SSB 5664: Forensic Competency Restoration Programs

WDA and WACDL support expanding access to Outpatient Competency Restoration Programs, 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 only necessary changes be addressed at this point and that a task force be formed to address the comprehensive change that is needed.

Many of the proposed amendments to RCW 10.77 will result in additional costly litigation. It is disappointing that ten years after the legislature initially addressed timeliness in competency evaluation and restoration services, that proposed changes are taking leaps backwards. The result of these proposals will be litigation. The legislature continues to fail those with mental illness in the criminal legal system and the result will be ongoing legislation to right these wrongs.

These statistics are alarming. As a state, we are failing the most vulnerable in the criminal legal system. Only nine counties have access to outpatient restoration, that is less than one ¼ of Washington counties. Changes, including expanding Outpatient Competency Restoration Programs (OCRP) and reducing the number of people undergoing restoration, must occur if we are ever going to reduce the backlog in access to treatment and in criminal case resolution. This bill does not expand 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 restoration[1]. Of the 457:

- 232 are in-custody, awaiting transport for restoration. Those individuals have access to limited mental health treatment.
- Those who are out-of-custody wait months (some have waited years) to be admitted for inpatient restoration.
- 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.

One of the problems with access to Outpatient Competency Restoration Treatment is that misdemeanor offenses have a disproportionate length of time undergoing outpatient treatment. A longer period of restoration on misdemeanor offenses is more costly to the state. A person facing a lesser offense should not be in a restoration program for a longer period. A non-violent felony has a maximum restoration period of 45 days, for both in-custody and out-of-custody restoration. Misdemeanor offenses have a maximum restoration period of 29 days in-custody restoration and 90 days out-of-custody. It appears that the legislature is inviting legal challenges to the disparate periods of restoration and the likelihood that a person could spend significantly more than 29 days undergoing inpatient restoration.

It is a violation of due process and equal protection to fail to provide credit for the time spent in an Outpatient Competency Restoration Program (OCRP). To lengthen the period of restoration for a person who spends time in an OCRP and subsequently needs a higher level of care is a violation of the rights of a protected class. This bill provides in part, "[t]he 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." A defendant must be provided credit for all time spent in an OCRP. This proposal denies individuals credit for the time spent undergoing OCRP which will lengthen the length of time undergoing restoration when a higher level of care is needed. Once again, the legislature is inviting unnecessary legal challenges.

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. Language for the work group that would thoroughly review and propose any needed changes to RCW 10.77 is included in our redline proposal. Some of the pressing issues that must be addressed include:

- Untreated mental illness causes harm. RCW 10.77 must be amended to allow charges to be dismissed and civil commitment pursued if an individual is not timely admitted**.** Because hospitals are so overwhelmed with the number of people in need of restoration, now is the time to reevaluate whether restoration must occur or whether more people can be treated through the voluntary and involuntary behavioral health treatment. Based on the systematic failure to address the backlog, the legislature must proactively reduce the number of individuals in the que for forensic services: the focus must be on restoring those alleged to have committed a violent offense
- If significant changes are not made in RCW 10.77, cases will continue to be delayed. Only Clark County has developed the diversion program that was implemented as part of the *AB by Trueblood v DSHS s*ettlement. DSHS is not able to timely evaluate those who are out-of-custody. Many with mental health issues are enveloped in the criminal legal system. Outpatient evaluations often occur months after arrest all during a time when the individual has not received needed services.
- When DSHS conducts an evaluation, the evaluator often is unable to ask questions that would provide the most information about an individual's competency to proceed to trial on a specific charge. Amending RCW 10.77.060 to exclude statements made about criminal allegations would allow for more accurate competency evaluations. Washington is one of the few states that does not offer immunity in competency evaluations/restoration. Evaluators consistently state in their reports that they could not address the actual charge and thus could not do a thorough evaluation. DSHS has requested immunity in competency evaluations for several years.
- Court orders routinely are not sent within 24 hours of signing. Attorneys and courts across the state indicate that they are not notified when a court order is sent to DSHS. The failure

to provide the court order further delays evaluations and treatment**.** The DSHS response to a PDR request that provided the information on page 1 of this statement demonstrated that many jurisdictions do not provide the court order for restoration within 24 hours as is required by RCW 10.77.075. Clerks in several jurisdictions do not send the court orders because they do not have the staff to complete the additional work.

- Children are different. It is time to enter the 21st century and specifically address competency in children**.** Our courts have repeatedly recognized that children are not the same as adults, yet we continue to use the same standard for competency assessments on children (whose brains are still developing) as we do on adults.
- The title of the statute does not reflect that much of the work related to mental health in the criminal legal system occurs prior to adjudication. "Criminally Insane Procedures" does not appropriately address the multiple behavior health issues that this statute addresses.
- Despite being ordered nearly seven years ago to admit individuals within seven days of a court order for restoration, DSHS has not reduced longstanding delays. Over the past 24 months (2020-2021), the Department paid $5,973,000.00 in sanctions to the federal court; $78,976,500.00 accrued but is held in abeyance pending a finding of substantial compliance with the *Trueblood* Contempt Settlement Agreement. Since 2020, DSHS paid $93,580.00 in sanctions in individual show cause hearings at the state level.[2]
- Now is the time to address this failing system. The federal mandate and settlement agreement in *A.B. by Trueblood v. DSHS*, previous statutory amendments and the settlement agreement in *Ross v. Inslee* have done little to systematically address meaningful ways that we can assist those with behavioral issues in the criminal legal system.

An additional current amendment is needed to appropriately address the costs of independent experts that are required for insanity and diminished capacity defenses and to provide second opinions. The low rate of pay and considerable hoops required to get payment above $800 causes further delay in resolving contested competency hearings, pleas of not guilty by reason of insanity, and diminished capacity defenses.

WDA/WACDL do not oppose extending the time for evaluation for commitment under the involuntary treatment act for those who have not undergone competency restoration treatment on either an inpatient or outpatient basis to 180 hours. Evaluations for individuals found incompetent after a period of restoration should remain at 72 hours. It is fiscally irresponsible to extend the time for evaluation for involuntary commitment for those who have already spent weeks with mental health professionals.

For more information, contact:

Neil Beaver: (509) 979-9550 or neil.beaver@gmail.com; or

Kari Reardon: (509) 879-0695 or Reardon_K@msn.com

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