

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Health Care 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) Scientific research demonstrates the inability of clinicians to predict
14 violence.

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

1 profession, should know that his or her patient poses a serious risk of danger to
2 an identifiable victim has a duty to exercise reasonable care to protect him or
3 her from that danger.”

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

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

13 (6) The *Kuligoski* decision has been seen by many mental health
14 professionals as unworkable. First, unlike the *Peck* duty, the *Kuligoski*
15 decision does not require the risk be serious or imminent. This puts providers
16 in a position of violating the Health Insurance Portability and Accountability
17 Act, Pub. L. 104-191, the federal law regarding the confidentiality of patient
18 records. Second, unlike the *Peck* duty, the *Kuligoski* decision does not require
19 that the prospective victim be identifiable. Mental health professionals must
20 guess who might be a victim or violate patient rights and involuntarily hold
21 patients who pose no actual risk of violence. Third, the *Kuligoksi* decision

1 singles out caregivers and potentially creates a situation in which they could be
2 held liable for the actions of the person for whom they are caring, which will
3 likely make caregivers reluctant to take on this role and thus leave patients
4 without the supports they need. Fourth, the *Kuligoski* decision is unworkable
5 because arguably it imposes a limitless duty on mental health facilities and
6 professionals to protect the public from patients and clients who are no longer
7 in their care or under their control.

8 (7) The *Kuligoski* decision appears to have had a chilling effect on the
9 mental health system: During the quarter in which the decision was issued by
10 the Vermont Supreme Court, more adults were held by application for
11 emergency examination or warrant in Vermont’s emergency departments (164)
12 than in any other quarter of measurement since March 2013 and calendar year
13 2016 had the highest number of adults held via emergency examination (572
14 adults compared to 524 in 2015). While the number of adults held returned to
15 predecision numbers (137) in the quarter following the decision, the percent of
16 adults who do not go into inpatient care has increased from 11–15 percent to
17 19–20 percent, suggesting more adults are being held who ultimately do not
18 need inpatient care.

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

2 § 1882. DISCLOSURES OF PROTECTED HEALTH INFORMATION TO
3 AVERT A SERIOUS RISK OF DANGER

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

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

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

1 (d) This section does not affect the requirements for treating mental health
2 professionals to communicate with individuals involved in a patient’s care in a
3 manner that is consistent with legal and professional standards, including
4 section 7103 of this title.

5 Sec. 3. EFFECTIVE DATE

6 This act shall take effect on passage.

7

8

9 (Committee vote: _____)

10

11

Representative _____

12

FOR THE COMMITTEE