

E2SSB 5664: Forensic Competency Restoration Programs

WDA and WACDL support expanding access to Outpatient Competency Restoration Programs (OCR), but are concerned that this bill fails to address the systematic overhaul that must occur to appropriately and effectively address the long delays in access to treatment. Until more steps are taken, Washington State will continue to violate the due process rights of class members across the state, which results in an ongoing accumulation of federal and state sanctions against DSHS. WDA/WACDL recommend that a task force be formed to address the comprehensive change that is needed.

Two of the proposed amendments in this bill to RCW 10.77 will result in additional costly litigation. The proposed amendments to Sec 4. (1)(d) and Sec. 5 (2)(d) includes the following language that both violates due process and equal protection:

The time period for inpatient competency restoration shall be the same as if the outpatient competency restoration had not occurred, starting from admission to the facility.

There is a great deal of case law indicating that criminal defendants shall receive credit for time spent incarcerated and when in compliance with probation. The result of the current language is that two similarly situated defendants (i.e., two mentally ill individuals who have been ordered to undergo competency restoration) could spend vastly different amounts of time undergoing competency restoration with one being ordered to spend more time undergoing restoration than authorized by the statutes: such differences would violate equal protection and due process. The quoted language violates the rights of a protected class.

Clarification is needed to clarify that a misdemeanor defendant cannot be ordered to undergo more than 29 days of inpatient restoration. As currently written, a person can be revoked from OCRP and spend the remainder of their competency restoration receiving inpatient treatment resulting in a longer hospitalization than a person who did not participate in OCRP.

This proposal does not effectively address the violation of the due process rights of *Trueblood* class members. As of January 10, 2022, 457 individuals were awaiting admission for restoration¹. Of the 457:

- 232 are in-custody, awaiting transport for restoration. Those individuals have access to limited mental health treatment.
- At least 94 people awaiting restoration are charged with violent offenses: 52 are in-custody and 42 are out-of-custody. The cases are simply on hold, with listed victims in limbo.
- 93 beds will be occupied by individuals on misdemeanor offenses. 45 currently are incarcerated, waiting to be admitted for restoration, on charges that carry a maximum of less than a year in-custody.
- Only one person on the waitlist appears to have been referred for outpatient restoration.

¹ In response to a Public Disclosure Request, DSHS provided a redacted waitlist for admission for restoration. WDA/WACDL hand counted each case in which someone is awaiting restoration and also calculated how long people had been waiting admission.

- The restoration chart does not include the lengthening delay in receiving timely competency evaluations since it was specific to restoration.

These statistics are alarming. As a state, we are failing the most vulnerable in the criminal legal system and a task force of stakeholders is necessary. WDA/WACDL propose that a work group be established to comprehensively address the on-going needs of those with behavioral health issues in the criminal legal system. Rather than piecemeal change each legislative session, stakeholders can meet and proactively address improvements in a manner that is not limited to a 60-day legislative season and two-minute soundbites.

To further demonstrate why a task force is needed, we need only look at the continuing accrual of fines to the state for failure to provide timely evaluation and treatment. Over the past 24 months (2020-2021), the Department paid \$5,973,000 in sanctions to the federal court; \$78,976,500 accrued, but is held in abeyance pending a finding of substantial compliance with the *Trueblood* Contempt Settlement Agreement. Since 2020, DSHS paid \$93,580 in sanctions in individual show cause hearings at the state level.²

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² This sanction information was provided by an assistant attorney general in response to a subpoena.