



# STATE OF CONNECTICUT

OFFICE OF PROTECTION AND ADVOCACY FOR  
PERSONS WITH DISABILITIES

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## Testimony of the Office of Protection and Advocacy for Persons with Disabilities Before the Judiciary Committee

Presented by: James D. McGaughey  
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Good afternoon, Senator McDonald, Representative Lawlor and members of the Committee and thank you for this opportunity to comment on two bills on your agenda today.

The first of these is **Raised Bill No. 5840, AN ACT CONCERNING CONSERVATORS**. This proposal would require courts hearing applications for involuntary representation to consider more particular evidence relevant to the respondent's circumstances and expressed wishes, permit superior courts to hear such matters when they are being contested, and clarify the continuing responsibilities of the court to issue specific orders related to psychosurgery and electric shock therapy.

This bill grows out of an increasing sense of frustration - some would say outrage - shared by advocates for people who are elderly and people who have disabilities, over the widespread failure of our current involuntary representation mechanism to respect the rights and expressed preferences of people who are being considered for, or are actually living under court ordered representation by a conservator. We have seen a number of cases where people who could manage some of their own affairs were placed under full, rather than limited conservatorship, and where people, particularly people with psychiatric or cognitive disabilities, were placed into nursing homes or other long term care arrangements by conservators, only to have their homes sold, their apartment leases terminated, and their furniture and other possessions disposed of by those same conservators. In fact, in some jurisdictions it is not unusual to find the same individual appointed to be conservator for a number of people who have been placed into local residential care homes or nursing homes, and to learn that that conservator has collected substantial fees for these questionable "services" performed on behalf of their multiple wards. While ostensibly aimed at preserving the ward's assets, these actions actually operate to greatly limit the person's prospects for recovering his or her place in the community, and moving on with life, effectively consigning these individuals to long term careers as "mental patients". Not infrequently, and not surprisingly, we find that the person who is the alleged beneficiary was not consulted concerning these actions and only learned of them after-the-fact.

To be sure, many conservators faithfully fulfill their duties and do try to determine and act on the best interests of their wards. Similarly, many probate judges take seriously their responsibility to inquire into and fully consider all evidence, apply the appropriate statutory standards, and to exercise continuing supervision over conservators they appoint. However, we have also seen probate courts ignore, or waive without explanation, procedural and substantive safeguards established in statute. And, many people under involuntary representation report to us that they have not had any contact with their conservator for many months or even years, and that they do

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not know how to independently contact him or her. All they know is that their conservators disposed of their property and apparently want them to remain institutionalized.

Many factors contribute to this phenomenon: the informality of probate proceedings, the level of practice and role confusion exhibited by appointed counsel, unacknowledged conflicts of interest, and across the board ignorance of the principles and possibilities of recovery and rehabilitation. One of the biggest flaws is that conservatorship itself is too often an overpowering, self-perpetuating, blunt instrument when what is needed is a sensitive, individually tailored, respectfully implemented response to the demonstrated vulnerabilities of a particular human being - vulnerabilities that have been carefully analyzed in the context of the person's life circumstances and clearly proven by objective evidence. Although our current statutes allow appointment of limited conservators of the estate and of the person, the burdens for judicial inquiry and explicit justification still operate so as to create a considerable bias in favor of appointing full conservators.

The reforms proposed in this bill would certainly move things in a better direction. It is particularly heartening to note the language in Section 4(c) that would clarify that courts could not simply delegate authority to conservators to make decisions concerning psychosurgery and electric shock therapy - which is increasingly done on an out patient basis. Allowing removal of contested cases to superior court, where proceedings are on the record and formal rules of evidence apply, would also protect against abuses. However, to address the issue of over-reliance on full conservatorship, it would also be useful to further amend Section 1(f) of the bill to require written findings as to why the court determined that an individual needed a full, rather than a limited conservator. Language could readily be borrowed from Section 45a-676 of the General Statutes, which establishes just such a preference for limited guardianship of persons with mental retardation.

The other bill I want to comment on is **Raised Bill No. 5736, AN ACT AUTHORIZING THE DEPARTMENT OF CORRECTION AND A CONTRACTED HEALTH CARE PROVIDER TO SHARE CERTAIN RECORDS AND RESTRICTING THE DISCLOSURE OF THE FINDINGS OF AN INVESTIGATION OF A SERIOUS INJURY OR UNEXPECTED DEATH.** This bill would apparently do three things: 1) allow sharing of peer review results between the Department of Correction (DOC) and any entity it contracts with for the provision of health care services to inmates; 2) significantly expand the evidentiary privilege traditionally associated with peer review by applying it to "any investigation" conducted by DOC into a death or serious injury; and, 3) exempt the findings of any such investigation from the purview of the Freedom of Information Act. While the Office of Protection and Advocacy (OPA) has no objection to DOC having access to the results of peer reviews conducted by its subcontractors, we do have concerns about shielding the findings of internal investigations from public view. Conn. Gen. Stat. § 19-17b defines peer review as "the procedure for evaluation by health care professionals of the quality and efficiency of services

ordered or performed by other health care professionals, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review and claims review." Conn. Gen. Stat. § 19a-17b(2). Connecticut law recognizes an evidentiary privilege with respect to peer reviews. The purpose of this privilege is to encourage "health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care. Only where ... peer review committees ... are assured of confidentiality [will they] feel free to enter into uninhibited discussions of their peers." *Babcock v. Bridgeport Hosp.*, 251 Conn. 790, 825 (1999) (internal citations omitted). OPA respects the concept of peer review privilege. However, the extension of this privilege to DOC investigations of unexpected deaths or serious injuries is not warranted.

As a public agency charged with the care and custody of prisoners incarcerated in its institutions, DOC is accountable to the public for what happens within its walls. If a death or serious injury occurs due to abuse or neglect, the public is entitled to know that, and, just as importantly, is entitled to know how DOC conducts its internal investigations and, if warranted, how it holds accountable those who it finds to be responsible. Of course, if a proper medical review committee is established pursuant to Conn. Gen. Stat. § 19a-17b(4) so that the actions of the health care professionals may be reviewed, those actions should be subject to the peer review privilege as it is presently provided for in statute. However, to expand the privilege to broadly include "any investigation of [a] serious injury or unexpected death conducted by the Department of Correction and an agency with which the department has contracted to provide health care services" goes far beyond the scope of peer review privilege as it is commonly understood. Adopting such a provision would effectively shield the Department from public scrutiny and public accountability.

Our concern about this provision does not stem from worry over its implications for our agency's ability to access DOC investigations. By its own terms, subsection (b) would not apply to the Office of Protection and Advocacy. The last sentence states that "[n]othing in this section shall be construed as restricting the disclosure of confidential communications or records upon which such findings are based **where such disclosure is otherwise required by law.**" OPA programs operate under both state and federal statutory mandates, and the federal statutes would require disclosure of these records.

On February 16, 2005, Judge Squatrito of the Federal District Court of the District of Connecticut ruled that OPA was entitled to receive peer review records from the Department of Mental Health and Addict Services despite the privilege articulated in Conn. Gen. Stat. § 19a-17b. *Office of Protection and Advocacy v. Kirk*, 354 F.Supp.2d 196 (D. Conn. 2005), *appeal pending* 05-1457-cv (2<sup>nd</sup> Cir.).<sup>1</sup> In this case, Judge Squatrito ruled that the state peer review

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<sup>1</sup> It is important to note that two Circuit Courts of Appeals have already ruled that a P&A is entitled to these records. *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10<sup>th</sup> Cir. 2003), *Penn. Prot. & Advocacy v. Houston*, 228 F.3d 423 (3<sup>rd</sup> Cir. 2000).

privilege was preempted by the Protection and Advocacy for Individuals for Mental Illness Act [PAIMI], 42 U.S.C. §§ 10801-10827. Judge Squatrito held that PAIMI requires that OPA have access to all records of an individual, and that "all records" included peer review records.

PAIMI requires that a Protection and Advocacy Agency be granted access to:

reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents....

42 U.S.C. 10806(b)(3)(A).

Whatever the outcome of the pending appeal in the above referenced case, the records of the investigations contemplated under this Bill would clearly fall within this definition. These records are also available to OPA under the Developmental Disabilities Assistance and Bill of Rights Act 42 U.S.C. § 15043, and the Protection and Advocacy for Individual Rights Act [PAIR] 29 U.S.C. § 794e.<sup>2</sup> Therefore, the last sentence of subsection (b) of Raised Bill 5736 would apply to OPA.

Not only is disclosure otherwise required by law, but the Federal Courts have held that "a P&A's authority to seek records as provided in that Act preempts any State law to the contrary by virtue of the Supremacy Clause of the United State Constitution." *Office of Prot. & Advocacy v. Armstrong*, 266 F. Supp. 2d 202, 319-20 (D. Conn. 2003) (and cases cited therein). Additionally, PAIMI itself contains express preemption language. 42 U.S.C. § 10806(b)(2)(C). Thus, regardless of the language of the bill, this section would still not apply to OPA.

Thank you for your attention. If there are any questions, I will try to answer them

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<sup>2</sup> In the DD Act the definition of records appears in the regulations at 45 CFR 1386.22 (b).

Reports prepared by an agency charged with investigating incidents of abuse or neglect, injury or death occurring at a facility or while the individual with a developmental disability is under the care of a member of the staff of a facility, or by or for such facility, that describe any or all of the following:

- (i) Abuse, neglect, injury, death;
- (ii) The steps taken to investigate the incidents;
- (iii) Reports and records, including personnel records, prepared or maintained by the facility in connection with such reports of incidents; or,
- (iv) Supporting information that was relied upon in creating a report, including all information and records which describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings....

PAIR incorporates the provisions of the DD Act.