

Behavioral Health is Essential To Health



Prevention Works



Treatment is Effective

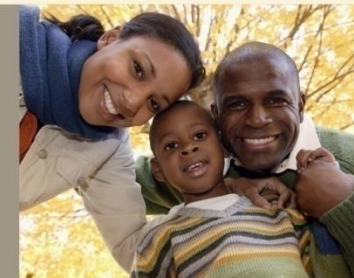


People Recover



Jail Delay: **Ensuring Timely Receipt of** **Competency Services**

Presented by: Diane Smith Howard, NDRN
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Diane Smith Howard – National Disability Rights Network



Diane Smith Howard
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Protection and Advocacy (P&A) Network Background

- **P&A agencies have the authority to provide legal representation and other advocacy services, under all federal and state laws, to all people with disabilities (based on a system of priorities for services).**
- **Maintain a presence in facilities that care for people with disabilities, where they monitor, investigate and attempt to remedy adverse conditions.**
- **57 agencies: State and Federal Funds**
- **Lawyers with “Special Powers” (access and standing)**

P&A Criminal Justice Work

- **Most P&As do criminal justice (CJ) work.**
- **P&As set casework priorities at the state level.**
- **P&As do not represent individuals in criminal cases.**
 - *P&As work to ensure that individuals' with disabilities needs are met within the CJ system.*
- **P&As represent clients in competency cases.**

Possible P&A Activities

- **Using monitoring of jails and mental health facilities to assess the evaluation and restoration processes**
 - *Using access authority*
- **Working with public defenders**
 - *Recognizing possible conflicting concerns*
- **Litigation to assist defendants transferred from jail for evaluation**

P&A Access – Facilities

- **“...a P&A system shall have reasonable unaccompanied access to facilities including all areas which are used by residents, are accessible to residents, and to programs and their residents at reasonable times....” 42 C.F.R. § 51.42.**

P&A Access – Photos & Videos

- **P&A Access is for the purpose of “Inspecting, viewing and photographing all areas of the facility which are used by residents or are accessible to residents.”
42 CFR § 51.42(c)(3).**

P&A Access - Presence

- **"Only by frequent personal contact with residents, out of the presence of [institution] staff, can [a P&A] effectively carry out its mission of pursuing remedies to protect the rights of [institution] residents and of providing the necessary information to them."**

Emily Cooper – Disability Rights Washington



Disability Rights
WASHINGTON

Washington's protection and advocacy system

www.disabilityrightswa.org

Emily Cooper
Staff Attorney, Disability Rights Washington

www.disabilityrightswa.org

The Legal Standard for Competency to Stand Trial

***Dusky v. US*, 362 US 402 (1960), defendant is competent if she has both:**

- *sufficient present ability to consult with lawyer with reasonable degree of rational understanding*
- *a rational and factual understanding of proceeding against her*
- ***Drope v. Missouri*, 420 US 162 (1972)**
 - *Is able to assist in defense*

The Competency Process

- 1. Question of competency raised by either party or the court**
- 2. Court orders evaluation**
- 3. Evaluation completed and report filed**
- 4. Defendant returned to court for competency hearing**
- 5. If competent – case continues including proceeding to trial**
- 6. If not competent – forensic commitment & restoration**
- 7. If not competent, not restorable – civil commitment or dropped charges/release**

Competency Evaluation

- **May be done anywhere (in WA, nearly 90% in jail)**
- **By a mental health or other appropriate professional (in WA, doctors only conduct these evaluations)**
- **Usually bail is denied or revoked during evaluation (in WA, the parties may agree to release someone on personal recognizance “PR”).**
- **Criminal case is stayed**
- **May be timelines for evaluation – in WA can be extended for “good cause”**

Competency Services Delays

States have consistently failed to provide timely court ordered competency services causing people with serious mental health issues to be subjected to the harms associated with prolonged detention in jail.

Where Delays Can Happen

- **Inadequate number of evaluators to both timely conduct evaluation and complete the report.**
- **Inadequate evaluations and need for reevaluation**
- **Inadequate inpatient capacity for timely admission**
- **Lengths of stay for restoration and related inefficiencies**
- **If not restorable, delays in dismissal of charges or civil commitment process**

Implications of Delays

- **Lengthy stays in jail often in solitary confinement**
- **Lengthy stays in mental health facilities**
- **Use of too many hospital beds for forensic clients (both competency patients and NGRIs)**
- **Longer stays in mental health hospitals than would be spent in prison/jail if convicted**
- **No resolution of criminal case**
- **Jackson v. Indiana, 506 US 715 (1972)**

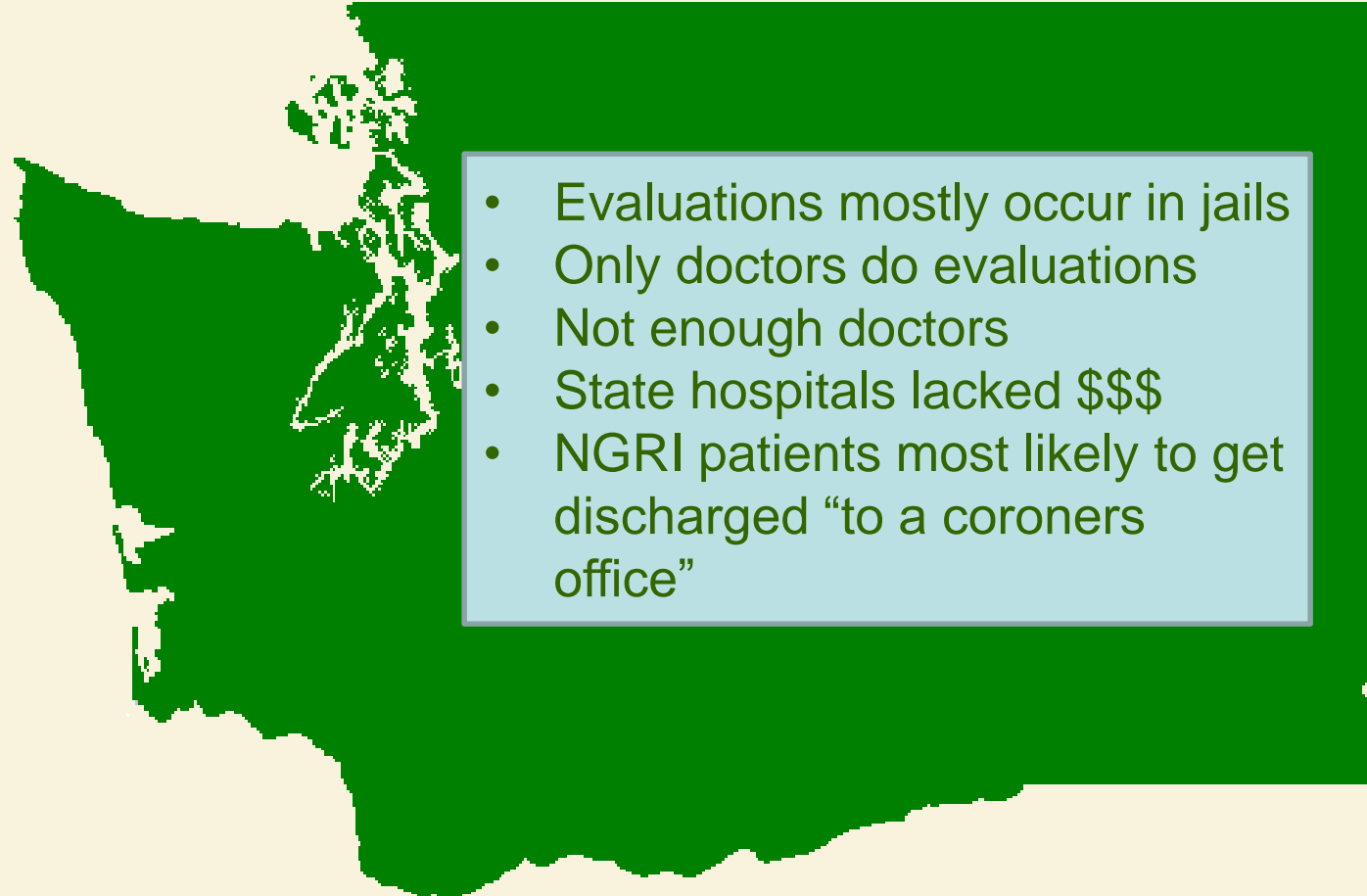
Common National Trends

- **Proposals to use jails for evaluation and restoration**
 - *See, Hinkle v. Scurr, 677 F.2d 667 (8th Cir. 1982)(location of evaluation isn't necessarily significant)*
 - *See, Hogg Foundation Study re correction based restoration not being a best practice*
- **Proposals for more secure MH hospital beds**
- **Criminalization of mental illness**
- **Law enforcement and “mercy bookings”**

Evaluating the Possible Remedies

- **Efficient use of existing hospital beds**
- **Community evaluation (“comp fest”) and restoration programs**
- **Court house specialized dockets and calendars**
- **Efficiencies with repeat referrals**
- **Diversion (reducing the referral demand)**
- **Therapeutic courts**

Trueblood v. DSHS, 101 F.Supp.3d 1010 (2015)



- Evaluations mostly occur in jails
- Only doctors do evaluations
- Not enough doctors
- State hospitals lacked \$\$\$
- NGRI patients most likely to get discharged “to a coroners office”

Legal Framework

Holding incapacitated criminal defendants in jail for weeks or months violates their due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals.”

***Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003)**

DRW' s Factual Framework

JAIL DELAY MONITORING TOOL
 CONSTITUENT FORM
 CONFIDENTIAL, ATTORNEY WORK PRODUCT

Date of Monitoring:

DRW employee:

CONSTITUENT INFORMATION SECTION (to be filled during visit):

Constituent Name:

Jail:

Date of Birth:

Age:

Gender:

Ethnicity (Asian Black
 Hispanic Caucasian
 Native American
 Other (specify)):

Date and Type of Court
 Order:

Date of Arrival at Jail:

Charges:

Public Defender and
 phone number (ROI,
 Y or N):

Parent or Next of Kin and
 contact information (ROI, Y
 or N):

Other Contact (ROI,
 Y or N):

Housing Location:

Community Provider
 (ROI, Y or N):

Monitoring Of Facilities



Amanda Cook, who died in jail while waiting for competency services



Policy Solution?

Lost and Forgotten

Conditions of Confinement While Waiting for Competency
Evaluation and Restoration



This report was completed by Disability Rights Washington, a federally funded non-profit organization mandated to provide protection and advocacy services to people with disabilities in Washington.

Preliminary Policy Outcomes in WA

2012 - SB 6492: Established 7 day Target

2013 - SB 5551: Established Panel of Outside Evaluators

2014 - State hired consultants (“Groundswell Report”)

2012 – 2014 – State reports failure to meet 7 day target

Dozens of Contempt Findings (\$200k in just two counties)

The Court Grants Our SJ Motion

“Because Defendants’ failure to provide timely services, causing the prolonged incarceration of criminal defendants waiting for court-ordered competency evaluation and restoration, violates the substantive due process rights of those detained, the Court GRANTS Plaintiffs’ motion for summary judgment.”

The *Trueblood* Decision

- **Ordered in jail evaluations complete within 14 days and admission for evaluation or restoration within 7 days**
- **Restoration locations cannot sacrifice the therapeutic environment of the state hospitals.**
- **Appointed a Court Monitor in light of contempt history**
- **Compliance by January 2, 2016***
- **Held: “The mentally ill are deserving of the protections of the Constitution that our forefathers so carefully crafted. The rights protected can be difficult and sometimes costly to secure; however, the Constitution is a guarantee to all people, and is not dependent upon a price tag.”**

Using Social Media



Trueblood Enforcement

- **Multiple restraining orders against alternative sites**
- **State held in contempt**
- **\$500-\$1000 per day in contempt sanctions = \$10 million and counting**
- **Contempt sanctions to fund diversion programs**
- **Collaborating to improve forensic mental health efficiencies**

Erin Sullivan – Disability Law Center (Utah P&A)

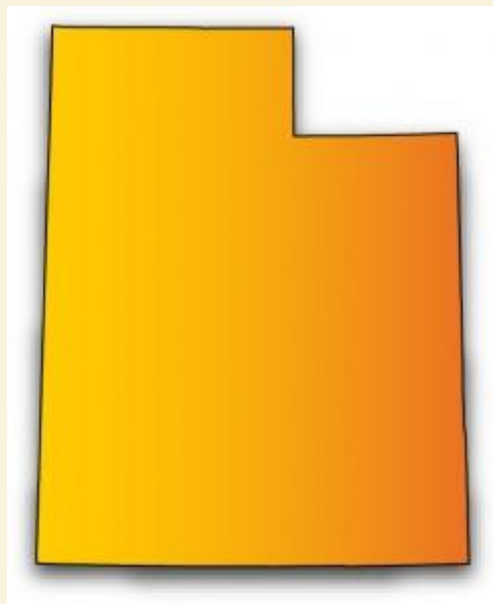


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DLC v. State of Utah

Case No. 2:15-cv-00645-RJS



Utah State Hospital



How We Learned About the Issue

- 2008 Legislative Audit
- “Patients who need treatment in the forensic unit will wait approximately 2-3 months for a bed to become available.”
- 2014 Legislative Audit
- “Current waitlist is about 40 people.”
- “We recommend that USH consider the costs and benefits of additional options to reduce the forensic waitlist and/or the demand for forensic beds.”

Utah State Hospital's Waitlist

- 100 beds at USH's Forensic Facility
- Utah has experienced a 500% growth in demand for forensic services since 1985
- Waitlist has doubled each year for the past 3 years
 - **FY13: 15**
 - **FY14: 26**
 - **FY15: 56**
- Wait times have ↑ from **30 to 180 days** in the past 3 years
- When we filed the lawsuit:
 - *> 50 on waitlist*
 - *5 had been waiting > 6 mos*
 - *7 had been waiting > 5 mos.*
 - *12 had been waiting > 3 mos.*

Utah's Statutory Framework

- Utah Code 77-15-1, *et seq.*
- Petition is filed
 - Court grants the petition . . .
- Court orders an evaluation . . .
 - EVALUATIONS
 - 2 mental health experts
 - Initial report due within 30 days
 - Can request an additional 30 days
 - RESTORATION
 - No deadlines
 - Examiner's full report due "within 90 days of arrival . . . *at the treatment facility.*"

Practical Considerations

- 1. Fact gathering**
- 2. Coalition building**
- 3. “Outreach” as treatment**

Fact Gathering

- **Request the waitlist**
- **Build a database**
 - *Charges?*
 - *Diagnosis?*
 - *Date booked into jail?*
 - *Date of evaluations?*
 - *Date ordered to hospital?*
- **Visit inmates in jail**
- **Request records**
- **Attend competency hearings**
- **Reach out to family members**

Sample Inmate Profile

Inmate Name

Case No. _____

Public defender: _____

Diagnosis: _____

Notes: _____

4/26/15: Booked into Salt Lake Co. Jail

8/3/15: Ordered to USH

8/11/15: Ltr from USH re: waitlist (staff will meet with her to provide an assessment and orientation to the competency restoration process in the jail while she waits)

10/22/15: Ltr from USH (extension of hearing b/c still on waitlist)

1/26/15: Competency review hearing

Coalition Building

- **Co-counsel**
- **Public defenders**
- **Jail staff**
 - *Sheriff*
 - *Jail commander*
 - *Medical + mental health staff*
- **Inmates' family members**
- **Other P&As**

“Outreach” as treatment

- **Utah:**
 - ❑ *\$700K ongoing, began July ‘15*
 - ❑ *“USH jail-based visits to begin competency restoration”*
 - ❑ *4 social workers dispatched across the state*
 - ❑ *1 psychologist to conduct re-evaluations*
- **Not authorized by law**
- **Not a substitute for inpatient treatment at a state hospital**
- **“Drive-by therapy” that is an extreme departure from traditional continuum of care**

- ***“The establishment of a makeshift supplement such as the CFS program does not establish that the continued incarceration of [incompetent detainees] is rationally related to the restoration of their competency.”***

- — Judge Sarah S. Vance, US District Court Judge, E.D. La.

Case Status

- **9/8/15** **Complaint & Class Cert. Motion filed**
- **4/7/16** **Order denying State's MTD**
- **9/27/16** **Order granting class certification**

“All class members are seemingly held in county jails for extended periods after a court declares them incompetent and commits them to the custody of DHS’ director or a designee. It appears this occurs not because the State uses a procedure in which a qualified professional recommends this course of action, but because USH is full.”

- **11/7/16** **10th Circuit denies State's petition for permission to appeal order granting class certification**

Next Steps

- Case is currently stayed while parties engage in settlement negotiations. Parties have retained 2 experts to help inform future negotiations.
 - DHS has requested \$3.3 million from the Legislature to fund a
 - jail-based forensic competency restoration unit.
 - Similar to programs in Colorado and Georgia
 - *Day Program vs. Full-Time Residential?*
 - *CIT training for staff*
 - *Female patients*
 - Questions remain as to whether restoration can be achieved through outreach and medication alone.
- GOAL: for class members to receive clinically-appropriate restoration treatment within 14 days of a court order

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LOUISIANA CASES

- ***Cooper v. Gee* and *Jackson v. Gee* are two cases that were consolidated by the federal court, so that they could be tried at the same time. A settlement agreement was reached in September 2016.**
- **The *Cooper* case was filed in May 2014 on behalf of individuals found Not Guilty by Reason of Insanity.**
- **The *Jackson* case was filed in October 2015 on behalf of individuals found incompetent to stand trial.**

THE PLAINTIFFS

- **In Cooper, the Plaintiffs remained incarcerated for extended periods of time after the courts found that they were Not Guilty by Reason of Insanity (NGRI) and ordered them to East Louisiana Mental Health System (ELMHS) to be provided with appropriate mental health services.**
- **The Plaintiffs in Jackson has been diagnosed with mental illness and was found incompetent to stand trial and ordered committed to ELMHS but, like the individuals found NGRI, were incarcerated for extended periods of time following that order.**

Plaintiffs' Claims

- **Plaintiffs alleged that Defendants' refusal to accept physical custody had resulted in prolonged and unconstitutional confinement in parish jails in violation of their rights to due process under**
 - **the United States Constitution,**
 - **Title II of the Americans with Disabilities Act of 1990, and**
 - **Section 504 of the Rehabilitation Act of 1973.**

THE FACTS-The Jackson Case

- **In the Jackson case, the Plaintiff was, at the time of filing her suit, a pretrial detainee in the custody of the Orleans Parish Sheriff's Office.**
- **Plaintiff Jackson had been found incompetent to stand trial and ordered by the Criminal District Court to ELMHS for competency restoration.**
- **Plaintiff Jackson was detained in Orleans Parish Prison for 78 days while on the waitlist for admission to ELMHS.**

PLAINTIFFS FOUND INCOMPETENT TO STAND TRIAL

At the time the Jackson case was filed, the waitlist contained a total of 22 people.

- Of those 22 people awaiting placement, 4 had been detained in jail more than 40 days after being court ordered to Feliciana for treatment;
- 1 had been waiting in jail for 100 days as of October 23, 2015;
- 3 on the waitlist had been detained for 31 to 40 days;
- 5 more had been detained for 21 to 30 days; and
- 6 others had been detained between seven and 20 days.

The NGRI Plaintiffs

On average, the Plaintiff-NGRI Acquittees spent 188.1 days in jail after the district courts presiding over their criminal cases found them NGRI, terminated their criminal prosecutions, and ordered the Defendants to be placed at ELMHS.

- **The period of time they remained incarcerated ranged from 65 days to 371 days.**
- **Two of the individuals had been incarcerated for about a year, one 363 and the other 371 days.**
- **6 out of the nine had been incarcerated between 108 and 165 days.**

The NGRI Purported Class

- From 2013 to 2016, when the cases settled, 90 NGRI Acquittees had been placed at ELMHS, or have been on a waitlist for placement, including the named-Plaintiffs.
- Everyone of them, with 1 exception, languished in jail for more than seven days from the date of the Louisiana district court order finding them NGRI and terminating their criminal prosecution.

Average Length of incarceration for NGRI-Acquittees

- The vast majority (84 out of 90), waited in jail for over thirty days.
- Of the 90 NGRI Acquittees that had been placed, or on a waitlist for placement, 65 out of 87 waited more than 120 days for placement at ELMHS.
- On average, these 87 individuals remained in jail for 175.7 days while they were waiting for placement at ELMHS.

Average Length of incarceration for Incompetent Detainees

- Just prior to the scheduled trial, there were also 25 Incompetent Detainees awaiting placement at ELMHS.
- Of the Incompetent Detainees, the longest wait time for someone not in DOC custody was 107 days.
- Inmates in DOC custody serving out a sentence on other crimes were waiting as long as 270 days for competency restoration.

APA recommendations regarding Mental Health Services

- **The American Psychiatric Association recommends that a jail have a minimum of one full-time equivalent (i.e., 40 hours per week) psychiatric provider for every 75-100 inmates or detainees in need of psychotropic medication.**
- **The recommended number above explicitly presumes the presence of a complete team of mental health professionals, including licensed social workers, psychologist, and psychiatric nurses.**
- **The APA recommends a higher standard of care for psychiatric hospitals, suggesting that psychiatric hospitals limit the number of patients cared for by each psychiatrist to between 24 and 30 patients.**

The Findings of Plaintiffs' Expert, Dr. Joel Dvoskin

- **The primary purpose for incarcerating individuals in Louisiana is punishment and pre-trial detention. Such facilities do not have the capacity to provide the mental health treatment to individuals found NGRI or Incompetent to Stand Trial.**
- **Parish jails do not meet the definition of a “proper state mental institution” as required under the applicable state law.**
- **Mental health treatment in parish jails falls far below the recommended standard of care even for jails, which is in turn far below the recommended standard of care for inpatient psychiatric hospitals.**

Adequacy of Mental Health Services Available to NGRI Acquittees and Incompetent Detainees

- **None of the jails housing NGRI Acquittees provide care even remotely equivalent to hospital-quality care for inmates with serious mental illness.**
- **The recommended standard of care for the inpatient treatment of serious mental illnesses includes far more than simply offering them psychotropic medications.**

Other Expert Findings

- **Defendants do not provide treatment or counseling for NGRI Acquittees or Incompetent Detainees kept in jail on the waitlist pending physical admission to a DHH facility.**
- **Defendants do not assess NGRI Acquittees' needs for prompt treatment prior to their physical admission to a DHH facility. No formal psychiatric assessments are conducted for NGRI clients maintained within the jail while awaiting placement.**
- **The District Forensic Coordinators employed by DHH to see Plaintiffs in jail do not provide counseling, mental health medication or medication management. Their role is limited to informally evaluating individuals found NGRI or remanded for competency restoration in the jails at least monthly.**

The Settlement Agreement

- **On September 1, 2016, the parties filed a signed settlement agreement, requesting the court to enter an order approving the agreement and continuing its jurisdiction for purposes of enforcement.**
- **The court subsequently signed the order and approved the agreement.**

Settlement Terms

Under the settlement agreement, which will be enforceable by the court for at least 4 years, the state has agreed to do, among other things, the following:

- Provide all NGRI or Incompetent Individuals a Behavioral Health Assessment (BHA) within five (5) calendar days to determine if they are in need of emergency treatment.**
- Admit all new NGRI or Incompetent Individuals with Emergency Mental Health Needs to a Mental Health Facility within two (2) business days following completion of a BHA.**

Settlement Terms (Continued)

- **Admit all NGRI or Incompetent Individuals to ELMHS or another mental health facility, or to an appropriate community based program within 15 calendar days, except if Defendants demonstrate that unusual and exigent circumstances exist then defendants may have up to thirty (30) calendar days.**
- **Implement procedures to provide incarcerated NGRI or Incompetent Individuals with expedited admission in the event of emergent mental health needs.**
- **Develop a plan for providing less restrictive placement options in which NGRI and Incompetent Individuals can receive clinically appropriate competency restoration or treatment.**

Settlement Terms (Continued)

- **Coordinate a meeting with Plaintiffs' counsel and Plaintiffs' expert, and any stakeholders deemed necessary to discuss (a) needed research and analysis, and (b) necessary elements of the strategic plan.**
- **Defendants shall consider, in addition to the funding of new placements, opportunities to divert NGRI and Incompetency Individuals from the criminal justice system and to improve efficiencies in existing operations.**
- **Allocate necessary resources to create new placement options, in addition to and not in lieu of current placement opportunities, at clinically and legally suitable locations. New locations will include community-based settings.**

Settlement Terms (Continued)

- **Increase the number of available beds at ELMHS by an amount necessary to accommodate the placement of individuals within the time frame established in this Agreement.**
- **Report to Plaintiffs' counsel on the first working day of each month regarding the number of NGRI and Incompetent Individuals disaggregated by category of detention, gender, and the facility who have been found NGRI or Incompetent to Stand trial.**

Questions



Photo depicts several questions marks with one question mark in red.

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Disclaimer

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