2024

Aid and Assist

BARRIERS TO INSURANCE

Per SB 5506 (2023) Section 84 and Budget Note

INTRODUCTION

The 82nd Legislative Assembly, with the passage of SB 5506 (2023) Section 84, directed the Oregon Department of Administrative Services (DAS) to collaborate with county governments and community mental health programs established under ORS 430.620 to study barriers that prevent local governments, community mental health programs and providers from obtaining insurance coverage for liability arising out of the provision of services pursuant to ORS 161.365 and 161.370.

The accompanying budget note directed DAS, by Feb. 1, 2024, to submit a report to the Joint Committee on Ways and Means and an appropriate committee or interim committee of the Legislative Assembly with recommended solutions and a timeline for how to insure against liability arising out of the provision of services pursuant to ORS 161.365 and 161.370 for the purposes of community restoration or to restore fitness to proceed, or other behavioral health services required under a court order. Recommended solutions include establishing an insurance pool for counties, community mental health programs and providers.

The following report captures acknowledged barriers that prevent local governments, community mental health programs and providers from obtaining such insurance coverage, as well as mention of additional challenges to current community mental health care provision, and a short series of recommendations.

Per statutory guidance, this work group was moderated by DAS, in close collaboration with the Association of Oregon Counties, and both policy representatives and operations veterans of various community mental health programs (CMHPs) *and other mental health providers*. In addition, the Oregon Health Authority (OHA), Oregon Department of Justice (DOJ), Oregon Trial Lawyers Association (OTLA), City County Insurance Services (CIS), and various counties participated in the conversations which spanned 10 meetings over five months, beginning in August 2023 and concluding in January 2024.

While this committee was formed to expressly examine the barriers to adequate insurance protections, open and honest dialogue quickly revealed that the challenges facing our communities, CMHPs, and the clients they are charged to care for will not be solved by insurance, even if appropriate and adequate insurance were available. These additional challenges are noted throughout the report and mentioned briefly in a subset of recommendations.

BACKGROUND AND CONTEXT

In recent years states across the nation have seen an increase in the number of people with behavioral health disorders who have been charged with a crime yet are unable to aid and assist in their own defense. This increase has created capacity strain on state hospitals nationwide, in addition to the population of aid and assist clientele that remain in jail due to the capacity constraints in state hospitals and community restoration services. In Oregon, defendants unable to aid and assist in their own defense are court ordered into community restoration services, “services and treatment necessary to safely allow a defendant to gain or regain fitness to proceed in the community,”[1] which may include supervision by pretrial services.

Community restoration has evolved through legislation and court orders, beginning with senate bills 24 and 25 in 2019, which improved communication and information sharing in the aid and assist

[1] ORS 161.355

process (SB 24), and narrowed the criteria for aid and assist restoration to those with felony charges (SB 25). A 2019 budget note (HB 5525)[2] directed OHA to establish caseload funding formulas for this mandated population. This work remains outstanding, and without it, community restoration programs lack stable funding to perform these services.

Senate Bill 295 (2021) further clarified aid and assist processes. The array of services included in ORS 161.355 as a part of restoration services includes legal skills training, consultation orders, and coordination with system partners in addition to basic needs assistance as well as clinical services and residential treatment.

These responsibilities are carried out by CMHPs, entities that are responsible for planning and delivering services for individuals with mental illnesses, substance use disorders, or gambling addictions. CMHP services (ORS 430.630)[3] are provided by either county governments or private mental healthcare providers.

County Financial Assistance Agreement (CFAA) are the contractual method by which CMHPs receive state general fund dollars for non-Medicaid services. Community restoration services are one element of the CFAA that is funded through Legislative appropriations to the Oregon Health Authority. The CFAA includes services required to be provided by CMHPs and has grown to include basic legal education and other services. Additionally, CMHPs do not have the authority to compel treatment or participation in community restoration services. When defendants do not participate in the treatment plan(s) agreed upon in their court release orders, the only recourse a CMHP has is to report the non-participatory client. If the defendant is not remanded back into the system, the CMHP remains potentially responsible for the risk the defendant brings while remaining in the community.

This work has always contained an element of risk and, indeed, the initial mental health evaluation includes a determination of risk unique to each defendant. With community restoration, the volatile dynamic of some aid and assist defendants exists in the community, rather than in a staffed and monitored facility such as the State Hospital. In too many cases, they may not be monitored at all due to shortages of appropriate treatment facilities. Harm can be caused if the defendant released back into a community commits another crime.

Under current Oregon law, the victim of a secondary or subsequent crime committed while the defendant is in court-ordered community restoration treatment may be owed financial compensation in an amount that can be significant due to serious life-long harm.

RECENT AID AND ASSIST IN OREGON

In addition to OSH having been over capacity in recent years, with defendants unfit to proceed with their cases due to underlying mental health and/or substance use disorders, an order by Judge Michael Mosman on Aug. 29, 2022, limited the time frames clients under aid and assist orders can remain at OSH for restoration treatment.

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[2] The Oregon Health Authority, in consultation with the Chief Financial Office of the Department of Administrative Services, the Legislative Fiscal Office, and community mental health programs, shall make recommendations to the 2020 Legislative Assembly about how to update behavioral health caseload forecast methodologies, processes and related funding formulas. At a minimum, the agency shall consider if the price per case accurately captures the cost of community based behavioral health treatment and how caseload methodologies and use of funding incentivizes regionally and nationally recognized best practices, and outcome-oriented strategies, to create a more effective system to meet the behavioral health needs of individuals in the community and prevent higher levels of care when appropriate. The agency shall present recommendations to the Legislature by December 1, 2019.

[3] Full list of services available via this link to ORS 430.630.

This combination has resulted in a significantly higher number of aid and assist clients being in the community.[4] Risk exposure brought to the community behavioral health system as a result of that increase includes:

1) Growing client caseloads have rapidly outpaced dedicated resources.
2) Insufficient facility space, at all levels of placement.
3) Lack of recourse for providers when defendants do not participate under restoration order.
4) The outcome is a high risk, low oversight situation in our communities, which makes it difficult, if not impossible, to obtain insurance coverage for the risk that has been created.

Given the increased numbers and acuity of aid and assist clients in community restoration and concerns over liability, especially considering the inadequate bed capacity, workforce and overall resources, OHA provided $5M in 2021 to reimburse CMHPs for excess insurance required to serve this population. Even with this resource, sufficient insurance coverage has been difficult, and in some cases, impossible to purchase.

INSURANCE LANDSCAPE

The increase in aid and assist clientele, combined with challenges from substance use disorders and homelessness, equates to additional exposure being taken on by behavior healthcare providers.

The increasingly high acuity of aid and assist clients that CMHPs are mandated to treat, combined with the lack of suitable placements, can increase risk for serious injury or wrongdoing that impacts members of the community. Lack of insurance for the community setting or the mental healthcare providers may result in a serious shortfall of resources for the victim or their family to recover from the impact of any such wrongdoing.

These exposures can result in very large claims that are difficult to predict, difficult for insurers to underwrite, and extremely difficult for pools and self-insurance programs to cover and fund. In addition, no matter the amount of insurance coverage, there is the potential for large claims that exceed the limits of coverage. Due to these factors, self-insurance is not a viable option for this situation.

EXISTING INSURANCE OPTIONS AND CHALLENGES

Insurance Pool

- City County Insurance Services (CIS) has operated a local government risk pool supporting 29 of Oregon's 36 counties since 1981.[5]
- Insurance pooling allows entities to collectively share risk, creating one of the few options for some counties to be able to qualify for liability insurance coverage for this service.
- At the same time, insurance pooling also requires entities to collectively share the cost. One high-cost claim can result in substantial premium increases to all counties in the pool.
- These unpredictable and expensive increases are very difficult for counties to budget for and can result in the curtailment of other general fund budgets, including sheriff's office, public health, community corrections and other basic county services.

[4] Under Judge Mosman's order in 2022, community restoration caseload nearly doubled, from 355 in the quarter ending September 2022 to 630 in the quarter ending September 2023.

[5] Under the authority of ORS 30.282(3) which allows two or more local public bodies by intergovernmental agreement to jointly procure insurance or establish self-insurance against the tort liability of the public body and its officers, employees and agents or against property damage.

Self-Insured Counties
Some larger counties in Oregon self-insure the first $1M of their losses and buy excess insurance to cover losses above this amount. Taking aid and assist into account, self-insurance is problematic and unsustainable and may be out of reach entirely for smaller operations.

- Self-insurance can be an effective option for entities with a *high volume* of *predictable claims* from *ordinary exposures*. This allows for predictable funding of claims at lower overall cost (avoids paying for additional overhead and profits associated with commercial insurance policies).
- Self-insured entities may also purchase excess insurance to cover larger, less frequent losses. But excess loss insurers require history for developing adequate premium for the risk and are also averse to providing coverage for new, unordinary, potentially volatile risk.
- Harmful effects from large, difficult to predict claims include:
    - Using up self-insurance funds leaving little or no funded dollars for other claims.
    - Increased cost and decreased availability of excess insurance covering large losses.
- Losses exceeding insurance coverage, coupled with the legal costs resulting from claims, could result in curtailment of some county services to pay for the loss. Examples of county general fund services at risk include sheriff's office patrol services, sheriff's office corrections program, district attorney's office prosecution, community justice, juvenile justice, public health program, behavioral health services, elections.

Private Mental Healthcare Providers
- Increased cost and decreased availability of insurance.
- Cancelled or non-renewed insurance coverage.
- Losses exceeding insurance coverage limits could result in bankruptcy and being put out of business, further straining the resources of municipal services.

BARRIERS TO INSURANCE RECOMMENDATIONS

Increased Risk/Growing Exposure
- Continued increasing volume and acuity of aid and assist clients requiring services.
- Restoration services in Oregon for aid and assist clientele include skills training regarding court room procedures and potential outcomes of the court process. These are legal services mental health providers are not trained to provide.
- No documented standards guide the mandated restoration services in Oregon.
- Treatment resistant clientele, who may not participate in receiving services, thereby maintaining rather than mitigating existing risk.
- Cyclical or repeating nature of aid and assist population increases the liability risk to providers.
- No time limit for community restoration "achievement" or completion.
- No tort cap protection for private mental healthcare provider in state court.
- No tort cap protection for county or private providers for claims in federal courts.

Limitations in the Insurance Industry
- The factors listed above increase liability to mental healthcare providers which ultimately impacts cost and availability of insurance.
- No historical data to forecast losses and develop adequate premium.
- Lack of resolution for liability; no updated safety and prevention practices related to services provided to aid and assist clientele to mitigate risk.
- Likelihood of claims which exceed coverage limits.

RECOMMENDATIONS

Solutions must be equitable for all providers including private mental healthcare providers.

To mitigate these barriers to insurance, unanimous agreement emerged on the four following risk reduction measures. Current or new forms of insurance coverage will be dependent on their successful implementation. These recommendations are an attempt to reduce liability for healthcare providers and increase opportunity for viable insurance coverage for these critical partners.

Expand resources to safely manage the volume of clients placed in community restoration.

- More staff is critical, as well as increased access to housing and basic needs such as transportation and medications. Programs currently operate at significant deficits and are facing alarming increases in shortages in funding, workforce, facilities and other supports.
- Lack of housing hampers individuals' ability to engage in treatment, prolongs treatment time and creates delays for those awaiting entry into treatment.

Mitigate claim potential through safety and prevention best practices updates.

- Private and county mental healthcare providers update and implement safety and prevention best practices related to services provided to aid and assist clientele.
- Examples of resources for assistance include:
    - Insurer loss control and legal services.
    - Collaboration with Oregon State Hospital on discharge process.
    - Knowledge sharing of effective best practices between counties and private providers.
    - Outside resources such as industry associations and Dr. Debra Pinals.[6]

Mitigate potential injury and claims arising from aid and assist clientele through law.

- Statute establishing a Safe Harbor. Focus on safety and prevention with enhanced protection from liability.[7]
- Statute establishing jurisdictional length for aid and assist community restoration services.
- Statute requiring courts to issue mandated instructions that aid and assist client must follow.
- Statute giving measures county and private providers take to clearly relieve them of responsibility (and liability) for non-participating aid and assist clients.

Reduce insurer hesitancy with increased communication and partnership.

- Implement and communicate best practice loss control processes.
- Concerted effort to disseminate knowledge of Oregon Tort Cap Act (OTCA)
- Limit provider responsibilities in statute; aid and assist clients responsible for their own conduct when in the community.

[6] Neutral expert appointed by Judge Moseman in the Mink (Aid and Assist) and Bowman (Guilty Except for Insanity) cases.

[7] If a county or private mental healthcare provider follows an established set of safety and prevention practices related to services provided to aid and assist clientele, they can receive enhanced protection from liability arising from those services. This approach may limit compensation to a victim in a very severe situation but generates a focus on safety and prevention and addresses a barrier of potential unlimited liability to private and county mental healthcare providers.

ADDITIONAL NOTES

Through City County Insurance Services (CIS), explore development of a separate insurance pool for private mental healthcare providers.

- This is not a standalone recommendation. If feasible, it would necessitate development and implementation of most all the above noted recommendations.
- Requires feasibility study and development by CIS, in partnership with the mental health care providers and counties.
- Requires statutory change to allow private mental healthcare providers to establish a pool.
- Requires statutory change to allow caps from OTCA to cover private mental healthcare providers who provide community mental health services.

Carry forward the current $2.9M set aside "for the purpose of providing reimbursement to local governments, community mental health programs established under ORS 430.620 and providers for payment of awards, settlements and expenses that are incurred in civil actions arising out of the provision of services pursuant to ORS 161.365 and 161.370" in SB 5506 (2023) into the 2025-2027 budget cycle, as third-party liability risk continues to be addressed.

Consider an immunity option for court-ordered aid and assist services, similar to the immunity granted for those providing outpatient civil commitment services and, if necessary, the state and its officers, employees and agents. The pursuit of immunity is supported by Oregon counties and the CMHPs mandated to provide these services.

APPENDICES

Appendix A: Background and Supporting Documents

Authorizing Legislation:
SB 5506 (Section 84) and the accompanying Budget Report (page 20).

Judge Mosman Orders:
9/1/2022 Order: Mosman Order
7/3/2023 Amended Order: Second Amended Order to Implement Neutral Expert's Recommendations
10/17/2023 Order Related to Supremacy Clause: Opinion and Order

Impacts of Judge Mosman Orders and Expanding Provider Requirements:
Association of Oregon Community Mental Health Programs Presentation to House Committee on Behavioral Health and Health Care (November 2023).

- Slide 3: Growing community restoration service requirements.
- Slide 5: The increase in aid and assist clients in community restoration after the Mosman Order.

Oregon State Hospital Presentation to the House Committee on Behavioral Health and Health Care (November 2023).

- Oregon State Hospital Discharge and Community Transition Process Update
- As the Oregon State Hospital continues to come into compliance with the Mosman order, more pressure is put on community restoration services.

Article on the release of more than 100 patients from the State's locked psychiatric hospital.

Appendix B: Work Group Members

Stakeholders from across the spectrum of providers as well as advocates for patients, clients and community members and local governments were invited to participate. The list below includes the organizations that were represented at one or more meetings of the workgroup.

Organization
Lane County
Washington County
Multnomah County
Marion County
Clackamas County
NW Public Affairs
Association of Oregon Counties
City County Insurance Services
Association of Oregon Community Mental Health Programs
Oregon Council for Behavioral Health
Columbia Care Services
Community Counseling Solutions
Options for Southern Oregon
Telecare Corporation
Greater Oregon Behavioral Health, Inc.
Brown & Brown, Inc.
Oregon Trial Lawyers Association
Department of Administrative Services
Oregon Department of Justice
Oregon Health Authority
Department of Consumer and Business Services
Office of Senator Kate Lieber