NHHA Statement on ACLU-NH Lawsuit Intervention

January 7, 2019

Steve Ahnen, president of the New Hampshire Hospital Association, released the below statement on hospitals’ decision to intervene in the lawsuit brought by the American Civil Liberties Union of New Hampshire (ACLU-NH) against the State of New Hampshire:

ACLU-NH recently filed a lawsuit against the State of New Hampshire for failure to provide timely probable cause hearings for patients in an acute psychiatric crisis in accordance with State law.

While one hospital was named as a party to the lawsuit, hospitals across New Hampshire are intervening in the suit on behalf of our patients because the State is not only depriving them of their constitutional and statutory rights to due process but also failing to provide timely treatment for those patients in an acute psychiatric crisis as required by State law. The ACLU-NH explicitly excluded this important element from their lawsuit. Because this issue is so fundamental to the challenges facing our patients and the broader mental health system, it is imperative that the Court address this issue as part of the ACLU’s litigation.

State law is very clear. When a patient is deemed to be a danger to himself, herself or others and a petition for involuntary emergency admission (an IEA Petition) is completed, the patient is committed to the state mental health system and is to be transferred immediately to an appropriate and specialized site of care – a designated receiving facility (DRF). But the State of NH is not—and has not been for years—in compliance with this requirement, relying on hospitals to hold these patients in their emergency departments (EDs) until a bed becomes available at a DRF. Hospital EDs are ill-equipped to meet the specialized needs of these patients but due to the shortage of DRF beds IEA patients are forced to wait days, sometimes weeks, in hospital EDs before they are transferred to appropriate sites of care.

New Hampshire’s failure to ensure immediate treatment and due process for those in need of mental health care services is morally and ethically wrong, and it does not serve the health care needs of patients. Now is the time to resolve this crisis so that patients with acute psychiatric needs can get the care they need, when and where they need it. We know State policymakers share this priority, and we look forward to partnering with them on solutions this legislative session.

While hospitals agree with a number of the allegations raised in the ACLU lawsuit, we believe the lawsuit’s narrow focus on due process does not fully and adequately address the mental health care needs of IEA patients. Moreover, on the issue of due process, we fundamentally disagree with the ACLU’s claim that holding probable cause hearings in hospital EDs is a viable alternative. Not only is this bad public policy and bad health care practice, it serves to enable and perpetuate the flawed system that exists today. The solution is not to build courtrooms in hospital EDs; the solution is to move these patients to appropriate DRFs where they can get
the care and due process to which they are entitled by state law. Ensuring these hearings take place in a timely manner in the appropriate judicial setting is a State responsibility. As the ACLU alleges, “the responsibility to fix this problematic practice continues to be the State’s.”

Despite this responsibility belonging exclusively to the State, during the Summer and Fall of 2017, several hospitals worked with the NH Department of Health and Human Services, the court system and other stakeholders to design a pilot project for providing probable cause hearings in their emergency departments for patients subject to an IEA Petition. The pilot project evaluated a plan relative to the due process rights of patients subject to IEA Petitions who are waiting transfer to a DRF. Four non-profit hospitals in the state agreed to explore the viability of this pilot project, including possible changes in their emergency departments to facilitate probable cause hearings, for which the State’s Circuit Court System is solely responsible.

Contrary to claims made in the ACLU lawsuit, all stakeholders involved, including State officials, ultimately concluded that safety and security concerns for patients, family members, other patients, as well as hospital and court staff, presented insurmountable barriers to successfully and safely launch the pilot project.

What the current lawsuit does not address is the fundamental issue of a mental health system that fails to provide timely access to mental health care services for every patient who needs it. It is imperative that the State fulfill its obligation to meet the needs of patients seeking mental health care services and address the immediate crisis these patients and their families are facing. Securing timely probable cause hearings is just one of the many significant challenges facing patients who are boarding in hospitals waiting to receive the mental health care they need in the appropriate setting. We are choosing to intervene so that the larger, fundamental issue of ensuring that New Hampshire has adequate capacity to provide the necessary, immediate care for all patients seeking mental health care services is addressed.

Hospitals have long partnered with the State on many critical issues, including funding support for both New Hampshire’s Medicaid Expansion program and the State’s substance abuse prevention, treatment and recovery efforts, to helping establish integrated delivery networks through the Medicaid 1115 Transformation Waiver and a hub and spoke system aimed at enhancing access to resources for those suffering substance use disorders. Even with these successes, there is still much to be done and we look forward to continuing these efforts in partnership with the State and others so that together we can better serve our patients and communities.

Steve Ahnen is president of the New Hampshire Hospital Association