

SENATE BILL REPORT

ESSB 5106

As Amended by House, April 20, 2017

Title: An act relating to clarifying obligations under the involuntary treatment act.

Brief Description: Clarifying obligations under the involuntary treatment act.

Sponsors: Senate Committee on Human Services, Mental Health & Housing (originally sponsored by Senator O'Ban).

Brief History:

Committee Activity: Human Services, Mental Health & Housing: 1/17/17, 1/30/17 [DPS].

Floor Activity:

Passed Senate: 2/23/17, 49-0.

Passed House: 4/11/17, 89-8; 4/20/17, 87-9.

Brief Summary of Engrossed First Substitute Bill

- Amends procedures under Joel's Law by establishing a time limit for filing, changing detention procedures, and requiring designated mental health professional (DMHP) agencies to assist Joel's Law petitioners, and requiring the Administrative Office of the Courts to develop materials to assist Joel's Law petitioners.
- Requires a revocation petition for a less restrictive alternative order (LRA) under the Involuntary Treatment Act (ITA) to be filed in the county where the respondent is located or being detained.
- Modifies a requirement for a DMHP to consult with an examining emergency room physician during an initial commitment evaluation.
- Allows chemical dependency professionals to participate in petitions for involuntary treatment based on a substance use disorder.

SENATE COMMITTEE ON HUMAN SERVICES, MENTAL HEALTH & HOUSING

Majority Report: That Substitute Senate Bill No. 5106 be substituted therefor, and the substitute bill do pass.

Signed by Senators O'Ban, Chair; Miloscia, Vice Chair; Darneille, Ranking Minority Member; Hunt, Padden and Walsh.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Kevin Black (786-7747)

Background: The Involuntary Treatment Act. Under the Involuntary Treatment Act (ITA), an evaluation of a person for detention for civil commitment by a DMHP may be requested by calling a crisis line. Only a DMHP may perform a mental health civil commitment evaluation. The ITA process starts with a 12-hour hold for investigation and evaluation by a DMHP to determine whether to detain the person for civil commitment. The purpose of the DMHP evaluation is to determine whether, as the result of a mental disorder, the person presents a likelihood of serious harm or is gravely disabled. If the DMHP so finds, the DMHP may detain the person for up to 72 hours if the DMHP can locate a bed in a licensed evaluation and treatment facility (E&T) or in a facility capable of providing timely and appropriate mental health treatment that is willing accept the person pursuant to a single-bed certification.

The facility providing 72-hour treatment may file a civil commitment petition asking superior court to authorize continued detention for involuntary treatment for up to an additional 14 days. If the condition of the person does not sufficiently improve, the facility may subsequently file a petition asking the court to authorize an additional 90 days of involuntary inpatient treatment. A requirement of the ITA is for the patient to receive treatment in the least restrictive alternative setting that will meet the health and safety needs of the person and the public.

A facility providing treatment may alternatively request a 90-day Less Restrictive Alternative Order (LRA), which is a court order for involuntary outpatient treatment. An LRA requires a patient to pursue treatment in the community while residing at home or in an unlocked facility and to follow conditions related to treatment imposed by the court. If a person who resides in the community on an LRA fails to follow the court conditions, or their mental health condition significantly deteriorates, a DMHP may detain the person to an E&T or single-bed certification facility and file a revocation petition asking the court to authorize a return to inpatient treatment for the balance of the time on the LRA.

A section of the ITA expressing legislative intent instructs courts when they are construing ITA requirements to focus on the merits of a civil commitment petition, except where the requirements of the ITA have been "totally disregarded."

Joel's Law. In 2015, the Legislature enacted Engrossed Second Substitute Senate Bill 5269, known as Joel's Law. Under Joel's Law, an immediate family member, guardian, or conservator of a person may petition superior court to review a decision by a DMHP to not detain a person for civil commitment. A petition may also be filed if the DMHP has taken no action 48 hours after a request for investigation. Forms for filing a Joel's Law petition were created by the Administrative Office of the Courts (AOC). These forms prompt the petitioner to provide information required by statute, including the date on which an investigation was requested from the DMHP.

The court must review a petition under Joel's Law within one judicial day to determine whether the petition raises sufficient evidence to support the allegation. If the court so finds, it must request the DMHP's investigation file and make a final determination on the petition within five judicial days after the petition was filed. If the court overrules the DMHP by

issuing an order for initial detention, the court must provide the order of detention to the DMHP agency, which must execute the order without delay. An order for detention under Joel's Law expires after 180 days.

On November 14, 2016, the Senate Human Services, Mental Health & Housing Committee held a work session on Joel's Law, reviewing statistics and hearing testimony about the implementation of the law.

Consultation with Emergency Room Physicians. In 2013, the Legislature enacted Substitute Senate Bill 5456, which requires a DMHP performing a civil commitment investigation to consult with an examining emergency room physician regarding the physician's observations and opinions as to the person's condition, and whether the physician believes that detention is appropriate. In 2016, Division Two of the Washington Court of Appeals decided *In re K.R.*, 195 Wash. App. 843. In this case, the court reversed the civil commitment of the petitioner because the DMHP failed to consult with an examining emergency room physician, in circumstances where the petitioner had been released from the hospital to a community treatment facility before the start of the DMHP evaluation.

Revocation of LRAs. In 2015, the Legislature enacted Engrossed Second Substitute House Bill 1450 which, among other things, changed rules for revocation of LRAs. Some jurisdictions have interpreted new statutory language adopted as changing the venue requirements for LRA revocation petitions by requiring the petition to be filed in the court that originally entered the LRA, instead of the court where the person is located or being detained.

Involuntary Treatment for Substance Use Disorders. Washington State has parallel involuntary treatment systems for mental health and chemical dependency. While the legal structures surrounding the two commitment systems are similar, the limited availability of secure commitment beds related to substance use disorder treatment causes practice to diverge. In the Chemical Dependency Involuntary Treatment System (CD ITA), a designated chemical dependency specialist (DCDS), instead of a DMHP, is summoned by the crisis line to perform a civil commitment investigation. The DCDS is legally empowered to detain the person for a limited time to an approved substance use disorder treatment facility if there is a bed available for treatment and the person is found to meet civil commitment criteria similar to the ITA, providing that the person presents a likelihood of serious harm or is gravely disabled due to a substance use disorder.

In 2016, the Legislature passed Engrossed Third Substitute House Bill 1713, which provides for the creation of an Integrated Crisis Response system by April 1, 2018. Under this system, one crisis responder, called a designated crisis responder (DCR), performs a simultaneous evaluation for civil commitment based on the presence of a mental disorder or substance use disorder. The DCR may detain the person to an E&T, secure detox facility, or approved substance use disorder treatment facility. Amendments were made to the existing chemical dependency involuntary treatment system as a bridge to the effective date of Integrated Crisis Response. As part of these amendments, the required signatories to a CD ITA petition were changed from requiring the signature of a DCDS to requiring the signature of two licensed professionals, including some combination of a physician, physician assistant, psychiatric advanced registered nurse practitioner, and a mental health professional.

Mental Health Professionals and Chemical Dependency Professionals. A mental health professional is a psychiatrist, psychologist, physician assistant working with a supervising psychiatrist, psychiatric advanced registered nurse practitioner, psychiatric nurse, or social worker. The Department of Social and Health Services may define other mental health professionals by rule. A chemical dependency professional is a person certified in chemical dependency counseling by the Department of Health.

Substance Use Disorder. Substance use disorder is the current terminology used by the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published in 2013, to describe a condition in which the use of one or more substances leads to clinically significant impairment or distress. The term replaces the earlier usage of the term of chemical dependency disorder.

Summary of Engrossed First Substitute Bill: Joel's Law. A Joel's Law petition must be filed within ten calendar days after a DMHP evaluation. If more than ten days have elapsed, the petitioner must request a new DMHP evaluation. If a court issues an order of detention under Joel's Law, it must issue a written order of apprehension of the person by a peace officer, instructing the officer to deliver the person to a facility or emergency room designated by the DMHP. The DMHP must collaborate and coordinate with law enforcement regarding apprehension of the person, including sharing information relating to risk and information which would assist in locating the person. A person may not be detained to jail under Joel's Law.

A DMHP or DMHP agency must disclose the date of a DMHP investigation to a family member, guardian, or conservator of a person to assist in the preparation of a Joel's Law petition.

An order for detention under Joel's Law should contain the advisement of rights which the person would receive if the person were detained by a DMHP. By December 15, 2017, AOC must, in collaboration with stakeholders, develop a user's guide to assist pro se litigants in the preparation and filing of a Joel's Law petition and develop a model order of detention which contains an advisement of rights for the detained person.

LRA Revocations. An LRA revocation petition must be filed with the court of the county where the person is currently located or being detained.

Consultation with Emergency Room Physicians. If a person subject to an ITA evaluation is located in an emergency room at the time of the evaluation, the DMHP must take serious consideration of observations and opinions by an examining physician, advanced registered nurse practitioner, or physician assistant as to whether detention under the ITA is appropriate. The DMHP must document the DMHP's consultation with this professional, if the professional is available, or the DMHP's review of the professional's written observations or opinions. This requirement does not create an exception to the general rule creating a presumption that courts should decide ITA petitions on their merits in deference to the state's interest in protecting the safety of individuals and the public.

Evaluation and Petition by Chemical Dependency Professionals. Provisions of the CD ITA effective until April 1, 2018, are amended to allow a civil commitment petition under the CD ITA to be signed by a chemical dependency professional, instead of a mental health professional. These provisions are subject to an emergency clause and take effect immediately.

Provisions of law related to Integrated Crisis Response effective April 1, 2018, are changed to allow a chemical dependency professional to evaluate a person for 14-day, 90-day, or 180-day civil commitment and to sign the civil commitment petition. If the person is detained for mental health treatment, the petition must be signed by a mental health professional.

References to chemical dependency treatment are changed to substance use disorder treatment.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: We support the bill. We request a technical amendment to clarify bill language.

CON: Please provide a better description of the medical staff which the DMHP is allowed to interact with when making the decision whether to detain an individual, to make sure those individuals are qualified according to definitions already provided in law. The consultation must be made in-person, rather than just reading notes in a medical chart. This safeguard is necessary to protect against deprivations of liberty. Not everything is placed in the chart, and nothing substitutes for the give and take of a live conversation. We object to the presumption provided that civil commitment should be decided on the merits. This offends the Separation of Powers doctrine and will lead to harmful litigation. Revocation hearings should be held in the county where the witnesses are, and before the judge who best knows the history of the individual and the case.

Persons Testifying: PRO: Seth Dawson, National Alliance on Mental Illness, NAMI WA.

CON: Mike De Felice, WA Defender Assn. and WA Assn. of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: No one.

EFFECT OF HOUSE AMENDMENT(S):

- Requires a DMHP or DMHP agency to provide written or electronic information about Joel's Law to the extent feasible to an immediate family member, guardian, or conservator of a person who is the subject of a request for a DMHP investigation.

- Amends initial petition and reauthorization requirements for CD ITA until April 1, 2018, to require a participating chemical dependency professional to be a DCDS.
- Amends initial evaluation and 14-day petition requirements for the ITA after April 1, 2018, to require an ARNP participating in a petition for involuntary mental health treatment to be a psychiatric ARNP.
- Requires DSHS to ensure that an additional 16-bed secure detox facility opens by April 1st of each year starting in 2020 until there is adequate capacity to meet involuntary treatment requirements for substance use disorder clients.