
WDA/WACDL REDLINE OF SUBSTITUTE SENATE BILL 5664

Areas that have no proposals have been removed for easier review

State of Washington 67th Legislature 2022 Regular Session

By Senate Behavioral Health Subcommittee to Health & Long Term Care
(originally sponsored by Senators Dhingra, Keiser, and Nobles)

READ FIRST TIME 01/31/22.

AN ACT Relating to forensic competency restoration programs;
amending RCW 10.77.020, ~~RCW~~ 10.77.060, 10.77.068, 10.77.086,
10.77.088, 10.77.220, and 10.77.250; reenacting and amending RCW
10.77.010; and adding new sections to chapter 10.77 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 10.77.010 and 2021 c 263 s 9 are each reenacted and amended to read as follows - *WDA/WACDL have no current proposals for this section so removed it for ease.*

Sec. 1A. RCW 10.77.020(1)(c) and(2) are reenacted and amended to read as follows -

(1) At any and all stages of the proceedings pursuant to this chapter, any person subject to the provisions of this chapter shall be entitled to the assistance of counsel, and if the person is indigent the court shall appoint counsel to assist him or her. A person may waive his or her right to counsel; but such waiver shall only be effective if a court makes a specific finding that he or she is or was competent to so waive. In making such findings, the court shall be guided but not limited by the following standards: Whether the person attempting to waive the assistance of counsel, does so understanding:

- (a) The nature of the charges;
- (b) The statutory offense included within them;
- (c) The range of allowable punishments ~~thereunder~~;
- (d) Possible defenses to the charges and circumstances in mitigation thereof; and

(e) All other facts essential to a broad understanding of the whole matter.

(2) Whenever any person is subjected to an examination pursuant to any provision of this chapter, he or she may retain an expert or professional person to perform an examination in his or her behalf. In the case of a person who is indigent, the court shall upon his or her request assist the person in obtaining an expert or professional person to perform an examination or participate in the hearing on his or her behalf. An expert or professional person obtained by an indigent person pursuant to the provisions of this chapter shall be compensated for his or her services out of funds of the department, ~~in an amount determined by the secretary~~ at an hourly rate and for a maximum period of time determined by the court to be fair and reasonable. A person is not limited in the number of requests for expert services that can be submitted to the court.

(3) Any time the defendant is being examined by court appointed experts or professional persons pursuant to the provisions of this chapter, the defendant shall be entitled to have his or her attorney present.

(4) In a competency evaluation conducted under this chapter, the defendant may refuse to answer any question if he or she believes his or her answers may tend to incriminate him or her or form links leading to evidence of an incriminating nature.

(5) In a sanity evaluation conducted under this chapter, if a defendant refuses to answer questions or to participate in an examination conducted in response to the defendant's assertion of an insanity defense, the court shall exclude from evidence at trial any testimony or evidence from any expert or professional person obtained or retained by the defendant.

Sec. 2. RCW 10.77.060 and 2021 c 263 s 5 are each amended to read as follows: *WDA/WACDL do not oppose the current amendment for this section but believe that the amendment to section 6 (RCW 10.77.220) would be better placed in the section that addresses competency evaluation. The sections without proposals have been removed for easier review.*

~~(2)~~(5) In the event that a person remains in jail more than 21 days after service on the department of a court order to transport the person to a facility designated by the department for inpatient competency restoration treatment, upon the request of any party, the department shall perform a competency to stand trial status check at reasonable intervals to determine if the circumstances of the person have changed such that the court should authorize an updated competency evaluation. The status update shall be provided to the parties and the court. Status updates may be provided at reasonable intervals.

Sec. 3. RCW 10.77.068 and 2015 c 5 s 1 are each amended to read as follows: *Areas that are not opposed have been removed for reading ease.*

(1) (a) The legislature establishes (~~(the following)~~) a performance (~~(targets and maximum time limits for the timeliness of the completion of accurate and reliable evaluations of competency to stand trial and admissions for inpatient restoration services related to competency to proceed or stand trial for adult criminal defendants)~~) target of seven days or fewer for the following services related to competency to stand trial, when access to the services is legally authorized and the person is detained in a correctional facility:

(i) To extend an offer of admission to a defendant in pretrial custody for inpatient competency evaluation or inpatient competency restoration services;

(ii) To extend an offer of admission to a defendant ordered to be committed to a state hospital following dismissal of charges based on incompetency to stand trial under RCW 10.77.086; and

(iii) To complete a competency evaluation in jail and distribute the evaluation report.

(b) The legislature establishes a performance target of 21 days or fewer to complete a competency evaluation in the community and distribute the evaluation report.

(2) (a) A maximum time limit of 14 days is established to complete the services specified in subsection (1) (a) (ii) and (iii) of this section, subject to the limitations under subsection (9) of this section.

(b) Based on the federal mandate in A.B. by Trueblood v. DSHS, the maximum time limit for admission for competency restoration is 7 days.

(c) A maximum time limit of 40 days is established to complete a competency evaluation in the community and distribute the evaluation report

. . . .

~~((5))~~ (9) This section does not create any new entitlement or cause of action related to the timeliness of competency ~~((evaluations or admission for inpatient restoration))~~ to stand trial services ~~((related to competency to proceed or stand trial)), nor can it form the basis for contempt sanctions under chapter 7.21 RCW or a motion to dismiss criminal charges.~~ Case law makes it clear that sanctions can be imposed and that a motion to dismiss can be brought. See *State v. Sims*, *State v. Luvert* and *State v. Hand*.

Sec. 4. RCW 10.77.086 and 2019 c 326 s 4 are each amended to read as follows: *Areas that are not opposed have been removed for easier tracking.*

(1)

~~((D))~~ (d) If a defendant fails to comply with the restrictions of the outpatient restoration program such that restoration is no longer appropriate in that setting or the defendant is no longer clinically appropriate for outpatient competency restoration, the ~~((department shall remove the defendant from the outpatient restoration program and place the defendant instead))~~ director of the outpatient competency restoration program shall notify the authority and the department of the need to terminate the outpatient competency restoration program and intent to request placement for the defendant in an appropriate facility of the department for

inpatient competency restoration (~~((for no longer than the time allowed as if the defendant had been initially placed into inpatient competency restoration, in addition to reasonable time for transport to or from the facility))~~). The outpatient competency restoration program shall coordinate with the authority, the department, and any law enforcement personnel under (d) (i) of this subsection to ensure that the time period between termination and admission into the inpatient facility is as minimal as possible. 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 reduced by the period time spent in the outpatient competency restoration program.~~ The department shall obtain a placement for the defendant within seven days of the notice of intent to terminate the outpatient competency restoration program.

. . . .

(5) At the hearing upon the expiration of the second felony competency restoration period, or at the end of the first felony competency restoration period ((in the case of a)) if the defendant ((with a developmental disability)) is ineligible for a second or third competency restoration period under subsection (4) of this section, if the jury or court finds that the defendant is incompetent ((, or if the court or jury at any stage finds that the defendant is incompetent and the court determines that the defendant is unlikely to regain competency, the charges shall be dismissed)) to stand trial, the court shall dismiss the charges without prejudice ((,)) and ((the court shall)) order the defendant to be committed to a state hospital ((as defined in RCW 72.23.010)) for up to ((seventy-two)) 120 hours if the person has not undergone any competency restoration services and up to 72 hours if person engaged in competency restoration services starting from admission to the facility, excluding Saturdays, Sundays, and holidays, for evaluation for the purpose of filing a civil commitment petition under chapter 71.05 RCW. ~~((The criminal charges))~~ However, the court shall not

~~((be dismissed))~~ dismiss the charges if the court or jury finds that: (a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time. ~~((In the event that))~~ If the court or jury makes such a finding, the court may extend the period of commitment for up to an additional six months. ~~((The six-month))~~

(6) Any period of competency restoration treatment under this section includes only the time the defendant is actually at the facility or is participating in outpatient competency restoration and is in addition to reasonable time for transport to or from the facility.

Sec. 5. RCW 10.77.088 and 2020 c 18 s 4 are each amended to read as follows: *Areas that are not opposed have been removed for reading ease.*

(2). . . .

~~((iv))~~ (d) If a defendant fails to comply with the restrictions of the outpatient competency restoration program such that restoration is no longer appropriate in that setting or the defendant is no longer clinically appropriate for outpatient competency restoration, the ~~((department shall remove the defendant from the outpatient restoration program. The department shall place the defendant instead))~~ director of the outpatient competency restoration program shall notify the authority and the department of the need to terminate the outpatient competency restoration program and intent to request placement for the defendant in an appropriate facility of the department for inpatient competency restoration ~~((for no longer than twenty-nine days regardless of any time spent in outpatient competency restoration, in addition to reasonable time for transport to or from the facility))~~. The outpatient competency restoration program shall coordinate with the authority, the department, and any law enforcement personnel under (d)(i) of this

subsection to ensure that the time period between termination and admission into the inpatient facility is as minimal as possible. 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 reduced by the period time spent in the outpatient competency restoration program~~ The department shall obtain a placement for the defendant within seven days of the notice of intent to terminate of the outpatient competency restoration program.

. . . .

~~((b))~~ (3) The placement under ~~((a))~~ subsection (2) of this ~~((subsection))~~ section shall not exceed ~~((twenty-nine))~~ 29 days if the defendant is ordered to receive inpatient competency restoration, ~~((or))~~ and shall not exceed ~~((ninety))~~ 90 45 days if the defendant is ordered to receive outpatient competency restoration. The court may order any combination of this subsection, but the total period of inpatient restoration may not exceed 29 days. ~~((, not to exceed ninety days. This period must be considered to include only the time the defendant is actually at the facility and shall be in addition to reasonable time for transport to or from the facility))~~.

. . . .

~~((d)(i))~~ (5). . . .

~~((ii))~~ (b) If the defendant was in custody and not on conditional release at the time of dismissal, the defendant shall be detained and sent to an evaluation and treatment facility for up to ~~((seventy-two))~~ 120 hours if the person has not undergone any competency restoration services and up to 72 hours if person engaged in competency restoration services, excluding Saturdays, Sundays, and holidays, for evaluation for purposes of filing a petition under chapter 71.05 RCW. The ~~((seventy-two))~~ 120-hour evaluation period shall commence upon the next nonholiday weekday following the court order and shall run to the end of the last nonholiday weekday within the ~~((seventy-two))~~ 120-hour period of evaluation.

~~((3))~~ (6) If the defendant is charged with a nonfelony crime that is not a serious offense as defined in RCW 10.77.092 and found by the court to be not competent, the court may stay or dismiss proceedings and detain the defendant for sufficient time to allow the designated crisis responder to evaluate the defendant and consider initial detention proceedings under chapter 71.05 RCW. ~~The court must give notice to all parties at least ((twenty-four)) 24 hours before the dismissal of any proceeding under this subsection, and provide an opportunity for a hearing on whether to dismiss the proceedings.~~

(7) The court must give notice to all parties at least ((twenty-four)) 24 hours before the dismissal of any proceeding under this subsection, and provide an opportunity for a hearing on whether to dismiss the proceedings.

~~((4))~~ (7) (8) If at any time the court dismisses charges under subsections (1) through ~~((3))~~ (6) (7) of this section, the court shall make a finding as to whether the defendant has a history of one or more violent acts. If the court so finds, the defendant is barred from the possession of firearms until a court restores his or her right to possess a firearm under RCW 9.41.047. The court shall state to the defendant and provide written notice that the defendant is barred from the possession of firearms and that the prohibition remains in effect until a court restores his or her right to possess a firearm under RCW 9.41.047.

~~(8)~~ (9) Any period of competency restoration treatment under this section includes only the time the defendant is actually at the facility or is participating in outpatient competency restoration and is in addition to reasonable time for transport to or from the facility.

Sec. 6. RCW 10.77.220 and 2015 1st sp.s. c 7 s 8 are each amended to read as follows:

(1) No person who is criminally insane confined pursuant to this chapter shall be incarcerated in a state correctional institution or

facility. This section does not apply to confinement in a mental health facility located wholly within a correctional institution. Confinement of a person who is criminally insane in a county jail or other local facility while awaiting either placement in a treatment program or a court hearing pursuant to this chapter is permitted for no more than seven days.

~~(2) In the event that a person remains in jail 21 days after service on the department of a court order to transport the person to a facility designated by the department for inpatient competency restoration treatment, the department shall upon the request of any party perform a competency to stand trial status check at reasonable intervals to determine if the circumstances of the person have changed such that the court should authorize an updated competency evaluation, and provide a status update to the parties and the court.~~ Moved to Section 2 under RCW 10.77.060 on evaluation.

Sec. 7. RCW 10.77.250 and 1987 c 75 s 1 are each amended to read as follows: *Removed as there are no proposed changes to this section.*

NEW SECTION. **Sec. 8.** A new section is added to chapter 10.77 RCW to read as follows: *Removed as there are no proposed changes to this section.*

NEW SECTION. **Sec. 9.** A new section is added to chapter 10.77 RCW to read as follows:

The department shall report annually to the governor, ~~and~~ relevant committees of the legislature, and shall make public beginning November 1, 2022, describing:

. . . . *The remainder was removed as there were no additional proposed changes.*

NEW SECTION **Sec. 10.** A new section is added to chapter 10.77 RCW to read as follows:

(1) (a) A task force is established on mental health issues in the criminal legal system to evaluate the current legislation and the on-going delays in providing competency evaluation, restoration services and other services related to 10.77 RCW, members as provided in this subsection.

(i) The president of the senate shall appoint one member from each of the two largest caucuses of the senate.

(ii) The speaker of the house of representatives shall appoint one member from each of the two largest caucuses of the house of representatives.

(iii) The governor shall appoint the following members:

(A) The director of the health care authority or his or her designee;

(B) The secretary of the department of social and health services or his or her designee;

(C) The Washington state attorney general or his or her designee;

(D) An individual with lived experience of addressing mental health pursuant to RCW 10.77;

(E) An individual with lived experience as a family member of a person addressing mental health pursuant to RCW 10.77;

(F) A representative of The Washington association of prosecuting attorneys;

(G) A representative of The Washington defender association;

(H) A representative of plaintiff's counsel from federal suits in either A.B. by Trueblood v DSHS or Ross v. Inslee;

(I) The director of the Washington office of public defense and his or designee;

(J) A representative for the superior court judge's association;

(K) A representative of the municipal/district court judge's association;

(L) A serviced provider for forensically involved individuals;

(M) A representative of a behavioral health provider; and

(N) Two at-large representative appointments.

(b) The task force shall choose as its cochairs one person from among its legislative members and one person from among the governor's appointments. _____ shall convene the first meeting of the task force by June 30, 2022.

(2) The task force shall review 10.77 RCW, information regarding the increasing demands on the Department of Social and Health Services, and the delays in access to treatment. The task force shall develop a list of priorities and shall provide recommendations for any suggested change to 10.77 RCW.

(3) Staff support for the task force must be provided by the health care authority.

(4) Legislative members of the task force are reimbursed for travel expenses in accordance with RCW 44.04.120. Nonlegislative members are not entitled to be reimbursed for travel expenses if they are elected officials or are participating on behalf of an employer, governmental entity, or other organization. Any reimbursement for other nonlegislative members is subject to chapter 43.03 RCW.

(5) Task force expenditures for legislative members are subject to approval by the senate facilities and operations committee and the house of representatives executive rules committee, or their successor committees.

(6) The task force shall report preliminary findings and recommendations to the governor and appropriate committees of the legislature by October 15, 2022, and issue its final recommendations to the governor

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