September 12, 2019
By electronic mail to DMH-regulations@state.ma.us

Office of the General Counsel
Department of Mental Health
25 Staniford Street
Boston, MA 02114

Re: Comments on emergency regulation 104 CMR 27.13

Dear Office of the General Counsel:

The Massachusetts Association for Mental Health (MAMH) is pleased to submit the following comments to the Department of Mental Health's emergency regulation, 104 CMR 27.13, regarding the use of drug sniffing canines for searches at Department facilities. We believe the regulation is ill advised and poorly conceived. The proposed language grants permission for facilities to use drug detecting canines without providing even minimal standards for their use. Accordingly, it should be withdrawn.

We, of course, understand the real and immediate need to address the recent drug overdose deaths at the Worcester Recovery Center and Hospital. No one should die from an overdose in a locked mental health facility. We share the Department's desire to prevent any reoccurrence of these tragic incidents. We also very much appreciate the effective efforts that the Department and other state agencies have made to address the very serious problems attendant to illegal drugs. However, for the reasons we set out below, we believe that using drug detection canines has no place in our mental health facilities.

1. The use of drug sniffing dogs is inconsistent with a therapeutic environment.

Drug sniffing dogs are widely viewed as tools of law enforcement. Massachusetts Department of Correction's (DOC) prisons controversially use them to search visitors. Drug sniffing dogs contribute to the perception of a hostile, punitive, and restrictive atmosphere in mental health facilities that are designed to provide treatment in a therapeutic environment. In a study of the attitudes of psychiatric hospital staff and patients, researchers discovered that patients viewed the use of sniffer dogs more negatively than staff, particularly in relation to the need for consent and the perception that the searches were punitive.[1] Residents of Department

[1] Najat Khalifa et al., Police and sniffer dogs in psychiatric settings, Psychiatric Bulletin (2008), available at https://pdfs.semanticscholar.org/365b/7cedbfce14f066fdf379734a68c8ae06e9c5.pdf (last visited September 10, 2019).

facilities have the right to a humane psychological and physical environment. 104 CMR 27.13(6)(d). The use of drug sniffing canines is contrary to that right.

The emergency regulation also applies to visitors. In litigation about the DOC rule, the Supreme Judicial Court noted that the introduction of dog searches "could have a potentially significant impact on the visiting public's experience, including increased wait times, increased anxiety due to a fear of dogs or of false positives, and concerns in connection with allergies."[2] Certainly, discouraging visitation, even indirectly, is countertherapeutic and contrary to the clear intent of the Department's regulations. 104 CMR 27.13(6)(c) (patients "shall have the right to receive visitors of [their]own choosing daily and in private, at reasonable times.").

In a concurring opinion in a case about the use of dogs during a traffic stop, Judge John Greaney wrote, "there is something viscerally disturbing about the use of police dogs in traffic stops—something that hints at the oppressive measures used by police in societies where respect for personal freedom and privacy are devalued or nonexistent."[3] We believe the same can and should be said about the use of dogs in mental health facilities.

2. Drug detection dogs are not infallible and false positives can result in more intrusive searches

The high rates of false positives by sniffer dogs should in itself discourage their use. False alerts may result from traces of drugs on clothing as the result of incidental contact, or from handler error, including misinterpretation of the dog's signals, or consciously or unconsciously signaling the dog where the handler suspects.[4] There is also a potential for a false alert as the result of unconscious signaling or "cueing" from its handler. Although some researchers have concluded that dogs correctly indicated drugs in 50-91% of cases, in at least one instance (in a secondary school) the dogs were wrong 85% of the time.[5]

Research is also clear that dog handlers powerfully influence outcomes, reducing accuracy. As the Supreme Court has noted, "even assuming a dog is generally reliable, circumstances surrounding a particular alert …if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions" may raise questions about reliability.[6]

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[2] *Carey v. Commissioner of Correction*, 479 Mass. 367, 372 (2018).
[3] *Commonwealth v. Feyenord*, 445 Mass. 72, 88–89 (2005)(Greany, J concurring in judgment).
[4] *See, United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990)(we are mindful that less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing,' may well jeopardize the reliability of dog sniffs"); *United States v. $80,760.00*, 781 F.Supp. 462, 478 (N.D.Tx. 1991)(Reliability problems arise when the dog receives poor training, has an inconsistent record, searches for narcotics in conditions without reliability controls, or receives cues from its handler.).
[5] https://www.aclu.org/press-releases/nine-mile-falls-school-district-abandons-drug-sniffing-dog-searches?redirect=drug-law-reform/nine-mile-falls-school-district-abandons-drug-sniffing-dog-searches.
[6] *Florida v. Harris*, 568 U.S. 237 (2013).

Moreover, minority groups may be subject to increased false positives. For instance, the Chicago Tribune found that although dogs that correctly "alerted" to alleged drugs 44% of the time, were correct only 27% of the time when the driver was Hispanic.[7]

3. Consent to search may be infrequent when dogs are used.

Long standing Department regulations properly require a patient's consent to, and a right to be present during, a search in non-emergency situations. We are concerned that because of their very nature many dog searches will be deemed emergencies. At any rate, the emergency regulation is completely silent on what circumstances constitute an emergency.

4. Dog sniffing may not be effective.

There is little or no evidence that using drug sniffing canines actually decreases the amount of contraband in facilities. One of the reasons may be that at least some drugs may be brought in by staff and, unlike patients and visitors, staff are often not searched. Recent incidents in prisons[8] demonstrate what may also be a problem in mental health facilities.[9]

5. Alternatives

The use of dogs, in the end, may be more a cosmetic response than a real solution. Rather than creating a more prison-like atmosphere at its facilities, it would be better for the Department to institute reasonable security measures that do not infringe on the rights of patients and their families and visitors. Moreover, the Department should increase its efforts to provide effective voluntary treatments for people with substance use disorders.

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[7] Eyder Peralta, Report: Drug-Sniffing Dogs Are Wrong More Often Than Right, NPR (Jan. 7, 2011), (review of three years of cases in which law enforcement used dogs to sniff out drugs in cars in suburban Chicago), available at https://www.npr.org/sections/thetwo-way/2011/01/07/132738250/report-drug-sniffing-dogs-are-wrong-more-often-than-right (last visited September 10, 2019).

[8] *See, e.g.*,Phil Davis, Jessup Prison Employee, Two Others, Plead Guilty to Racketeering in Drug Smuggling Scheme, Baltimore Sun June 24, 2019 available at https://www.baltimoresun.com/news/crime/bs-md-ci-cr-mcdaniels-jessup-prison-drugs-20190724-c3z2lz2xlzhwpgk6toidl2rzyq-story.html (last visited September 10, 2019) and Michael Schwirtz & Michael Winerep, Drug Smuggling Charges for Rikers Island Officers, New York Times, July 29, 2014, available at https://www.nytimes.com/2014/07/30/nyregion/officers-charged-with-smuggling-drugs-onto-rikerhttps://www.npr.org/sections/thetwo-way/2011/01/07/132738250/report-drug-sniffing-dogs-are-wrong-more-often-than-rights-island.html (last visited September 10, 2019);

[9] Brian Biscobing, Who's Smuggling Contraband into AZ State Hospital? ABC !% Arizona, May 5, 2016 available at https://www.abc15.com/news/local-news/investigations/az-state-hospital-dealing-with-dozens-of-recent-contraband-incidents (last visited September 10, 2019)(staff and patients being investigated for contraband).

We urge you not to adopt the emergency regulation as a final rule. MAMH stands ready to continue work with the Department to find lasting solutions to the drug use problems faced by citizens of our Commonwealth.

Sincerely,

Danna Mauch
President and CEO