

House Proposal of Amendment

S. 3

An act relating to mental health professionals' duty to warn.

The House proposes to the Senate to amend the bill by striking all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. FINDINGS

The General Assembly finds that:

(1) The overwhelming majority of people diagnosed with mental illness are not more likely to be violent than any other person; the majority of interpersonal violence in the United States is committed by people with no diagnosable mental illness.

(2) Generally, there is no legal duty to control the conduct of another to protect a third person from harm. However, in 1985, the Vermont Supreme Court recognized an exception to this common law rule where a special relationship exists between two persons, such as between a mental health professional and a client or patient. In *Peck v. Counseling Service of Addison County, Inc.*, the Vermont Supreme Court ruled that “a mental health professional who knows or, based upon the standards of the mental health profession, should know that his or her patient poses a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect him or her from that danger.”

(3) The *Peck* standard has been understood and applied by mental health professionals in their practices for more than 30 years.

(4) In 2016, the Vermont Supreme Court decided the case *Kuligoski v. Brattleboro Retreat and Northeast Kingdom Human Services* and created for mental health professionals a new and additional legal “duty to provide information” to caregivers to “enable [the caregivers] to fulfill their role in keeping [the patient] safe” if that patient has violent propensities and “the caregiver is himself or herself within the zone of danger of the patient’s violent propensities.”

(5) The *Kuligoski* decision has been seen by many mental health professionals as unworkable. First, unlike the *Peck* duty, the *Kuligoski* decision does not require the risk be serious or imminent. This puts providers in a position of violating the Health Insurance Portability and Accountability Act, Pub. L. 104-191, the federal law regarding the confidentiality of patient records. Second, unlike the *Peck* duty, the *Kuligoski* decision does not require that the prospective victim be identifiable. Third, the *Kuligoski* decision singles out caregivers and potentially creates a situation in which they could be held liable for the actions of the person for whom they are caring. Fourth, the

Kuligoski decision imposes a duty on mental health facilities and professionals to protect the public from patients and clients who are no longer in their care or under their control.

Sec. 2. 18 V.S.A. § 1882 is added to read:

§ 1882. DISCLOSURES OF PROTECTED HEALTH INFORMATION TO
AVERT A SERIOUS RISK OF DANGER

(a) It is the intent of the General Assembly in this section to negate the Vermont Supreme Court's decision in *Kuligoski v. Brattleboro Retreat and Northeast Kingdom Human Services*, 2016 VT 54A, and limit mental health professionals' duty to that as established in common law by *Peck v. Counseling Service of Addison County, Inc.*, 146 Vt. 61 (1985).

(b) A mental health professional's duty is established in common law by *Peck v. Counseling Service of Addison County, Inc.* and requires that "a mental health professional who knows or, based upon the standards of the mental health profession, should know that his or her patient poses a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect him or her from that danger." This duty shall be applied in accordance with State and federal privacy and confidentiality laws.

(c) This section does not limit or restrict claims under State or federal law related to safe patient care, including federal discharge planning regulations within the Conditions of Participation for hospitals, patient care regulations for other federally certified facilities, the Emergency Medical Treatment and Active Labor Act of 1986, Pub. Law 99-272, professional licensing standards, or facility licensing standards.

(d) To the extent permitted under federal law, this section does not affect the requirements for mental health professionals to communicate with individuals involved in a patient's care in a manner that is consistent with legal and professional standards, including section 7103 of this title.

Sec. 3. EFFECTIVE DATE

This act shall take effect on passage.