Department of Legislative Services

Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 864 (Senator Kelley, *et al.*)
Finance Health and Government Operations

Health – Emergency Evaluees and Involuntarily Admitted or Committed Individuals – Procedures

This bill requires a health care provider to disclose legal and medical records (including mental health records) without the authorization of an individual to a public defender who states in writing that the Office of the Public Defender (OPD) represents the individual in an involuntary admission or release proceeding under the Health-General Article or a commitment or release proceeding under the Criminal Procedure Article. The bill also requires facilities to notify OPD about the admission of an emergency evaluee or a change in admission status.

Fiscal Summary

State Effect: OPD realizes operational efficiencies and may achieve minimal cost savings, as discussed below. Revenues are not affected.

Local Effect: The bill is not expected to materially affect local finances or operations.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Disclosure of Records

Disclosed records must be limited to those that are needed by the public defender to represent the individual in specified proceedings. Legal records that must be disclosed include (1) an emergency petition; (2) an application for involuntary admission; and (3) a certification for involuntary admission.

Records relating to an involuntary admission proceeding under the Health-General Article must be provided within 24 hours after the health care provider receives a written request for the records from the public defender and only if the individual has not yet retained private counsel.

Notification of Application, Admission, or Change in Status

An emergency facility must notify OPD within 30 hours of completing an application for the involuntary admission of an emergency evaluee. The notice must include any legal documents relating to the acceptance of the evaluee into the facility, including specified documents. Notice of the acceptance of an emergency evaluee must be provided by email or facsimile. Additionally, such notice requirements do not apply to a voluntary admission.

An involuntary admission facility must notify OPD of the involuntary admission of an individual to the facility within 24 hours of the admission.

Additionally, a facility must notify OPD of an individual's change in admission status from voluntary to involuntary within 24 hours of the change in status. Notice of the change in status must be provided by email or facsimile.

Other Provisions

A hearing officer may not order the release of an individual who meets the requirements for involuntary admission on the grounds that a health care provider or an emergency or other facility did not comply with the bill's disclosure or notice requirements, as specified.

Current Law:

Disclosure of Medical Records

Generally, a health care provider may not disclose medical records without the authorization of the person in interest. However, a health care provider must disclose a medical record without the authorization of the person in interest under specified circumstances, including to a local drug overdose fatality review team. Chapters 165 and 166 of 2017 require disclosure to a guardian *ad litem* appointed by a court to protect the best interest of a minor or a disabled or elderly individual who is a victim of a crime or a delinquency act under specified circumstances.

Chapters 700 and 701 of 2017 alter the circumstances under which a health care provider may disclose directory information and medical records without the authorization of the person in interest, including information that was developed primarily in connection with mental health services. Unless the patient has restricted or prohibited the disclosure of

directory information, a health care provider may disclose directory information to an individual who has asked for the patient by name. Additionally, a health care provider may disclose a medical record without the authorization of a person in interest to immediate family members of the patient or any other individual with whom the patient is known to have a close personal relationship, if the disclosure is limited to information that is directly relevant to the individual's involvement in the patient's health care and other conditions are met.

"Directory information" means information regarding the presence and general health condition of a patient admitted to or receiving emergency treatment at a health care facility.

"Person in interest" means:

- an adult on whom a health care provider maintains a medical record;
- a person authorized to consent to health care for an adult;
- a personal representative of a deceased person;
- a minor, if the medical record concerns treatment to which the minor has the right to consent and has consented; or a parent, guardian, custodian, or representative of the minor designated by a court, in the discretion of the attending physician who provided the treatment to the minor, under specified circumstances;
- a parent of the minor generally, except if the parent's authority to consent to health care for the minor has been specifically limited by a court order or a valid separation agreement entered into by the parents of the minor, or another person authorized to consent to health care for the minor; or
- an attorney appointed in writing by a person meeting another definition of person in interest.

Federal Health Insurance Portability and Accountability Act

In addition to restrictions in state law, federal law and regulations restrict the ability of a health care provider to disclose a medical record (also referred to as protected health information) without the authorization of the person in interest. Generally, federal law and regulations preempt state law with respect to protected health information confidentiality. However, the federal Health Insurance Portability and Accountability Act (HIPAA) and its standards do not preempt state law if the state provision (1) relates to the privacy of individually identifiable health information and (2) is "more stringent" than HIPAA's requirements.

Under HIPAA regulations, a health care provider is required to treat a personal representative of an individual *as the individual* for the purposes of disclosure of protected health information and may be required to disclose an individual's protected health

information to a personal representative without the individual's consent. For example, if a person has the authority to act on behalf of an individual who is an adult or an emancipated minor with respect to making health care decisions, a health care provider is required to treat the person as a personal representative and disclose the protected health information. Likewise, generally, when a parent, guardian, or other person acting in place of the parent has the authority to act on behalf of an unemancipated minor in making health care decisions, a health care provider must treat that person as the personal representative of the individual and disclose the protected health information. However, if a person is not authorized to make health care decisions, that person likely does not qualify as a personal representative for purposes of the disclosure of protected health information.

Additionally, a health care provider is authorized, under exigent circumstances, to use or disclose protected health information if the health care provider believes in good faith that the use or disclosure is "necessary to prevent or lessen a serious or imminent threat to the health or safety of a person or the public" and the disclosure is made to a person "reasonably able to prevent or lessen the threat."

Involuntary Admissions (Health-General Article)

Under the Health-General Article, an application for involuntary admission of an individual to a facility or Veterans' Administration hospital may be made by any person who has a legitimate interest in the welfare of the individual.

In addition to other requirements, the application must (1) state the relationship of the applicant to the individual for whom admission is sought; (2) be signed by the applicant; and (3) be accompanied by the certificates of one physician and one psychologist, two physicians, or one physician and one psychiatric nurse practitioner.

Additionally, within 12 hours of receiving notification from the health care practitioner who has certified an individual for involuntary admission, the Maryland Department of Health (MDH) must receive and evaluate the individual for involuntary admission if certain requirements are met, including that the health care practitioner is unable to place the individual in a facility not operated by MDH.

A facility or Veterans' Administration hospital may not admit an individual under involuntary admission unless (1) the individual has a mental disorder; (2) the individual needs inpatient care or treatment; (3) the individual presents a danger to the life or safety of the individual or of others; (4) the individual is unable or unwilling to be admitted voluntarily; and (5) there is no available, less restrictive form of intervention that is consistent with the welfare and safety of the individual.

Specified health professionals and other interested parties may petition for an emergency evaluation of an individual, which may result in the involuntary admission of the individual to a mental disorder treatment facility, if the petitioner has reason to believe that the individual (1) has a mental disorder and (2) presents a danger to the life or safety of the individual or of others. Petitions for an emergency evaluation must contain specified additional information. If an emergency evaluee meets the requirements for an involuntary admission and is unable or unwilling to agree to a voluntary admission, the examining physician must take the steps needed for involuntary admission of the emergency evaluee to an appropriate facility, which may be a general hospital with a licensed inpatient psychiatric unit. If the examining physician is unable to have the emergency evaluee admitted to a facility, the physician must notify MDH, which must provide for the admission of an emergency evaluee to an appropriate facility within six hours of receiving notification.

Within 12 hours after initial confinement to a facility, the facility must provide the individual with a form, provided by the Behavioral Health Administration, which explains the individual's rights, including the right to consult with a lawyer. An individual who is proposed for involuntary admission must be afforded a hearing to determine whether the individual should be involuntarily admitted or released, which must be conducted within 10 days of initial confinement.

Commitments Relating to Incompetency to Stand Trial or Not Criminally Responsible (Criminal Procedure Article)

By statute, a defendant is incompetent to stand trial (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.

A defendant is not criminally responsible (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.

State Expenditures: According to its 2017 annual report, OPD handled 6,140 involuntary commitment matters in 2016.

OPD advises that the bill results in cost savings and operational efficiencies for involuntary admission procedures. In particular, OPD advises that by explicitly requiring health care providers to disclose specified records to OPD, the bill results in reduced litigation relating to obtaining such records for clients undergoing involuntary admission. OPD also advises that requiring facilities to notify OPD of an admission mitigates time spent tracking client transfers from one facility to another. OPD did not provide a specific estimate as to these potential cost savings. The Department of Legislative Services advises that, to the extent the bill results in reduced litigation and/or other operational costs, general fund expenditures may decrease minimally.

Additional Information

Prior Introductions: None.

Cross File: HB 1392 (Delegate Lam, *et al.*) - Health and Government Operations.

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

Fiscal Note History: First Reader - March 5, 2018
mag/jc Third Reader - April 2, 2018
Revised - Amendment(s) - April 2, 2018
Enrolled - April 19, 2018
Revised - Amendment(s) - April 19, 2018

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