

HJR 50: A Primer

Background and Study Questions for the Study of the Involuntary Mental Health Precommitment Process and Costs

A REPORT TO THE LAW AND JUSTICE INTERIM COMMITTEE

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Montana Legislative Services Division
for the
Law and Justice Interim Committee
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Purpose

This paper provides background for the House Joint Resolution No. 50 (HJR 50) study of the civil involuntary mental health precommitment process and the costs and outlines basic study questions for discussion, revision, and approval by the Law and Justice Interim Committee (LJIC).

Current Law

Process

Montana's current law provides that when a person appears to be suffering from a mental disorder and presents an imminent danger to the person's self or to another, a peace officer may detain the person until the person can receive a mental health evaluation by an appropriate professional. The evaluation must be done by the next regular business day following the detention. After conducting a mental health evaluation, the professional must report the professional's findings and determination to the District Court.

If the professional determines that the person should be involuntarily committed to a secure treatment facility, the professional must immediately notify the County Attorney. If the County Attorney agrees that "probable cause exists" for an involuntary civil commitment, then the County Attorney files a commitment petition with the District Court.¹

¹ Section 53-21-129, Montana Code Annotated (MCA).

As soon as a petition for involuntary commitment is filed with the District Court, a judge must immediately consider the petition and determine whether probable cause for an involuntary commitment exists. If the judge determines that probable cause for an involuntary commitment does exist, then the judge immediately appoints a public defender (unless the person already has an attorney) and the person (now the "respondent") must appear before the judge. At this initial appearance, the respondent may object to the county's petition for an involuntary commitment. If the respondent objects, then the judge must set a hearing date that is not more than 5 days after the initial appearance. However, the respondent has the right to be evaluated by a professional of the respondent's choosing (which must be granted irrespective of the respondent's ability to pay) ² and may request that more than 5 days be allowed before the initial hearing.³

During this time, the County Attorney must arrange for the person to be transported as necessary for mental health evaluation and treatment. If community-based services are not available, such as in a secure psychiatric unit of a community hospital or in a behavioral health inpatient facility licensed by the Department of Public Health and Human Services (DPHHS), the respondent must be transported to and detained in the Montana State Hospital (MSP) at Warm Springs under the DPHHS.⁴

A respondent may not be detained in jail. If sound medical reasons require additional time for a complete evaluation, a judge may order further evaluation of the respondent before the initial hearing⁵ and the respondent must continue to be evaluated and treated during the detention period (unless the respondent's counsel objects).⁶

At any time prior to the hearing, the respondent has the right to request a trial by jury. If the respondent requests a jury trial, then the hearing is canceled and a trial date must be set for as

² Section 53-21-124, MCA.

³ Section 53-21-122, MCA.

⁴ Section 53-21-129, MCA.

⁵ Section 53-21-123, MCA.

⁶ Section 53-21-124, MCA.

soon as possible (but not later than 7 days after the request), with the trial taking precedence over any other court business.⁷

At a detention hearing or trial, the court considers all of the facts, evidence, and testimony and weighs those factors against certain criteria and standards governing involuntary commitments. Additionally, a medical or mental health professional, who is appointed by the court, must be present during the proceedings. Based on the hearing or trial, the court then makes a determination about whether the respondent is to be involuntarily committed to a secure treatment facility under the DPHHS, such as the MSH, or not.⁸

Costs

Under section 53-21-132(2)(a), MCA, the costs of psychiatric precommitment examination, detention, treatment, and testimony must be billed to the following entities in the order listed:

- (i) the respondent, the parent or guardian of a respondent who is a minor, or the respondent's private insurance carrier, if any;
- (ii) a public assistance program, such as medicaid, for a qualifying respondent; or
- (iii) the county of residence of the respondent in an amount not to exceed the amount paid for the service by a public assistance program.

Interpretations and implementation of who should pay for what costs vary county by county. Additionally, transportation costs are not specifically addressed in section 53-21-132(2)(a), MCA.

Stakeholder Concerns

The following discussion identifies the key stakeholders and their primary concerns about the precommitment process and costs.

⁷ Section 53-21-125, MCA.

⁸ Section 53-21-127, MCA.

Montana Association of Counties

The Montana Association of Counties (MACo) was the driving force behind HJR 50 and House Bill No. 551 (HB 551), which died in the House Committee on Local Government. HB 551 would have limited county obligations to pay precommitment costs to the examination, detention, and treatment costs for no more than 6 days. During the hearing on HJR 50 and HB 551, MACo and representatives of several county commissions made the following arguments in support of capping county obligations to a specified amount of time.

- The precommitment process has been taking too long. Although the process can take as few as 3 days, in some cases, the process has taken as long as 45 days. Each day of detention, evaluation, and treatment racks up additional costs to the counties as a payor of last resort (often, some argue, the payor of *only* resort). When the process takes more than 9 or 10 days, the cost can break the county's budget.
- With volatile timelines and the case-by-case nature of mental illness, costs are unpredictable and vary greatly year to year. Counties, especially smaller rural counties, have a difficult time budgeting for their precommitment costs.
- Costs are high and unevenly shared among counties. Although the per diem cost at MSH is about \$450 a day, the per diem cost for a county using a community-based private psychiatric hospital unit, such as Billings Clinic, can be as high as \$1,200 a day (although the rate may be reduced from there to the Medicaid rate or a percentage of the Medicaid rate, for example, 62% of the Medicaid rate in Billings, for a per diem cost of about \$800 being charged to Yellowstone County).

Montana Hospital Association (MHA)

The MHA opposed HB 551 on the grounds that it would have required the hospitals (those that do provide emergency psychiatric services) to eat all of the costs after the 6-day period set in the bill for county payment and highlighted the huge costs paid annually by hospitals that

essentially do charity work to ensure that people are getting the proper care and treatment for their mental illnesses. The MHA supported the HJR 50 study. A representative (Ms. Jani McCall) of Billings Clinic said that the state needs a comprehensive policy and guidelines to govern the precommitment process statewide.

County Attorneys

Based on testimony by County Attorneys on HJR 50 and HB 551, County Attorneys do not like to file petitions for involuntary commitment unless absolutely necessary and they may disagree with a mental health evaluator about the need to initiate a petition for the precommitment process. However, once the petition is filed, County Attorneys must follow the steps required by the legal process and have no control over how long it takes for a judge to be reached so that a determination can be made or for a court to handle the proceeding or for an evaluation to be conducted.

Respondents and public defenders

The Montana Advocacy Program (MAP), which advocates for the rights of people who suffer from mental disorders and who are the consumers of mental health services, opposed HB 551. Although sympathetic to the problem and the issues raised by the counties, the primary concerns for MAP were the protection of the respondent's rights to due process, a vigorous defense against involuntary commitment, and appropriate community-based evaluation and treatment. Although public defenders were not represented at the hearings on HJR 50 or HB 551, discussion during the hearings suggests that, given a recent Montana Supreme Court case, it is now clearer than ever that public defenders are expected to provide a vigorous defense against involuntary commitment petitions.

Judges

Judges and the court system were not represented in the hearings on HJR 50 and HB 551. However, Rep. Arlene Becker, who sponsored both of the bills on behalf of MACo and Yellowstone County, indicated that extension of hearing dates and the granting of continuances were a problem for counties.

The HJR 50 Study

Study objectives

A narrow interpretation of HJR 50 (given the history of HB 551) is that the main objective is to limit the number of days for which a county is responsible to pay for involuntary precommitment costs. However, as noted above, broader concerns were articulated during the hearings on HJR 50 and HB 551. This suggests broader study objectives, including a discussion of a statewide policy and procedures to govern the precommitment process and recommendations to: (1) streamline the process; and (2) improve the county's ability to predict and budget for costs.

Additionally, the study language contemplates a survey to gather data about:

- how counties interpret and apply the statutory provisions;
- county costs;
- court caseload and timelines; and
- provider caseload and costs, the availability of community-based resources and the role of the MSH.

Study questions

I. Survey

- A. Who should be surveyed?
- B. What information should be asked in the survey?
- C. What should be the deadline for returning the survey?

II. Process

- A. Are there unreasonable delays in the precommitment process? If there are unreasonable delays:
 - (1) Why?
 - (2) What are the options for avoiding the delays?
- B. What policies and procedures should be developed to improve the process?

- (1) By the Legislature through statutory changes?
- (2) By others?

III. Costs

- A. What will improve the county's ability to predict and budget for costs?
 - (1) What are the options?
 - (2) Which options are viable for Montana?

Work plan approach

To gather the necessary data, staff proposes that the survey instrument be developed by the LJIC (with the input of all stakeholders) and that it be reviewed and approved by the LJIC at its September 2007 meeting. This would mean that the LJIC's draft work plan should be modified to reflect the following:

- A working group should be organized to answer the study questions under paragraph I above.
- The survey instrument should be reviewed and approved by the LJIC at its September 2007 meeting.

To answer the study questions under paragraphs II and III, the work plan proposes panel discussions at the LJIC meetings in November 2007 and February 2008, with recommendations being developed at the June 2008 meeting. Because of the LJIC's other workload, staff proposes that no more than 15% of available time during the interim be allocated to the HJR 50 study.

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