an opinion and offer testimony, the decision has always ultimately been up to the Court. It seems very dangerous to delegate this authority to an administrative panel and raises very serious due process and other constitutional protections. While the US Supreme Court case of *Washington vs. Harper* did permit this type of procedure in the prison context, we see a real legal distinction between the procedural protections that the law offers to individuals who are incarcerated because they have been found guilty of committing a crime and individuals with a mental illness who are supposed to be in a treating hospital. Moreover, we would note that even the prisons in Hawaii do not utilize this type of administrative panel. In the prisons, they utilize the traditional judicial process to seek orders to involuntarily medicate inmates. It would seem extremely contradictory for Hawaii to provide more legal protections for the rights of prison inmates than it does for individuals with disabilities in a hospital setting. We believe the better approach is to work with the Judiciary to find ways to expedite the judicial process.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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THE QUEEN'S HEALTH SYSTEMS

To: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice Chair
Members, Committee on Judiciary and Labor

From: Paula Yoshioka, Senior Vice President, The Queen's Health Systems
Date: February 21, 2017
Hrg: Senate Committee on Judiciary and Labor Hearing; Wednesday, February 22, 2017 at 9:15AM in Room 016

Re: **Support and comments for SB 146, SD1, Relating to Orders for Treatment Over Objection**

My name is Paula Yoshioka and I am a Senior Vice President at The Queen's Health Systems (Queen's). I would like to provide **support** and **comments** for SB 146, HD1, Relating to Orders to Treat Over Objection. This bill permits an administrative order to overcome a patient's objection to psychiatric treatment.

At QHS we are committed to providing care for Hawaii's most underserved. The needs of the mental health population in Hawaii are growing and QHS has experienced an increased volume of civilly committed mental health patients who are unable, or unwilling, to consent to necessary treatment. The Civil Rights of Institutionalized People Act (CRIPA) guarantees a patient's right to receive treatment while committed, but facilities with committed patients are unable to provide that treatment without the patient's permission or a court order to treat. Without prompt treatment, the mental condition of these patients can deteriorate and is not quality patient care.

We believe that SB 146, HD1, effectively provides in statute the medical criteria for issuing an order to treat and also creates an administrative process alternative to the current court process. While we have no objections an administrative process, QHS would like to see the option for a court order preserved and therefore respectfully requests the following amendments:

- Page 2, lines 11-12: §334-A Criteria for issuance of [~~administrative~~] order for treatment over objection...
- Page 2, lines 17-19: ...if the court or administrative panel finds, [~~through the administrative authorization process established pursuant to section 334-B,~~] that:
- Page 3, line 2: (3) [~~Treatment with medication~~] The proposed treatment is medically appropriate;

Thank you for the opportunity to provide comments on this legislation.

The mission of The Queen's Health Systems is to fulfill the intent of Queen Emma and King Kamehameha IV to provide in perpetuity quality health care services to improve the well-being of Native Hawaiians and all of the people of Hawai'i.