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Director

MENTAL HYGIENE LEGAL SERVICE
APPELLATE DIVISION, FOURTH DEPARTMENT

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November 5, 2015

New York State Office of Indigent Legal Services
William J. Leahy, Director
Alfred E. Smith Bldg.
80 S. Swan Street, 29th Floor
Albany, New York 12210

Re: Determining Eligibility of County Law 18-B in Assignment of Counsel

Dear Director Leahy:

I write as the Director of Mental Hygiene Legal Service ("MHLS") for the Fourth Judicial Department. The Service is an auxiliary agency of the Appellate Division that operates pursuant to Article 47 of the Mental Hygiene Law (MHL) to provide legal services and assistance to individuals who are mentally disabled and alleged to be in need of care and treatment in facilities.

We understand that the purpose of the Office of Indigent Legal Services ("Office") is to monitor, study and make efforts to improve the quality of services provided pursuant to Article 18-B of the County Law. While MHLS does not provide legal services under the County Law, the operation of Article 18-B does impact our constituents who may, in some cases, have assigned counsel other than MHLS. Thus we write to offer our support for a recent policy statement issued by the New York State Defenders Association ("NYSDA") on the Criteria and Procedures for Determining Eligibility in New York. NYSDA urged you to consider whether persons who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or who have incomes below a fixed multiple of federal poverty guidelines should be deemed eligible and be represented by public defense counsel until that representation is waived or a determination is made that they are able to afford private counsel. We concur and write to offer examples of how our constituents are negatively impacted by rules requiring them to establish eligibility for the services of assigned counsel.

Office of Indigent
Legal Services

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As an example, County Law § 722 now provides that each county shall have in place a plan for providing counsel to indigent respondents subject to sex offender civil management proceedings (MHL article 10). More specifically, upon the filing of a sex offender civil commitment petition, the appointment of counsel is required (MHL § 10.06[c]). The statutory framework anticipates the appointment of MHLS as counsel "if possible" (*id.*). If that is not possible, the Court shall appoint an attorney eligible for appointment pursuant to Article 18-B of the County Law or an entity, if any, that has contracted for the delivery of legal representation services under subdivision MHL § 10.15(c). The same rules apply for the representation of respondents on appeal cases (MHL § 10.13). Any fees or expenses incurred by counsel shall be a State charge (MHL § 10.15[a]). So clearly, in such cases, standards used to determine the availability of MHLS representation, and if necessary, representation by assigned counsel, are tied to the eligibility standards used by 18-B programs.

Respondents in Article 10 proceedings, in particular, would benefit from the presumption of eligibility as urged by NYSDA. The initial proceedings almost always are initiated while the respondent is still in prison, often shortly before their discharge from prison on a criminal sentence, and the individual is almost always immediately thereafter placed in a psychiatric facility to await further Article 10 proceedings, with no chance of bail given the civil nature of the proceedings. The liberty interest at risk is immediate, and after over seven years since the implementation of Article 10, I can say with confidence that the vast majority of respondents are indigent and would otherwise qualify for the appointment of counsel. Practices vary around the State, but there are cases where the Service or private counsel is not available to assist the respondent until an order is signed upon the court being satisfied the respondent is indigent, sometimes upon the very date when their right to a hearing matures.

In another important respect, residents of mental health facilities should be given the benefit of the suggested presumption of financial need. Diversion of mentally ill individuals charged with crimes, not only in our local jails, but in mental institutions, is recognized as a valid goal of both the corrections and court systems. This goal would be greatly enhanced if assigned counsel programs could provide legal representation of such individuals facing criminal charges upon request. Often criminal defendants spend time in jails and mental health facilities under mental health care before an attorney is ultimately assigned, sometimes with counsel being assigned only after the facility involved recommends the criminal proceedings be resumed. For example, Correction Law 508 permits a local jail to send a mentally ill inmate with charges pending to a local mental health facility for treatment. While notice to the inmate's counsel is anticipated by the statutory scheme, in many cases the person confined in jail may not yet have an attorney appointed, and cannot otherwise afford counsel, lengthening periods of confinement. The due process concerns inherent in such ambiguity are apparent.

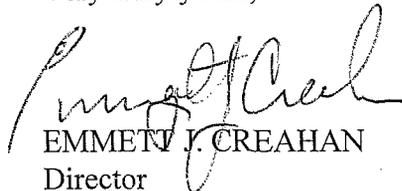
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Indeed, while reasons may vary, the Office of Mental Health does report that detainees with mental illness and substance abuse disorders will remain incarcerated 4-5 times or days longer than similarly charged individuals without such disorders (*see*, Office of Mental Health, Providing Mental Health Services in Local Detention/Correctional Facilities: <http://www.omh.ny.gov/omhweb/forensic/manual/html/chapter2.htm> - last accessed 11/02/15). Timely access to assigned counsel may improve the circumstances of these individuals.

Finally, those facing parole violations are another group that when incarcerated can spend a substantial period of time receiving mental health care as inpatients before the court is advised that proceedings may be resumed (*see e.g., Lopez v. Evans*, 25 NY3d 199 [2015] - parole violation proceeding cannot proceed when respondent has been deemed to be incapacitated). The availability of counsel based upon the presumption advanced by the NYSDA could serve to foster advocacy for these individuals, through advocacy for treatment in lesser restrictive settings for restoration of capacity, *i.e.*, counsel may be successful in advocating for outpatient as opposed to inpatient care in such cases.

We offer these comments in the hope they might aid your Office in its future deliberations. Thank you for your consideration.

Very truly yours,


EMMETT J. CREAHAN
Director