

disABILITY LAW CENTER OF VIRGINIA



Protection & Advocacy for Virginians with Disabilities

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Governor Terry McAuliffe
Patrick Henry Building, Third Floor
1111 East Broad Street
Richmond, VA 23219

Dear Governor McAuliffe:

As you know, there has been a great public outcry over the senseless death of Jamycheal Mitchell. Mr. Mitchell died of wasting syndrome in August, 2015, at the Hampton Roads Regional Jail, some four months after having been court-ordered for treatment at Eastern State Hospital. Mr. Mitchell was never transferred to ESH. According to reports, Mr. Mitchell's physical and mental health deteriorated dramatically in the jail due to the denied treatment, leading to his death. Had he been hospitalized, as the court ordered, he most certainly would not have died.

This tragic death was entirely predictable. It was a foreseeable result of the Commonwealth's longstanding failure to comply with court orders to transfer incompetent individuals to Department of Behavioral Health and Developmental Services (DBHDS) hospitals for constitutionally mandated restoration services and treatment. You may be unaware of the full scope and duration of these longstanding violations.

As early as May 2008, our predecessor agency, the Virginia Office for Protection and Advocacy (VOPA) found probable cause that the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) had abused and neglected incompetent pretrial detainees by failing to transfer them promptly from jails to appropriate hospitals for court-ordered treatment. On April 14, 2009, DMHMRSAS submitted a Corrective Action Plan intended to reduce this waiting list. This Corrective Action Plan failed. As of June 28, 2011, after the Commissioner's 2009 Plan had been in place for almost two years, there were 84 incompetent individuals in jail awaiting transfer, some of whom had been waiting as long as 171 days.

On February 10, 2011, VOPA filed a formal human rights complaint on behalf of forensic individuals awaiting transfer. Both the Local Human Rights Committee and the State Human Rights Committee found that the DBHDS had violated the human rights of the individuals. The Committees requested corrective action. DBHDS promised "a written plan to

reduce and ultimately eliminate the waiting lists for forensic services at our state hospital.” This plan, too, failed.

Between June and September 2011, VOPA represented 22 detainees who were awaiting transfer from jail. In 13 of those cases, we sought relief from the court, asking for Rules to Show Cause against the Commissioner for his failure to obey the individual court orders. In response to those legal actions, on September 21, 2011, the Commissioner created a plan entitled “Proposal for Addressing Forensic Waiting Lists at State Facilities.” The Plan stated that “By approximately the end of February 2012, and if no new or unforeseen variables are encountered, all persons currently on the forensic waiting list could be admitted under this plan. From that point forward, it is anticipated that this plan would continue to admit defendants within 10-15 business days of receipt of an order.” Once more, the plan failed

In July 2012, dLCV again notified the DBHDS Commissioner of the growing number of individuals awaiting transfers both from Jail and between CSH and ESH. The Commissioner responded that “DBHDS remains committed to aggressively addressing the waitlist issues” and offered a plan with various strategies in progress to accomplish this. This plan, like the others before it, failed. The jail transfer waitlists grew to a total of 66 individuals by March, 2015, and included individuals who were waiting as long as 87 days and 106 days for beds at CSH and ESH respectively.

At the time of Jamycheal Mitchell’s death in August 2015, there were 55 individuals on the waiting list for transfer to either ESH or CSH for restoration services. Of course, we now know that Mr. Mitchell and some 10 to 12 additional individuals had never even been placed on the waiting list.

After the negative publicity generated by Mr. Mitchell’s needless death, DBHDS did transfer to hospitals many of the individuals on the waiting list, proving that DBHDS can comply with court orders when motivated to do so. Although DBHDS substantially reduced the wait list, the wait lists have never been eliminated fully.

Based on DBHDS’ long-standing pattern of violations and failed attempts at corrective action, it is extremely unlikely that DBHDS’ inhumane and unconstitutional wait listing of incompetent pretrial detainees can be resolved without permanent and verifiable systemic reforms. It is time for you, as Governor, to establish clear, enforceable standards for these transfers. As Governor, you must:

- Issue an immediate Executive Order directing DBHDS to admit individuals who are court ordered for hospital based restoration services within seven days of entry of the court order.
- Obtain legislative reforms establishing a statutory standard of court-ordered transfers from jail to hospital for restoration services within seven days of entry of the court order.

As was clearly evident in the investigative reports recently released, the courts have no standardized method for transmitting their orders for restoration. Likewise, the state hospitals

and DBHDS have no fail-safe system for receiving and tracking such orders. While recent amendments to Virginia Code §19.2-169.8 attempt to address this issue, further action is necessary. As Governor, you must:

- Direct DBHDS to develop a standardized procedure for management of the forensic waiting lists for all DBHDS operated facilities and programs.
- Obtain legislative reforms requiring that court orders for transfer be sent *both* to the designated service provider *and* to the DBHDS Office of Forensic Services.

While Mr. Mitchell was arrested for a petty offense, in reality he was confined because of his mental illness. As Mr. Mitchell discovered, jails have become the true, no-refusal, providers of last resort for individuals with behavioral health needs in the Commonwealth. According to the Compensation Board, in June 2015, 7,054 inmates in Virginia jails were believed to be mentally ill. This is a far greater number than those served in state mental health facilities.

In fact, Mr. Mitchell, and thousands like him, should not be forced to encounter the criminal justice system simply because of a lack of mental health services. Jails are ill-suited for persons with mental illness. Instead, rapid access to community mental health services is critical. Programs that support diversion from the criminal justice system into mental health treatment a priority are sorely lacking in Virginia. Therefore, as Governor, you must:

- Identify sufficient immediate resources for the Commonwealth to have “no refusal drop-off centers” accessible to *every* law enforcement agency in the Commonwealth. Access to such centers is a keystone in support of the Crisis Intervention Team (CIT) model. This will support diversion of individuals with mental illness from the criminal justice system.
- Identify and develop sufficient long term resources to divert all individuals with mental illness from the criminal justice system at the earliest points possible. These diversion resources must include accessible and adequate community mental health services to prevent interface with the criminal justice, pre-arrest diversion programs, and post-arrest diversion programs.

It is time for you to take decisive action. We can imagine no other circumstance where court orders are ignored with so little consequence to those in violation. We can imagine no other circumstance with such significant and tragic consequences for individuals with mental illness. As Governor, the responsibility for

an immediate and permanent solution is yours. Thank you for your attention to this urgent matter

Sincerely,

A handwritten signature in blue ink, appearing to read 'V. Colleen Miller', with a large, stylized loop at the end.

V. Colleen Miller
Executive Director

cc: Health and Human Resources Secretary, Dr William Hazel
Speaker of the House, Honorable William Howell, Esq
Senate President Pro Tem, Honorable Ralph Northam
Chair, House Appropriations, Honorable S. Chris Jones
Co-Chair, Senate Finance, Honorable Thomas K. Norment, Jr.
Co-chair, Senate Finance, Honorable Emmet W. Hanger, Jr