

1 S.3

2 Introduced by Senators Sears, Ayer, and White

3 Referred to Committee on Judiciary

4 Date: January 10, 2017

5 Subject: Human services; mental health; duty to warn

6 Statement of purpose of bill as introduced: This bill proposes to impose a duty  
7 on mental health professionals to take reasonable precautions when a patient  
8 poses an imminent risk of serious danger to a reasonably identifiable victim.

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

10 It is hereby enacted by the General Assembly of the State of Vermont:

11 ~~Sec. 1. LEGISLATIVE INTENT~~

12 ~~It is the intent of the General Assembly in this act to overrule the Vermont~~  
13 ~~Supreme Court's decision in Kuligowski v. Brattleboro Retreat, 2016 VT 54A.~~  
14 ~~In Kuligowski, the Court held that a psychiatric hospital and designated agency~~  
15 ~~had a duty to inform parents caring for a recently discharged patient of the~~  
16 ~~patient's risk of harm to himself and others and to provide information on~~  
17 ~~managing the patient's ongoing treatment. In this act, the General Assembly~~  
18 ~~responds to the Kuligowski decision by clarifying that a mental health~~  
19 ~~professional's duty to warn is triggered when there is an imminent risk of~~

1 ~~serious danger to an identifiable victim, but does not require a mental health~~  
2 ~~professional to otherwise train or advise caregivers or to take other precautions~~  
3 ~~to protect an unidentifiable victim or victims or property from a client's or~~  
4 ~~patient's behavior.~~

5 Sec. 2. 18 V.S.A. § 7115 is added to read:

6 § 7115. MENTAL HEALTH PROFESSIONAL; DUTY TO WARN

7 (a) A mental health professional, as defined in section 7101 of this title,  
8 who knows or, based upon the standards of his or her respective mental health  
9 profession, should know that his or her client or patient poses an imminent risk  
10 of serious danger to an identifiable victim has a duty to exercise reasonable  
11 care to protect the identifiable victim from that danger.

12 (b) A mental health professional may discharge his or her duty to exercise  
13 reasonable care to protect an identifiable victim by:

14 (1) communicating the serious risk of danger to the identified victim or  
15 victims; or

16 (2) notifying an appropriate law enforcement agency of the serious risk  
17 of danger to the identified victim or victims.

18 (c) No cause of action against a mental health professional shall arise  
19 concerning client or patient privacy or confidentiality for disclosing  
20 information to third parties in order to discharge the duty described in  
21 subsection (a) of this section.

1 ~~(d) Except as directed in subsection (a) of this section, a mental health~~  
2 ~~professional shall not have a duty to warn, train, or counsel the caretakers of a~~  
3 ~~patient or client, nor otherwise take precautions to protect a person or property~~  
4 ~~from any behavior of the patient or client.~~

5 Sec. 3. EFFECTIVE DATE

6 ~~This act shall take effect on passage.~~

~~Sec. 1. LEGISLATIVE INTENT~~

~~*It is the intent of the General Assembly in this act to respond to the Vermont Supreme Court's decision in Kuligoski v. Brattleboro Retreat and Northeast Kingdom Human Services, 2016 VT 54A, by clarifying a mental health professional's duty to disclose information concerning a client or patient in certain circumstances.*~~

~~Sec. 2. 18 V.S.A. § 7115 is added to read:~~

~~§ 7115. MENTAL HEALTH PROFESSIONAL; DISCLOSURE OF INFORMATION~~

~~(a)(1) *A mental health professional has a duty to exercise reasonable care to protect an identifiable victim or property from danger when the mental health professional knows or, based upon the standards of his or her respective mental health profession, should know that his or her client or patient poses:*~~

~~(A) *an imminent risk of serious danger to the identifiable victim; or*~~

~~(B) *an imminent risk to property to the extent that the risk represents a lethal threat to a person in the vicinity of the property.*~~

~~(2) *In discharging in good faith the duty described in subdivision (1) of this subsection:*~~

~~(A) *no cause of action against a mental health professional shall arise concerning client or patient privacy or confidentiality for disclosing information to third parties; and*~~

~~(B) *a mental health professional shall not be subject to criminal or civil liability.*~~

~~(b) *A mental health professional shall not be required to violate the standards of his or her respective mental health profession in disclosing information pursuant to this section.*~~

~~(c) As used in this section:~~

~~(1) "Identifiable victim" means a potential victim or victims who are capable of being identified.~~

~~(2) "Mental health professional" means the same as in section 7101 of this title.~~

~~Sec. 3. 18 V.S.A. § 8011 is added to read:~~

~~§ 8011. DISCHARGE PLANS~~

~~(a) To the extent permitted under State and federal patient privacy laws, a mental health professional discharging a client or patient from a psychiatric inpatient hospital or residential setting shall include in the discharge plan all necessary information on the client or patient's condition to enable the person or persons named in the discharge plan to carry out his or her discharge functions.~~

~~(b) No cause of action against a mental health professional shall arise concerning client or patient privacy or confidentiality for disclosing information to third parties pursuant to subsection (a) of this section.~~

~~Sec. 4. EFFECTIVE DATE~~

~~This act shall take effect on passage.~~

~~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.