



STATE OF HAWAII
DEPARTMENT OF HEALTH
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Testimony in SUPPORT of S.B. 812, S.D. 2

**RELATING TO A BEHAVIOR SUPPORT REVIEW COMMITTEE FOR PERSONS
WITH DEVELOPMENTAL OR INTELLECTUAL DISABILITIES.**

REPRESENTATIVE DELLA AU BELATTI
HOUSE COMMITTEE ON HEALTH

Hearing Date: 03-18-15

Room Number: 329

1 **Department's Position:** The Department **strongly supports** this bill establishing a Behavior
2 Support Review Committee for persons with developmental or intellectual disabilities.

3 **Fiscal Implications:** None.

4 **Department Testimony:** The Hawaii Department of Health's (DOH) position on behavior
5 support is to ensure that behavior interventions are implemented appropriately to assist and
6 support individuals receiving services and those providing support to them. The DOH is
7 committed to ensuring that any use of restraint or seclusion is used only when there is imminent
8 danger to an individual or others, and the use of such restrictive interventions needs oversight
9 and review.

10 The Behavior Support Review Committee (BSRC) is required by the federal Centers for
11 Medicare and Medicaid Services (CMS) for the DD Home and Community Based Services
12 (HCBS) Waiver Program. The BSRC is needed to provide the necessary oversight and review to
13 ensure appropriate and safe use of restrictive interventions. Nearly all states have incorporated
14 laws or procedures on the use of restraints or seclusion for people with developmental and
15 intellectual disabilities.

16 The DD HCBS Waiver requires specific committee members on the BSRC that includes
17 DOH employees and others such as a parent of a participant of developmental disability, a DD
18 Waiver participant, a community member, and a Waiver provider. Recruiting non-state

employees to serve on the BSRC may be difficult, due to liability concerns. Passage of this measure will enable the DOH to implement the BSRC and provide ongoing review of restrictive interventions to ensure safety and to address any incidents of inappropriate use.

Offered Amendments: The DOH respectfully requests the following amendments (see attached Proposed H.D. 1):

(1) The definition of "restraint" on page 3, line 21 should read:

"Restraint" means any physical, chemical, or mechanical intervention that restricts the movement or function of the person or a portion of the person's body.

(2) The definition of "seclusion" on page 4, lines 13-14 should read:

"Seclusion" means any involuntary confinement of a person alone in a room or an area where a person is physically prevented from having contact with others or leaving.

(3) Delete "of a person with developmental or intellectual disabilities" on page 5, lines 5-6, so it reads: "...review committee the circumstances of..."

(4) Add "of the restraint" and refer to "seclusion" rather than "seclusions" on page 7, line 14, so it reads: "...participating in multidisciplinary reviews of the restraint or seclusion of..."

(5) Substitute "the agency or individual" for "it" on page 8, line 1, so it reads: "...relied upon information or opinion that the agency or individual knew was false or misleading."

(6) Substitute "restraint" for "restraints" on page 4, line 17, page 5, lines 6 and 9, and page 6, line 7, for purposes of consistency

(7) The proposed new part is better placed in HRS chapter 333F, rather than chapter 321, because the BSRC pertains only to persons with developmental or intellectual disabilities.

The above definitions are consistent with the definitions contained in the CMS Instructions, Technical Guide and Review Criteria for the Medicaid HSBS Waiver Program.

Thank you for the opportunity to testify on this measure.

A BILL FOR AN ACT

RELATING TO BEHAVIOR SUPPORT REVIEW COMMITTEE FOR PERSONS WITH
DEVELOPMENTAL OR INTELLECTUAL DISABILITIES.

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

SECTION 1. The department of health's position on behavior support is to ensure that behavior interventions are implemented appropriately to assist and support individuals receiving services and those providing support to them. This position:

(1) Emphasizes positive behavior supports that promote the growth, development, and independence of individuals; individual choice in daily decision-making; self-management; and individual responsibility for behaviors;

(2) Provides for working with persons with challenging behavior (with a focus on teaching replacement behaviors that serve as the function for what the individual is communicating rather than the suppression or elimination of undesirable behaviors), and specification of prohibited interventions; and

(3) Enables appropriate safeguards and oversight if aversive procedures (planned or crisis) are used, with

1 planning for the eventual elimination of seclusion and
2 restraints.

3 When an individual with intellectual or developmental
4 disabilities is a danger to oneself or to others, restraints or
5 seclusion may be recommended. Before and after such methods are
6 administered, a behavior support review committee is convened to
7 evaluate such cases and make recommendations.

8 The behavior support review committee membership may
9 include a parent of an individual receiving service from the
10 department of health's developmental disabilities division, a
11 developmental disabilities division service provider who
12 provides at least two services to participants, a community
13 member with no direct involvement with the developmental
14 disabilities division's waiver provider programs, a department
15 of health facilitator with experience or training in best
16 practices to support behaviors of individuals with developmental
17 disabilities, a department of health case manager with
18 experience in supporting participants with behavior concerns,
19 and a person receiving services from the developmental
20 disabilities division.

1 The purpose of this Act is to describe the behavior support
2 review process and to provide behavior support review committee
3 members with immunity from liability.

4 SECTION 2. Chapter [REDACTED], Hawaii Revised Statutes, is
5 amended by adding a new part to be appropriately designated and
6 to read as follows:

7 **"PART . BEHAVIOR SUPPORT REVIEW COMMITTEE FOR PERSONS WITH**
8 **DEVELOPMENTAL OR INTELLECTUAL DISABILITIES**

9 § [REDACTED]- **Definitions.** Whenever used in this part, unless
10 the context otherwise requires:

11 "Department" means the department of health.

12 "Developmental disability" shall be as defined in section
13 333F-1.

14 "Director" means the director of health or the director's
15 designated representative.

16 "Intellectual disability" shall be as defined in section
17 333F-1.

18 "Person with developmental or intellectual disabilities"
19 means a youth or an adult with a developmental or intellectual
20 disability.

1 "Restraint" means any physical, chemical, or mechanical

2 intervention that restricts the movement or function of the

3 person or a portion of the person's body.

4 "Seclusion" means any involuntary confinement of a person

5 alone in a room or an area where a person is physically

6 prevented from leaving contact with others or leaving.

7 **§ 1105- Behavior support review.** The department of

8 health may convene a committee to conduct multidisciplinary and

9 multiagency reviews of restraint or seclusion of persons with

10 developmental or intellectual disabilities in order to ensure

11 appropriate use and to reduce the risk of harm or death to

12 persons with developmental or intellectual disabilities.

13 **§ 1106- Access to information.** (a) Upon written request

14 of the director, all providers of supports and state and county

15 agencies shall disclose to the department and those individuals

16 appointed by the director to participate in the behavior support

17 review committee the circumstances of restraint or seclusion

18 used or to be used for a person with developmental or

19 intellectual disabilities to allow the department to conduct

20 multidisciplinary reviews of restraint or seclusion used or to

1 be used for persons with developmental or intellectual
2 disabilities pursuant to section 321-31 and this part.

3 (b) To the extent that this section conflicts with other
4 state confidentiality laws, this section shall prevail.

5 **§ [REDACTED]- Exception.** Information regarding an ongoing
6 civil or criminal investigation shall be disclosed at the
7 discretion of the applicable state, county, or federal law
8 enforcement agency.

9 **§ [REDACTED]- Use and review of information and records and**
10 **activities pertaining to behavior support review of persons with**
11 **developmental or intellectual disabilities.** (a) Except as
12 otherwise provided in this part, all information and records
13 acquired by the department during its multidisciplinary,
14 multiagency reviews of the restraint or seclusion of persons
15 with developmental or intellectual disabilities pursuant to this
16 part shall be kept confidential and may be disclosed only as
17 necessary to carry out the purposes of this part.

18 (b) Information and statistical compilations of data from
19 the multidisciplinary reviews of **[REDACTED]** or seclusion of
20 persons with developmental or intellectual disabilities that do

1 not contain any information that would permit the identification
2 of any person shall be public record.

3 (c) No individual participating in the department's
4 multidisciplinary review of the restraint or seclusion of a
5 person with developmental or intellectual disabilities shall be
6 questioned in any civil or criminal proceeding regarding
7 information presented in, or opinions formed, as a result of
8 meetings of the multidisciplinary review of restraints or
9 seclusion. Nothing in this subsection shall be construed to
10 prevent a person from testifying to information obtained
11 independently of the department's multidisciplinary behavior
12 support review, or that is public information, or where
13 disclosure is required by law or court order.

14 (d) Information held by the department as a result of a
15 multidisciplinary review of the restraint or seclusion of a
16 person with developmental or intellectual disabilities conducted
17 under this part shall not be subject to subpoena, discovery, or
18 introduction into evidence in any civil or criminal proceeding.

19 ~~§ 33-15~~ **Immunity from liability.** All agencies and
20 individuals participating in multidisciplinary reviews of the
21 restraint or seclusion of persons with developmental or

1 intellectual disabilities pursuant to this part shall be immune
2 from civil or criminal liability for the use and review of
3 information and records pertaining to behavior support review of
4 persons with developmental or intellectual disabilities as
5 required under this part. All agencies and individuals
6 participating in multidisciplinary reviews ~~of the department~~ or
7 ~~of the department~~ of persons with developmental or intellectual
8 disabilities pursuant to this part shall be presumed to be
9 acting in good faith and shall be immune from civil liability
10 for taking or recommending actions as part of the behavior
11 support review committee. The presumption of good faith may be
12 rebutted upon a showing by preponderance of the evidence that
13 the agency or individual relied upon information or opinion that
14 ~~the agency or individual~~ knew was false or misleading."

15 SECTION 3. This Act shall take effect upon its approval.

Report Title:

Behavior Support Review Committee for Persons with Developmental or Intellectual Disabilities

Description:

Authorizes the department of health to establish a behavior support review process to conduct multidisciplinary reviews of the restraint or seclusion of persons with developmental or intellectual disabilities. Exempts those who participate in the reviews from liability. (SD2)

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

SB812 SD2_Prop HD1_03-12-15
SB812 SD2_Prop HD1_03-12-15
SB812 SD2_Prop HD1_03-12-15



STATE OF HAWAII
STATE COUNCIL
ON DEVELOPMENTAL DISABILITIES
919 ALA MOANA BOULEVARD, ROOM 113
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March 18, 2015

The Honorable Della Au Belatti, Chair
House Committee on Health
Twenty-Eighth Legislature
State Capitol
State of Hawaii
Honolulu, Hawaii 96813

Dear Representative Belatti and Members of the Committee:

SUBJECT: SB 812 SD2– Relating to Behavior Support Review Committee for Persons with Developmental or Intellectual Disabilities

The State Council on Developmental Disabilities (DD) **SUPPORTS SB 812 SD2**. The purpose of the bill is to authorize the Department of Health (DOH) to establish a behavioral support review process to conduct multi-disciplinary reviews of restraints or seclusion of persons with developmental or intellectual disabilities, and exempts those who participate in the reviews from liability.

The passage of this bill would add a new part to Chapter 321 to enable the DOH DD Division to facilitate a review process of the Behavioral Support Review Committee (BSRC) to review restraints and seclusion interventions for persons with DD or intellectual disabilities receiving services under the Medicaid Home and Community-Based Services Waiver program (Waiver). This is a requirement of the Waiver program. Apparently, DD Division has had difficulty meeting this requirement because individuals are reluctant to serve on the Committee due to liability concerns. The bill includes a provision that addresses immunity from liability as indicated on page 7, lines 6-20, and page 8, lines 1-2. With this provision, DD Division would be able to recruit members to serve on the BSRC and meet the Waiver program requirements.

The Council supports the proposed amendments by DOH regarding the definitions for restraint and seclusion. We understand that the definitions meet the Centers on Medicare and Medicaid Services guidelines.

Thank you for the opportunity to submit testimony **in support of SB 812 SD2**.

Sincerely,

A handwritten signature in black ink, appearing to read "Waynette K.Y. Cabral".

Waynette K.Y. Cabral, M.S.W.
Executive Administrator

A handwritten signature in black ink, appearing to read "Rosie Rowe".

Rosie Rowe
Chair

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 812 S.D.2**

Date: Wednesday, March 18, 2015
Time: 8:45 pm

To: Chairperson Della Au Belatti and Members of the House Committee on Health:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 812 S.D.2, relating to Behavior Support Review Committee For Persons With Developmental Or Intellectual Disabilities.

The Hawaii Association for Justice opposes the section entitled: "Immunity from liability," because that section is overly broad and unnecessarily expansive so as to provide immunity for even reckless, intentional or grossly negligent conduct. This provision in the bill provides that anyone participating in a multidisciplinary review can do whatever they want, regardless of reasonableness, that such action no matter how outrageous it may be shall be presumed to be in good faith, and that there shall be total and complete immunity without any responsibility.

The function of the Behavior Support Review Committee is to assess whether, how and to what extent people with developmental or intellectual disabilities may be restrained (physically or by administration of chemicals) or confined. The consequences of decisions regarding restraint and confinement are profound and extremely serious for the disabled people who are being restrained and/or confined. There needs to be some basic protections for these people who are unable to protect their own interests because of their intellectual or developmental disabilities. Here there is complete secrecy shielding the disclosure or discovery of any information pertaining to the behavior support review of individuals so there can never be any meaningful review of why a person was restrained or confined; and complete immunity so there can never be any accountability for any abuses of the process. This total secrecy and immunity results in a complete lack of basic due process and protection for these vulnerable individuals.

HAI recognizes that this measure is well intended and those that serve on these review committees bear a heavy responsibility for the welfare of those with intellectual or developmental disabilities and those who come in contact with these individuals; however, the needs of the committee members must be balanced with the need to protect the disabled and provide meaningful oversight of committee activities. The most basic principles of fairness and oversight require deletion of the confidentiality and immunity provisions of this measure. It is requested that this measure be held or amended to delete/revise the subsections relating to confidentiality and immunity to eliminate or narrow those provisions to the minimum extent needed to accomplish the purposes of this measure. Those provisions are far too broad as currently drafted.

Thank you very much for allowing me to testify regarding this measure. Please feel free to contact me should you have any questions or desire additional information.