

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Health and
the Senate Committee on Human Services**

February 9, 2021

S.B. No. 1375: RELATING TO HEALTH

Chairs Keohokalole and San Buenaventura, Vice Chairs Baker and Ihara, and Members of the Committees:

The Office of the Public Defender respectfully opposes S.B. No. 1375, in particular the phrase, “*the court shall consider statements submitted by the parents of the person, regardless of the age of the person.*” The phrase is repeated under Section 2 (Involuntary hospitalization criteria) , Section 3 (Criteria for assisted community treatment), and Section 5 (Criteria for issuance of court or administrative order for treatment over the patient's objection).

The above phrase suggests that the parents of the person need not appear at the hearing to testify on the issue of whether the person is imminently dangerous to self or others. Indeed, the phrase suggests that the parents’ written statements in lieu of live testimony is acceptable and thus admissible.

First, the Hawai‘i Rules of Evidence (HRE) applies to all courts of the State of Hawai‘i and generally to all civil and criminal proceedings. *See* HRE Rule 1101. Out-of-court statements prepared by parents are hearsay and therefore not admissible unless a hearsay exception applies. *See* HRE Rules 801, 802. Therefore, the courts cannot consider written statements submitted by the parents.

Moreover, even if there is an exception to the hearsay rule to admit the statements submitted by the parents, any out-of-court statements relating to the dangerousness of the person will likely be deemed as testimonial. Hence, the statements will only be admissible if the parents are unavailable and the person had the prior opportunity to cross-examine the parents. The Hawai‘i Supreme Court in State v. Fields, 115 Hawai‘i 503, 565, 168 P.3d 955, 1017 (2007), clearly held,

Under Hawai‘i’s confrontation clause, if an out-of-court statement is testimonial, it is subject to the [Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)] analysis, which mandates that

(1) the witness be “unavailable,” and (2) the accused had a prior opportunity for cross-examination.

Therefore, if the parents are not available to testify at the hearing, any attempt to introduce their statements on the issue of whether the person is imminently dangerous to self or others will be deemed inadmissible as a violation of the Hawai‘i Constitution.

The proposed measure simply undermines the Hawai‘i Rules of Evidence and the purpose of the Confrontation Clause. Consideration of the statement submitted by the parents will allow unfettered narrative statements to be received in evidence without the person having the opportunity to test the credibility and veracity of the parents. The trier of fact will not be able to assess the credibility of the parents by observing their behavior. For these reasons, we strongly opposed S.B. No. 1375.

Thank you for the opportunity to comment on this measure.



SB1375 Involuntary Commitment for Substance Abuse and Mental Illness COMMITTEE ON HEALTH,

- Sen. Jarrett Keohokalole, Chair; Sen. Rosalyn Baker, Vice Chair

COMMITTEE ON HUMAN SERVICES:

- Sen. Joy San Buenaventura, Chair; Sen. Les Ihara, Vice Chair
- Tuesday, Feb. 9, 2021: 3:05 pm: Videoconference

Hawaii Substance Abuse Coalition Supports SB1375:

GOOD MORNING CHAIR, VICE CHAIR AND DISTINGUISHED COMMITTEE MEMBERS. My name is Alan Johnson. I am the CEO of Hina Mauka, providing services for substance use disorder and mental health including programs for prevention, adult addiction treatment, adolescent treatment, case management, and withdrawal management. Helping people on Oahu and Kauai..

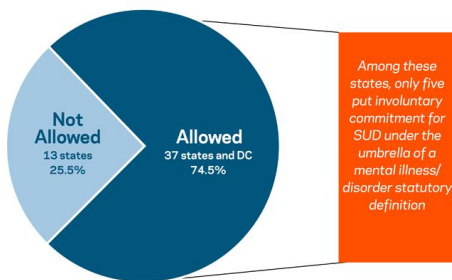


Figure 1. Legal Provision for Involuntary Commitment for Substance Use Disorders among U.S. states and DC (N=51)¹

For individuals with severe substance use disorder, several states are now implementing involuntary commitment laws for the first time or proposing changes to existing laws that would remove barriers to make commitment less difficult.

The substance abuse treatment gap between the need and access stems from stigma, lack of available effective treatment and the inability of some individuals to seek treatment voluntarily.¹

- Relatives and loved ones of an individual with a substance use disorder often feel helpless and disempowered when that individual is unable, due to an impaired brain, to make the rational decision to undergo and complete addiction treatment.
- Situations can escalate to the point where relatives and loved ones feel unsafe or are afraid that the individual with the substance use disorder is at great risk for overdose and/or death.

¹ Hazelden Betty Ford Foundation: Involuntary Commitment for Substance Use Disorders: <https://www.hazeldenbettyford.org/education/bcr/addiction-research/involuntary-commitment-edt-717>

- Involuntary commitment laws for substance use disorder can be a way to initiate the treatment these individuals need to avoid death and ultimately re-establish productive and healthy lives.

Involuntary Commitment to 90 days. Several states have changed the commitment to 90 days because a criticism of some current civil commitment laws is that the length of stay for individuals with a substance use disorder is insufficient. Several assert that effective treatment for severe substance use disorder must last at least 90 days.²

What Does it Take for Civil Commitment?

1. Casey's Law in Kentucky allows family members to exercise civil commitment if the disorder and risk have clearly grown severe and grave. It's allowed if the family can demonstrate a desperate situation such as after multiple overdoses and the loss of home, job, children, car, insurance, self-esteem and hope," Family members report "The only thing left to lose is their loved one's life. That is the right the family is trying to protect—their loved one's right to live."
2. Almost all states now allow a family member to petition the court to get an individual involuntarily committed to drug and alcohol addiction treatment. Most states allow a spouse, guardian, relative, medical professional or administrator of the treatment facility to petition the court for involuntary commitment. However, some states will allow a friend or any responsible person to petition, and in at least one state, police officers are allowed to do so.

What Treatment is Best. People with severe substance use disorder are often recommended residential treatment that can ultimately transition, or step down, to outpatient treatment and other lower levels of care. Such determinations are made by professionals based on criteria established by the American Society of Addiction Medicine.³ Addiction is like other chronic illnesses in that the sooner it is recognized and the longer it is treated, the better the chances of recovery.

We appreciate the opportunity to provide testimony and are available for questions.

² National Institute on Drug Abuse. (2012). Principles of drug addiction treatment: A research-based guide. Rockville, MD: National Institutes of Health.

³ Mee-Lee, D. E. (2013). The ASAM criteria: Treatment criteria for addictive, substance-related, and co-occurring conditions. Rockville, MD: American Society of Addiction Medicine.



Hawai'i Psychological Association

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SENATE COMMITTEE ON HEALTH

Senator Jarrett Keohokalole, Chair,
Senator Rosalyn H. Baker, Vice Chair

SENATE COMMITTEE ON HUMAN SERVICES

Senator Joy A. San Buenaventura, Chair,
Senator Les Ihara, Jr., Vice Chair

DATE: February 9, 2021 3:05 P.M. - VIA VIDEO CONFERENCE

Testimony in Support of SB1375 RELATING TO HEALTH

The Hawai'i Psychological Association (HPA) supports SB1258, which would require decision-makers in certain legal and administrative proceedings to determine whether a person is a danger to oneself or others to consider the statements of that individual's parents – regardless of whether the parent lives with that person or not.

It is the experience of HPA members' practices that very often it is the parents who know the individual being evaluated best, who love them and care for them the most. Parents are often the ones wanting the individual civilly committed - desperate to get care for their children, but unable to do so without their adult child's consent. However, these patients are often not competent to consent to treatment due to the nature of their mental illness.

HPA understands the tension between an individual's civil liberties and their need for fully supervised treatment. Defense lawyers often oppose civil commitment because the patient (who is not competent) refuses treatment; while the patient's parents lack the resources and capacity to get help for their loved one. This bill helps add clarity to the balance decision-makers need to strike.

It is also HPA's understanding that statements submitted by parents shall already be considered in civil commitment proceedings if that parent is available and wants to give input. However, there is no requirement that such statements be actively sought in these procedures. To be clear, HPA does not believe that a civil commitment determination or proceeding should cease just because a parent's statement is not available, or if a parent is not involved.

Nevertheless, HPA questions the impetus of this bill, and can only conjecture on whether there is a demonstrated history where decisionmakers ignore or refuse to consider parents' statements in these determinations.

Finally, HPA does not believe there are too many civil commitments. Rather, there are too few, which is why so many homeless mentally ill are being victimized, arrested and sent to jail.

Thank you for the opportunity to provide support for this important bill.

Sincerely,

Alex Lichton, Ph.D.

Chair, HPA Legislative Action Committee

SB-1375

Submitted on: 2/5/2021 5:13:30 PM

Testimony for HTH on 2/9/2021 3:05:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Dara Carlin, M.A. | Individual | Support | No |

Comments:

Stand in support

SB-1375

Submitted on: 2/6/2021 5:08:09 PM

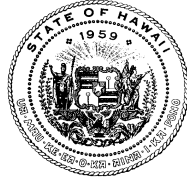
Testimony for HTH on 2/9/2021 3:05:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Louis Erteschik | Individual | Comments | No |

Comments:

This seems like a reasonable measure. We know that many families are frustrated by their inability to obtain mental health treatment for their loved ones, including children. Often, those children are over the age of 18 and so whatever parental rights may otherwise exist are not applicable typically . So, allowing them to file the petitions as set forth herein is a good idea.

Additionally, if the Court is to make a finding as to the individual's "dangerousness" it makes sense to consider evidence that may be probative. Clearly, input from a parent falls into that category. While it will not be dispositive, it nonetheless will provide useful guidance to the Court as it makes its decision.



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**Testimony COMMENTING on S.B. 1375
RELATING TO HEALTH**

SENATOR JOY A. SAN BUENAVENTURA, CHAIR
SENATE COMMITTEE ON HUMAN SERVICES

SENATOR JARRETT KEOHOKALOPE, CHAIR
SENATE COMMITTEE ON HEALTH

Hearing Date: 2/9/2021

Hearing Time: 3:05 p.m.

1 **Department Position:** The Department of Health (“Department”) supports the intent of this
2 measure and offers comments.

3 **Department Testimony:** The subject matter of this measure intersects with the scope of the
4 Department’s Behavioral Health Administration (BHA) whose statutory mandate is to assure a
5 comprehensive statewide behavioral health care system by leveraging and coordinating public,
6 private and community resources. Through the BHA, the Department is committed to carrying
7 out this mandate by reducing silos, ensuring behavioral health care is readily accessible, and
8 person-centered.

9 The Department is committed to reducing the incidence of mental health disorders and
10 substance use, and to treating and rehabilitating individuals who have been diagnosed with and
11 are experiencing symptoms of mental illness in the least restrictive and most therapeutic
12 environment possible. There may be situations where an individual manifests behaviors that
13 make him or her a danger to self and/or others. During these times, mental health
14 professionals intervene and the court may subsequently need to make a determination
15 regarding disposition.

1 The Department recognizes the importance of considering all relevant information
2 when determining the level of risk a person may pose to him/herself and/or to others in civil
3 matters. Information considered includes both historical information, as available, clinical
4 assessments and evaluations, as well as information provided by others who may have had
5 recent interactions with the individual.

6 The Department acknowledges that this bill expressly excludes, and the requirement to
7 take into consideration input from parents does not apply, if the person is a defendant in a
8 criminal trial, Hawaii Revised Statutes Chapter 704 proceeding. For Chapter 704 proceedings,
9 forensic examiners employed by the state shall continue to assess risk by taking into
10 consideration all relevant information that pertains to answering the court's question(s).

11 We wonder if this bill may be expanded beyond parents to include other family
12 members such as immediate family (e.g., spouse, children, grandparents, etc.) or persons with
13 whom the individual has current or had previous close affiliation (e.g., ex-spouse, roommates,
14 neighbors, etc.).

15 **Offered Amendments:** None.

16 Thank you for the opportunity to testify on this measure.

17 **Fiscal Implications:** Undetermined.