

# Between a Bed and a Hard Place: How Washington Can Keep Psychiatric Patients in Treatment and Off the Streets

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## INTRODUCTION

On February 27, 2013, ten psychiatric patients were being involuntarily detained in hospital emergency departments located in Pierce County under Washington State’s Involuntary Treatment Act (ITA).<sup>1</sup> Despite the name of the law that authorized their detainment, these individuals were not receiving any psychiatric treatment during their confinement.<sup>2</sup> Nor were they there as the result of a criminal conviction.<sup>3</sup>

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\* J.D. Candidate, 2016. I would like to thank all of my friends and family who have supported me over the years. I would not be publishing this Comment without you. I would also like to thank the editorial staff of the *Seattle University Law Review* who contributed to this Comment. Your contributions made it far better than it ever would have been otherwise.

1. Det. of D.W. v. Dep’t of Soc. & Health Servs., 332 P.3d 423, 424–25 (Wash. 2014).

2. *Id.* at 425.

The only thing these ten detainees were guilty of was being mentally ill. Under what is now considered to have been a misinterpretation of the ITA,<sup>4</sup> counties across Washington had for years been confining mentally ill patients in hospitals not certified to provide psychiatric treatment.<sup>5</sup> When this practice was finally challenged in *Detention of D.W. v. Department of Social & Health Services*, it was predictably outlawed.<sup>6</sup>

The Washington Supreme Court's decision in *D.W.* stems from a challenge to Washington's practice of "psychiatric boarding," a term of art for the involuntary confinement of mentally ill patients to hospitals not authorized to provide psychiatric treatment by using "single-bed certifications" under the ITA.<sup>7</sup> Single-bed certifications are temporary permits that allow a patient detained under the ITA to be housed in a facility not certified to provide psychiatric treatment for a limited period of time.<sup>8</sup> The primary motivation behind this practice is to limit overcrowding in certified psychiatric hospitals.<sup>9</sup> A combination of drastic budget cuts in the area of mental health treatment and a lack of legislative attention given to the reality that psychiatric treatment centers are grossly underfunded and overcrowded has culminated in a mental healthcare crisis.

Although the rampant abuse of the ITA's single-bed certification provision was a necessary evil in the fight against overcrowding in certified treatment centers in recent years, this option is no longer legal under *D.W.*<sup>10</sup> Therefore, the state is now left with hundreds of patients who would normally be eligible for detention under the ITA and nowhere to legally house them. Given that patients eligible for involuntary detention are typically those who pose a danger to either themselves or others, this problem is concerning both for the patients in need of treatment and for

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3. *Id.*

4. See WASH. REV. CODE § 71.05.153 (2015); *id.* at 428.

5. *Det. of D.W.*, 332 P.3d at 424.

6. *Id.* at 428.

7. See Kevin Hanson, Opinion, *ER Crisis Created by Supreme Court's Ruling on Psychiatric Boarding*, SEATTLE TIMES (Sept. 4, 2014), <http://www.seattletimes.com/opinion/guest-er-crisis-created-by-supreme-courtsquos-ruling-on-psychiatric-boarding/>; Brian M. Rosenthal, *'Boarding' Mentally Ill Becoming Epidemic in State*, SEATTLE TIMES (Oct. 5, 2013), <http://www.seattletimes.com/seattle-news/times-watchdog/lsquoboardingsquos-mentally-ill-becoming-epidemic-in-state/>.

8. See WASH. ADMIN. CODE § 388-865-0526 (2015).

9. Andy Mannix & Lynn Thompson, *Ruling that Bans 'Psychiatric Boarding' Has Health Officials Scrambling*, SEATTLE TIMES (Aug. 7, 2014), <http://www.seattletimes.com/seattle-news/ruling-that-bans-lsquopsychiatric-boardingsquos-has-health-officials-scrambling/>.

10. In 2013, 3,412 single bed certifications were issued across Washington, an increase from just 1,221 in 2007. See ANDY TOULON, WASH. OFFICE OF PROGRAM RESEARCH, DSHS: MENTAL HEALTH UPDATES 22 (2013), available at <https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=svE8ROxR73E&att=false>.

the public they inevitably interact with.<sup>11</sup> This problem is only getting worse, and the Washington State legislature must dedicate additional funds and facilities to the housing and treatment of psychiatric patients if this new crisis is to be averted.

To address these new and complex issues, this Comment proposes both a short-term and long-term solution to the systemic complications brought about by the *D.W.* decision. In the short term, this Comment proposes amending Washington's ITA to permit the temporary psychiatric boarding of mentally ill patients if they would otherwise be released despite posing a danger to themselves or others. A bill proposing an amendment similar to the one proposed in this Comment was passed by the Washington State legislature and signed by Governor Jay Inslee on May 14, 2015,<sup>12</sup> and took effect in July 2015.<sup>13</sup> Second, this Comment proposes a long-term restoration of mental health funding to pre-2009 levels.<sup>14</sup> The recent increase in the use of single-bed certifications is correlated with a drop in mental health funding.<sup>15</sup> This downward trend in mental health funding must be reversed if we are to truly resolve Washington's mental health crisis once and for all.

Without sufficient funding and housing for patients who would have been detained under single-bed certifications prior to *D.W.*, the state faces the daunting possibility of having to release those patients into society. The release of patients who are eligible for detention under the ITA raises numerous concerns related to public safety and federal law violations on the part of doctors and hospitals. The dilemma for medical professionals arises from the federal Emergency Treatment and Labor Act's requirement that patients be stabilized before they are transferred or released.<sup>16</sup> If a hospital or doctor authorizes the transfer or release of an unstable patient, they can be subjected to monetary fines and civil lawsuits by anyone who suffers harm resulting from the transfer or re-

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11. Washington's ITA authorizes involuntary detention on two grounds, one being when the patient "[p]resents a likelihood of serious harm." WASH. REV. CODE § 71.05.150(1) (2015). "Likelihood of serious harm" is defined as a likelihood of harm to the patient, another person, or the property of another person. WASH. REV. CODE § 71.05.020(25)(a) (2015).

12. Jordan Schrader, *New Law Allows Hospitals to Hold Mental Patients if No Room Elsewhere*, NEWS TRIBUNE (May 14, 2015), <http://www.thenewstribune.com/2015/05/14/3791608/new-law-allows-for-mental-health.html>.

13. See H.R. 1450, 64th Leg., Reg. Sess. (Wash. 2015).

14. See WASH. DEP'T OF SOC. & HEALTH SERVS., BUDGET REPORT (2009), available at <http://leap.leg.wa.gov/leap/budget/lbns/2009dshs.pdf>.

15. See generally MASON BURLEY, WASH. STATE INST. FOR PUB. POLICY, INPATIENT PSYCHIATRIC CAPACITY IN WASHINGTON STATE: ASSESSING FUTURE NEEDS AND IMPACTS (PART ONE) (2011), available at [http://www.wsipp.wa.gov/ReportFile/1092/Wsipp\\_Inpatient-Psychiatric-Capacity-in-Washington-State-Assessing-Future-Needs-and-Impacts-Part-One\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1092/Wsipp_Inpatient-Psychiatric-Capacity-in-Washington-State-Assessing-Future-Needs-and-Impacts-Part-One_Full-Report.pdf).

16. 42 U.S.C. § 1395dd(c) (2012).

lease.<sup>17</sup> With psychiatric boarding now outlawed, if a medical professional must involuntarily commit a mentally ill patient but no bed is available at a certified treatment center, the doctor and hospital treating that patient are faced with an impossible situation. They must choose between violating Washington law under the ITA and *D.W.* by detaining the patient in a treatment center not authorized to provide psychiatric treatment, or violating federal law by releasing the patient prior to stabilization.<sup>18</sup>

This Comment explores the consequences the *D.W.* decision has for the mental healthcare system in Washington and potential solutions to these growing problems. Part I examines the language, legislative history, and purpose of Washington's ITA. Part II provide background and analysis of the Washington Supreme Court's decision in *D.W.*, particularly on how the statute's language forced the court to hold as it did. Part III focuses on solutions to the problems caused by the *D.W.* decision. This Part first advocates for a temporary amendment to Washington's ITA permitting single-bed certifications of a limited duration to avoid the release of unstable patients into the community. It then asserts that the only long-term solution to the mental healthcare crisis in Washington is increased funding and attention from the legislature to the plight of psychiatric patients and providers.

#### I. WASHINGTON'S INVOLUNTARY TREATMENT ACT

Washington's ITA was first enacted in 1974 and last amended in 2007.<sup>19</sup> Washington Revised Code § 71.05.010 enumerates the express legislative intent of the ITA:

- (1) The provisions of this chapter are intended by the legislature:
  - (a) To protect the health and safety of persons suffering from mental disorders and to protect public safety through use of the *parens patriae* and police powers of the state;
  - (b) To prevent inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;
  - (c) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders;

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17. *Id.* § 1395dd(d).

18. Hanson, *supra* note 7.

19. *Frequently Asked Questions About Involuntary Treatment and Mental Illness Laws*, KING CNTY. DEP'T OF CMTY. & HUMAN SERVS., <http://www.kingcounty.gov/healthservices/MentalHealth/Services/CrisisServices/FAQs.aspx> (last updated Aug. 5, 2015).

- (d) To safeguard individual rights;
- (e) To provide continuity of care for persons with serious mental disorders;
- (f) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures; and
- (g) To encourage, whenever appropriate, that services be provided within the community.

. . . A presumption in favor of deciding petitions on their merits furthers both public and private interests because the mental and physical well-being of individuals as well as public safety may be implicated by the decision to release an individual and discontinue his or her treatment.<sup>20</sup>

It is clear that the legislature had both sides of the mental health dilemma in mind when enacting the ITA. On the one hand, the legislature clearly contemplated the right of psychiatric patients to not be indefinitely detained without treatment.<sup>21</sup> However, the legislature also recognized that one of the fundamental purposes behind the ITA is to protect the public from the occasionally unpredictable behavior of the mentally ill.<sup>22</sup>

Washington's ITA permits the civil commitment of mentally ill individuals who "present a likelihood of serious harm," or who are "gravely disabled."<sup>23</sup> Upon being informed that an individual could be in need of involuntary commitment, a mental health provider is then required to evaluate and interview the patient.<sup>24</sup> If the mental health provider agrees that a patient is in need of psychiatric treatment and believes that he or she will not seek such treatment of their own volition, the provider may then file a petition for involuntary commitment under the ITA.<sup>25</sup> These petitions are then reviewed by a superior court judge who determines if probable cause exists to involuntarily detain the person.<sup>26</sup> If the judge determines probable cause exists and the individual has not sought treatment by choice, a probable cause hearing is held within seventy-two hours where the individual may oppose the petition and be represented by counsel.<sup>27</sup> If the petition is granted after the probable cause hearing,

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20. WASH. REV. CODE § 71.05.010 (2015).

21. *Id.* § 71.05.010(1)(b).

22. *Id.* § 71.05.010(2).

23. *See* WASH. REV. CODE § 71.05.150 (2015).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

the individual may be taken into custody and confined to an evaluation and treatment center.<sup>28</sup>

Under the authority granted by the ITA,<sup>29</sup> the Washington Department of Social and Health Services (DSHS) developed procedural rules for detaining patients under the ITA.<sup>30</sup> One of the provisions enacted by DSHS was the authorization of single-bed certifications.<sup>31</sup> A single-bed certification is an exception to the mandate that all patients detained under the ITA be housed in a certified psychiatric treatment center.<sup>32</sup> Prior to a 2015 amendment, the Washington Administrative Code permitted the issuance of a single-bed certification in two circumstances. First, a single-bed certification could be issued when a patient required treatment not available at a certified psychiatric care center or state psychiatric hospital.<sup>33</sup> Second, a single-bed certification could be issued if the patient would have been ready for discharge within thirty days and housing them in a noncertified treatment center would promote continuity of care tailored to the patient's individual needs.<sup>34</sup> One scenario clearly not enumerated as being appropriate for the issuance of a single-bed certification is to avoid overcrowding in certified treatment centers.<sup>35</sup>

Although the ITA explicitly states two narrow circumstances where single-bed certifications are permissible, it is now clear that Washington mental healthcare providers were using the certifications for another purpose; namely, reconciling the need to detain unstable patients with the pervasive overcrowding present in certified treatment centers. While this practice violates the express language of the ITA under *D.W.*, it is difficult to fault mental healthcare providers for attempting to find a workable solution to the inevitable choice between two undesirable outcomes. It is clear that educated and knowledgeable mental health providers believe the patients housed under single-bed certifications should be detained, both for their own safety and for the safety of the public, as made evident by filings for involuntary detention in the first place. However, the issue then becomes finding space for these patients where they may receive proper treatment. Only certain types of facilities are certified to

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28. *Id.*

29. WASH. REV. CODE § 71.05.560 (1998).

30. *See* WASH. ADMIN. CODE § 388-865-0526 (2015).

31. *Id.*

32. *See* Annie Zak, *New Rule for Psychiatric Boarding — A Treatment Plan for Every Patient*, PUGET SOUND BUS. J. (Dec. 22, 2014), <http://www.bizjournals.com/seattle/blog/health-care-inc/2014/12/new-rule-for-psychiatric-boarding-a-treatment-plan.html>.

33. WASH. ADMIN. CODE § 388-865-0526 (2009) (amended 2015).

34. *Id.*

35. *See id.* The court in *D.W.* thus found that awarding single-bed certifications to avoid overcrowding violated the statute. *Det. of D.W. v. Dep't of Soc. & Health Servs.*, 332 P.3d 423, 428 (Wash. 2014).

provide psychiatric treatment,<sup>36</sup> and these facilities are severely overcrowded.<sup>37</sup> As opposed to releasing these patients, the mental health community in Washington chose to house them in hospital emergency rooms, a solution that was imperfect at the time and is now unlawful.

II. *DETENTION OF D.W. V. DEPARTMENT OF SOCIAL & HEALTH SERVICES: ISSUES AND IMPLICATIONS*

The events giving rise to the litigation in *D.W.* occurred in early 2013 in Pierce County, Washington.<sup>38</sup> *D.W.* represents the consolidated cases of ten respondents, all of whom were detained under the ITA in hospital emergency rooms and acute medical care centers due to single-bed certifications.<sup>39</sup> These ten patients moved to dismiss the petitions for single-bed certifications because they did not believe they were being detained in an authorized treatment center as is required under the language of the ITA.<sup>40</sup> After reviewing several of these petitions, the Pierce County Superior Court Civil Mental Health Commissioner decided to hold an evidentiary hearing involving both DSHS and several of the hospitals and treatment centers being used to house single-bed certification patients.<sup>41</sup>

At the evidentiary hearing, the commissioner heard testimony from both the supervisor of Pierce County's designated mental health professionals and a representative of DSHS's Division of Behavioral Health and Recovery.<sup>42</sup> Both of these officials testified as to the process of obtaining single-bed certifications, as well as the startling trend of their increased prevalence in cases of overcrowding.<sup>43</sup> In fact, the DSHS representative testified that the use of single bed certifications had "within the past seven years . . . pretty much exploded and [was] continuing to increase."<sup>44</sup> Following this hearing, the commissioner found that patients detained under single-bed certifications did not receive sufficient treatment for their mental illnesses and ruled their detention unlawful under the ITA.<sup>45</sup>

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36. See WASH. ADMIN. CODE § 388-865-0500 (2015).

37. Rosenthal, *supra* note 7.

38. *Det. of D.W.*, 332 P.3d at 424.

39. *Id.* at 424–25.

40. *Id.*

41. *Id.* at 425. The Civil Mental Health Commissioner is appointed to act in a judicial role by hearing and deciding matters related to the civil commitment of mentally ill patients. WASH. REV. CODE § 71.05.137 (2013).

42. *Det. of D.W.*, 332 P.3d at 425.

43. *Id.*

44. *Id.* (internal quotation marks omitted).

45. *Id.*

Pierce County moved to revise the commissioner's decision.<sup>46</sup> However, the superior court judge reached the same conclusion as the commissioner and again ruled that the use of single-bed certifications to avoid overcrowding was not authorized by the ITA.<sup>47</sup> The Washington State Court of Appeals consolidated the ten cases and, on its own motion, transferred them to the Washington Supreme Court.<sup>48</sup>

The Washington Supreme Court's decision in *D.W.* relied on very little other than the text of the ITA.<sup>49</sup> The ITA itself acknowledges that each patient detained under its authority is entitled to both adequate care and individualized treatment.<sup>50</sup> Additionally, the ITA makes it clear that detention is only authorized when it occurs in a treatment center certified by DSHS, with the only exceptions being the very narrow circumstances previously elaborated where single-bed certifications are appropriate.<sup>51</sup>

The *D.W.* decision hinged on whether the portion of the Washington Administrative Code pertaining to single-bed certifications permitted detention in uncertified treatment centers due to overcrowding. The State's argument<sup>52</sup> focused on the following language:

- (3) The request for single bed certification must describe why the consumer meets at least one of the following criteria:
  - (a) The consumer requires services that are not available at a facility certified under this chapter or a state psychiatric hospital; or
  - (b) . . . [B]eing at a community facility would facilitate continuity of care . . . .
- (4) . . . The single bed certification must not contradict a specific provision of federal law or state statute.<sup>53</sup>

The State contended that due to overcrowding, mental health treatment was often "not available at a certified evaluation and treatment center" under the ITA.<sup>54</sup> The Washington Supreme Court rejected this interpretation of the Code.<sup>55</sup> Instead, the court held that the aforementioned language only authorized detention outside of certified treatment centers when, in the judgment of a mental health professional, a patient required a particular type of medical treatment not available at certified treatment

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46. *Id.*

47. *Id.*

48. *Id.*

49. *See id.* at 427.

50. WASH. REV. CODE § 71.05.360(2) (2009).

51. WASH. REV. CODE § 71.05.020(16) (2015); *see supra* text accompanying notes 33–34.

52. *Det. of D.W.*, 332 P.3d at 427.

53. WASH. ADMIN. CODE § 388-865-0526 (2013).

54. *Det. of D.W.*, 332 P.3d at 427.

55. *Id.*

centers.<sup>56</sup> The court expressly forbade detentions under single-bed certifications due exclusively to overcrowding.<sup>57</sup>

The ramifications of the *D.W.* decision are both encouraging and concerning for different reasons. First and foremost, from the statutory language of the ITA, the court's holding appears to be correct. The ITA and the portions of the Washington Administrative Code governing its implementation make no explicit mention of authorizing single-bed certifications because of overcrowding.<sup>58</sup>

While the decision may be correct, that does not mean it is free from potentially harmful consequences, particularly in the short term. The decision effectively outlaws a practice that although undesirable, prevents the release of unstable patients into the community without treatment or stabilization. In the long-term, banning psychiatric boarding benefits both the community and mentally ill patients. Ensuring that psychiatric patients are detained in certified treatment centers will guarantee they receive proper, individualized treatment. This sort of treatment will decrease the likelihood of recurring symptoms and obviate the need for future treatment. Any decrease in the likelihood of symptoms or treatment benefits the patient's quality of life while also reducing the public safety concerns and economic burden that treating and housing mentally ill citizens creates.

An inevitable question arises from the dueling long-term and short-term interests: how best to handle the short-term concerns in areas of public safety and the medical profession while also preparing to implement a long-term solution that will provide lasting support to mentally ill patients and accomplish the goals of the ITA. How Washington State answers this question has implications for patients, physicians, and the general public. A prudent long-term solution to the problem presented by the *D.W.* decision will require a combination of attention to the short-term fallout of the decision with increased legislative attention to an increasingly broken system of mental health.

### III. SOLVING THE PROBLEM: SHORT-TERM AND LONG-TERM SOLUTIONS

The problem left in the wake of the *D.W.* decision is multi-layered and a single prescriptive measure that will remedy all of the problems raised by outlawing psychiatric boarding likely does not exist. Addressing these issues will require a combination of short-term and long-term solutions that will address the several issues at the heart of this problem. First, the state must address the question of what to do with the thou-

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56. *Id.*

57. *Id.* at 427–28.

58. See WASH. ADMIN. CODE § 388-865-0526 (2015).

sands of patients who had been detained under single-bed certifications each year who may no longer be housed outside of authorized treatment centers.

On September 4, 2014, the Washington Supreme Court granted a stay on its order banning psychiatric boarding to give the state time to address the many issues the decision raised.<sup>59</sup> The state has begun to address this issue in the form of adding beds in authorized treatment centers.<sup>60</sup> As of October 29, 2014, the state had already added 117 new beds since the Washington Supreme Court handed down its decision in *D.W.*<sup>61</sup> This increase in housing for mentally ill patients represents a promising start towards reforming Washington's broken mental healthcare system, but it will not completely resolve the state's issues.

Psychiatric boarding was already prevalent at the time of the *D.W.* decision, and its use was only increasing in frequency prior to being outlawed.<sup>62</sup> The potential for authorized treatment centers to remain overcrowded certainly persists, and if a patient is now deemed eligible for involuntary detention, the state faces the possibility of being forced to release that patient prior to stabilization—a concern to public safety and to treating physicians subject to federal law prohibiting such a release.<sup>63</sup> Therefore, the state must identify a solution to the problem of potentially releasing unstable patients. The best solution exists in the form of amending the text of the Washington Administrative Code.

*A. In the Short Term: Amending the Washington Administrative Code to Permit Temporary Psychiatric Boarding*

The *D.W.* court limited its analysis to an examination of the plain language of the ITA and the provisions of the Washington Administrative Code governing its implementation.<sup>64</sup> The plain language of Washington Administrative Code § 388-865-0526 enumerates the specific circumstances under which single-bed certifications are permitted.<sup>65</sup> Granting single-bed certifications for the purposes of addressing overcrowding in psychiatric care facilities is not included in this list of circumstances;

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59. *Washington State Supreme Court Grants Stay on Psychiatric Boarding Ban*, MODERN HEALTHCARE (Sept. 6, 2014), <http://www.modernhealthcare.com/article/20140906/INFO/309069937>.

60. Ruby De Luna, *Washington DSHS Gives Progress Report on Psychiatric Boarding*, NW. PUB. RADIO (Oct. 29, 2014), <http://nwpr.org/post/washington-dshs-gives-progress-report-psychiatric-boarding>.

61. *Id.*

62. Rosenthal, *supra* note 7.

63. See 42 U.S.C. § 1395dd(c) (2012).

64. *Det. of D.W. v. Dep't of Soc. & Health Servs.*, 332 P.3d 423, 427 (Wash. 2014).

65. WASH. ADMIN. CODE § 388-865-0526 (2015).

therefore, the Washington Supreme Court held that the practice of issuing single-bed certifications due to overcrowding is not permitted under the statutory language as it is currently written.<sup>66</sup>

The justices relied heavily on the language of the ITA in outlawing psychiatric boarding, thereby raising the question of what to do about the psychiatric patients facing premature release. To address this issue in the short term, this Comment proposes temporarily amending parts of the Washington Administrative Code to permit short-term detentions under single-bed certifications due to overcrowding. DSHS has the statutory authority to adopt such rules in order to evaluate “procedures and standards for certification and other action relevant to evaluation and treatment facilities.”<sup>67</sup> A key aspect of this proposal is its temporary nature. I believe that the Washington Supreme Court’s holding in *D.W.* was correct both legally and prudentially. However, its sweeping mandate must be implemented in a gradual manner. Despite the unlawful nature of the psychiatric boarding system, it did serve an important purpose in Washington’s mental healthcare system, specifically providing a means of detention for unstable patients. Now that the state has been ordered to find an alternative means of achieving this same purpose, it must do so while simultaneously avoiding the unfortunate consequences the ITA was enacted to prevent.

The portion of the Washington Administrative Code pertaining to single-bed certifications was enacted under the statutory rulemaking authority granted to DSHS.<sup>68</sup> Relatedly, the *D.W.* analysis focused almost entirely on the portions of the Washington Administrative Code dealing with single-bed certifications.<sup>69</sup> Therefore, if DSHS had authorized short-term single-bed certifications by the express language of the Washington Administrative Code to avoid the release of an unstable patient due to overcrowding, the court’s analysis would presumably have been different and the detention of the plaintiffs would have been upheld.

By advocating for the temporary preservation of psychiatric boarding, I do not wish to convey the idea that the *D.W.* decision was incorrect or unwise. In fact, I believe quite the opposite. Psychiatric boarding represents the unfortunate consequence of a mental healthcare system that has been historically underfunded and has not received nearly the level of attention it warrants. Psychiatric boarding is detrimental both to those patients detained in unauthorized treatment centers and to the hospital

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66. *Det. of D.W.*, 332 P.3d at 427.

67. WASH. REV. CODE § 71.05.560 (1998).

68. See WASH. ADMIN. CODE § 388-865-0526 (2015) (outlining the statutory provisions by which DSHS is granted rulemaking authority).

69. *Det. of D.W.*, 332 P.3d at 427.

staff charged with their care.<sup>70</sup> Unauthorized treatment centers typically do not have the proper staff or resources to fulfill the psychiatric evaluation and treatment requirements of Washington's ITA and its implemented regulations.<sup>71</sup> Therefore, treatment of psychiatric patients in unauthorized treatment centers is often limited to sedation and restraint to prevent the patients from harming themselves or others.<sup>72</sup> This sort of treatment does nothing to address the underlying mental health issues that have led to the patients' detention in the first place.

Ridding Washington of all psychiatric boarding is an admirable goal, and striking down psychiatric boarding under single-bed certifications in *D.W.* is a much-needed first step toward providing necessary care for all of the state's mentally ill. However, the glaring gap left by the outlawing of psychiatric boarding in the state's mental healthcare system must be addressed in the short term. As unfortunate an occurrence as psychiatric boarding may be, it provides housing for psychiatric patients during an unavoidable transition period between the initial evaluation and eventual detention in an authorized treatment center. This transition period remains following the *D.W.* decision, yet the solution the state had relied on for so long in handling this period is now forbidden. Finding a new solution to the problem of where to house these patients transitioning from evaluation to detention is the task the state is currently wrestling with, and will continue to struggle with for the foreseeable future.

As part of this struggle, DSHS and the state legislature are working to find a solution to the problems identified in this Comment. Emergency rules that increase the number of facilities able to house patients under a single-bed certification took effect on April 21, 2015.<sup>73</sup> Under these new rules, a single-bed certification may be issued to any certified treatment center, psychiatric hospital, hospital with a psychiatric department, or hospital capable of providing timely and appropriate mental health treatment.<sup>74</sup> While this new rule seems simply to reinstate psychiatric boarding—this time with authority derived from the Washington Administrative Code—it does require that the hospital be willing and able to

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70. See generally Leslie S. Zun, *Pitfalls in the Care of the Psychiatric Patient in the Emergency Department*, 43 J. EMERGENCY MED. 829 (2012).

71. *Id.*

72. B.A. Nicks & D.M. Manthey, *The Impact of Psychiatric Patient Boarding in Emergency Departments*, EMERGENCY MED. INT'L, June 5, 2012, available at <http://www.hindawi.com/journals/emi/2012/360308/>.

73. DSHS Emergency Rule, 15-01 Wash. Reg. 193 (Dec. 24, 2014), available at <http://lawfilesexternal.wa.gov/law/wsr/2015/01/15-01-193.htm>.

74. *Id.*

provide timely and appropriate mental health treatment.<sup>75</sup> This language appears to have been added in order to avoid the indefinite detainment of patients without treatment that plagued Washington's mental healthcare system prior to *D.W.*

This new rule is a promising change to the law governing single-bed certifications because it ensures that at the very least, psychiatric patients will be housed in hospitals capable of treating them. However, the problem of an insufficient number of beds persists.<sup>76</sup> Therefore, while those patients detained under single-bed certifications will receive better treatment than they have in the past, some patients in need of care will still not have a place to go.

Until the state can provide a sufficient number of beds, these patients must be detained somewhere in accordance with federal law.<sup>77</sup> Under state law, the relevant portion of the Washington Administrative Code is section 388-865-0526.<sup>78</sup> I propose amending this subsection. The amended section would read as follows:

- (3) The request for single bed certification must describe why the consumer meets at least one of the following criteria:
  - (a) The consumer requires services that are not available at a facility certified under this chapter or a state psychiatric hospital; or
  - (b) . . . [B]eing at a community facility would facilitate continuity of care . . . ; or
  - (c) *Failing to secure a single-bed certification would result in the release of an unstable patient in violation of 42 U.S.C. § 1395dd.*<sup>79</sup>

Adding this language to the administrative code would preserve single-bed certifications for purposes already recognized under the ITA, while also permitting psychiatric boarding as a last resort when the only alternative would be to release a patient prior to stabilization. Doing so during the transition period between initial detention and treatment represents a change that is the "lesser of two evils" in addressing a problem that has no other legal solution.

One of the most important aspects of this proposed solution is its temporary nature. I only intend for this amendment to be in effect for as

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75. *Id.*

76. JoNel Aleccia, *State's Psychiatric Care Changes Still Not Enough, Say Some Experts*, SEATTLE TIMES (Mar. 22, 2015), <http://www.seattletimes.com/seattle-news/health/psychiatric-boarding-dips-but-fix-just-a-band-aid-critics-say/>.

77. See 42 U.S.C. § 1395dd (2012).

78. See WASH. ADMIN. CODE § 388-865-0526 (2015).

79. Emphasis was added to the proposed amendment, which is not currently part of the regulation. To compare this language to the actual regulation as it is currently written, see *id.*

long as it takes for the Washington State legislature to address the larger problem of the state's broken mental healthcare system and provide adequate treatment facilities for all of those patients detained under the ITA. Enacting the amendment proposed above for an indefinite period of time would only reinstate the psychiatric boarding practices in effect prior to the *D.W.* decision. While psychiatric boarding may be able to withstand judicial review if it was authorized by statutory language, the detrimental effects it has on hospitals and psychiatric patients in need of treatment is significant. I do not wish to reinstate pre-*D.W.* psychiatric boarding, but rather to avoid the consequences that would result if it was abandoned suddenly and without consideration of the implications that would result from that abandonment.

### *B. Recent Legislative Action Concerning Single-Bed Certifications*

In response to the *D.W.* decision, DSHS enacted emergency rules to accommodate patients in need of treatment who had been involuntary committed.<sup>80</sup> These rules permitted hospitals that did not qualify as certified treatment centers under the ITA to house involuntarily committed patients if they were able and willing to provide psychiatric treatment while the patient was housed there.<sup>81</sup> An effort to codify these new rules into the ITA was successful, and an amendment to the ITA was approved by the legislature and signed into law by Governor Jay Inslee on May 14, 2015.<sup>82</sup> This law permits hospitals other than those certified to provide psychiatric treatment to house involuntarily detained patients as long as those hospitals are willing to house the patients and able to provide some psychiatric treatment.<sup>83</sup> Thus, while this amendment to the ITA provides legal authority to continue psychiatric boarding, it also requires that detained patients receive psychiatric treatment. This represents a step forward from the system before *D.W.* where patients were simply detained without any opportunity to receive treatment.

The legislature's goal in enacting this new law appears to be to provide a stopgap between the *D.W.* decision and the addition of a sufficient number of new beds to provide for the state's mentally ill population.<sup>84</sup> While this new law largely aligns with the short-term solution proposed

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80. See DSHS Emergency Rule Order, 15-01 Wash. Reg. 193 (Dec. 24, 2014), available at <https://www.dshs.wa.gov/sites/default/files/SESA/rpau/documents/103E-15-01-193.pdf>.

81. *Id.*

82. H.R. 1450, 64th Leg., Reg. Sess. (Wash. 2015); see also WASH. ADMIN. CODE § 388-865-0526 (2015) (codifying emergency rules).

83. Schrader, *supra* note 12.

84. Jordan Schrader, *Mentally Ill Still Wait at Hospitals for Lack of Room*, NEWS TRIBUNE (Mar. 14, 2015), <http://www.thenewstribune.com/2015/03/14/3688992/mentally-ill-still-wait-at-hospitals.html>.

in this Comment, it neither addresses the conflicts with federal law,<sup>85</sup> nor the fact that there are still too few hospitals capable of providing the required treatment to house all of the patients in need.<sup>86</sup> The recent legislative movement to address the pervasive problem of overcrowding in psychiatric treatment centers is a promising start, but it must be combined with long-term reform to ensure that this new law authorizing detentions outside of certified treatment centers is in fact a stopgap and not simply the reinstatement of psychiatric boarding.

*C. In the Long-Term: Making Room for Washington's Mentally Ill in Certified Treatment Centers*

As the population of Washington State has grown, the number of beds reserved for patients detained under the ITA has decreased.<sup>87</sup> In 2000, Washington had 604 beds certified to accept patients detained under the ITA.<sup>88</sup> By 2009, this number had decreased to 356.<sup>89</sup> As we have seen, ITA detentions and the use of single-bed certifications was growing more prevalent prior to the *D.W.* decision; consequently, this decrease in beds reveals a troubling correlation between the number of ITA detentions and beds available to those patients in appropriate treatment centers. Therefore, implementing a long-term solution to the problem of psychiatric boarding not only involves a general increase in legislative attention to the current situation, but also a reversal of recent cuts to the state budget.

Recent history and the economic recession of 2008–2012 have not been kind to Washington's mental healthcare budget. Washington's 2009–2011 budget notes reveal that the Washington State legislature set the mental healthcare budget at \$69 million below what was required to maintain the level of service provided to psychiatric patients in 2009.<sup>90</sup> This cut included reductions in funding for community mental healthcare centers, staffing at Eastern and Western State psychiatric hospitals, and civil commitment beds at those hospitals.<sup>91</sup>

The 2011–2013 budget notes reported further cuts only two years later.<sup>92</sup> The 2011 budget notes reported additional cuts that left the state

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85. See Hanson, *supra* note 7.

86. See Aleccia, *supra* note 76.

87. BURLEY, *supra* note 15.

88. *Id.* at 20.

89. *Id.*

90. WASH. DEP'T OF SOC. & HEALTH SERVS., BUDGET REPORT 138 (2009), available at <http://leap.leg.wa.gov/leap/budget/lbns/2009dshs.pdf>.

91. *Id.*

92. WASH. DEP'T OF SOC. & HEALTH SERVS., BUDGET REPORT 146 (2011), available at <http://leap.leg.wa.gov/leap/budget/lbns/2011dshs.pdf>.

\$57.2 million short of what would be required to maintain the level of mental healthcare services provided to psychiatric patients in 2011.<sup>93</sup> Once again, these cuts included reductions in funding for community treatment centers and both Eastern and Western State psychiatric hospitals.<sup>94</sup> This gradual yet systematic reduction in mental healthcare funding in Washington has culminated in the abuse of the single-bed certification system as mental healthcare providers are left with limited options as to how to accommodate patients in need of involuntary detention. It should come as no surprise that as staffing and the number of beds available at certified treatment centers has been reduced, the number of single-bed certifications issued by the state has increased.<sup>95</sup>

Governor Jay Inslee has pledged \$30 million in state funds to aid the state in implementing the Washington Supreme Court's order following the *D.W.* litigation.<sup>96</sup> This commitment to reform is a promising start to the drastic changes required by the *D.W.* decision, but when viewed collectively with the budget reports from previous years, it becomes clear that this \$30 million is only replacing what was recently taken away from the state's mental healthcare budget. Budget cuts to mental healthcare since 2009 total in excess of \$120 million.<sup>97</sup> Dedicating \$30 million to ridding the state of psychiatric boarding, while certainly helpful, represents only a quarter of what the state has cut from funding in the past five years.

The statistics pertaining to the number of ITA-certified beds in psychiatric hospitals are also troubling. While the state has supplied 117 additional beds since the *D.W.* decision,<sup>98</sup> the state has stripped psychiatric hospitals of many more due to budget cuts in recent years. As recently as the summer of 2014, the number of patients housed under single-bed certifications was as high as 400.<sup>99</sup> It is clear the state must do more, as psychiatric boarding was occurring even before the budget cuts outlined

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93. *Id.*

94. *Id.* at 146, 162.

95. See TOULON, *supra* note 9, at 22. This increase in single-bed certifications coincides with the budget cuts outlined in the Washington State legislature's budget notes from 2009 to 2013. See *supra* notes 90–94 and accompanying text. As the number of beds available at certified treatment centers has been cut, the need for single-bed certifications has increased due to a lowered capacity for ITA patients in those treatment centers.

96. Andy Mannix, *Gov. Inslee Approves \$30M to Ease Psychiatric Boarding*, SEATTLE TIMES (Aug. 22, 2014), <http://www.seattletimes.com/seattle-news/gov-inslee-approves-30m-to-ease-psychiatric-boarding/>.

97. The 2009–2011 biennium budget cut mental health funding by roughly \$69 million, while the 2011–2013 budget cut an additional \$57.2 million. See *supra* notes 90–94 and accompanying text.

98. See De Luna, *supra* note 60.

99. Aleccia, *supra* note 76.

above.<sup>100</sup> Implementing a long-term, effective solution to Washington's mental healthcare debacle will require not only replacing previously allocated funds and beds, but also new funding beyond what the state has typically provided.

I propose a long-term solution to the problem raised by psychiatric boarding and its subsequent ban in the form of restoring mental healthcare funding in Washington to pre-2009 levels. Data presented to the Washington House Appropriations Subcommittee on Health and Human Services shows that in 2007, prior to the economic recession and resulting budget cuts, single-bed certifications were issued at roughly one-third of the rate they were granted in 2013.<sup>101</sup> This explosion of single-bed certifications after the budget cuts indicates that restoring the beds, staff, and funding provided to mental healthcare centers prior to 2009 would be effective in eliminating the majority of cases that eventually result in a patient being detained in an unauthorized treatment center.

Of the remaining cases, some will certainly be detained under single-bed certifications for legitimate reasons such as continuity of care or to receive treatment not available at a certified treatment center. Psychiatric patients often experience mental health problems that are comorbid with other medical issues.<sup>102</sup> However, the remaining cases must be addressed, as it is likely that even with an increased budget, the number of certified beds will not always be able to accommodate the number of patients who are being involuntarily detained. A number of strategies could be employed to handle these cases.

One strategy that has had promising results elsewhere for reducing the length and frequency with which psychiatric patients must be detained in uncertified treatment centers is the creation of a regional psychiatric facility that evaluates and treats all of the mental health patients in a specified area.<sup>103</sup> A study conducted in California found that a regional psychiatric treatment center reduced the length of stay for involuntarily detained patients by as much as 80%.<sup>104</sup> The same study found that a regional psychiatric treatment center also stabilized roughly 75%

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100. Lauren Dake, *Psychiatric Boarding a Longtime Issue Locally*, COLUMBIAN (Sept. 16, 2014), <http://www.columbian.com/news/2014/sep/16/officials-hope-state-lawmakers-add-more-money-for/>.

101. TOULON, *supra* note 10, at 22.

102. National surveys indicate that up to 68% of adults with a mental illness also experience a general medical disorder. See BENJAMIN G. DRUSS & ELIZABETH REISINGER WALKER, MENTAL DISORDERS AND MEDICAL COMORBIDITY 4 (2011), available at [http://www.integration.samhsa.gov/workforce/mental\\_disorders\\_and\\_medical\\_comorbidity.pdf](http://www.integration.samhsa.gov/workforce/mental_disorders_and_medical_comorbidity.pdf).

103. See Scott Zeller, Nicole Calma & Ashley Stone, *Effects of a Dedicated Regional Psychiatric Emergency Service on Boarding of Psychiatric Patients in Area Emergency Departments*, 15 W. J. EMERGENCY MED. 1 (2014).

104. *Id.* at 5.

of patients admitted for evaluation.<sup>105</sup> Stabilization at the point of admission reduces the need for inpatient psychiatric care, as the patient is eligible for release before ever being admitted to a certified treatment center.<sup>106</sup> A regional center like this in Washington would be entirely dedicated to the evaluation and treatment of psychiatric patients. The presence of such a center would remove a burden from general emergency departments where patients are so often detained yet cannot receive the treatment they require, as those departments do not have staff with the requisite expertise to effectively treat mentally ill patients.

A regional psychiatric treatment and care center is one possibility for reducing both the need for beds in certified treatment centers and the length of time those patients must be detained for treatment. However, bringing about lasting change to our broken mental healthcare system will require a combination of efforts from Washington's legislature, mental health advocates, and psychiatric healthcare providers. Only a concerted effort from all of the parties involved can produce reform on the level required to provide lasting benefit to our state's mentally ill.

Asking the state for additional funding to provide the psychiatric treatment centers necessary to eliminate psychiatric boarding entirely is not as simple as it may sound, particularly when the legislature has other areas in desperate need of funding, such as education.<sup>107</sup> However, a gradual implementation of the measures necessary to end psychiatric boarding is possible when combined with short-term changes meant to ensure both public safety and care for patients in need. The state has added roughly 160 beds to certified treatment centers by July 2015, only a year removed from a time when as many as 400 psychiatric patients were boarded in a given month.<sup>108</sup> In other words, nearly half of the patients who previously would have been subjected to psychiatric boarding now have a bed available to them in a certified treatment center.

If a short-term, stopgap solution such as the one outlined above is implemented, patients can still receive care while the legislature addresses the budget issues. These issues will likely take years to resolve given how stretched the state budget currently is, but as shown by the tremendous progress made in the last year, it is possible that the state could eliminate psychiatric boarding within the next five years if it funds an additional forty beds each year. In the meantime, implementing a short-

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105. *Id.* at 4.

106. *Id.* at 5.

107. See Melissa Santos, *State Asks for More Time for Lawmakers to Comply with McCleary Education Funding Order*, OLYMPIAN (Apr. 27, 2015), <http://www.theolympian.com/2015/04/27/3698510/state-asks-for-more-time-to-meet.html>.

108. Jordan Schrader, *Hospital Detentions of Mentally Ill Increasing*, NEWS TRIBUNE (Sep. 2, 2015), <http://www.thenewstribune.com/news/local/watchdog/article33609288.html>.

term solution like the one outlined above would give the legislature plenty of time to decide whether to add the beds gradually or all at once by building some sort of new treatment center. The funding for these additions will have to be drawn from someplace, likely meaning cuts to the budget of other government services. However, a gradual implementation of long-term solutions to psychiatric boarding will provide lasting benefits for Washington while imposing a modest burden on the state budget and legislature.

#### CONCLUSION

Washington's mental healthcare system is undergoing dramatic change as one of the traditional strategies for housing patients detained under the ITA has been outlawed. Though the decision in *D.W.* has created new and troubling problems for the state, it also represents a promising step toward lasting reform that will not only benefit mentally ill patients, but hospitals, doctors, and the general public as well. Implementing the *D.W.* decision, along with the other reforms that are necessary to fully mend our broken mental healthcare system, will require a two-step process. First, the state must address the short-term implications of a ban on psychiatric boarding. These involve finding housing for the thousands of patients who would have been detained under single-bed certifications, as well as avoiding the alienation of emergency room physicians who face liability if they are forced to release an unstable patient. Second, the state must provide additional funding both for the current mental healthcare system, and new strategies that will reduce the need for inpatient psychiatric care. The task is a tall one, but it must be accomplished if we are to provide the necessary care to some of our most vulnerable citizens while also ensuring public safety.