VERMONT

State of Vermont
Department of Mental Health
280 State Drive, NOB 2 North
Waterbury, VT 05671-2010
http://mentalhealth.vermont.gov/

Agency of Human Services
[phone] 802-241-0090
[fax] 802-241-0100
[tty] 800-253-0191

DMH LEGISLATIVE AGENDA BRIEF

FORENSIC SYSTEM OF CARE | STATUTORY AND OTHER ACTIONS

ISSUE

Vermont lacks a true forensic system of care. The Department of Mental Health (DMH) is recommending both statutory and other actions to address the limitations of the current system to manage the needs of forensic patients.

The lack of a forensic system combined with the lack of a state-funded forensic facility impacts: 1) the ability of the Department of Mental Health to fulfill its responsibilities as a health care provider, 2) the certification and accreditation of hospitals, including VPCH, and 3) the public safety of Vermonters.

Statutory Actions:

1. DMH Party Status in Criminal Cases

DMH is proposing a statutory change that would allow DMH to have party status in criminal court.

2. Competency and Sanity Assessments

DMH is proposing a statutory change that would require these two assessments to be done in separate reports, with sanity assessments to occur only if a person is found competent. Proposed change would also require re-evaluations of competency when requested by a treating psychiatrist.

3. Develop a Formal Restoration of Competency Program

DMH is proposing a statutory change that would create a formal restoration of competency program for people found not competent to stand trial.

4. Review and consider Guilty but Mentally Ill verdict as well as the development of a Psychiatric Security Review Board (PSRB).

DMH is proposing to explore both a Guilty but Mentally lll verdict and the development of a Psychiatric Security Review Board (PSRB) to determine the respective opportunities and effectiveness of each approach to both address public safety and DMH's ability to fulfill its responsibilities as a healthcare provider.

Other Actions:

5. Victim Notification

DMH is proposing short-term and long-term options for victim notification.

6. Oversight of Forensic Evaluators

DMH is proposing to strengthen the oversight and training of the current forensic evaluators across the state.

DISCUSSION

STATUTORYACTIONS

1. DMH Party Status

DMH does not have party status in criminal proceedings when competency, sanity, involuntary hospitalization, and/or an Order of Non-Hospitalization are at issue. These criminal court hearings are litigated by State's Attorneys and the Defender General. These parties often lack expertise in this area of the law and/or see putting someone into the custody of DMH as a good option regardless of whether the person meets criteria to do so. DMH is unable to present an alternate intervention or perspective that may be more appropriate in relation to an individual's mental health status and treatment needs.

Recommendation:

To assure DMH expertise is available in these cases, DMH proposes that when competency and/or sanity is at issue, DMH be granted party status as co-counsel with the States Attorney and the Mental Health Law Project for the Defender General.

Having DMH input is critical to assuring a defendant is getting clinically appropriate care and that their personal autonomy is respected by assuring they are being served in the least restrictive level of care (as is statutorily required in Title 18 and by CMS and the Joint Commission) based solely on clinical needs.

Currently, DMH can be put in a difficult position due to no advance warning of these orders and then it can complicate DMH's ability to find appropriate placement for these individuals. If people are placed in inpatient beds that do not meet hospital level of care, it can result in someone waiting in an ED or DOC who actually needs that level of treatment. DMH wants to provide and contribute clinical expertise to best determine the appropriate treatment or level of care necessary to treat an individual's mental illness and to prevent inadvertent placement in an inappropriate setting or level of care.

In addition, the Centers for Medicaid and Medicare Services (CMS) and the Joint Commission, which accredit and certify hospitals, require individuals in a hospital to be receiving active

treatment for a medical issue that can be treated in the hospital. Thus, a criminal court ordering someone hospitalized who does not meet medical criteria risks a hospital's certification and accreditation. These are required to receive Medicaid and Medicare funds.

2. Assessments of Competency and Sanity:

Currently if a court orders a defendant to be assessed for competency and sanity those evaluations are often done at the same time in the same report. While competency is a current state, sanity is a point in time assessment based on mental status at the time of the alleged crime.

Recommendation:

Change statute to a sanity evaluation is only conducted after an individual is found to be competent. Also include a provision that, when requested by a treating psychiatrist, the court shall order another evaluation by a neutral expert selected by DMH.

To assure a defendant is fully able to participate in a sanity evaluation a defendant must first be competent to participate in that assessment. As sanity is referring to the defendant's mental status at the time of the alleged offense, the defendant needs to be able to recall the events clearly as opposed to trying to ask a defendant about this point in time while the defendant is incompetent.

To assure a re-evaluation of competency takes place when clinically indicated, DMH recommends the treating psychiatrist should have input as to when a re-evaluation takes place.

3. Creation of a competency restoration program

Vermont has no statutory mandate to restore competency.

Recommendation:

Create a formal restoration of competency program. During initial research, we have looked at what would be a best practice model for competency restoration. Elements of competency restoration program could include:

- Systematic Competence Assessment
- Individualized Treatment Program
- Education
- Anxiety Reduction
- Additional Education for Defendants with Limited Intelligence
- Periodic Reassessment
- Medication
- Assessments of Capacity
- Risk Assessment

If DMH is required by a court to continue to hold an individual who is incompetent to stand trial, but who no longer meets hospital level of care, we would be violation of CMS and Joint Commission requirements. This is because they require an individual to be promptly moved to a lower level of care once they no longer meet hospitalization criteria. And, this type of violation of CMS and Joint Commissioner requirements can lead to a loss of CMS certification and Joint Commission accreditation. Certification and accreditation are required to receive CMS funding.

4. Review and consider Guilty but Mentally Ill verdict as well as the development of a Psychiatric Security Review Board (PSRB).

Guilty but Mentally Ill:

Many states not only have not guilty by reason of insanity defenses, but also, or only have, guilty but mentally ill defenses. This verdict option that enables juries and judges to find a defendant guilty of committing an offense while formally acknowledging that the defendant has a mental illness. This verdict, as proposed in H.768, creates a "dual" custody status between DMH and the Department of Corrections (DOC) or the Department of Disabilities, Aging, and Independent Living (DAIL) and DOC where the defendant would receive treatment in the appropriate setting as long as it was clinically required and then, if time was left on their sentence, transition to corrections. DMH recommends limiting the use of this defense to just felonies, or even listed crimes as defined by Vermont Statute[1].

Psychiatric Security Review Board:

DMH has researched the Connecticut (CT) model[2] as a promising model as CT have successfully implemented and operated for many years an administrative psychiatric security review board to monitor the post-verdict disposition of defendants found not guilty by reason of mental disease.

In this model, the board's responsibility is to review the status of NGRI acquittees through an administrative hearing process and order the level of supervision and treatment (inpatient and outpatient) for the acquittee necessary to protect the public.

The Board is composed of six members appointed by the Governor and are designated to represent including professional expertise in the field of law, probation/parole services, psychology, psychiatry, victim services, and the interest of the general community.

5. Victim Notification

DMH recognizes the burden put on a victim when someone is discharged without their knowledge. As DMH is a covered entity as a health care provider, HIPAA prevents DMH from

[1] 13 V.S.A. § 5301(7).
[2] https://portal.ct.gov/PSRB

sharing that type of information in most cases unless there is an exception that applies. One example is Act 51 (2017), adding 18 V.S.A. § 1882, which states 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."

Short Term Ideas:

Currently, DMH notifies the States Attorneys of a person's discharge if there is a hearing requirement as part of their 90-day hospitalization order from Criminal Court. However, if there is an ongoing criminal case, DMH could notify the court and the parties to the criminal case of a discharge from custody as that may impact the criminal case. This, admittedly, does not impact cases that are dismissed or where insanity is stipulated, but it would provide a short-term option.

Long Term Considerations:

The psychiatric security review board (PSRB) model, like Connecticut, includes rights for the victim[3] to be notified by certified mail of all board hearings as well as the right to testify at the board hearing if they wish to do so. Thus victims would not only know about hearings but, unlike the issues with S.183 where the hearing is to determine commitment to the Department of Mental Health, a PSRB model coupled with a general fund forensic unit would allow the decision to be based not just on a person's clinical presentation but also their public safety risk.

Another option being discussed would be to put a requirement in law that DMH notify the States Attorney whenever an individual was discharged from custody, regardless of whether the criminal case was still ongoing or if it had been resolved or dismissed. HIPAA does require that covered entity make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.

6. Oversight of Forensic Evaluators

DMH believes that strengthening the oversight and training of forensic evaluators across the state will assure defendants are equally evaluated by individuals who have the necessary training and experience to provide these incredibly important evaluations.

Recommendation:

Create a program of oversight of forensic evaluations and reports as well as an educational

[3] The Connecticut PSRB defines a victim as either the victim, their legal representative, or, if they are deceased, a close family member.

program for the mental health professionals who perform evaluations and prepare reports. Elements of these programs could include:

- A manual with resources that could include best practices, relevant literature, guidelines, and examples of model reports
- Education on best practices for writing a forensic report
- Review of individual reports
- Professional support for evaluators
- Peer review of evaluations and reports

OTHER CONSIDERATIONS

General Fund Forensic Facility

Vermont has an acute psychiatric inpatient system that is federally funded. Vermont does not have a general fund forensic facility. To our knowledge, Vermont is an outlier in that most states have a forensic facility not paid for by Medicaid for these types of defendants/patients. This means that DMH is often expected to maintain criminally justice involved individuals for purely public safety reasons, beyond their clinical need of remaining in a hospital level of care.

A facility that can manage both hospital level of care and those who no longer require psychiatric inpatient treatment but remain a public safety risk might be needed. People who have been adjudicated as incompetent to stand trial or not guilty by reason of insanity could receive care at this type of facility. Those ordered to have an inpatient competency or sanity evaluation could also receive the evaluation and treatment at this type of facility. We could be a DOC/DMH/DAIL facility.

Having this type of facility would mean that inpatient psychiatric beds that currently occupied by forensic patients would be available for civil patients, greatly increasing flow and capacity in the system. Vermont would no longer be risking our federal financial participation and the CMS certification and Joint Commission accreditation of our hospitals. This could better assure public safety concerns were forefront when considering placement options of justice system involved individuals.