

HOUSE BILL REPORT

E2SHB 2060

As Passed House:
March 4, 2015

Title: An act relating to timeliness of competency evaluation and restoration services.

Brief Description: Concerning competency evaluation and restoration services.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Jinkins and Ormsby).

Brief History:

Committee Activity:

Judiciary: 2/17/15, 2/19/15 [DPS];

Appropriations: 2/25/15, 2/27/15 [DP2S(w/o sub JUDI)].

Floor Activity:

Passed House: 3/4/15, 83-15.

Brief Summary of Engrossed Second Substitute Bill

- Establishes maximum time limits for the provision of competency-related evaluation and restoration services.
- Establishes affirmative defenses against an allegation that the Department of Social and Health Services (Department) has exceeded maximum time limits and requires additional information to be provided with a competency referral.
- Encourages the Department to develop alternative locations for competency restoration services for individuals who do not need inpatient psychiatric hospitalization.
- During the 2015-2017 biennium, allows the Department to contract with cities or counties to provide competency restoration in a city or county jail under certain conditions.
- Provides that competency restoration time limits include only the time the defendant is at the treatment facility and do not include reasonable time for transport.
- Extends the expiration date of a statute that provides for state reimbursement to counties for the costs of appointing independent competency evaluators for

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in-custody defendants, and expands the grounds under which a county may request the reimbursement.

- Provides that a statute limiting the correctional confinement of a person under the forensic laws applies only to persons who are criminally insane.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Muri, Orwall, Stokesbary and Walkinshaw.

Staff: Edie Adams (786-7180).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Judiciary. Signed by 18 members: Representatives Hunter, Chair; Ormsby, Vice Chair; Carlyle, Cody, Dunshee, Hansen, Hudgins, S. Hunt, Jinkins, Kagi, Lytton, Pettigrew, Sawyer, Senn, Springer, Sullivan, Tharinger and Walkinshaw.

Minority Report: Do not pass. Signed by 12 members: Representatives Chandler, Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Condotta, Dent, Haler, G. Hunt, MacEwen, Magendanz, Schmick, Taylor and Van Werven.

Minority Report: Without recommendation. Signed by 2 members: Representatives Fagan and Stokesbary.

Staff: Andy Toulon (786-7178).

Background:

Incompetent to Stand Trial.

A criminal defendant is incompetent to stand trial if, due to a mental disease or defect, he or she lacks the capacity to understand the nature of the proceedings or is unable to assist in his or her own defense. A defendant who is incompetent may not be tried, convicted, or sentenced for a criminal offense as long as the incompetency continues.

Competency Evaluations and Restorations.

When a defendant's competency is in question, the court must either appoint, or ask the Department of Social and Health Services (Department) to designate, a qualified expert to evaluate and report on the defendant's mental condition. The evaluator must assess the defendant in a jail, detention facility, the community, or the court, to determine whether an inpatient commitment is needed to complete an accurate evaluation. If an inpatient commitment is not necessary, the evaluator will complete the evaluation.

If a defendant charged with a felony is found incompetent, the court may order restoration treatment for up to 90 days, except if the defendant's highest charge is a class C felony or a nonviolent class B felony, the maximum time for the first restoration period is 45 days. A second period of restoration treatment for up to 90 days may be ordered if necessary and reasonably likely to restore competency. Under limited circumstances the court may order a third period of restoration treatment for up to six months.

A defendant charged with a serious non-felony offense is eligible for one period of inpatient competency restoration for up to 14 days plus any unused evaluation time. This restoration treatment period includes only the time the defendant is at the treatment facility and does not include time for transport to or from the facility.

If a defendant cannot be restored to competency within the specified time periods, the criminal case must be dismissed without prejudice and the defendant must be evaluated for potential civil commitment.

The Department has historically provided competency restoration services at the state psychiatric hospitals, although there is statutory authority for restoration treatment to be provided in an alternative facility determined by the Department.

Performance Targets for Competency Services.

Legislation enacted in 2012 established the following performance targets for the completion of competency-related services for criminal defendants:

- seven days for the state hospital to extend an offer of admission for inpatient competency-related evaluation and restoration services;
- seven days for completion of an evaluation in jail and distribution of the evaluation report for a defendant in pre-trial custody; and
- 21 days to complete an evaluation in the community of a defendant released from custody.

The performance target time periods run from the date the state hospital receives court referral and charging documents, discovery, and criminal history information relating to the defendant.

A non-exclusive list of factors that may inhibit the ability of the Department to achieve these performance targets is provided in statute, including: the lack of medical clearance information necessary for admission to the state hospital; the inability to obtain necessary medical information about the defendant that is in the custody of a third party; the lack of availability or participation by counsel, jail or court personnel, interpreters, or the defendant; and an unusual spike in evaluation referrals or the number of defendants needing restoration services.

County Reimbursement for Competency Evaluations.

Legislation enacted in 2013 requires the Department to reimburse a county for the cost of appointing a qualified expert to conduct a competency evaluation for a defendant in jail if the Department has not met performance targets for competency evaluations for in-custody defendants in 50 percent of the cases submitted by the county during the most recent quarter.

The Department must reimburse the county for the costs of the competency evaluator in an amount that is at least equivalent to the amount for evaluations conducted by the Department. The reimbursement requirement is subject to funds appropriated for this purpose, and it is set to expire June 30, 2016.

Correctional Confinement under Forensic Laws.

State forensic laws govern the criminally insane and competency to stand trial procedures. A person is criminally insane if the person is found not guilty by reason of insanity and subsequently committed to a state hospital due to substantial dangerousness or substantial likelihood of committing criminal acts jeopardizing public safety.

A statute in the forensic laws provides that a person must not be confined in a correctional institution and that any confinement in a county jail while awaiting placement in a treatment program or a court hearing may not exceed seven days. The original statute and all subsequent amendments to the statute were part of legislation relating to the criminally insane. However, the statute does not specifically limit its application to persons who are criminally insane.

Summary of Engrossed Second Substitute Bill:

Maximum Time Limits for Competency Services.

Maximum time limits are established for the provision of competency-related evaluation and restoration services:

- 14 days for the state hospital to offer admission for inpatient competency-related evaluation and restoration services; and
- 14 days for completion of a competency evaluation in jail, with the option to extend the time for another seven days if needed for clinical reasons.

These time limits are to be phased in over the course of one year beginning July 1, 2015. Current performance targets for competency-related services are retained.

Additional records and information must be received by the Department before the time periods for performance targets and time limits begin to run. These records and information include mental health and medical records, police records, names and addresses of involved attorneys, information about the alleged crime, and reasons for the referral.

The non-exhaustive list of circumstances under which it is recognized that performance targets might not be met are designated as defenses to an allegation that the Department has not met performance targets or maximum time limits. Two additional defenses are established: the jail does not have access to appropriate space to conduct a jail evaluation; or the defendant asserts legal rights that delay the provision of competency services.

Competency Restoration Provisions.

The Legislature encourages the Department to develop, on a phased-in basis, alternative locations and increased access to competency restoration services for individuals who do not need the level of services provided in inpatient psychiatric hospitalizations. The Department must work with counties and the courts to develop a screening process to identify individuals who are safe to receive restoration treatment outside the state hospital. The Department also

must develop a plan to sufficiently increase capacity to meet the projected 10-year need for forensic and civil mental health bed demand.

Alternate facilities for competency restoration may include community mental health providers or other local facilities that contract with the Department and are willing and able to provide competency restoration treatment. During the 2015-2017 biennium, the Department may contract with one or more cities or counties to provide competency restoration treatment in a city or county jail if the city or county jail is willing to serve as a location for restoration treatment and if the Department determines that there is an emergent need for beds and documents the justification, including a plan to address the emergency.

Patients receiving competency restoration treatment in a jail must be physically separated from other jail populations, must interact only with treatment staff and not jail staff, except for incidental interaction with jail staff for custodial service, food service, or similar services, and must be provided as much as possible with a therapeutic environment. Competency restoration services provided in a city or county jail must be performed by staff and professionals with the skills and qualification necessary to provide competency restoration services comparable to those in a state hospital.

Competency restoration time limits for felony defendants include only the time the defendant is at the facility and do not include reasonable time for transport to or from the facility. Specific language is added to restoration statutes stating that if a court determines a defendant is unlikely to regain competency, the court may dismiss the charges without ordering restoration and refer the defendant for evaluation for civil commitment.

County Reimbursement for Competency Evaluations.

The statute that requires the Department to reimburse counties for the cost of appointing competency evaluators for in-custody defendants is extended from 2016 to 2018, and an additional ground under which a county may seek reimbursement is established. The county may request reimbursement if the Department in the most recent quarter did not perform at least one-third of the number of jail-based competency evaluations for in-custody defendants as were performed by qualified experts appointed by the court. Reimbursement is subject to funds appropriated for this purpose.

Correctional Confinement under Forensic Laws.

The statute imposing limitations on the correctional confinement of a person under the forensic laws governing competency and criminal insanity applies only to persons who are criminally insane.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 2, relating to reimbursing counties for the cost of appointing competency evaluators in some circumstances, which takes effect immediately, and section 9, relating to making a technical correction, which takes effect April 1, 2016.

Staff Summary of Public Testimony (Judiciary):

(In support) When the competency performance targets were passed, there was not much research out there on what is an appropriate timeline. Now the data and best practices we have seen indicate that our timelines are not long enough to do adequate evaluations. The bill will bring us more into line with what is happening in the rest of the nation. These timelines are still aggressive and the state is not meeting them now, but it is important to establish a standard for the state to meet.

There is a class action lawsuit in federal court claiming that the state's wait times violate the constitutional rights of defendants. The state recognizes that some people are waiting excess times and those times are indefensible. The National Judicial College recommends that it is reasonable to extend out the period for evaluation to allow time for substance abuse issues to clear and medication to take effect. The state does not have enough forensic evaluators or beds to meet the demand. The early action supplemental budget has money for additional evaluators and beds, but that won't be enough. We cannot meet these standards overnight so we need the phase in.

(Opposed) Extending the competency timelines is unfair and not a good response to what is a human rights tragedy. These defendants have not been convicted of any crime. They have a mental illness and are sitting for extensive time in jails. Judge Peckman in her initial order said that any wait times over seven days are suspect. It is true that this is happening all over the country, but that is not right either. We shouldn't base our law on wrong laws in other states.

The Department has had performance standards in place since 2012 and it has failed to meet them in every single case. The legislation is just a means for the Department to implement further lengthy delay. Courts have been imposing contempt sanctions against the Department for failing to timely evaluate the defendants. The bill allows an extension of the time for clinical reasons, but that term is undefined. The current practice is unacceptable and has been found unacceptable by the judge.

Staff Summary of Public Testimony (Appropriations):

(In support) The mental health system is broken and massively under-funded. This bill had very strong bi-partisan support being voted out of committee unanimously. This legislation adopts recommendations of the forensic mental health consultant review, provided in June of this year, which outlines best practices for evaluation timelines. There are not enough resources to meet the standards in this bill. This bill provides a good evidence-based approach rather than making up some random timelines that don't make sense in terms of best practices.

The state is not in compliance with the performance targets that are currently in law. Some of the long waits that were and still are occurring are indefensible. This legislation balances what the national forensic consultants and the national judicial college have said are best practice standards for competency evaluation and restoration services. Each component of the fiscal note is an integral part of being able to respond to this legislation as well as any potential court order.

(Opposed) This is not a new issue, has been going on for many years, and has finally had to come to litigation. A federal judge already ruled in a partial summary judgment that any delay beyond seven days in meeting timelines is suspect. The judge is going to adopt a standard regardless of whether or not this legislation passes. All sides have agreed that the state is going to lose the case.

If there are extraordinary circumstances, delays may be warranted on a case-by-case basis, but that is something that needs to be decided by the court and not by arbitrary guidelines that are established in this legislation. The Department had until 2012 to phase in standards and this bill just codifies another delay in coming up to a standard that is somewhat lower than the present standard.

This is not just a casual problem and will require resources. People who are not convicted of a crime are waiting for weeks and sometimes months. If this bill were enacted it would allow for 21 days which is excessive. There is information out there on the impacts long delays have on people. This bill should not move forward and the court will work this out.

Persons Testifying (Judiciary): (In support) Representative Jinkins, prime sponsor; and Jane Beyer, Department of Social and Health Services.

(Opposed) David Lord, Disability Rights Washington; and Kari Reardon, Washington Association of Criminal Defense Lawyers and Washington Defense Attorneys.

Persons Testifying (Appropriations): (In support) Representative Jinkins, prime sponsor; and Jane Beyer, Department of Social and Health Services.

(Opposed) Bob Cooper, Washington Defender Association and Washington Association of Criminal Defense Lawyers; and David Lord, Disability Rights Washington.

Persons Signed In To Testify But Not Testifying (Judiciary): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.