HB 650

Department of Legislative Services

Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 650 (Delegate Morhaim, *et al.*)
Judiciary Judicial Proceedings

Criminal Procedure - Incompetency and Criminal Responsibility - Court-Ordered Evaluation

This bill establishes that in a proceeding in which a court finds a defendant incompetent to stand trial (IST) or not criminally responsible (NCR), if the court commits the defendant to a facility because of a mental disorder and the mental disorder is treatable with psychiatric medication that will likely make the defendant less of a danger to self or the person or property of another, the court may order the defendant's treating physician to evaluate and develop a recommended treatment plan within five days of the defendant's admission to the facility. If the defendant refuses the treatment recommended by the treatment plan, a clinical review panel must be established under procedures set forth in the Health-General Article; the review panel must convene within 14 days of the defendant's admission to the facility in order to review any proposed administration of psychiatric medication over the refusal of the defendant.

Fiscal Summary

State Effect: General fund expenditures may increase significantly for the Department of Health and Mental Hygiene (DHMH) and the Office of the Public Defender (OPD) to conduct additional evaluations and/or participate in court hearings conducted under the bill. The Office of Administrative Hearings (OAH) can handle the bill's requirements with existing resources, as long as no more than 100 additional administrative hearings are generated due to the bill. Revenues are not affected.

Local Effect: The bill is not expected to materially affect circuit court operations.

Small Business Effect: None.

Analysis

Current Law:

Incompetent to Stand Trial and Not Criminally Responsible: By statute, a defendant is IST if the defendant is not able to understand the nature or object of the proceeding or assist in the defense. If the court finds that the defendant is IST and, because of mental retardation or a mental disorder, is a danger to self or the person or property of others, the court may order the defendant committed to a facility designated by DHMH until the court finds that the defendant is (1) no longer IST; (2) no longer a danger to self or the person or property of others due to a mental disorder or mental retardation; or (3) not substantially likely to become competent to stand trial in the foreseeable future.

Under Maryland law, a defendant is NCR for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation (intellectual disability), lacks substantial capacity to appreciate the criminality of that conduct or to conform that conduct to the requirements of law. The law further clarifies that a mental disorder does not mean an abnormality manifested only by repeated criminal behavior or other antisocial misconduct.

After a verdict of NCR, a court ordinarily is required to commit a defendant to the custody of DHMH for institutional inpatient care or treatment. However, the court may release a defendant after an NCR verdict if (1) DHMH issues a report within 90 days prior to the verdict stating that the defendant would not be a danger if released and (2) the State's Attorney and the defendant agree to the release and any conditions the court decides to impose.

Involuntary Administration of Psychiatric Medications: In general, psychiatric medication prescribed for the treatment of a mental disorder may not be administered to an individual who refuses the medication except (1) in an emergency, on the order of a physician where the individual presents a danger to the life or safety of the individual or others or (2) in a nonemergency, when the individual is hospitalized involuntarily or committed for treatment by order of a court and the medication is approved by a clinical review panel.

A clinical review panel consists of (1) the clinical director of the psychiatric unit, if the clinical director is a physician, or a physician designated by the clinical director; (2) a psychiatrist; and (3) a mental health professional, other than a physician. A person who is directly responsible for implementing the individual's treatment plan may not be part of the panel.

Clinical Review Panel Process: The chief executive officer of the facility or the chief executive officer's designee must give the individual and the lay advisor written notice

containing specified information at least 24 hours prior to convening a panel. The individual may attend the panel meeting (but not panel deliberations) and has specified rights at the panel meeting, including presenting information and witnesses; asking questions of presenters to the panel; and requesting assistance from a lay advisor, who is an individual at a facility who is knowledgeable about mental health practice and who assists individuals with rights complaints, as specified by State law.

Prior to determining whether to approve the administration of medication, the panel must (1) review the individual's clinical record; (2) assist the individual and the treating physician to arrive at a mutually agreeable treatment plan; and (3) meet for the purpose of receiving information and clinically assessing the individual's need for medication by consulting with the individual and facility personnel, receiving information presented by the individual and other persons participating in the panel, providing the individual with an opportunity to ask questions of anyone presenting information to the panel, and reviewing the potential consequences of requiring the administration of medication and of withholding the medication from the individual.

Under § 10-708(g) of the Health-General Article, the panel may approve the administration of medication or medications and may recommend and approve alternative medications if the panel determines that:

- the medication is prescribed by a psychiatrist for the purpose of treating the individual's mental disorder;
- the administration of medication represents a reasonable exercise of professional judgment; and
- without the medication, the individual is at substantial risk of continued hospitalization because the individual will (1) remain seriously mentally ill with no significant relief of the mental illness symptoms that caused the individual to be a danger to the individual or others while in the hospital, resulted in the individual being committed to a hospital, or would cause the individual to be a danger to the individual or others if released from the hospital; (2) remain seriously mentally ill for a significantly longer period of time with the mental illness symptoms described above; or (3) relapse into a condition in which the individual is unable to provide for the individual's essential human needs of health or safety.

A panel may not approve the administration of medication where alternative treatments are available and are acceptable to both the individual and the facility personnel who are directly responsible for implementing the individual's treatment plan.

A panel must document its consideration of the issues and the basis for its decision on the administration of medication or medications and must provide a written decision on the administration of medication or medications. The decision must be provided to the

individual, the lay advisor, and the individual's treatment team for inclusion in the individual's medical record.

If a panel approves the administration of medication, the decision must contain specified information, including a list of the approved medication(s), dosage information, and the duration of the panel's approval of treatment, which cannot exceed 90 days.

Appeals of Clinical Review Panel Decisions: An individual may request an administrative hearing to appeal the panel's decision by filing a request for hearing with the chief executive officer of the facility or the chief executive officer's designee within 48 hours of receipt of the decision of the panel. An individual has a right to legal representation at the hearing. Hearings are conducted before OAH, and an initial panel decision authorizing the administration of medication must be stayed for 48 hours or until the issuance of OAH's decision, if the individual requested a hearing.

OAH must conduct a hearing and issue a decision within 7 calendar days of the decision by the panel, but the hearing may be postponed by agreement of the parties or for good cause shown. Within 14 calendar days from the decision of the administrative law judge, the individual or the facility may appeal the decision and the appeal must be to the circuit court on the record from the hearing conducted by OAH. The scope of review in the circuit court must be as a contested case under the Administrative Procedure Act. The circuit court must hear and issue a decision on an appeal within 7 calendar days from the date the appeal was filed.

Renewals of Administration of Medications: Prior to expiration of an approval period and if the individual continues to refuse medication, a panel may be convened to decide whether renewal is warranted. If a clinical review panel approves the renewal of the administration of medication or medications, the administration of medication or medications need not be interrupted if the individual appeals the renewal of approval. When medication is ordered pursuant to the approval of a panel, and at a minimum of every 15 days, the treating physician must document any known benefits and side effects to the individual.

Background: In *Allmond v. Department of Health and Mental Hygiene*, 448 Md. 592 (2016), the Maryland Court of Appeals held that even though the provision of § 10-708(g) of the Health-General Article addressing involuntary administration of psychiatric medication to an individual committed to a mental health facility authorizes involuntary medication without a showing of dangerousness in the facility, the statute is not unconstitutional on its face. However, the court also determined that mere compliance with the criteria of the statute does not ensure compliance with the substantive due process requirement of the Maryland Declaration of Rights. According to the court, the authorization for involuntary medication may only be constitutionally exercised when there

is an "overriding justification," such as a need to render a committed defendant competent to stand trial.

State Expenditures: General fund expenditures may increase significantly for DHMH and OPD to conduct additional evaluations and/or participate in hearings conducted under the bill. The extent of this increase depends on the number of additional evaluations and hearings conducted as a result of the bill, which cannot be reliably determined at this time.

The Behavioral Health Administration (BHA) of DHMH advises that its hospitals are experiencing a physician shortage and that devoting additional time to evaluations, clinical review panel hearings, and appeals under the bill results in increased expenditures and operational inefficiencies.

DHMH advises that physicians develop treatment plans at the time of admission and no court order or law is required for an inpatient physician to develop a treatment plan. DHMH further advises that all hospitals have policies and procedures that require staff to initiate treatment plans at the time of admission and fully develop those plans within five to seven days. Treatment plans are constantly evaluated to ensure accurate diagnoses and appropriate treatment recommendations.

The bill authorizes a court to order the treating physician of a defendant found IST or NCR to evaluate and develop a recommended treatment plan within five days of the defendant's admission to a facility under specified circumstances. However, whether a patient has a mental disorder that is treatable with psychiatric medication and the consideration of specified medications is not determined prior to when a court decides whether or not to commit a defendant found IST or NCR to a designated facility. This determination is made as part of a treatment plan at the time of the defendant's admission to a facility, as discussed above.

Most pretrial evaluations for IST and NCR defendants are conducted by psychologists who do not have medical training. The evaluations conducted for the courts do not include an evaluation for medication. Medication decisions must be made by a medically trained psychiatrist and cannot be made by a psychologist. Therefore, if these determinations need to be made prior to judicial decisions under the bill, then general fund expenditures increase, perhaps significantly, to implement the bill's requirements.

BHA advises that it conducts approximately 2,500 pretrial evaluations and admits approximately 900 forensic patients each year. The vast majority of admitted forensic patients are committed as IST or NCR. Competency evaluations take approximately one hour to conduct. Evaluating defendants for medications requires at least one additional hour. BHA advises that in order to comply with the bill, it needs to contract with psychiatrists rather than psychologists for competency and medication evaluations or have

psychiatrists conduct medical evaluations and contract with psychiatrists to evaluate defendants for medications prior to judicial commitment proceedings. While a court may not order a treating physician to develop a treatment plan for every defendant, BHA advises that it has no way of knowing which defendants may be subject to future judicial orders and may need to incorporate additional evaluations in anticipation of requests for information by courts.

BHA contracts with psychologists at an average rate of $100 per hour to evaluate defendants. BHA pays psychiatrists a similar rate. However, BHA advises that due to its continued challenges with recruiting psychiatrists, it needs to reimburse psychiatrists at a substantially higher rate in order to secure enough psychiatrists. BHA also advises that it is unlikely it can find enough psychiatrists to conduct additional evaluations.

For illustrative purposes only, if BHA has to contract with psychiatrists to conduct 1,000 pretrial IST/NCR evaluations and make medication determinations for these defendants at a rate of $200 per hour, then DHMH expenditures amount to $400,000, compared to $100,000 for a psychologist to conduct a one-hour competency-only evaluation under existing statute.

In addition, OPD incurs expenditures to hire experts to testify at hearings conducted under the bill. OPD's Mental Health Division represents clients facing involuntary commitment to mental health facilities. OPD did not provide information with respect to this bill on the cost to hire experts in these cases. However, in 2013, OPD advised that expert review of medical records costs $1,000 per record, and expert testimony can cost up to $2,000 per case.

OAH advises that, unless the bill results in a significant increase in 100 or more additional administrative hearings, it can handle the bill's requirements with existing budgeted resources. DHMH advises that while the bill likely increases the number of administrative hearings conducted, it does not have data to quantify the magnitude of this increase.

Additional Information

Prior Introductions: None.

Cross File: SB 691 (Senators Ready and Hough) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of Health and Mental Hygiene; State's Attorneys' Association; Department of Legislative Services

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