SPEAKER NOTES

Mental Health Law: A Road of Potholes and Roadblocks

Summarized by Thomas T. Thomas

A family member, educator, activist, attorney, and Bay Area native, **Paula Aiello** is on the steering committee of Families Advocating for the Seriously Mentally Ill (FASMI). She originally gave this presentation to that group. Her talk covered the history of mental health laws and regulations from a global, national, state, and local perspective and offered a valuable framework with which to view our present conundrum. (**Note:** This is the barest outline of her richly detailed presentation, for the full Zoom recording, go to the NAMI East Bay website.)

Aiello pointed out that, while she is an attorney, she is not an expert in mental health law. But working with FASMI involves a lot of legal questions. "Mental health laws affect people in dramatic ways," she said.

The history of mental health before the 1960s involved warehousing people in prisons or shelters, like London's St. Elizabeth's Hospital—known as "Bedlam"—established in 1403. America began building asylums for the mentally ill in the 1800s, but still no treatments were available. In the 1950s, the asylums were full, with 2,000 people in Agnews State Hospital in Santa Clara. Before the 1960s, it was easy for someone to initiate a civil commitment process on an incapacitated person. Not until 1954 did the FDA approved the first antipsychotic medication, Thorazine.

Advocacy for the mentally ill at the global level began with the U.N. in 1948 and its Universal Declaration of Human Rights, whose Article 25 included medical care. The U.S. adopted this resolution but does not necessarily follow it. Other global agreements and the World Health Organization (WHO) support a right to health care, but so far the U.S. Supreme Court has not recognized this right.

At the national level, the United States follows the Constitution, legislation written into the Code of Federal Regulations, executive branch regulations and executive orders, and judicial branch opinions and rulings involving constitutional matters, federal statutes, and areas of conflict in individual state laws.

The Constitution is based on English common law and maintains individual freedom from involuntary detention or servitude, but it permits exceptions such as for criminal acts. It provides freedom to make choices about our lives but has exceptions for public welfare and for individual incapacity. It protects individuals from unrelieved state power with equal protection of due process and allows individuals to challenge detention with a writ of *habeas corpus*.

In 1949, the National Institute of Mental Health was established. In 1963, John F. Kennedy signed the Community Mental Health Centers Act, designed to deinstitutionalize patients and treat locally those who are a danger to self or others—but its provisions were never fulfilled. In 1964, the Civil Rights Act

included mental health treatment for the gravely disabled. In 1965, Medicare and Medicaid were created, under which society assumes a share of responsibility for care of the mentally ill. In 1990 came the Americans with Disabilities Act (ADA), which protects against discrimination of the physically or mentally impaired and ensures they have the same rights as everyone else, and in 1996 came the Health Insurance Portability and Accountability Act (HIPAA), which provides for patient confidentiality.

A Supreme Court case in 1999 involving ADA resolved self-determination for people with disabilities, saying they could receive state-funded treatment in the community if a professional approves it, the person does not object, and reasonable accommodation can be made. But the ruling did not say the person *must* be held in the community. Each person is entitled to treatment in the most integrated setting with the least amount of restraint.

Medicare is a federal insurance program for people over 65, and those younger in some cases, regardless of income. However, it limits payment for treatment in a psychiatric hospital to 190 days over a person's lifetime—a limit that does not apply to medical care. Both NAMI and FASMI support repeal of this limitation.

Medicaid (in California, Medi-Cal) is an assistance program for people under 65 based on income and assets. It is co-run by the federal and state governments, and states can adopt and expand its programs. However, Medicaid has an Institution for Mental Diseases (IMD) exclusion that prohibits payment for patients in mental hospitals with more than 16 beds—which are most of the major hospitals like Alameda County's John George Pavilion. States can seek a waiver, and California has one for substance abuse but not for serious mental illness. HR2611 seeks to repeal the IMD exclusion.

HIPAA was intended to protect release of a patient's sensitive information to health care providers, insurance companies, and employers. It permits giving information to families and caregivers, but many providers don't understand this. The patient can also sign a release but then verbally rescind it.

At the state level, California also has constitutional, legislative, executive, and judicial influences on mental health care. The largest was the Lanterman-Petris-Short (LPS) Act of 1967, which wrote into the Welfare & Institutions Code Sections 5150, 5250, and others. These were intended to end inappropriate involuntary detention and create a right to prompt psychiatric evaluation and treatment as a matter of due process. They apply to people who are "a danger to self or others or gravely disabled" and provide a series of staged evaluations with a hearing before a judge at the end of 72 hours and then after 14 days of detention. Involuntary use of antipsychotic medications is not permitted except in emergencies.

Gravely disabled is defined as "unable to provide for personal needs for food, clothing, and shelter" and is vague and inconsistently applied. A person clothing themselves out of a garbage can and eating roadkill is not considered disabled. California's AB2020 would amend this to include mentally ill people incapable of making informed decisions or providing for themselves without supervision and at risk of bodily harm, worsening condition, or psychiatric deterioration. It recognizes

that a person with anosognosia—denying their illness—may also be gravely disabled.

Conservatorships for the mentally ill are complicated. Probate conservatorships are for people who can't make decisions—often the elderly—and are carefully monitored. LPS conservatorships are for people gravely disabled due to a mental disorder, are appointed a public guardian (not necessarily a family member), and the guardian cannot mandate psychiatric medications but can authorize involuntary placement in a licensed hospital or facility. In Alameda County there are just nine deputies serving as guardians, and each has a caseload of 40 to 50 patients.

The Mental Health Services Act (MHSA), based on Proposition 63 passed in 2004, levies a 1% tax on people with million-dollar incomes to build a fund for people with serious mental illness. The problem is that the money sometimes just replaces other funds that the county can now spend for other purposes. It is also susceptible to expansion, such as school programs intended to prevent mental illness and substance use disorders—which were added in a 2021 amendment.

In 2002, California adopted Assisted Outpatient Treatment (AOT) and is now weighing the just-proposed SB1338, which would establish CARE Court. This is a plan to provide services to the homeless with psychiatric disorders and allow another person close to the patient to petition for clinical evaluation and treatment. For details see CARE Court at the California Health and Human Services website. The state is also studying a proposed right to mental health care with SB1446.

Mental health care in California is provided by the counties, and Alameda County's record is not the greatest. There have been a number of lawsuits to correct this.

A case from 2018 was recently settled to improve the condition of mentally ill people in jails, with an order for the county to provide the sheriff's department and jail facilities with more funding and staff to treat patients.

Another suit, by the group Disability Rights California, seeks to correct the lack of community-based services. It says that John George is overused, and that lack of appropriate services leads to people being recycled through the system.

FASMI, in a protest early in March, demanded that the Board of Supervisors address the need for acute and subacute care beds in the county. With a population estimated at 1,685,000 and growing at a rate of 0.27% per year, Alameda is California's eighth largest county, yet it has only 200 hospital beds for psychiatric patients. Based on the best estimates of needed services, it should have more than 1,000 beds.

This is a situation we are all working to correct, along with housing, treatment, and patient advocacy.

If you have questions, you can contact Paula Aiello at paulaforjustice@gmail.com.