

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 Human Services**

February 13, 2023

S.B. No. 916: RELATING TO HEALTH

Chair Buenaventura, Vice Chair Aquino, and Members of the Committee:

The Office of the Public Defender (“OPD”) strongly opposes S.B. No. 916, which allows patients who are admitted to a psychiatric facility or hospital under an emergency admission, emergency examination or a finding of unfitness to proceed to be subjected to involuntary treatment, including long-acting psychotropic medication, in violation of their substantial due process rights under the Hawai‘i and U.S. constitutions.

“Freedom from unjustified governmental intrusions into ... bodily autonomy [is] at the core of the liberty protected by due process.” State v. Miller, 84 Hawai‘i 269, 273, 933 P.2d 606, 610 (1997) (citing Foucha v. Louisiana, 504 U.S. 71, 80, 112, S.Ct. 1780, 118 L.Ed.2d 437 (1992), reconsideration denied, 84 Hawai‘i 496, 936 P.2d 191 (1997)). Allowing the involuntary administration of medication (i.e., “treatment”) without affording the individual due process violates an individual’s rights under both the Hawai‘i and U.S. constitutions. The Hawai‘i Supreme Court in State v. Kotis, 91 Hawai‘i 319, 984 P.2d 78 (1999), citing the U.S. Supreme Court’s decision in Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), recognized that *the forcible administration of antipsychotic drugs constitutes a “substantial” intrusion on an individual’s bodily integrity and liberty*. Both the U.S. Supreme Court and the Hawai‘i Supreme Court concluded that the following specific findings must be made before an individual (an incarcerated person in Kotis) may be involuntarily medicated with antipsychotic drugs:

- (1) the defendant actually poses a danger of physical harm to himself or others;
- (2) treatment with antipsychotic medication is medically appropriate; and
- (3) considering less intrusive alternatives, the treatment is essential to forestall the danger posed by the defendant.

1. Section 1 of S.B. No. 916

The OPD opposes the proposed amendments to HRS §§ 334-59(b) and (d) which would allow patients who are admitted to a psychiatric facility or behavioral crisis center for an emergency examination or who are being held on an emergency hospitalization pending an involuntary commitment hearing to be subjected to involuntary treatment, including “long-acting psychotropic medication,” simply based upon the opinion of a physician, medical resident, or advanced practice registered nurse. These amendments, ***which would allow involuntary treatment without a court hearing and prior to a court order of commitment***, would violate the patient’s substantial due process rights under both the Hawai‘i and U.S. constitutions. Kotis, *supra*.

The OPD also opposes the proposed amendments to HRS §§ 334-59(b) and (d) which allow a psychiatric facility or hospital to request that the Director of the Department of Health (“the Director”) file a petition for involuntary treatment, including “long-acting psychotropic medication,” with the court or to convene an administrative panel to authorize involuntary treatment pursuant to HRS § 334-162 for patients who are being held for an emergency examination or emergency hospitalization prior to a court-ordered involuntary commitment. First, persons being held pursuant to HRS § 334-59 are being held only for examination or admission pending a determination by the court that they should be involuntarily committed. Such persons who have not been court-committed should not be subject to involuntary treatment prior to a determination by the court that they meet involuntary commitment criteria.

Second, while HRS §§ 334-161 and 162 authorize an “administrative panel” to order involuntary treatment, there has been ***no*** Hawai‘i case which has confirmed the authority of an administrative panel to authorize the administration of involuntary medication. In Kotis the Hawai‘i Supreme Court held that the circuit court possessed the authority to issue an order permitting the administration of involuntary medication to a criminal defendant. 91 Hawai‘i at 329-30, 984 P.2d at 88-89. Thus, there has been no confirmation that the use of an administrative panel is constitutional. Further, an administrative panel, which could include members who are co-workers of the patient’s treatment team or who are associated with the patient’s treatment team would not have the same ability to fairly and impartially render a decision as a judge. As such, the OPD believes the practice of using an administrative panel to authorize involuntary treatment and thereby bypassing court intervention violates the patient’s substantial due process rights under both the Hawai‘i and U.S. constitutions.

2. Section 2 of S.B. No. 916

The OPD takes no position on the proposed amendment to HRS § 334-60.3 which would allow the petitioner to joint in the petition for a request for treatment.

3. Section 3 of S.B. No. 916

The OPD opposes the proposed additions to HRS § 334-161 of subsections (c) and (d) which would add patients who are found unfit pursuant to HRS § 704-406(1) or being held for emergency examination or admission pursuant to HRS § 334-59 to be ordered to receive involuntary treatment upon the authorization of an administrative panel. First, persons being held pursuant to HRS § 334-59 are being held only for examination or admission pending a determination by the court that they should be involuntarily committed. Such persons who have not been court-committed should not be subject to involuntary treatment prior to a determination by the court that they meet involuntary commitment criteria.

Second, patients who are found unfit pursuant to HRS § 704-406(1) or being held for emergency examination or treatment pursuant to HRS § 334-59 should not be ordered to receive treatment upon the authorization of an administrative panel for the same reasons set forth for opposition to Section 1. There has been no confirmation by the Hawai‘i Supreme Court that the use of an administrative panel is constitutional, as Kotis only held that the circuit court possessed the authority to issue an order permitting the administration of involuntary medication to a criminal defendant. 91 Hawai‘i at 329-30, 984 P.2d at 88-89. Further, an administrative panel, which could include members who are co-workers of or persons associated with the patient’s treatment team, would not have the same ability to fairly and impartially render a decision as a judge. As such, the OPD believes that the practice of using an administrative panel to authorize involuntary treatment and thereby bypassing court intervention violates the patient’s substantial due process rights under both the Hawai‘i and U.S. constitutions.

The OPD does not believe the proposed addition of subsection (e) is necessary as the Director is able to adequately discern when it is necessary to file a petition for involuntary treatment with a petition for involuntary commitment.

The OPD does not oppose the proposed addition of subsection (f) to the extent that it requires that court hearings are held expeditiously and that the court issue an order within 30 days unless exigent circumstances exist. For the reasons stated above, the

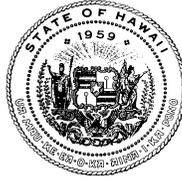
OPD believes the practice of using an administrative panel to authorize involuntary treatment and thereby bypassing court intervention violates the patient's substantial due process rights under both the Hawai'i and U.S. constitutions.

4. Section 4 of S.B. No. 916

The OPD opposes the amendments to HRS § 334-162(a) which would add patients who are found unfit pursuant to HRS § 704-406(1) or being held for emergency examination or admission pursuant to HRS § 334-59 to be subject to receive involuntary treatment upon court order or the authorization of an administrative panel. First, persons being held pursuant to HRS § 334-59 are being held only for examination or admission pending a determination by the court that they should be involuntarily committed. Such persons who have not been court-committed should not be subject to involuntary treatment prior to a determination by the court that they meet involuntary commitment criteria.

Second, patients who are found unfit pursuant to HRS § 704-406(1) or being held for emergency examination or treatment pursuant to HRS § 334-59 should not be ordered to receive treatment upon the authorization of an administrative panel. For the reasons stated above, the OPD believes the practice of using an administrative panel to authorize involuntary treatment and thereby bypassing court intervention violates the patient's substantial due process rights under both the Hawai'i and U.S. constitutions.

Thank you for the opportunity to comment on this measure.



STATE OF HAWAII
DEPARTMENT OF HEALTH
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Testimony COMMENTING on S.B. 916
RELATING TO HEALTH

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

Hearing Date, Time and Room: Monday, February 13, 2023 at 1:00 p.m. in Room 225/VIDEO

1 **Fiscal Implications:** Undetermined.

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

4 **Department Testimony:** The Adult Mental Health Division (AMHD) provides the following
5 testimony on behalf of the Department.

6 The purpose of this measure is to temporarily amend §334-59, §334-121.5, §334-60.3,
7 §334-161, §334-162, §334-131, §334-133, Hawaii Revised Statutes until July 1, 2026.

8 The Department is committed to addressing the needs of individuals who live with
9 behavioral health issues and need necessary medical treatment when it is in their best interest.
10 Methods to establish authorization to treat are important to ensure the application of those
11 services for those who would benefit from treatment over their objection. The Department is
12 committed to supporting the availability and effectiveness of court and administrative
13 procedures to obtain authorization to treat over objection including working with state
14 agencies, the Judiciary, and community partners to improve access and implementation.

1 We support expedited processes for obtaining authorization and reducing the time to
2 initiate treatment including submitting a petition for authorization to treat concurrently with a
3 petition for civil commitment, legal assistance for filing petitions, and authorization to treat in
4 the time period between filing a petition and obtaining an order for commitment. Additionally,
5 we support extending the availability of the administrative authorization process to patients
6 who are subject to a petition for involuntary hospitalization.

7 The Department opposes the Director of Health filing petitions for an order to treat over
8 objection or convening an administrative panel pursuant to §334-162, Hawaii Revised Statutes,
9 for other institutions. We strongly believe that the provider of care needs to prepare and
10 present information for a petition rather than a third-party. The provider has specific patient
11 health information that needs to be conveyed to the court. By introducing a third party into
12 the process, it will be inefficient, lead to increased costs by the state for the third party review,
13 and could lead to misclarifications in the petitions. Further, we strongly believe that the facility
14 or hospital should convene an administrative panel rather than a third-party. The Department
15 is committed to supporting affected stakeholders with technical assistance and trainings, and
16 believes this would better lead to the desired outcomes of this measure.

17 Lastly, we have concerns about the feasibility of adequately implementing the
18 administrative authorization process in the setting of an emergency examination pursuant to
19 §334-59(a) or (b), Hawaii Revised Statutes.

20 **Offered Amendments:** We recommend striking out Sections c-f on pages 7-8 and Section b on
21 page 9.

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



The Judiciary, State of Hawai'i

**Testimony to the Thirty-Second State Legislature
2023 Regular Session**

Committee on Health & Human Services

Senator Joy A. San Buenaventura
Senator Henry J.C. Aquino, Vice Chair

Monday, February 13, 2023 at 1:00 p.m.
State Capitol, Conference Room 225 & Videoconference

WRITTEN TESTIMONY ONLY

by:

Matthew J. Viola
Senior Judge, Deputy Chief Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No. 916 – Relating to Health.

Purpose: Authorizes long-acting psychotropic medication to be provided to patients who are subject to emergency examination or hospitalization. Expands the administration of treatment over a patient's objection to include persons in director of health custody at any hospital, subject to an emergency examination, subject of an application for involuntary hospitalization, and subject to a court order regarding fitness to proceed for a criminal trial. Requires orders for treatment over objection proceedings to be expedited. Expands who may file a petition for an order to treat over objection under certain circumstances.

Judiciary's Position:

The Judiciary takes no position on Senate Bill No. 916. We respectfully offer the following comments.

We are concerned that the amendments proposed for subsection (b) are confusing.



Subsection (b) covers the emergency examination process that allows the medical personnel to determine whether commitment to a hospital is necessary. The amendments are also ambiguous. For example, the amendments seem to suggest that “a petition for an order for treatment over the patient’s objection” could somehow be a “stand alone” petition. The amended language is inserted just before the existing language that requires an examination pursuant to Section 334-121.5 regarding assisted community treatment. That section further provides that “[n]othing in this section shall delay the appropriate discharge of a person from the psychiatric facility after the examination for assisted community treatment (“ACT”) indication has been completed.”

We respectfully suggest that this committee delete the entire first section of this bill, from page 1, line 3, to and including page 2, line 20. This does not leave the patient without assistance since the existing statute already requires an ACT exam if hospitalization is not needed.

Similarly, we are concerned about the ambiguity found at page 8, lines 1 to 6, that appears to allow filing a petition for involuntary commitment and a petition for an order for treatment over the patient’s objection at the same time. The new subsection (e) is nestled in section 334-161 concerning involuntary treatment for persons involuntarily hospitalized. New language is then added at lines 5 to 9 that adds the emergency examinations into this section. Again, the question is whether this ambiguous language allows a “stand alone” petition for treatment over a person’s objection.

We respectfully suggest that this committee delete this language on page 6, lines 4 to 9:

~~... is transported to a psychiatric facility pursuant to a petition for emergency admission pursuant to section 334-59(a); or is delivered to a psychiatric facility or a behavioral health crisis center for an emergency examination under section 334-59(b) ...~~

We further respectfully suggest deletion of subsection (e) on page 8, lines 1 to 6.

~~(e) When involuntary commitment of the person is additionally sought pursuant to section 334-60.3, the petitioner shall combine the petition for involuntary commitment with the petition for an order for treatment over the patient’s objection to reduce the time the patient is involuntarily hospitalized without treatment.~~

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

SB-916

Submitted on: 2/10/2023 6:48:37 PM

Testimony for HHS on 2/13/2023 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Oppose	Remotely Via Zoom

Comments:

We believe that the provision in Section 3 whereby an order to treat would accompany an individual who is involuntarily committed probably makes sense from a logistical point of view. We have no objection to that. Beyond that, we are very concerned about this bill and the expanded use of administrative panels to decide whether the individual should be involuntarily medicated.

Current law at 334-162 HRS authorizes these panels in the specific case of someone who is at the State Hospital. That is all. It was intended to address specific situations where doctors at the State Hospital felt the need to treat residents and they argued that the judicial process was lengthy. Interestingly, at the time the law was passed, the Department of Public Safety opted not to seek that change in the law for prison inmates and they still utilize the Courts. The idea of expanding it to inpatients at the other psychiatric facilities such as Castle or Queen's may not theoretically be a huge stretch but we are not sure if they even have the medical or legal mechanisms in place for that. However, the bill appears to propose to expand it to a scenario where someone is brought in on a 48 hour hold. It has no place in that context. For one thing, unless a court were to order a longer hold there is simply no time to do it. Even the administrative panels they use at the State Hospital have a built in " due process" component that takes time. There is just no way it can be done that fast.

Aside from the practical challenges, there are huge legal and constitutional implications. To begin with, the individual has not been found otherwise to meet the criteria for longer confinement. As a practical matter, the criteria for bringing someone to a hospital on an MH1 or MH2 seems to be a relatively lower threshold and the determination is made by a Police Department psychologist who receives a telephone call from an Officer so to go from there to a point where the individual is being involuntarily medicated with a long lasting medication is a major leap. While we don't pretend to speak for the Attorney General we did have conversations with them last year regarding a similar proposal and they seemed to concur in that view. Our collective understanding was that Hawaii case law sets forth the judicial procedure which needed to be followed to involuntarily medicate an individual and it was not the process set forth in this bill. It certainly did not involve substituting the judgment of an administrative panel for the Courts.

Currently, hospitals release these individuals deemed "stable". We share the concern about the revolving door and we understand the frustration that some of our colleagues in the advocacy field are expressing. It may even be true that the long lasting injectable medication might make sense from a medical perspective but we believe that this bill violates the law. We are certainly open to being part of an ongoing discussion to explore ways in which that situation can be remedied.



THE QUEEN'S HEALTH SYSTEM

To: The Honorable Joy San Buenaventura, Chair
The Honorable Henry Aquino, Vice Chair
Members, Senate Committee on Health & Human Services

From: Sondra Leiggi-Brandon, Vice-President - Patient-Care and Behavioral Health, The Queen's Health System

Jacce Mikulanec, Director, Government Relations, The Queen's Health System

Date: February 13, 2023

Re: Comments on SB916: Relating to Health

The Queen's Health System (Queen's) is a nonprofit corporation that provides expanded health care capabilities to the people of Hawai'i and the Pacific Basin. Since the founding of the first Queen's hospital in 1859 by Queen Emma and King Kamehameha IV, it has been our mission to provide quality health care services in perpetuity for Native Hawaiians and all of the people of Hawai'i. Over the years, the organization has grown to four hospitals, and more than 10,000 affiliated physicians, caregivers, and dedicated medical staff statewide. As the preeminent health care system in Hawai'i, Queen's strives to provide superior patient care that is constantly advancing through education and research.

Queen's appreciates the opportunity to provide comments on SB916, which authorizes long-acting psychotropic medication to be provided to patients who are subject to emergency examination or hospitalization, expands the administration of treatment over a patient's objection to include persons in director of health custody at any hospital, subject to an emergency examination, subject of an application for involuntary hospitalization, and subject to a court order regarding fitness to proceed for a criminal trial. The bill also requires orders for treatment over objection proceedings to be expedited and expands who may file a petition for an order to treat over objection under certain circumstances.

Queen's commends the Committee for taking a thoughtful approach to statutorily enabling timely and necessary care for individuals requiring emergency hospitalization (HRS 334-59 (d)); we share and appreciate your commitment to addressing the needs of those suffering from serious mental health and substance abuse in our community. While the changes proposed herein could allow for more timely and medically appropriate administration of long-acting psychotropic medication we would ask the Committee to consider setting clear timeframes within which requests must be acted upon by the Director of Health. Clarity will assist hospital and/or other facilities to determine when they can file a petition should the Director not act expeditiously.

Thank you for the opportunity to testify on this measure.

The mission of The Queen's Health System 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.

SB-916

Submitted on: 2/11/2023 9:10:58 PM

Testimony for HHS on 2/13/2023 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Naomi Bikle MD	Individual	Support	Written Testimony Only

Comments:

I support this measure, please consider

Naomi Bikle, MD | Psychiatry | Kailua Kona, HI

TESTIMONY OF ELLEN GODBEY CARSON IN SUPPORT OF SB 916

I write in strong support of SB 916 with a request for one amendment to conform section 334-59(d) to language in other sections in the bill (described below).

While I write as an individual, I have served as President of Hawaii Women Lawyers, the Hawaii State Bar Association, and the Institute for Human Services. The major part of my legal career and volunteer community work have been spent seeking to protect constitutional rights and the rights of vulnerable persons.

We only need to walk down our urban streets to see that we are failing to protect persons with severe mental illness. They live on our streets, rotating between the ER, jail, and the streets again in a never-ending downward cycle. Over 100 of our homeless residents die on our streets each year, at an average age of only 54. [Deaths of homeless people continue to climb on Oahu | Honolulu Star-Advertiser](#) In other words, they lose 25-30 years of their expected lifespan due to the very real dangers of living on the street without effective treatment. Many of them are so mentally ill they do not know they need medication, and they are unable to make decisions for life-saving medication and self-preservation.

This bill will increase the likelihood that persons suffering from severe mental illness or substance abuse will receive timely and appropriate care and treatment. We have miracles of modern medicine that can treat even the most severe mental illnesses. But treatment requires either actual consent or legal procedures for ordering treatment. We owe it to these individuals to provide them life-saving treatment and help restore their lucidity when they lack their own decision-making authority.

SB 916 will help us better address these needs in the following ways:

- Our “Orders To Treat over Objection” laws (HRS 334-161 and 334-162) currently only help persons committed to the State Hospital. This bill expands those orders to include persons:
 - in DOH director custody at any hospital;
 - subject to an MH4 emergency examination under HRS 334-59(b);
 - subject of an MH6 application for involuntary hospitalization under HRS 334-59(d); and
 - subject to a court order under HRS 704-406(1)(unfit to proceed for criminal trial).All these situations involve persons at imminent risk of harm to self or others, where prompt treatment is warranted to help them get better and either avoid or minimize any time needed in involuntary hospitalization.
- Because these persons are imminently dangerous, SB 916 requires Orders to Treat proceedings to be brought on an expedited basis with a final order to be rendered within 30 days of the date of the petition, absent exigent circumstances, so that treatment can be promptly provided.

- SB 916 allows a psychiatric facility or hospital to request the DOH director to file and pursue a petition for an Order to Treat, and allows the facility or hospital to file a petition if the director does not file expeditiously. It is very appropriate for DOH take the lead on these petitions based on community need, just as for involuntary commitment orders.
- Where an MH4 emergency examination occurs, SB 916 authorizes a psychiatric facility or hospital to request the director to file a petition for order to treat. And where a petition for MH6 involuntary hospitalization is filed, SB 916 authorizes the petitioner to seek an order to treat. Expediting these orders at these points allows early intervention and prompt treatment which may avoid altogether or at least diminish, the time needed in involuntary hospitalization.
- Where involuntary commitment is requested, SB 916 authorizes a simultaneous request for an order to treat, so as to minimize the time of involuntary hospitalization without any treatment. It is cruel to many of these individuals, who lack decisional authority, to be committed indefinitely to involuntary hospitalization, with no means to provide treatment until an order to treat is obtained.

I request an amendment to conform the language in section 334-59(d) to that found in 334-59(b), and 334-161(c), as is clearly intended by the bill, so that all references to seeking an order to treat may be made to the director, who shall review and act on such requests expeditiously. This can be done by inserting the boldfaced language below into the proposed amended language in section 59(d) to say:

The facility or hospital where the patient is held may ***request the director to file a petition for*** an order to treat pursuant to section 334-162, to provide such treatment as is indicated by good medical practice, which may include long-acting psychotropic medication. ***The facility or hospital shall provide supporting information. The director shall review such request expeditiously and if the request appears to satisfy the four factors in section 334-161, the director shall file and pursue a petition to request order for treatment over the patient's objection as soon as possible by convening an administrative panel pursuant to section 334-162.***

This bill relies on the due process protections already embedded in HRS 334-161 and 334-162 that strike an appropriate balance between the individuals' rights and the need to help to help treat and stabilize them so they can regain their decisional capacity. In so doing, we can help avoid the very real dangers of irreversible disability and death that these severely ill persons face if they are left on their own on the streets.

Thank you for your consideration of my testimony and helping protect our most vulnerable residents.

Ellen Godbey Carson, Honolulu, Hawaii

SB-916

Submitted on: 2/12/2023 12:47:53 PM

Testimony for HHS on 2/13/2023 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Mary Pat Waterhouse	Individual	Support	Written Testimony Only

Comments:

I strongly support this bill because of my experience of over 35 years with two family members with serious mental illness. I am also on the boards of two mental health organizations.

The use of long acting antipsychotic medication would have made my family member's life more stable as well as the entire extended family. She could have been a better mother to her child. Now that it's years later, with many struggles, she is using a long acting medication. She is much more stable and has a good relationship with her family.

In regards to expanding the order to treat over objection to include all hospitals this should reduce revolving door in emergency rooms of those with mental illness and substance abuse. This also includes the use of the long acting antipsychotic medication.