HB 111

Department of Legislative Services

Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 111 (Delegate Barron, *et al.*)
Judiciary Judicial Proceedings

Maryland Department of Health - Defendants Found Incompetent to Stand Trial or Not Criminally Responsible - Commitment

This bill requires a court, upon a finding that a defendant is incompetent to stand trial (IST) and is a danger to self or others, or upon a verdict that a defendant is not criminally responsible (NCR), to enter an order of commitment that requires the Maryland Department of Health (MDH) to commit the defendant to a "designated health care facility" as soon as possible but no later than 10 business days after MDH receives the order. If MDH fails to timely place the defendant in a facility, the court may impose any sanction reasonably designed to compel compliance, including requiring MDH to reimburse a detention facility for costs incurred as a result of delayed placement.

Fiscal Summary

State Effect: General fund expenditures increase minimally due to the bill's reimbursement provisions. Potential significant capital and general fund expenditures beyond FY 2023, as discussed below. Revenues to the Department of Public Safety and Correctional Services (DPSCS) increase minimally from reimbursements.

Local Effect: Local government revenues increase minimally due to the bill's reimbursement provisions. Expenditures are not materially affected.

Small Business Effect: None.

Analysis

Bill Summary: "Designated health care facility" means a (1) State facility under specified provisions of the Health-General Article; (2) a State forensic residential center; or (3) a hospital or private residential facility under contract with MDH to house and treat individuals found to be IST or NCR.

The bill also requires a court to hold a hearing on whether an IST defendant continues to meet the criteria for commitment within 10 days (rather than 30 days) after receiving a report from MDH with specified information.

Current Law:

Incompetent to Stand Trial

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. After a hearing, a court may order MDH to examine the defendant to determine whether the defendant is IST. If the court finds that the defendant is IST *but is not a danger* as a result of a mental disorder or mental retardation (intellectual disability) to self or the person or property of others, the court may set bail or authorize the release of the defendant on recognizance.

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 MDH 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.

If a court commits a defendant because of mental retardation, MDH must require the Developmental Disabilities Administration (DDA) to provide appropriate treatment.

In order to determine whether a defendant continues to meet the criteria for commitment, the court must hold a hearing (1) every year from the date of the commitment; (2) within 30 days after a filing by the State's Attorney or the defendant's counsel detailing new and relevant information; and (3) within 30 days after receiving a report from MDH stating new and relevant information. The court may also hold a conference or hearing on its own initiative to review the status of the case. If the court finds that the defendant is still incompetent and is not likely to become competent in the foreseeable future, the court must civilly commit the defendant (as long as other specified criteria are met) or order the confinement of the defendant in a DDA facility in accordance with specified proceedings.

Not Criminally Responsible

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. A court may order MDH to examine the defendant to determine whether the defendant was NCR.

After a verdict of NCR, a court must immediately commit a defendant to the custody of MDH for institutional inpatient care or treatment. If the defendant was found NCR primarily because of mental retardation, MDH must designate an appropriate facility for such treatment.

Instead of commitment, the court may release a defendant after an NCR verdict if (1) MDH 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.

Background:

Litigation

In *Fredia Powell, et al. v. Maryland Department of Health, et al.*, No. 77, September Term 2016 (August 28, 2017), the appellants alleged that MDH violated statute and the appellants' constitutional due process rights by failing to comply with the timeline specified in a trial court's order of commitment. The trial court's order required MDH to place the appellants (who had been found IST and a danger to self or others) in a facility within 1 day of the issuance of the order; however, the appellants were admitted between 12 and 36 days later.

The Court of Appeals held that statute itself does not set a deadline for admission to a psychiatric hospital for IST defendants, nor does it authorize a circuit court to do so. In examining statute and relevant legislative history, the court noted that it could not find evidence of the Maryland General Assembly's intent that a court set a deadline for admissions in a commitment order. Thus, the court held that a delay in placing a criminal defendant by a deadline in a commitment order does not violate *statute* (although the delay may still violate the trial court's order). The court also held that an *unreasonable* delay violates a defendant's due process rights, but that what is considered "unreasonable" varies and depends on the particular circumstances of a case; given the limited record presented,

the court was unable to reach a decision on this issue as a matter of law for the particular case at hand.

On September 28, 2017, a Baltimore City Circuit Court found MDH (and several MDH officials) in constructive civil contempt for failing to timely place the petitioners (for competency evaluations or for IST commitments) in accordance with court orders. The court found that, although there may not have been available beds for the petitioners, the lack of beds was due to MDH's actions (or lack thereof, as MDH had failed to take a series of corrective actions). The court ordered MDH and named officials to take remedial actions to "purge" the order of contempt, including fully staffing and admitting patients to certain facilities by December 31, 2017. MDH filed an appeal with the Court of Special Appeals in November 2017; as of January 2018, the appeal is pending.

Forensic Services Workgroup

The State's system for delivering forensic services has been subject to increased scrutiny and growing concern in recent years. "Forensic services" include not only court-ordered evaluations and commitments of IST and NCR defendants (under the Criminal Procedure Article), but also court-ordered evaluations and commitments of individuals for substance abuse disorders (under the Health-General Article).

In 2016, former Secretary of Health Van T. Mitchell convened the Forensic Services Workgroup to develop and recommend systemwide changes to the delivery of forensic services in the State. The workgroup consisted of representatives from several State agencies, community providers, consumers, and advocates. In its final report, the workgroup noted several long-standing issues, including (1) lack of available beds in State facilities to complete court-ordered forensic evaluations and court commitments within statutory time requirements; (2) the length of time it takes for individuals who have been assessed as ready for release to return to court for disposition; (3) appropriate placement of incarcerated individuals ordered for evaluation and who are assessed, but not yet adjudicated, as IST; and (4) the impact on State facility staff from consistent overcapacity and care of a primarily forensic (rather than civil) population. The report also noted that one of the most "visible" issues was the inability for MDH to respond to court orders of commitment within statutory timeframes due to a lack of available inpatient beds. However, the report noted that the lack of available beds was due not only to the actual numbers of beds available but was also a result of a complicated and inefficient system.

The workgroup made six primary recommendations: (1) increase bed capacity within MDH; (2) increase availability of community crisis services; (3) expand the capacity of the Office of Forensic Services; (4) increase outpatient provider capacity to meet the needs of forensic patients; (5) centralize MDH forensic processes; and (6) increase education to reduce stigma in both the general public and the mental health treatment community.

Maryland Department of Health – Updates

In a November 2017 presentation entitled *Update on Forensic Services: Mental Competency and Substance User Disorders*, MDH outlined its actions in response to the Forensic Services Workgroup report. Among other actions, MDH reported that it (1) planned to open 95 beds of the recommended types from April 2017 to April 2018; (2) expanded the Office of Forensic Services with additional staff and hired consultants to help with procedural and system changes; and (3) created a Central Admissions Office (CAO) to serve as a single point of contact for submitting and inquiring about court orders and to handle all forensic evaluations and placements (CAO launched on October 13, 2017). MDH reported that, as of November 3, 2017, the backlog of court commitment orders was 13 (down from approximately 40 or 50 in June and July of 2017). MDH stated that, for mental competency-related proceedings, its objective was to place defendants and inmates into facilities within a *reasonable* time from the date of the court order.

MDH advises that the average wait time (between the date a court order is issued and the defendant is admitted to a facility) was approximately 12 days in November 2017 and was approximately 7 days for the first half of December 2017. The average wait time for January 2018 was 8 days, with 10 admissions occurring beyond 10 days. In February 2018, the average wait time was 7 days, with 5 admissions occurring beyond 10 days. The average wait time for March 2018 is 4 days, with no admissions occurring beyond 10 days (as of March 16, 2018).

State Fiscal Effect: MDH estimates that the bill results in the need for 50 to 150 additional beds in State facilities (beyond the beds already planned for April 2017 through April 2018) and also advises that existing facilities cannot accommodate these additions. Thus, MDH advises that a new State psychiatric facility must be constructed to meet the bill's requirements.

MDH estimates that the new facility would have a 100-bed capacity. Based on construction and operating costs for the Eastern Shore Hospital Center (an 80-bed facility), MDH estimates a total cost of $92.5 million for the new 100-bed facility; this includes $65 million in construction costs (site work, design/construction, and furnishings) and $27.5 million in operating costs (including staffing). MDH additionally advises that, as this is an unplanned capital project, the facility would likely not be constructed for seven to nine years (fiscal 2026 at the earliest). MDH estimates that a portion of capital expenditures ($2 million for planning purposes) may begin as early as fiscal 2023.

The Department of Legislative Services (DLS) assumes that, if a new psychiatric facility is needed, construction of any new facility does not begin until beyond fiscal 2023; thus,

any potential capital or operating expenditures for a new facility have not been factored into this analysis.

This analysis assumes that, as MDH advises that existing facilities are unable to accommodate any additional admissions, MDH may be subject to sanctions for failing to timely place defendants in appropriate facilities within a 10-day timeframe. The extent to which MDH may be subject to sanctions depends on several factors: (1) the backlog of admissions at any given time, which varies; (2) the number and frequency of commitment orders issued; (3) the length of each delay; and (4) judicial discretion in imposing sanctions. DLS advises that, given these factors, any impact from the bill's penalty provisions is likely to be minimal.

MDH may be required to reimburse DPSCS Baltimore City Pretrial Complex and local detention facilities for costs incurred to the extent that IST or NCR defendants are detained in those facilities due to the unavailability of MDH treatment beds. Thus, general fund expenditures for MDH increase minimally to reimburse DPSCS and local detention facilities. (For State correctional facilities, the average total cost per inmate, including overhead, is estimated at $3,800 per month. Excluding overhead, the average cost of housing a new State inmate (including variable health care costs) is about $870 per month. Per diem operating costs of local detention facilities have ranged from approximately $40 to $170 per inmate in recent years.) DPSCS revenues increase accordingly from reimbursements.

Local Revenues: Local government revenues increase to the extent that MDH is required to reimburse local detention facilities for costs incurred as a result of holding IST and NCR defendants in local facilities. Any such reimbursements are likely to be minimal. (As noted above, per diem operating costs of local detention facilities have ranged from approximately $40 to $170 per inmate in recent years.)

Additional Information

Prior Introductions: None.

Cross File: SB 233 (Senator Middleton) - Judicial Proceedings.

Information Source(s): Harford and Montgomery counties; cities of College Park and Rockville; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Maryland Department of Health; Department of Public Safety and Correctional Services; Department of Legislative Services

Fiscal Note History: First Reader - January 22, 2018
mag/kdm Third Reader - March 28, 2018
Revised - Amendment(s) - March 28, 2018

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