SENATE BILL REPORT
SB 5644

As of February 26, 2015

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

Brief Description: Concerning psychiatric boarding under the involuntary treatment act. [**Revised for 1st Substitute:** Concerning initial detention under the involuntary treatment act.]

Sponsors: Senators O'Ban, Dammeier and Darneille.

Brief History:
Committee Activity: Human Services, Mental Health & Housing: 2/03/15, 2/19/15 [DPS-WM].
Ways & Means: 2/25/15.

SENATE COMMITTEE ON HUMAN SERVICES, MENTAL HEALTH & HOUSING

Majority Report: That Substitute Senate Bill No. 5644 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators O'Ban, Chair; Miloscia, Vice Chair; Darneille, Ranking Minority Member; Hargrove and Padden.

Staff: Kevin Black (786-7747)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Sandy Stith (786-7710)

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).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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 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.

Summary of Bill (Recommended Substitute): Regional support networks (RSNs) must provide for the availability of an adequate network of E&T services to ensure access to treatment for persons who meet ITA detention criteria. DSHS must collaborate with the RSNs and the Washington State Institute for Public Policy to estimate the capacity needed for E&T services within each regional service area, including consideration of average occupancy rates needed to ensure access to treatment. Each RSN must develop and maintain an adequate plan to provide for E&T service needs.

A DMHP must submit a report to DSHS within 24 hours if the DMHP determines that an adult or minor meets ITA detention criteria but there are not any E&T beds available to admit the person within the time available for evaluation, and the person cannot be served through a single bed certification or less-restrictive alternative. Submittal of such a report is prima facie evidence that the responsible RSN is in breach of its duty to provide an adequate network of E&T services. DSHS must develop a standardized form for the DMHP to use to make this report, including a list of facilities which refused to admit the person. DSHS must promptly share reported information with the responsible RSN and require the RSN to attempt to engage the person in services and report back within seven days. DSHS must track and analyze DMHP reports and initiate corrective actions, including but not limited to enforcement of contract remedies and requiring expenditures of reserve funds, to ensure that each RSN has implemented an adequate plan to provide for E&T services. An adequate plan may include development of less-restrictive alternatives to involuntary commitment such as crisis triage, crisis diversion, voluntary treatment, or prevention programs reasonably calculated to reduce the demand for E&T services. DSHS must publish quarterly reports on

its website summarizing information reported by DMHPs and the number of single bed certifications granted by category.

DSHS is authorized to approve the single bed certification of E&T beds to be used for detention under the ITA, if the bed is located in a facility that is willing and able to provide timely and appropriate treatment to the person, either directly or by arrangement with other public or private agencies. A single bed certification must be specific to the patient receiving treatment. A DMHP who submits an application for single bed certification in good faith at a facility that is willing and able to provide timely and appropriate treatment may presume that the application will be approved for the purpose of completing the detention process and responding to other emergency calls.

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 to complete the evaluation 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 begin until there is medical clearance. Medical clearance means a physician or other health care provider has determined that the person is medically stable and ready for referral to the DMHP. Dismissal of the commitment petition is not an appropriate remedy for 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 is updated to include protecting the health and safety of persons suffering from mental disorders and protecting public safety 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, except where requirements have been totally disregarded.

EFFECT OF CHANGES MADE BY HUMAN SERVICES, MENTAL HEALTH & HOUSING COMMITTEE (Recommended Substitute): Provisions authorizing psychiatric boarding in certain circumstances are removed from the bill.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Original Bill (Human Services, Mental Health & Housing): 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 created 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 (Human Services, Mental Health & Housing): 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.

Staff Summary of Public Testimony (Ways & Means): CON: We believe that extending deadlines will tie up beds in the ER which are very costly. The medical clearance section of this bill is unclear and will cause havoc in civil commitment court. It will cause congestion in those courts which are underfunded and overwhelmed. We have a handout that will clear up the medical clearance language. If this language is added it will add to less litigation and fewer public defenders and prosecutors needed. The boarding portion of this bill is very concerning. There are portions of this bill that will allow psychiatric boarding to continue. It does exactly what the *D.W.* case banned. If this is allows, it will *D.W.* two. The language as it is written will increase litigation and cause a class action lawsuit. The Supreme Court has been clear that it is the State's duty is to ensure there are an adequate number of E&T facilities available. If the state is not be able to provide services at an adequate level, that violates everyone's civil rights. We urge you to not move this legislation forward and send good money after bad. The substitute is significantly different than what was heard. The policy that is being exposed in sections three and four is that we want RSN employees to tell DSHS that their employer is in breach of contract. The big concern is the level of reserves. We don't see it making sense to empty out reserves while we are keeping reserves for expanding capacity.

Persons Testifying (Ways & Means): CON: Mike De Felice, King County Dept. of Public Defense; Shankar Narayan, American Civil Liberties Union of WA; Brian Enslow, WA State Assn. of Counties.