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September 11, 2015

Joan Mikula, Commissioner  
Department of Mental Health  
25 Staniford St.  
Boston, MA 02114

Re: DMH Proposed Regulations Implementing Chapter 476 of the Acts of 2014

Dear Commissioner Mikula:

On behalf of the Conference of Boston Teaching Hospitals (COBTH) and its fourteen member institutions, I am writing to voice our general support of the comments offered by the Massachusetts Hospitals Association (MHA) on the proposed regulations implementing Chapter 476 of the Acts of 2014. COBTH and its members support Chapter 476 which adds “reasonable daily access to fresh air” to the listed rights of patients in psychiatric facilities operated, contracted or licensed by the Department of Mental Health (DMH or Department).

Ensuring all patients are provided with and are able to exercise their personal rights while in their care is of the utmost concern to our member hospitals. However COBTH, like MHA, is concerned that the proposed regulations as drafted go beyond the actual language and intent of Chapter 476 and do not provide facilities the flexibility to ensure patient and staff safety while also unintentionally imposing new costs and administrative requirements on hospitals not intended by the legislature. We therefore request the Department to consider the following modifications as well as those submitted by MHA to ensure patients’ access to rights, flexibility for hospitals and control of new costs.

COBTH joins MHA in requesting the following technical changes to the regulations, adding the word “or” after 104 CMR 27.13(5)(f)(4) and 104 CMR 27.13(5)(f)(5). Including the word “or” after both of these subsections will clarify the regulations to show that the factors listed do not all have to be considered by facilities when providing outdoor access to patients. Inclusion of “or” also ties in to the language that the considerations listed “may include, but are not limited to”.

Secondly COBTH agrees with MHA that the example of a “roof deck” in 104 CMR 27.13(5)(f)(2) as an example of an appropriate outdoor space for patients should be struck from the regulations. This example in actuality could have potential liability concerns for both patients and staff and would be better left unlisted. While we understand that the Department listed examples of open space to acknowledge that open space could also include secured and fenced in areas, we believe this point would be clearer if DMH inserted the phrase “but is not limited to” before providing examples and “which” prior to explaining that the space may be secured. As such the regulatory language would now read:

*2. For the purposes of 104 CMR 27.13(f), outdoors shall mean a space or area outside of a building, which may include **but is not limited to:** a porch, courtyard, or open space surrounded by a building, **which** may be fenced, locked or otherwise secured.*

COBTH additionally agrees that combining 104 CMR 27.13(5)(f)(3) subparts (c) and (d) would clarify the regulations as drafted and reduce the potential that hospitals may have to provide duplicative paperwork concerning their outdoor space and patient's access to it. COBTH supports the proposed language provided by MHA which reads:

*(3)(c): Provided however, if a facility determines that it cannot safely provide secure outdoor access, it shall instead document such limitations for review during its application for licensure or license renewal (or upon request of the Department), that it has reviewed all reasonable factors to safely provide access to outdoor space, which may include but shall not necessarily be limited to:*

- i. reasonable capital expenditures to develop, construct or otherwise acquire outdoor space that is safe and secure for patients and staff;*
- ii. staffing capacity and capability to permit staff escorts to ensure the appropriate coverage in the unit or facility as well as to monitor patients accessing fresh air;*  
*or*
- iii. reasonable modifications to building access policies to permit patient access or use of common areas of the facility or proximate to the facility not normally dedicated as patient areas, to allow access to a space or area outside of the building.*

Finally, COBTH feels that the proposed regulations would benefit from the Department clarifying the procedures to be considered for ensuring the safety of staff when providing patients access to fresh air. In 104 CMR 27.13 (5)(f)(5)(b) we, along with MHA, agree that the language should be phrased more broadly to provide facilities the flexibility to work within their own staff capacity and capabilities. We feel this alteration is best reflected in the language provided by MHA which reads:

*“b. availability of staffing capacity with the capability to monitor and supervise access to the outdoors, including reasonable and appropriate staffing for patients not accessing the outdoors, taking into account the number of patients accessing and not accessing the outdoors as well as any provisions for supervision determined by the treating clinician”*

COBTH and its members recognize the time and effort the Department has put into the proposed regulations. We appreciate this opportunity to provide comments on the proposed regulations and are available to answer any questions should they come up.

Sincerely,

A handwritten signature in black ink that reads "John Erwin". The signature is written in a cursive, flowing style.

John Erwin  
Executive Director