Department of Legislative Services

Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 361 (Senator Ready, *et al.*)
Judicial Proceedings Judiciary

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

This bill (1) authorizes a court to order the Maryland Department of Health (MDH) to evaluate a defendant found incompetent to stand trial (IST) or not criminally responsible (NCR) under specified circumstances and develop a prompt plan of treatment and (2) requires a clinical review panel to convene within a certain amount of time if the treatment plan indicates danger. **The bill takes effect July 1, 2018**.

Fiscal Summary

State Effect: Assuming MDH can comply with the bill, the bill can be handled with existing budgeted resources, as discussed below. Revenues are not affected.

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

Small Business Effect: None.

Analysis

Bill Summary: If a court commits a defendant to a mental facility pursuant to a finding that the defendant is IST and, because of a mental disorder, is a danger to self or the person or property of another, the court may order MDH, as soon as possible after the defendant's admission, but not to exceed 48 hours, to:

- evaluate the defendant;
- develop a prompt plan of treatment for the defendant under § 10-706 of the Health-General Article; and

- evaluate whether there is a substantial likelihood that, without immediate treatment, including medication, the defendant will remain a danger to self or the person or property of another.

The bill contains a similar authorization for a court that commits a defendant to a mental facility pursuant to a finding that the defendant is NCR and, because of a mental disorder, is a danger to self or the person or property of another.

A clinical review panel must convene within nine days after an individual's refusal of medication for a period of at least 72 hours if (1) the individual was committed to a hospital because of a mental disorder and (2) the individual's treatment plan indicates that there is a substantial likelihood that, without immediate treatment, the individual will remain a danger to self or the person or property of another.

The Behavioral Health Administration within MDH must develop and conduct training on the clinical review procedures outlined in statute to ensure compliance at all State facilities. The training is mandatory for all clinical directors and all individuals who are eligible to serve on a panel.

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 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.

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 MDH for institutional inpatient care or treatment. However, 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.

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 the Office of Administrative Hearings (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:

Maryland Department of Health

Assuming that MDH can comply with the bill, the bill can be handled with existing budgeted resources. However, given the variety and complexity of medical issues that may be addressed under the bill, compliance may not always be feasible.

The bill requires MDH to evaluate a defendant, develop a plan of treatment, and determine whether a defendant will remain a danger without treatment within 48 hours. MDH advises that even if staffed with the resources and employees of a local hospital, MDH would not be able to meet the bill's 48-hour deadline for medical purposes, and that compliance with the bill's 48-hour deadline may be inconsistent with practice guidelines and clinical realities.

Section 10-706 of the Health-General Article requires an MDH facility to develop a treatment plan promptly. According to MDH (1) the plan of treatment starts with the patient's first contact with the admitting clinician and (2) an official treatment plan document involving the input and signature of various treatment members is done by the fifth day after admission. The determination of whether a patient will remain a danger is complex and requires a longer assessment, which often takes more than 48 hours after admission. Also, a defendant may present a complex medical situation that requires a longer analysis or a medical comorbidity that would require a medical professional to consult with another medical specialist, both of which are situations that may not be feasible within 48 hours.

MDH advises that if the patient presents a current danger upon admission, then appropriate treatment interventions are ordered immediately (*e.g.*, one-to-one staff observation, having a single room, and emergency medication over objection in an emergency). The determination of whether a person remains a danger is based on response to treatment interventions, which can be slow (days or weeks), especially if medication has to be changed because the initial medication did not work or presented undesirable side effects.

The bill also requires a clinical review panel within 9 days of the patient's refusal to take medication for 72 hours. According to MDH, clinical review panels are typically scheduled within 7 to 10 days of the request.

Other Agencies

OAH advises that it does not expect a sizeable number of administrative appeals from clinical review panels as a result of the bill and can handle the bill's requirements with existing budgeted resources.

The Office of the Public Defender advises that any scheduling changes prompted by the bill can be handled with existing budgeted resources.

Additional Information

Prior Introductions: HB 650 of 2017, a similar bill, passed the House as amended but received an unfavorable report from the Senate Judicial Proceedings Committee. Its cross file, SB 691, received an unfavorable report from the Senate Judicial Proceedings Committee.

Cross File: HB 202 (Delegate Morhaim, *et al.*) - Judiciary.

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

Fiscal Note History: First Reader - January 26, 2018
mag/kdm Third Reader - March 27, 2018
Revised - Amendment(s) - March 27, 2018

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510