

87TH TEXAS LEGISLATIVE UPDATE

SPOTLIGHT: SB 49



Texas Judicial Commission on Mental Health

Texas Judicial Commission on Mental Health Legislative Summary of SB 49 SEN. JUDITH ZAFFIRINI / REP. ANDREW MURR

Relating to Procedures Regarding Defendants Who are or May Be Persons with Mental Illness or Intellectual Disability (IDD).

Section 1: 16.22 Interview for Out-of-Custody Defendant.

Issue: The intent of Article 16.22 of the Texas Code of Criminal Procedure, including amendments in 2017 and 2019, “has been to identify (promptly) persons in custody who will likely need treatment intervention.”¹ The current law requires that when a magistrate determines that an arrestee has a mental illness or is a person with intellectual disability (ID), they shall order the local mental health provider to conduct a 16.22 interview by a qualified mental health professional. Currently, this interview is required even if a defendant bonds out of jail. This interview and collection of information from an out-of-custody defendant is a beneficial idea in theory; however, in practice, there is neither the capacity in the system to conduct the required number of assessments, nor the mechanism to monitor the assessment requirement of those released on bond.²

SB 49: This bill removes the requirement that a magistrate order a 16.22 interview if the defendant is no longer in custody. This bill amends the statute to focus on screening those individuals suspected of mental illness or ID who remain in the jail population, and not “out-of-custody” defendants. The judge, however, can still order assessments as deemed appropriate.

Section 2: Production and Distribution of Written Report Regarding a Defendant Suspected of Having a Mental Illness or IDD.

Issue: Article 16.22 only stipulates that a written report regarding the interview of a defendant with a suspected mental illness or IDD be distributed to the magistrate.

SB 49: This bill expands the individuals required (entitled) to receive the report to include defense counsel, the prosecuting attorney, the trial court, the sheriff, or other person responsible for the defendant’s medical records while they are in county jail, and, if applicable, the personal bond office.

Section 3: Oath and Promise to Appear for Persons with Mental Illness and/or IDD.

Issue: Included in the requirements for a release on personal bond, is that the defendant swears under oath that he or she will appear in court. A failure to appear can result in a contempt finding and other

consequences. Individuals released on bond, with treatment conditions or competency restoration requirements, due to their mental illness or intellectual disability may not comprehend the significance of their oath yet might face a contempt charge for failing to appear.

SB 49: This bill removes the requirement that certain individuals with MI or ID “swear under oath” that they will appear in court as part of their release on bond. This oath is waived as the qualifying individuals (individuals released under certain statutes involving MI, ID, or a finding of incompetent to stand trial).

Sections 4 & 5: Clarification of Time Periods for Competency Orders.

Issue: The law is not clear on when competency restoration orders technically begin, thereby creating confusion.

SB 49: These sections of the bill provide clarification for when competency restoration orders technically begin. This promotes consistency and assists in determining the period of competency restoration, with the triggering event being the latter of either the date the order is signed or when competency restoration services begin.

Section 6: Jail-Based Competency Restoration Pilot Program and County Programs.

Issue: The Legislature created two possible paths for establishing jail-based competency restoration (JBCR) programs: i) the JBCR Pilot Program to be operated by the Texas Health and Human Services Commission (HHSC), and ii) a JBCR program implemented by a county. However, the laws regarding the two types of JBCR programs are not aligned.

SB 49: This bill amends the pilot program language to better align with the language for a JBCR implemented by a county and allows the HHSC program to sunset in 2022 and be governed by the laws of the county implemented JBCR.

Section 7: Deadlines for Competency Evaluations and Timelines in Jail Based Competency Restoration Programs.

Issue: The jail-based competency restoration statute caps the maximum period for JBCR services at sixty days, although the general period for an order of competency restoration services is longer. The statute contemplates that if the defendant has not been restored by the end of the 60-day period of jail-based services, he or she will be immediately transferred ‘without unnecessary delay’ to an inpatient facility for the remaining authorized restoration period. While this statutory requirement is reasonable in theory, the practical concern is that given long waiting lists and backlogs at state inpatient facilities, immediate transfers simply do not happen.

SB 49: This section of the bill mandates the continuation of jail-based services while the defendant waits for an inpatient bed at a JBCR facility. As currently written, the statute can result in the defendant receiving 60 days of JBCR but with the competency clock then pausing and resuming only when the defendant reaches an inpatient facility. This amendment would allow continued services until an inpatient bed opens. This proposed change also provides the trial court authority to modify an order for JBCR to outpatient competency restoration, when appropriate.

Issue: The JBCR statute requires “at least two full psychiatric or psychological evaluations of the defendant during the [sixty-day] period the defendant receives competency restoration services in the jail.” These evaluations must occur by the twenty-first and fifty-fifth days, respectively, of the sixty-day period. The practical problem, however, is that it can take weeks for a forensic psychiatrist

or psychologist to prepare and submit a report of an evaluation. Accordingly, it is effectively impossible for a court to be able to receive a report on an examination conducted on or shortly before the fifty-fifth day prior to the completion of the sixty-day statutory period.

SB 49: This section also revises the deadline for competency evaluations in JBCR to match those required for 46B.079.

Section 8: Modification of Order Following Inpatient Civil Commitment Placement.

Issue: The law currently allows a possible modification from an inpatient-hospitalization order for certain insanity acquittees to court-ordered outpatient or community-based care. Additionally, the law already provides the ability to transfer a civilly committed defendant from a maximum-security facility to a facility other than a maximum-security unit. The law, however, does not have a comparable provision for a defendant under an order of civil commitment with a finding of violence to modify to outpatient or community-based care, as the insanity-based commitments allow.

SB 49: This bill adds a statute to permit a court to consider a possible further step down in the placement of a defendant under an order of civil commitment with a finding of violence. Thus, making the procedures for a possible step-down for civil commitment comparable to those for an insanity-based commitment. This addition would allow a court to hold a hearing and determine if a step down to outpatient mental health services is appropriate in modifying the defendant's civil commitment order. The proposal also includes language to require consultation with the local mental health authority or local behavioral health authority before any court hearing.

Section 9: Expert Qualifications in Competency/Insanity Evaluations.

Issue: The qualifications for insanity experts were enacted in 2005 and provide that experts in insanity cases must be qualified by board certification or by certain training or experience. This statute also included a "legacy exception" for psychiatrists or psychologists who had five years of experience in performing forensic evaluations prior to the enactment of the statute. This language mirrored a comparable "five-year experience" exception that originally was a part of the qualifications for experts for competency evaluations; however, the exception for experts for competency evaluations was eliminated in 2011. Given that almost 16 years have passed since the enactment of the insanity laws, any expert appointed to provide these services should now be otherwise qualified, and the confusing five-year experience exception should be eliminated.

SB 49: This section of the bill aligns the expert qualifications required for insanity evaluations with those required for competency evaluations.

Section 10: Continuity of Prescription Medications for the Care and Treatment of Prisoners with Mental Illness.

Issue: Government Code § 511.009(d) requires the continuity of prescription medication for the care and treatment of prisoners.

SB 49: This section specifically requires that prisoners with a mental illness be provided with each prescription medication that a physician or mental health professional determines to be necessary for the care and/or stabilization of the prisoner.

¹ BRIAN D. SHANNON & DANIEL H. BENSON, TEXAS CRIMINAL PROCEDURE AND THE OFFENDER WITH MENTAL ILLNESS: AN ANALYSIS AND GUIDE 31 (NAMI-Texas 6th ed. 2019).

² TONY FABELO, THE CHALLENGE OF IDENTIFYING, DIVERTING, AND TREATING JUSTICE-INVOLVED PEOPLE WITH MENTAL ILLNESS, at 42 (Dec. 3, 2018).