

## **Summary of Testimony for the House Judiciary and Health Care Committees in Support of Stakeholder Draft - Duty to Warn Bill**

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The Legislature should negate the Supreme Court's Kuligoski decision because the new legal duty created by the decision causes patient harm when applied in other circumstances.

- Kuligoski radically changed the legal duties for all mental health professionals and changes their relationship to patients and people that support patients in a way that directly conflicts with the Legislature's established recovery-oriented perspective.
- Before Kuligoski, under the Peck standard, mental health professionals had a legal duty to identify situations where a patient's current condition presented a serious and imminent risk to an identifiable potential victim(s). In such an event, the mental health professional has a duty to take reasonable steps to protect third parties.
- Kuligoski creates an affirmative duty for all mental health professionals (MHP) to divert their focus away from their patients' current condition and requires the MHP to look for anything in the patient's past that would cause a court to label a patient as having "violent propensities."
- The legal duty applies even where the patient is being treated successfully and the patient and people that support the patient are engaged in the patient's recovery. The duty is triggered by the patient's history and information regarding "violent propensities" regardless of the patient's current condition.
  - The legal duty based on violent propensity causes patients to be permanently defined by their worst day.
  - The Court's opinion refers to the concept of violent propensities 12 times without reference to any supporting clinical evidence while stating that the consideration of policy arguments and evidence is appropriate for legislative action.
  - "Violent propensity" is not a clinical concept and there are no evidence based guidelines or assessment tools that a mental health professional could use as a part of a typical regular practice to accurately predict future risks.
- Kuligoski requires mental health professionals to communicate information to informal caregivers regarding unpredictable future risks and the caregivers' responsibilities to monitor the patient's and condition and take action to prevent harm to unidentified third parties.
  - The legal duty transforms the relationship -- between treatment providers and patients and the people that support them -- from an educational and supportive relationship to a legalistic relationship that creates potential liability for anyone that supports a patient.
  - The Kuligoski decision causes patient harm because it (1) degrades the support systems that patients need to recover from illness, (2) causes unnecessary disclosure of patient information that leads to discrimination and other negative consequences for patients; (3) prolongs hospitalizations for people who are labeled as having "violent propensities; and (4) makes community treatment providers reluctant to work with patients who are struggling, which has led to unnecessary referrals to the involuntary treatment system.

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The Kuligoski decision's use of "violent propensity creates an irreconcilable conflict with HIPAA, which prohibits providers from disclosing patient information unless there is a "serious and imminent risk of harm."

- The violent propensity standard creates a duty that is based on future risk that conflicts with HIPAA's limitation on disclosure of information based on imminent risk.
  - In relation to a duty to warn, a provider can only disclose protected health information where there is a "serious and imminent threat" to health and safety" 45 CFR 164.512(j)
  - HIPAA controls all disclosures because State law cannot be less privacy protective than HIPAA
  - When the U.S. Dept. of Health and Human Services was developing the HIPAA privacy regulations in the late 1990s, HHS created the "serious and imminent" standard based on their review of duty to warn cases like Tarasoff and Peck.
  - The conflict between HIPAA and Kuligoski creates an incentive for mental health professionals to over rely on conveying information to informal caregivers because HIPAA limits their ability to disclose information outside of the treatment relationship. This allows the provider to discharge their legal duty by conveying information to a person that is not qualified or potentially capable of using or acting on the information they receive.

The Stakeholder draft bill provides a clear standard that all mental health professionals can follow and restores the balance between patient's rights and dignity with the reasonable needs for safe mental health treatment.

- Subsection (c) of the bill emphasizes the broad legal responsibilities of hospitals and mental health providers for providing safe patient care while seeking to restore the supportive treatment relationships between mental health professionals and their patients and the people that support them.
- The bill creates a clear statutory standard that all mental health professionals are currently trained to understand and comply with.
- The Legislature's adoption of the common law Peck standard would recognize the legal consensus regarding the established duty to warn standard while avoiding the creation of a new discriminatory statutory standard that is not supported by any clinical evidence.