

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Judiciary to which was referred Senate Bill No. 3
3 entitled “An act relating to mental health professionals’ duty to warn”
4 respectfully reports that it has considered the same and recommends that the
5 House propose to the Senate that the bill be amended by striking out all after
6 the enacting clause and inserting in lieu thereof the following:

7 Sec. 1. FINDINGS

8 The General Assembly finds that:

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

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

1 an identifiable victim has a duty to exercise reasonable care to protect him or
2 her from that danger.”

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

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

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

1 to protect the public from patients and clients who are no longer in their care or
2 under their control.

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

4 § 1882. DISCLOSURES OF PROTECTED HEALTH INFORMATION TO
5 AVERT A SERIOUS RISK OF DANGER

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

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

18 (c) This section does not limit or restrict claims under State or federal law
19 related to safe patient care, including federal discharge planning regulations
20 within the Conditions of Participation for hospitals, patient care regulations for
21 other federally certified facilities, the Emergency Medical Treatment and

1 Active Labor Act of 1986, Pub. Law 99-272, professional licensing standards,
2 or facility licensing standards.

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

7 Sec. 3. EFFECTIVE DATE

8 This act shall take effect on passage.

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11 (Committee vote: _____)

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Representative _____

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FOR THE COMMITTEE