

# SENATE BILL REPORT

## SB 5644

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As of February 5, 2015

**Title:** An act relating to psychiatric boarding under the involuntary treatment act.

**Brief Description:** Concerning psychiatric boarding under the involuntary treatment act.

**Sponsors:** Senators O'Ban, Dammeier and Darneille.

**Brief History:**

**Committee Activity:** Human Services, Mental Health & Housing: 2/03/15.

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### SENATE COMMITTEE ON HUMAN SERVICES, MENTAL HEALTH & HOUSING

**Staff:** Kevin Black (786-7747)

**Background:** The Involuntary Treatment Act (ITA) allows a designated mental health professional (DMHP) to detain a person in situations where physical harm is at risk based on a mental disorder which causes the person to present a likelihood of serious harm or to be gravely disabled. The ITA requires persons to be detained to an evaluation and treatment facility (E&T). An E&T is defined as any facility which can provide directly or by arrangement with other agencies emergency evaluation and treatment, outpatient care, and timely and appropriate inpatient care to persons suffering from a mental disorder, and which is certified as such by the Department of Social and Health Services (DSHS).

When a person is held for initial evaluation in an emergency room, triage facility, or crisis stabilization unit, the DMHP must detain the person to an E&T or release the person within six hours of the time facility staff determines a DMHP evaluation is necessary, or within 12 hours from arrival at the facility if the person was brought in by a peace officer.

In August the Washington Supreme Court decided *In re D.W.*, 181 Wn.2d 201 (2014), in which the court determined that currently existing statutes and rules under the ITA do not allow DSHS to temporarily certify single E&T beds unless the person requires a service which is not available at an E&T, and do not authorize single bed certification based on lack of room at a regularly certified E&T facility. The court stayed the issuance of its mandate until December 26, 2014.

In response to this decision, DSHS enacted emergency rule changes in August, September, and December. Washington Administrative Code now authorizes DSHS to grant a single bed

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certification enabling detention of a person if the single bed certification is to a facility that is willing and able to provide timely and appropriate mental health treatment, either directly or by arrangement with other agencies. Examples of facilities that may be approved for single bed certifications include community facilities, residential treatment facilities, hospitals with psychiatric units, psychiatric hospitals, and hospitals that are willing and able to provide timely and appropriate mental health treatment. Also in response to the decision, DSHS collaborated with the Governor's Office and others to make 145 additional regularly certified E&T beds available for detention in King, Pierce, and Snohomish counties by the end of 2014, with additional expansion of beds planned in 2015.

Portions of this bill quote passages interpreting the ITA from the Washington Supreme Court case *In re C.W.*, 147 Wn.2d 259 (2002), including the rationale presented for deciding involuntary commitment cases on their merits, 147 Wn.2d at 281 (quoting *In re G.V.*, 124 Wn.2d 288 (1994)), and the direction that dismissal is not the appropriate remedy for lack of timely detention except in the few cases where facility staff or the DMHP has totally disregarded statutory requirements, *id.* at 283.

**Summary of Bill:** DSHS is authorized to use a single bed certification process to certify a temporary E&T bed, if the bed is located in a facility that can provide the person with timely and appropriate care, either directly or by arrangement with other public or private agencies. The single bed certification must be specific to the patient receiving treatment and be limited in time. A DMHP who submits a single bed certification application in good faith belief that all requirements have been met may presume that the application will be approved for the purpose of responding to other emergency calls, and has 24 hours from notification of lack of approval to submit additional information or make other arrangements for the detained person.

If a DMHP determines that a person meets ITA detention criteria who has not been accepted into a certified E&T facility within the time limitation, and the DMHP has exhausted safe alternatives such as a single bed certification, less-restrictive alternatives such as crisis triage or crisis diversion, or appropriate voluntary treatment, the DMHP must detain the person in boarding status. Boarding is defined as a state in which a person is temporarily held in a place capable of protecting the immediate health and safety needs of the person and the public while an appropriate placement is being actively sought for the person. When a DMHP detains a person in boarding status, the DMHP must submit a report to DSHS on a standard form to be developed by DSHS including information such as the date and time of commitment and a list of facilities that have refused to admit the person. Within two hours of receiving this report, DSHS must transmit a copy to the responsible regional support network (RSN), after which the RSN must collaborate with the DMHP to place the person in an appropriate bed as soon as possible. If the person is still in detention while boarding at the time of the 14-day hearing, the RSN must appear in court and show cause why an appropriate placement has not been made.

DSHS must track and analyze reports of detention while boarding and initiate appropriate corrective action or contract enforcement remedies to ensure that each RSN implements an adequate plan to provide E&T services. Detention of a person in boarding status constitutes prima facie evidence that the RSN is in breach of this requirement. Adequate plans may include investments in alternatives to detention and prevention programs. DSHS must

collaborate with RSNs and the Washington State Institute for Public Policy to estimate the capacity needs for E&T services within each regional service area.

The six-hour time limit for a DMHP to complete an evaluation of a person held in an emergency room or triage facility, or 12-hour time limit if the person was placed in the facility by a peace officer, must start upon notification to the DMHP of the need for evaluation and must not count time periods during which the person is not medically cleared. Dismissal of the commitment petition is not an appropriate remedy for a violation of these timeliness requirements except in the few cases where the facility staff or DMHP has totally disregarded statutory requirements.

The intent of the ITA includes protecting the health and safety of persons suffering from mental disorders and the public through use of the *parens patriae* and police powers of the state. When construing ITA requirements, courts must focus on the merits of the petition.

**Appropriation:** None.

**Fiscal Note:** Requested on January 27, 2015.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: No one in the Legislature is interested in prolonging psychiatric boarding. We need more capacity, and better treatment. We are in a tough situation because we don't have enough capacity and there are people who may get released who should not be, because they need treatment and for reasons of public safety. The provisions directed toward psychiatric boarding are to address this current problem, which we hope will go away as we get more capacity into the system. This bill is designed to get the RSNs to step up and create capacity, and to implement a data collection system to make sure they are doing that. We need ways to find out how many patients are stuck in this predicament, and to make sure enough resources are devoted to solving the problem.

CON: We appreciate elements of this bill, and the effort and intent behind it. We oppose sections two through seven, because we see these sections as overriding the Washington Supreme Court's decision. There are more E&T beds coming online, and hospitals are adding more capacity. There are still capacity shortages in eastern Washington and some other areas of the state. E&T facilities are the most appropriate setting for timely and appropriate mental health treatment. We see this bill as undermining the creation of these facilities. The bill as drafted would create a heightened standard for single bed certification compared to DSHS' current rule, which many of our facilities would be unable to meet. DMHPs should not be able to authorize a single bed certification. Rural areas will struggle to provide E&T resources. The solution is to create more inpatient capacity and to fund outpatient care and crisis intervention services to prevent the need for hospitalization in the first place. Our smaller facilities report some DMHPs are currently unable to detain patients for lack of room at certified facilities and no appropriate single bed certification; these facilities sometimes hold patients under the Emergency Medical Treatment & Labor Act authority until a certified treatment bed can be located. Proper and timely treatment is a

must. The system is broken because it lacks resources. Don't allow people to be transferred between improper settings like a shell game. This bill would prompt legal challenges. We shouldn't legitimize psychiatric boarding. Look for upstream solutions. We agree with demanding better recordkeeping and transparency from the RSNs. Boarding is unsafe for people's health and welfare and robs them of civil and human rights.

**Persons Testifying:** PRO: Senator O'Ban, prime sponsor.

CON: Lisa Thatcher, Chelene Whiteaker, WA State Hospital Assn.; Mike De Felice, WA Defender Assn., WA Assn. of Criminal Defense Lawyers; Shankar Narayan, American Civil Liberties Union of WA; Helen Nilon, Behavioral Health & Wellness.