

Use of Records for Kendra's Law Faulted for Violating Privacy Act

NYLJ

5/11/11

BY JOEL STASHENKO
ALBANY

GOVERNMENT agencies seeking to force the mentally ill to undergo treatment cannot access a patient's health records without the patient's knowledge, the state Court of Appeals ruled unanimously yesterday.

Privacy rules in the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996 shield the records except by subpoena or a court order. In either event, the patient must be notified that a government entity is seeking medical records, the Court said in *Matter of Miguel M.*, 76.

Miguel M. was contesting a finding that he had to receive six months of "assisted outpatient treatment" under New York state's so-called Kendra's Law. The law was adopted in 1999 to compel mentally ill people who are deemed to be a danger to themselves or to others to receive treatment.

Dr. Charles Barron, as an agent for the New York City Department

It seems only fair, and no great burden on the public agencies charged with enforcing Kendra's Law, to give patients a chance to object before the records are delivered."

—Judge Smith



of Health and Mental Hygiene, applied for an order to force Miguel M. to take his medication.

Dr. Barron said at a hearing on whether to order treatment that two hospitals voluntarily gave him records on Miguel M., which detailed three hospitalizations for mental illness at Elmhurst and Holliswood hospitals in Queens.

One requirement for ordering a patient into assisted outpatient treatment under Kendra's Law are

two prior psychiatric hospitalizations prompted by the patients' non-participation in a treatment regimen.

Miguel M.'s attorney argued that the patient never authorized the release of the hospital records and that they should not be used for an assisted outpatient treatment determination.

The Court yesterday said release of the records violated HIPAA.

"We can see no reason, and Barron has suggested none, why notice should not have been given here," Judge Robert S. Smith wrote for the Court. "It may well be, in this case as in many others, that no valid ground for withholding the records exists; courts ruling on disclosure issues will surely be conscious, as we are, of the strong public interest in seeing that mentally ill people who might otherwise be dangerous receive necessary treatment."

But Judge Smith » Page 2

The Court of Appeals decisions begin on page 26.

Now at nylij.com

Kendra's Law

Continued from page 1

wrote that "it seems only fair, and no great burden on the public agencies charged with enforcing Kendra's Law, to give patients a chance to object before the records are delivered."

Common Legal Issues

The Court rejected New York City's argument in defense of the release of the records that an assisted outpatient treatment investigation is a "public health investigation" or an "intervention" within the meaning of exceptions to HIPAA privacy rules under 45 CFR 164.512.

The public health privacy exception is for combatting emergencies such as outbreaks of serious, contagious diseases, the Court held yesterday.

"To disclose private information about particular people, for the purpose of preventing those people from harming themselves or others, effects a very substantial invasion of privacy without the sort of generalized public benefit that would come from, for example, tracing the course

of an infectious disease," Judge Smith wrote.

The Court noted that the six-month period for Miguel M.'s required treatments expired in 2008 and that its ruling in his case was moot.

But the Court opted to rule on the legal issues because the circumstance was not unique.

"The case presents a novel and substantial issue that is likely to recur and likely to evade review, and that therefore the exception to the rule against deciding moot disputes applies here," Judge Smith wrote.

Since its inception, more than 8,000 people have been treated under Kendra's Law, according to the Treatment Advocacy Center, an Arlington, Va.-based group promoting state civil management laws for people with severe mental problems. It supported the law in New York and assisted outpatient treatment as a way to compel the mentally ill to receive treatment.

In most cases, treatment includes the mandatory psychotropic drugs, which mental health officials verify through urinalysis and other testing.

Patients who persistently resist taking their medications can be arrested, first held for up to 72

hours in psychiatric wards and then committed for six months or one year to secure mental hospitals after officials commence Article 9 hearings against them under state Mental Hygiene Law.

Yesterday's ruling reversed two lower court findings about the use of the medical records.

Chief Judge Jonathan Lippman and Judges Carmen Beauchamp Ciparick, Victoria A. Grafeo, Susan Phillips Read, Theodore T. Jones and Eugene F. Pigott Jr. concurred with Judge Smith's determination.

Dennis B. Feld, deputy director for special litigation at Mental Hygiene Legal Service in Mineola, said attorneys for Miguel M. felt "vindication."

"Basically, it is a declaration that people who may have had psychiatric hospitalizations nevertheless have the same rights under the federal law to the privacy of their health care information as other people," Mr. Feld said.

He said it has been "uniform practice" for petitioners in assisted outpatient treatment cases under Kendra's Law to secure hospitalization records without the patient's permission. He said the practice is common in downstate areas and less common upstate.

Scott M. Wells of Mental Hygiene Legal Service also represented Miguel M.

Tahirih M. Sadrieh, senior counsel in the Corporation Counsel's office who argued for the city, said the city was "very disappointed" with the ruling.

"We feel that the city's investigations pursuant to Kendra's Law serve important public health interests in ensuring that at-risk individuals receive appropriate mental health care," she said in a statement. "Accordingly, we disagree with the Court's assessment that they do not constitute a public health activity within the meaning of HIPAA's implementing regulations. We are reviewing the decision and exploring our options on how to proceed."

Kendra's Law, Mental Hygiene Law §9.60, was named for Kendra Webdale, who was killed when she was shoved in front of a subway train by a schizophrenic who had refused to take his medication.

Miguel M. was described in court papers as a man with a schizoaffective disorder. He was living with his parents in Astoria, Queens, at the time.

Joel Stashenko can be contacted at jstashenko@alm.com.