Treatment of Persons with Mental Health Disorders in the Criminal and Juvenile Justice System

Advisory Task Force

2021 Annual Report

MHDCJS Advisory Task Force Updates

The oversight committee received updates on recent activities of the task force, which met monthly throughout 2021. The task force and its subcommittees focused on housing, data and information sharing, youth, and mental health holds, because of their importance for persons with mental health disorders who are involved in the criminal and juvenile justice systems. Further, the task force reviewed re-authorization legislation for the task force and oversight committee.

The task force received outside presentations from the Office of Behavioral Health on their efforts to address the Settlement Agreement in the class-action lawsuit against the state concerning incompetent to proceed (ITP) defendants, as well as guest presentations from individuals on both sides of the ongoing debate over involuntary treatment. These included people with lived experience and a medical director of one of the state's 17 mental health centers. Other guests involved in task force meetings and activities were from the Treatment Advocacy Center, a group dedicated to mitigating adverse outcomes for people with serious and persistent mental illness (SPMI) based out of Arlington, Virginia.

Task force members joined in the Office of Behavioral Health's ongoing bi-weekly stakeholder meetings on Colorado's Emergency Mental Health Procedures, co-facilitated by Mental Health America and the Department of Human Services. These meetings began February 22, 2021 and continued through November 2021.

Because of the COVID-19 pandemic, the task force opted out of its annual retreat in both 2020 and 2021, instead engaging in a months-long "Impact Effort Matrix Planning" exercise facilitated by a consultant from the Division of Criminal Justice, Department of Public Safety that began in February 2021. The consultant helped the task force focus its priorities, leading to the recommendations for bills given to the LOC in September 2021.

Additionally, the task force prioritized legislative outreach efforts, and clarified task force membership expectations. Further, the task force elected leadership positions and updated its membership as necessary. The work of the task force and its subcommittees is discussed in more detail below.

Juveniles. The task force continued its discussion and examination of the many ways that youth who struggle with mental health conditions are impacted by the criminal justice system. Competency, restoration, and confidentiality were ongoing areas of focus. The juvenile sex offender registry and judicial discretion in requiring registration were areas that continued to be monitored.

Housing. The task force reiterated that a criminal record often makes it hard for individuals with a mental health disorder to find housing. Colorado's population of people who are homeless has increased during the COVID-19 pandemic and these individuals continue to suffer disproportionately

from mental health and substance use conditions, as well as being incarcerated at rates higher than the general population, usually for only minor offenses. The task force continued its ongoing research on the extent of housing problems for this population and discussed housing infrastructure, information systems, data coordination, and supportive services. ARPA dollars were an area of hope and additional attention.

Data sharing. The criminal justice and behavioral health care systems are complex and made up of many independent agencies. The task force recognized that sharing information between agencies assists in effectively coordinating services, but due to the diversity and decentralization of the involved organizations, there is no common framework for sharing data. The task force examined ways to better connect state agencies, jails, and state health information exchanges, as this continues to be a serious impediment to recovery and stability for people with mental health conditions who come to the attention of the criminal and juvenile justice systems.

Mental Health Holds. The task force recreated a subcommittee to more closely examine state-wide problems with mental health holds (MHHs). Task force members have been privy to increasing numbers of complaints and frustrations with this aspect of the mental health treatment system, as a MHH often represents a dramatic moment in the course of a person's experience with serious mental illness, one in which family members and others wait and watch for evidence of improvement and stability to follow. The subcommittee's stance was that the 27-65 statute itself is not the reason for the erosion in effectiveness that has been seen over recent years, if not decades. More people were consistently able to get meaningful treatment in our state not long ago, with no significant change to the statutory criteria for a MHH occurring since the 1970s. Rather, the subcommittee believed that erosion in the mental health system's capability to address emergencies effectively and according to the standard of care has been the underpinning to the problems that have been witnessed.

Re-authorization. The task force discussed enacting legislation, task force membership, expectations, and the relationship between the oversight committee and task force. Bill (X) recommends re-authorization of the oversight committee and the task force for three more years, with certain changes in the task force included, such as term limits for members.

2021 Study Areas, Subcommittees, and Recommendations

Through its subcommittee and workgroup structure, the taskforce was able to conduct research throughout the 2021 calendar year on a variety of research topics. In September of 2021, the taskforce presented its recommendations to the LOC. Of these, two bills supporting ongoing diversion programs and housing were voted on and approved for drafting. In 2021, the taskforce operated through subcommittees that met regularly with the intent of conducting research on specific study areas and developing recommendations for legislation during the 2022 session.

Youth Subcommittee -- The MHDCJS Youth Subcommittee has met regularly throughout the reporting period and identified several areas of ongoing study related to juvenile competency to proceed and restoration services in Colorado. The most pressing issues the committee has identified for study are the following:

1. Statutes do not delineate a clear process for the Courts or the Department of Human Services to follow when competency is raised or after a finding of incompetency is made.

2. Statutes do not clearly define terminology. This leads to confusion about what restoration providers do, what records they generate (e.g., youth attendance, topics covered), and what forensic evaluators do (opine on competency).

3. There is no waiver of privilege in the statute.

4. Statutes do not discuss re-evaluations, contents of competency evaluations, or second opinion evaluations.

5. Clarification on best practices guidelines for restoration services.

6. Restoration process timelines, including limits on timelines.

7. Definition for restorability. The committee has recruited broader membership to include representation from key stakeholder roles (e.g. district attorneys, public defenders, OCR, OBH) to ensure subject matter expertise is driving key discussions and informing the potential for recommendations to the legislative oversight committee in subsequent sessions.

Data Sharing Subcommittee – This subcommittee focuses on addressing barriers to cross agency data analysis to inform policy as well as options to increase cross agency information sharing to improve outcomes of justice-involved individuals with mental health disorders. During the past year, the group has facilitated the following activities:

1. Producing a white paper on high potency THC and the potential effects on those in the criminal and juvenile justice system that was presented to the task force and the LOC. It was endorsed by the task force and then was utilized to help develop the basis for HB21-1317 which begins to put more regulations on the high potency concentrates and limits access by those 18-20 to medical marijuana.

2. Facilitating a task group focused on specialized responses to 911 calls involving behavioral health crises and developing tools to help local jurisdictions develop these programs to reduce the risk of criminal justice involvement during these events.

3. Facilitating a project to connect pilot jails sites to the Colorado Integrated Justice Information System to increase jail data and increase continuity of care for jail detainees with mental health disorders.

4. Working with the Colorado Department of Public Safety to help facilitate the SB20-037 Trusted Interoperability Platform Advisory Committee meetings and strategic plan.

5. Producing legislative recommendations to facilitate cross agency data analysis related to justice-involved individuals with behavioral health disorders.

Mental Health Holds Subcommittee – Mental Health Holds (MHHs) are usually the first step in the Emergency Procedure as described in C.R.S. 27-65. Increasingly over recent years, members of the task force have questioned whether MHHs consistently lead to meaningful treatment for Colorado citizens. The impression has been that they do not. The MHH Subcommittee had disbanded in 2019 over challenges with membership. It reformed in 2020 and accelerated its efforts during 2021.

The group initially listed broad problems in our system that consistently impair efforts to make MHHs effective. These included:

1. The use of certifications/Assisted Outpatient Treatment (AOT) is sometimes underutilized due to the fear of liability among providers.
2. Police sometimes have nowhere to take individuals on MHHs except, ultimately, jail.
3. Emergency Departments are often overloaded and/or on divert, creating pressure to discharge.
4. Jail is no place to be for a person in mental health crisis—they are generally not equipped, and not intended, for treatment.
5. People with mental health conditions fare poorly in jail or prison, often incurring more charges and gaining lengthier sentences.
6. Emergency Departments sometimes must release people without effective intervention due to a simple lack of available psychiatric inpatient beds.
7. In Colorado we too often see poor to no continuity of care.
8. Discharges from corrections too often happen without medications or available follow up.
9. A delay often happens in getting needed medications in jail.
10. Treatment files are too often closed at mental health centers (MHCs) when a person is jailed. (Please see the recent *Denver Post* expose that used the term, 'Reject or eject' in describing this phenomenon).
11. Minimum staffing exists for mental health treatment in jails and prison.
12. A 'default to failure' too often occurs in community corrections in which regression, recidivism, and a return to incarceration is the result.
13. Limited medication formularies exist in correctional settings.
14. Long-acting injectable medications are prohibitively expensive, reducing their use and benefit.
15. Insurance companies too often don't support inpatient stays beyond 72 hours.
16. MHCs don't accept certifications for transfer often enough.
17. Probationers and parolees with mental health conditions often face high levels of requirements with poor resources, leading to high recidivism.
18. Relative lack of diversion programs.
19. Relative lack of Mental Health/Drug Courts.
20. Courts sometimes drop certifications when people gain stability; then individuals subsequently stop treatment and relapse.
21. A lack of available substance abuse beds for rehab treatment and detox.
22. The "War on Drugs"—an ineffective and destructive policy—has ensnared too many people with mental illness.
23. Correctional officers are too often overtaxed, overburdened, and under-trained to effectively manage or help people with serious and persistent mental illness.
24. Police officers are generally not trained nor equipped to be the front-line in the mental health system (so-called "street corner psychiatrists"). They are rightfully resentful of this task and never sought out that responsibility in the first place.
25. We have a lack of good treatment and housing for sex offenders with mental illness.
26. For convicted felons who are released, having the permanent status as 'felon' effectively leads to a lifetime sentence of limited options for recovery, housing, jobs, etc.
27. Medicaid is not transferring between counties easily enough; nor does it get 'turned on' soon enough after release from a correctional facility.

28. MHCs will not take people into treatment until, or unless, the individual already has an in-county address. Therefore, people who are homeless in Colorado (homelessness in the U.S. has doubled during the pandemic) are effectively barred from MHC treatment. This is, again, the 'reject and eject' experience outlined in the *Denver Post* expose of 12/5/21.
29. We have a paucity of Assertive Community Treatment (ACT) teams which engage in Assisted Outpatient Treatment (AOT; also known as outpatient certification, or commitment) available; when available, they often do not meet fidelity to the model.
30. Mental health providers are too often untrained in managing violent or aggressive offenders with mental health conditions. Or they are not always comfortable with the use of authority, that is, involuntary care.
31. The mental health system is too often averse to working in tandem with the legal system.
32. Overloaded court dockets.
33. Unconstitutional delays in working ITP defendants through the system lead to frustration and disillusionment among both clients and providers.
34. A lack of housing and group homes for people with SPMI.
35. "Status" offenses for people with SPMI or who are homeless lead to jail for petty crimes, furthering criminalization.
36. A lack of real insurance parity.
37. The phenomenon of "creaming" (mental health systems who work with the easiest to treat, or best-funded, clients, first, and decline the challenging or complicated individuals), another aspect of 'reject and eject'.
38. Hospital systems that will not hold individuals in need of treatment beyond 72 hours due to their lack of insurance; or who, conversely, keep someone beyond an appropriate time period by virtue of a favorable payor source status.
39. Payor sources not supporting hospital admissions for dually diagnosed clients—or denying payment or authorization to admit when positive urine screens are obtained.
40. The state too often does not enforce our standard of care with necessary regulatory oversight.
41. Colorado has a high legal standard for Court-ordered medication (Medina), as compared to other states.
42. Funding and budget cuts over many years, following the adoption of TABOR in 1992, to the public mental health system and Institutes.
43. The lack of available psychiatric beds.
44. Generally, poorly funded and understaffed Office of Behavioral Health.

The result in Colorado, as is true elsewhere in the country, is that Corrections becomes the system that "cannot say no".

Against this backdrop, the MHH Subcommittee concluded that the 27-65 statute, itself, is not the cause of our misfortune. Neither is the M-1 form, itself. And, conversely, we do not believe that changing the statute will suitably counter the many barriers and obstacles listed above to enable a reversal of criminalization.

Therefore, the MHH Subcommittee focused on five key areas of concern: Enhancing ACT teams across the state and their capabilities for the use of AOT, enhancing the use of peer support services, allowing

for 'no closed door' access for individuals seeking care (to counter 'reject and eject' experiences), and increasing our state's capabilities with Diversion. These are not easy tasks, as they will require a coordinated, state-wide effort among all stakeholders that we clearly lack presently. So, the MHH Subcommittee began its recommendations to the LOC in 2021 with two modest proposals.

One, that the LOC use its position and influence to advise HCPF to open up its support, ultimately through "coding" and Medicaid funding, of the use of AOT in our community MHCs. Second, that OBH expand its designation of community outpatient treatment entities who are allowed to provide 27-65 designated involuntary care, beyond the 17 state MHCs, to include so-called mental health "clinics". Given that these are not statutory changes, the Subcommittee was advised by the Chair of the LOC to work collaboratively between the task force and the LOC and submit letters to those state agencies in the hope of triggering changes.

Housing Subcommittee --

Since the last Report to the Colorado General Assembly, MHDCJS' housing subcommittee was involved with:

HB20-1035, which dealt with the development of housing supportive services in rural, frontier, and underserved communities. 1035 died in appropriations due to COVID (attached). The bill had four major components specific to individuals living with behavioral health issues who were involved in or at risk of justice involvement: 1) statewide training and technical assistance to help communities develop and implement housing programs for individuals with behavioral health conditions; 2) a predevelopment grant program; 3) the establishing of supportive housing services and a homeless prevention grant program; and 4) an increased and improved data system, best practices, and training materials.

During COVID the housing subcommittee continued to meet and worked on the following:

a. Presented a formal paper and research with presentation to Governor Polis' Behavioral Health Task Force with specific recommendations for housing for the cross section of individuals with behavioral health and justice involved issues (attached).

b. Researched, formulated, and presented a Housing Platform document to potential bill sponsors and stakeholder groups that may be used when addressing any legislation regarding behavioral health and housing (attached).

c. Researched and made recommendations for amendments to the following bills consistent with our Housing Platform and the housing subcommittee's previous housing white paper.

1) SB21-137: Behavioral Health Recovery Act Bill. The housing subcommittee asked for the delineating of mental health and dual diagnosis conditions, not just substance disorders, in this bill. We asked for amendments to target and fund treatment for individuals who are dual diagnosed. Too often sober living homes cannot meet the need of individuals with severe mental health issues and deny them access to sober living homes or homes specializing in dual diagnosis.

2) SB21-146: Improving prison release outcomes. Specifically, recommendations to Sections 3-6 that the parole plan should specifically have a discharge plan that provides appropriate housing for this high-needs population. The bill was lacking in any housing or supportive housing services.

3) SB21-242: Housing Development Grants/Hotel Tenancy Support. The housing subcommittee backed this effort to support individuals with behavioral health and dual diagnosis conditions in the justice system with steps towards supportive housing; it addressed zoning ordinances that limit hotel or motel stays and/or the availability of supportive housing.

The housing subcommittee gave stakeholder input and a position paper to Health Management Associates (HMA), a group that was gathering information for Colorado's developing Behavioral Health Administration (attached).

Since the announcement of the American Recovery Plan Act (ARPA) dollars, HB21-1329, and the implementation of SB19-222, the housing subcommittee as had individual stakeholder meetings with HCPF, DOH, DOLA, and OBH, giving input and seeking recommendations for collaborative legislation to address gaps in services. The housing subcommittee has also met and collaborated with Mental Health Colorado, National Alliance on Mental Illness (NAMI) and other entities regarding possible bills for the coming years.

In summary, the housing subcommittee has been very active despite the pandemic and the interruptions it has brought. Our interest is in keeping housing at the forefront as the state explores new funding possibilities by virtue of ARPA dollars and during the rolling out of the BHA. For people who need our advocacy (individuals with mental illness in the criminal justice system), nothing will progress or even stabilize for them without the necessary spectrum of housing opportunities being available to them. Bill conceptions are also included in an additional attachment.

Prioritization of 2022 Study and Upcoming Work

The task force voted to expand its subcommittees to include the addition of a Marijuana Subcommittee. Recent research has identified that high potency marijuana may be contributing to the worsening of mental health symptoms and, therefore, inhibiting full recovery of individuals in the criminal and juvenile justice system, and worsening recidivism rates. The task force sees this as a pressing concern. Additionally, the MHH Subcommittee expects to expand its work to include all aspects of involuntary treatment, as it sees the lack of insight inherent in many mental health and substance use conditions, combined with the state's failure to substantially uphold the standard of care in this area in recent years, as prime reasons for criminalization and our state's inability to resolve the costly ITP Settlement Agreement.

Each subcommittee will be meeting regularly to continue their research on key areas for recommendation development, while focusing on the new parameters created by the Re-authorization bill, shall it be passed by the legislature. To help subcommittees identify focus areas, the taskforce has been having ongoing discussions about needed study areas for 2022 in monthly meetings. Further, to help prioritize issues of study, the taskforce is seeking presentations from and dialogue with other entities such as those who participated in the Governors' Behavioral Health Taskforce and the stakeholders working on the competency to proceed issues. Lastly, the taskforce will continue ongoing outreach to and dialogue with members of the LOC to best understand their needs and expectations.