

## **MINUTES**

### **Task Force for the continuing Study of the Treatment of Persons with Mental Illness Who are Involved in the Criminal Justice System**

**February 16, 2012**

**10:00 a.m. – 12:30 p.m.**

**Capitol Building**

#### **Call to Order – 10:06 a.m.**

The Task Force for the Continuing Study of the Treatment of Persons with Mental Illness who are Involved in the Criminal Justice System meeting was called to order at 10:09 a.m. by Kathleen McGuire, Chair of the Task Force.

#### **Introductions and Welcomes**

Introductions were made around the room. Task Force members and guests introduced themselves. Kathy McGuire welcomed the new member Patrick Teegarden, Director of Policy and Legislation, Colorado Department of Labor and Employment to the Task Force.

#### **Minutes Approval**

Name misspelling on page 8 of the January 19<sup>th</sup> minutes will be corrected.

Jeanne Smith moved that January 19, 2012 minutes of the Task Force for the Continuing Study of the Treatment of Persons with Mental Illness who are Involved in the Criminal Justice System be approved as provided. Joan Shoemaker seconded. Motion passed.

#### **Task Force Vacancies**

Kathleen McGuire reported that there are currently two vacancies on the Task Force:

- Local Law Enforcement (1)
- There is one vacancy for a person with knowledge of public benefits and housing- we are working on a lead.

#### **Not Guilty by Reason of Insanity (NGRI) Education Curriculum and Insanity Statute in Colorado**

It was reminded that in the fall 2011 the Task Force decided to focus on issues related to insanity in the state of Colorado, the steering committee put together a curriculum. Today is the first training in the series and Tamara Brady and Andrew Heher, Office of the Public Defender, the experts in the area, present on the topic of Implications of NGRI in Colorado.

Tamara Brady reminded the group what the constitutional rights of criminal defendants are; those include the right to remain silent, the right to have a lawyer, the right to not to turn in any evidence that will incriminate the defendant. Criminal defendants also have statutory rights and

rights of privilege, medical information, and information from their priest or lawyer that can be provided without their consent. Things change if the defendant is insane.

Andrew Heher stated that the states don't have to have or enact affirmative defenses and in Colorado the General Assembly gets to decide how any statutory defense is going to operate, be plead, proved, etc. In some states they don't have insanity, in some states they do. Each state gets to decide how they will run it. Colorado is unique as the Colorado Constitution provides for an insanity defense; however the state decides how that will operate. If a suspect is suspected to have a severe mental illness, before insanity is plead, a forensic psychiatrist may be hired by the defense to determine what is going on with that person. This evaluation is confidential unless or until a plea of NGRI is entered. The professionals conduct tests and interviews in a jail setting. Once the decision is made to plead NGRI everything transforms. The decision will mean that the defendant is ordered to go to the state hospital, and is ordered to talk to court-ordered evaluators, cooperate with individuals conducting evaluation, examination, and observation. The language was entered in the statute 10-15 years ago.

The Insanity provisions are codified in C.R.S. §16-8-10.5.

Mike Lewis wondered if the state hospital says the person is suspected in malingering what is done then. Tamara Brady responded she typically would go back and talk to psychologist who came to that conclusion.

Michele Manchester inquired if a request for a second opinion is done in those cases. Ms. Brady responded that she would typically go back to their psychologist and evaluate it with that psychologist, not asking for a second opinion and if the state hospital comes back with non insane conclusion she would go with original NGRI defense and leave it up to the jury to decide.

Waiver of any confidentiality and privilege between the patient to a physician or a psychologist of the statute §16-8-103.6 was discussed.

Kathy McGuire added that as part of the due diligence of a defense attorney, the lawyer would all prior evaluation and treatment records. This is considered confidential and no one would be allowed to obtain these records. However, once a plea of NGRI is entered, all of these records are produced to the treating/evaluating experts at the state hospital as well as the prosecution and confidentiality is deemed to be waived. Dr. Gregory Kellermeier asked if that information becomes a public record. Gina Shimeall raised an issue of a client who doesn't want to raise the defense and how this could effect the attorney-client relationship.

Bruce Langer asked about the legal reasoning behind the waivers of rights and what was the Supreme Court's reasoning to have a full disclosure. Andrew Heher gave a history of how the Statute encountered changes, mentioning the 1995 and 1998-1999 revisions of statutes. The result is that today everyone gets the same record - state hospital, trial court, defense, when in the past the defense has had more information. The Supreme Court allows us to raise the defense in

cases of insanity. Supreme Court allows full disclosure since we are dealing with mental health issues, very unique area, we can only find out fairly what is going on in the defendant's mind if we have the full disclosure for both sides.

Tamara Brady summarized that it is a very unique area of the law and the traditional laws that exist don't apply to NGRI cases.

Melinda Cox asked if it is applicable to all ages. Ms. Brady answered that it is not clear but can be argued it applies in juvenile cases as well.

Mike Lewis asked about what happens if the NGRI plea is withdrawn. Ms. Brady answered that all the rights would be reinstated and mentioned the portion of the law that states that everything learned during the course of examination for this can only be used to disprove insanity or prove sanity, she would argue that everything the other side learned in the past should not be used if that defense is not used. She also added that the jurors are told about implications of guilty, not guilty and NGRI verdicts.

Kathy McGuire inquired about how often it occurs that the state hospital finds that the person is sane and jury finds he is insane. Andrew Heyer has never had a case like that. Kathy McGuire is trying to get this research from the state hospital.

Jeanne Smith asked if there are concerns about consistency or biases from one evaluator to the next when getting evaluations done. Ms. Brady shared she finds that the state hospital very seriously evaluates these cases. She usually meets the state hospital doctors, provide them with the same information her doctor had to reach the conclusion ensuring that the difference in evaluation results is not due to lack of information or different information.

Kathy McGuire commented that she hasn't seen any real inconsistencies within the state hospital evaluations. Although anecdotally, she finds it unusual for the state hospital to find someone insane. Often, if the state hospital finds someone sane, that defense can be withdrawn. Ms. Brady responded that sometimes we find that the case will not withstand, we need to explore other lines of defense. There is also a provision that the court has discretion and can order the subsequent evaluation for a good cause.

Michele Manchester commented that the state hospital gets 10-15 cases of NGRI cases per year and inquired about the percentage of those that go to trial. Tammy Brady answered that anecdotally all do. Kathy McGuire and Michele Manchester commented they are working on getting statistics.

Dr. Elizabeth Hogan commented that she is pleased about Tammy Brady's comment about doctors not being biased.

Louise Boris asked if the cases can be NGRI if it is determined that severe mental health issue was caused by substance abuse. Tamara Brady responded that it is quite common, ultimately the jury decides.

Dr. Gregory Kellermeyer asked about the law in Colorado on settled insanity, if there is a timeframe with it. Andrew Heyer responded the Statute amendment was made in the 90s, stating that if the medical condition defense is raised even if it were fitting the definition of insanity or if it is settled insanity but if there is a dispute then it comes into play. The Statute addresses it by including mental illness terminology. Tammy Brady added that the law says that the mental decrease or defect can't be attributable to voluntarily ingestion of alcohol or drugs.

Gina Shimeall commented that this Task Force needs to realize that what is presented is the worst of the worst to make it to the level of NGRI. She recommended also looking at the population that doesn't make it to NGRI, is going to DOC and is severely mentally ill (18-20 % of DOC population). She made a comment of how we are looking at the law and what the state allows for criminal responsibility and mental illness.

The PowerPoint of presentation will be distributed to the Task Force after the meeting. Kathy McGuire will attach the Statute to it as per Bruce Langer's suggestion.

### **Behavioral Health Transformation Council Update**

Jeanne Smith updated the Task force on the daylong seminar forum held on January 26<sup>th</sup> that discussed the issues of short and long term certifications and how court orders are being put into effect by different providers. The goal was to find any gaps, if people in criminal justice system fall through the cracks, if the information is shared. Notes from that day are being prepared by Diane Pasini- Hill and will be shared with the group if interested. Kathy McGuire commented she would be interested. Joanie Shoemaker asked about the future dates and locations for the forum. Jeanne Smith will review the dates and locations and share them with the group hoping some spaces will be available.

Criminal Justice Committee is tracking the Evidence-Based Practice Implementation for Capacity (EPIC) Project, the cooperative effort between DOC, State Judicial, Probation, Division of Behavioral Health, Division of Criminal Justice (DCJ), and Community Corrections. The outcomes so far are wonderful. It was rolled out with the Mental Health First Aid course. Providers are excited with the tools that are being provided to them

We are monitoring the efforts that are going on - opportunities for people in community corrections to get on Medicaid.

## **Other Updates**

Kathy McGuire reminded that the Legislative Committee meeting was rescheduled for tomorrow and she will bring up the Suspension bill discussion to their attention. Representative Acree put the agenda that includes a presentation from a provider who serviced persons with mental health in jails and also the update on Commission on Criminal and Juvenile Justice (CCJJ) this year.

Susie Walton and Mike Lewis briefed the Task Force on the recent legislative audit of CMHP that brought up the Suspension bill. Joan Shoemaker clarified that the State Auditor's Office is working on the report, and it is not the final recommendation. Jeanne Smith suggested bringing up the Suspension Bill issue at tomorrow's Legislative Oversight meeting. Kathy McGuire will put the Suspension Bill issue on the radar of the Oversight Committee.

Patrick Teegarden asked for clarification of the role of the Legislative Oversight committee. Kathy McGuire and Jeanne Smith clarified.

The Task Force discussed the barriers to the Suspension Bill which included the fiscal note attached to it, the changes to the Colorado Benefits Management System (CBMS) and for it not being the highest priority. And if it was it would have taken 18 months to implement.

Louise Boris commented that the Adult Without Dependent Children (AWDC) is being rolled out now, however people in community corrections are still not eligible for it. It is a piece we might want to continue advocating for.

Gina Shimeall commented there is a state suit pending with a group of attorneys representing people whose medical needs are being denied. The issue is that the interpretation of people in community correction is not accurate. There is a difference between someone who is transitionally placed in community corrections that are part of DOC, diversion and not a part of DOC, and probation.

Susie Walton reminded the Task Force about the Jeffco manual workaround in CBMS that could implement the Bill without a fiscal note she talked about at the last meeting. The guidance needs to be sent out to all technicians in the state, however it hasn't happened yet.

Gina Shimeall mentioned there is a group of volunteer lawyers that has a subcommittee that looks at mental health issues that is reviewing the issue of the Suspension Bill. Is there any value in having them make a presentation to this group or ask them if there is anything we can do to help?

Bruce Langer mentioned two NGRI cases from Jeffco and Boulder counties. A notice of advisory appeal was filed for one of the cases to define what a good cause is. There was an article in the paper saying we might lose but there is a potential for a change in the legislature.

Jeanne Smith brought some Crisis Intervention Training notebooks requested at the last meeting today.

Mike Lewis updated the group on NGRI/SSI issue the subcommittee is working on. We are working with Anschutz and Community Reach, putting together some scenarios, reviewing our regulations. Patients discharged from the state hospital, NGRI case, living in an assisted facility in the community, we try to get them structured and get them back into the workforce. There is a disincentive to work for people as all of their money goes to room and board; there is a cap of \$150/month allowance. We don't know what will come out of it, either a legislature or some internal rule changes.

### **What's Happening at Your Agency?**

Patrick Teegarden mentioned that unemployment insurance fix is the main focus of the Department.

Marc Condujani reviewed the Jail Diversion and Trauma Recovery –Priority to Veterans grant program (JDTR) awarded through Substance Abuse and Mental Health Services Administration (SAMHSA). The Division of Behavioral Health is filling up a number of management positions; John Mahelic is the new Director of Evaluations, Laya Robinson who is here today is the new Associate Director of Community Treatment and Recovery Programs. The Division is hopeful to have a new Director soon.

Melinda Cox updated the Task Force that the Division of Child Welfare presented a press conference today. She also brought up the House Bill 12-1046 Concerning Requiring Drug Testing as a Condition for Eligibility for Colorado Works Program. Essentially everyone receiving public assistance needs to pass the drug test. The Bill passed the House on February 9<sup>th</sup>.

Michele Manchester asked the Task Force members to forward the names for presenters to her.

### **11:43 a.m. – Adjourn**

The Task Force for the Continuing Study of the Treatment of Persons with Mental Illness who are Involved in the Criminal Justice System was adjourned at 11:43 a.m.