

Senate, No. 2540

[Senate, July 12, 2010 – Substituted by amendment by the Senate (Ways and Means) for Senate, No. 45.]

The Commonwealth of Massachusetts



IN THE YEAR OF TWO THOUSAND AND TEN

AN ACT RELATIVE TO LEVEL IV TREATMENT INTERVENTIONS

Be it enacted by the Senate and House of Representatives in General Court assembled,

And by the authority of the same, as follows:

1 **SECTION 1.** Chapter 6A of the General Laws is hereby amended by adding the
2 following section:-

3 Section 16P. (a) As used in this section, the following words shall, except as otherwise
4 provided, have the following meanings:-

5 "Department", the department of mental retardation, or its successor, the department of
6 developmental services, established in chapter 19B.

7 "Executive office", the executive office of health and human services.

8 "Individual treatment plan", a plan approved by the statewide peer review committee
9 pursuant to regulations promulgated under this section.

10 "Level IV treatment intervention", any procedure which involves the systematic use of
11 noxious or intrusive stimuli which are generally known to be painful or otherwise unpleasant to
12 individuals including, but not limited to, procedures that: (i) cause physical pain to the
13 individual, whether administered directly or through intermediate devices, such as skin electric
14 shock, inhalants or ingestible substances but excluding alcoholism treatments including, but not
15 limited to, Disulfram, Antabuse or Antabus; (ii) involve sleep or food deprivation; (iii) include
16 the introduction of additives to make food unpleasant; or (iv) involve the prompting of an
17 individual to engage in a behavior which then results in an aversive stimulus being applied as a
18 punitive consequence.

19 "Secretary", the secretary of health and human services.

20 (b) A classification of behavioral treatment interventions, to be known as Level IV
21 treatment interventions, is hereby established and shall be utilized by the department. The
22 department shall adopt rules and regulations consistent with this chapter relative to the use of
23 Level IV treatment interventions to address behaviors that present a pattern of conduct or
24 behavior caused by a disorder which poses a serious danger or risk of injury or harm to self or
25 others by any consumer of a public or private agency in the commonwealth receiving public
26 funding or subsidy through the federal government, the commonwealth, any of its political
27 subdivisions or another state or political subdivision thereof. Such regulations shall govern all
28 uses of such procedures in the commonwealth by any public or private agency receiving public

29 funding through the federal government, the commonwealth, any of its political subdivisions or
30 another state or political subdivision thereof.

31 Level IV treatment interventions shall be used as a method to address dangerous or self-
32 destructive behaviors that directly present a clear risk of injury or harm to self or others. Level
33 IV treatment interventions shall not be used for addressing a minor behavior problem, even if
34 such behavior is identified as an antecedent to targeted challenging behavior. Level IV
35 treatment interventions shall be an option only if reinforcement-based interventions and other
36 less intrusive treatments have failed, including programs developed by clinicians specially
37 skilled in positive behavior supports. Documentation of the application of all less intrusive
38 interventions and the completion of formal procedural reliability assessments shall be provided
39 in all proposed Level IV treatment intervention submissions.

40 Level IV treatment interventions shall be restricted to those techniques and procedures
41 that are considered as evidence-based practices and meet the standards of being scientifically
42 validated, as demonstrated by publication thereof in peer-reviewed professional journals. All
43 such proposed interventions shall have been demonstrated as clinically effective in the reduction
44 of similar topographies of challenging behaviors with participants within similar age ranges,
45 diagnostic categories and settings. Proposed interventions for children shall be consistent with
46 the Individuals with Disabilities Education Act of 2004 and the No Child Left Behind Act of
47 2001.

48 (c) There shall be a statewide peer review committee on Level IV treatment
49 interventions, hereinafter called the statewide committee, consisting of 5 members appointed by
50 the governor for terms of 3 years. The statewide committee shall be located within, but not

51 subject to control by, the executive office. Members of the statewide committee shall be
52 residents of the commonwealth and citizens of the United States. Two members of the
53 statewide committee shall be licensed psychologists, who meet the guidelines and standards of
54 clause (2) of subsection (d), have 10 or more years of experience in applied behavior analysis
55 and behavior treatment of severe behavior problems, and have been actively engaged in the
56 practice of applied behavior analysis and behavior treatment of severe behavior problems for
57 licensed independent behavior analysts in the commonwealth or board certified behavior
58 analysts who meet the guidelines and standards of clause (2) of said subsection (d), have 10 or
59 more years of experience in applied behavior analysis and behavior treatment of severe behavior
60 problems and have been actively engaged in the practice of applied behavior analysis and
61 behavior treatment of severe behavior problems for the 5 years next preceding their
62 appointment. One member of the statewide committee shall be selected from, and shall
63 represent the public, subject to section 9B of chapter 13.

64 In the case of a public or private agency in the commonwealth that receives public
65 funding from another state or jurisdiction and seeks to utilize a Level IV procedure with a client
66 whose permanent residence is located within that state or jurisdiction, such state or jurisdiction
67 may recommend an individual who meets the guidelines and standards of clause (d) below to
68 serve as an “ad-hoc”, sixth member of the statewide committee to review any or all proposed
69 Level IV treatment interventions for residents from such state or jurisdiction.

70 The statewide committee shall: (i) oversee the implementation of Level IV treatment
71 interventions with any person in the commonwealth served by a public or private agency
72 receiving public funding or subsidy through the federal government, the commonwealth, any of
73 its political subdivisions or another state or political subdivision thereof; (ii) appoint a chair

74 from among its permanent members; (iii) review individual treatment plans and make
75 recommendations to the probate and family court relative to the approval or denial of Level IV
76 treatment interventions within such treatment plans; (iv) review and make recommendations to
77 the department relative to guidelines and standards for facility peer review committees; (v)
78 review and make recommendations to the executive office for any requested exclusions or
79 waivers from the regulations governing Level IV treatment interventions; and (vi) request
80 assistance from the executive office in order to fulfill its duties, as necessary. The executive
81 office may provide technical, technological, operational and administrative support as
82 requested.

83 Members of the statewide committee may participate in any meeting by means of a
84 conference telephone or similar communications technology by which all persons participating
85 in the meeting may simultaneously hear one another, and participation by such means shall
86 constitute in-person presence at such meeting. Members may transmit or receive any written
87 materials discussed at a meeting and transmit any written authorizations that may be required
88 during the meeting by electronic facsimile or other commercially acceptable transmission. A
89 quorum shall consist of not less than a majority of the members of the statewide committee
90 participating in the meeting.

91 A member of the statewide committee shall be indemnified from any civil action
92 brought for damages to the same extent as provided for public employees in chapter 258, and
93 shall be indemnified for all expenses in the defense thereof if the claim arose out of acts
94 performed by such member while acting in the lawful scope of such member's official duties.
95 A member of the statewide committee, however, shall not be considered a public employee by
96 virtue of the member's membership on the statewide committee.

97 (d) All Level IV treatment interventions shall be designed by an individual who is a
98 licensed applied behavior analyst, or is a board certified behavior analyst, or holds specialty
99 certification in cognitive and behavioral psychology from the American Board of Professional
100 Psychology, or is a licensed psychologist with verified education, professional training and
101 experience in applied behavior analysis and behavioral treatment and 5 years of full-time
102 experience serving individuals within the same age range and diagnostic category,
103 demonstrating similar topographies of challenging behaviors and utilizing similar treatment
104 approaches as those proposed in the Level IV plan under review. Individuals responsible for the
105 design of Level IV treatment interventions shall comply with the ethical principles of
106 psychologists and the code of conduct of the American Psychological Association. All Level
107 IV treatment interventions submitted for review and approval shall meet the standards outlined
108 within the guidelines for responsible conduct of the behavior analysis certification board and
109 include documentation that the challenging behaviors being addressed are not a function of a
110 medical or psychiatric disorder. Such proposed interventions shall include evidence of the
111 completion of a formal comprehensive functional behavioral assessment, a preference
112 assessment and reinforcement strategies designed to teach functionally equivalent replacement
113 behaviors. In addition to the ongoing empirical measurement of all targeted challenging and
114 replacement behaviors throughout any approved Level IV treatment intervention, such Level IV
115 treatment interventions shall include ongoing objective documentation of the trauma suffered by
116 the individual or others as a result of the challenging behaviors addressed within the treatment
117 plan.

118 (e) Level IV treatment interventions shall be implemented only by staff persons who
119 have received specific training in the application of the intervention and the individualized

120 treatment plan. Documentation listing all qualified staff who received training in the Level IV
121 treatment intervention and the individuals who designed the treatment protocol and who
122 administered each application of the Level IV treatment intervention shall be incorporated in the
123 client record.

124 All level IV treatment interventions shall be implemented under the direct supervision
125 and physical presence of a licensed applied behavior analyst, a board certified behavior analyst,
126 a professional with specialty certification in cognitive and behavioral psychology from the
127 American Board of Professional Psychology, or a licensed psychologist with verified education,
128 professional training and experience in applied behavior analysis and behavioral treatment.

129 (f) Each facility seeking to use Level IV treatment interventions shall establish a facility
130 peer review committee, hereinafter called the facility committee, whose membership shall
131 include a minimum of: (1) 2 licensed applied behavior analysts or board certified behavior
132 analysts or psychologists with verified education, professional training and experience in
133 applied behavior analysis and behavioral treatment; (2) 1 psychologist with broad clinical
134 expertise outside the specialty of applied behavior analysis; (3) 1 physician; and (4) 1 member
135 of the public who shall not, nor shall have been within the period of 5years immediately
136 preceding his appointment, either employed by such facility, a recipient of services from such
137 facility, nor having had any immediate family members been an employee or recipient of
138 services from such facility.

139 Prior to application to the statewide committee for authority to implement a Level IV
140 behavior treatment intervention, consent shall be obtained from the client, if competent, and the
141 facility committee.

142 In the case of an emergency, the agency serving the individual shall not be required to
143 apply for approval to the facility committee, but shall apply directly to the statewide committee
144 for a 30-day temporary approval of the intervention if that agency has secured informed consent
145 from the client, if competent. If such emergency application is approved by the statewide
146 committee in accordance with clauses (g) and (h), the application shall also be submitted,
147 together with a copy of the statewide committee's vote, to the probate and family court of the
148 county in which the client resides for approval through a substituted judgment review process
149 prior to implementation of the Level IV behavior treatment intervention.

150 (g) Prior to rendering a decision, the statewide committee shall permit the proponent of
151 the use of such intervention and any other interested person the opportunity to present materials
152 in support of, or in opposition to, the proposed treatment plan. Approval of a Level IV
153 treatment intervention by the statewide committee shall require an affirmative vote of a majority
154 of the members participating at the meeting while the Level IV treatment intervention is under
155 review. The decision of the statewide committee shall be in writing, with supporting reasons
156 provided for its decision. A finding by the statewide committee permitting a Level IV treatment
157 intervention relative to any individual treatment plan shall be submitted thereafter to the probate
158 court of the county in which the client resides as part of the court's independent review and
159 approval of such treatment plan.

160 (h) A level IV treatment intervention shall not be initially approved by the statewide
161 committee unless the proponent of the use of such intervention provides clear and convincing
162 evidence, through the evaluation protocol and ongoing behavioral data, that: (i) the target
163 behavior presents an immediate risk of serious physical injury or harm to self or others; (ii) the
164 Level IV procedures will lead to positive outcomes and a significant decrease in the target

165 behaviors; and (iii) that less intrusive treatments continue to be unsuccessful or would present
166 an immediate risk of serious physical injury or harm.

167 Level IV treatment interventions may be initially approved for not more than 30 days by
168 the statewide committee and may be re-approved thereafter for additional 30-day periods not to
169 exceed 6 months. Request for re-approval shall be subject to such conditions as the statewide
170 committee may designate, including a review of all existing data to confirm that the use of the
171 Level IV treatment intervention has led to positive outcomes and a significant decrease in the
172 target behaviors. Any request for the use of the Level IV treatment intervention beyond the 30-
173 day trial shall require re-submission to the statewide peer review committee and the probate
174 court of the county in which the client resides as part of the court's independent review and
175 approval of said treatment plan. The statewide committee shall petition the commissioner of the
176 department to review all cases in which the continued use of Level IV treatment interventions
177 are requested beyond the 6-month limit.

178 (i) The secretary may, after a hearing pursuant to chapter 30A, deny, refuse, revoke,
179 limit or suspend a license of any recipient of funding or subsidy through the executive office for
180 failure to comply with this section.

181 Except for emergency regulations adopted pursuant to section 2 of chapter 30A, any
182 regulation, as defined in section 1 of said chapter 30A, or any amendment or repeal of any such
183 regulation adopted by the department pursuant to this section, shall, after compliance with this
184 section and said chapter 30A, except section 5, be submitted to the general court. The
185 department shall file the proposed regulation, amendment or repeal with the clerk of the house
186 of representatives, together with a statement of compliance with said chapter 30A, except

187 section 5. The clerk of the house of representatives, with the approval of the president of the
188 senate and the speaker of the house of representatives, shall refer such regulations to the joint
189 committee on children, families and persons with disabilities. Within 30 days after such
190 referral, said legislative committee may hold a public hearing on the regulations and shall issue
191 a report to said department. The report shall contain any proposed changes to the regulations
192 voted upon by the legislative committee. The department and the statewide committee shall
193 review and report and the department shall adopt final regulations as deemed appropriate in
194 view of said report and shall file with the chairpersons of the legislative committee its final
195 regulations. If the final regulations do not contain the changes proposed by the legislative
196 committee, the department shall send a letter to the legislative committee accompanying the
197 final regulations stating the reasons why such proposed changes were not adopted. Not earlier
198 than 45 days after the filing of such letter and final regulations with said legislative committee,
199 the department shall file the final regulations with the state secretary as provided in section 5 of
200 said chapter 30A and the regulations shall thereupon take effect.

201 If no such proposed changes to the regulations are made to the department within 60
202 days of the initial filing of the proposed regulation or any amendment or a repeal of such
203 regulation with the clerk of the house of representatives, the department may file the final
204 regulations with the state secretary as provided in section 5 of said chapter 30A and the
205 regulations shall thereupon take effect.

206 **SECTION 2.** Within 90 days after the passage of this act, the department, with the
207 advice and input of the statewide committee, shall draft, pursuant to chapter 30A of the General
208 Laws, proposed rules and regulations for submission to the General Court relative to the

209 development, review, approval and on-going review and monitoring process for Level IV
210 treatment intervention.

211 **SECTION 3.** The implementation of any Level IV treatment intervention beyond the
212 scope of a court-ordered treatment plan or the approval of the statewide committee, or by a staff
213 member who does not meet the requirements of section 16P of chapter 6A of the General Laws
214 shall be considered an act of mistreatment, pursuant to section 13K of chapter 265 of the
215 General Laws, and shall be reported to the disabled persons protection commission.

216 **SECTION 4.** Except as provided herein, this act shall not otherwise alter the
217 procedures for substituted judgment review by the probate and family court.