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The Hon. Maggie McIntosh
Chair
Committee on Appropriations
121 Lowe House Office Building
6 Bladen Street
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Re: **HR 1382 Position: SUPPORT WITH AMENDMENTS**

Dear Chairperson McIntosh and Members of the Committee:

Maryland is in the midst of an ongoing placement crisis for foster children that the State has failed to address. The consequences are tragic: according to estimates of the Office of the Public Defender ("OPD"), approximately 90 foster children each year have been warehoused in psychiatric hospitals without medical justification or have been kept in emergency rooms of hospitals for extended periods of time without medical justification.

A. The Horrific Practice of Keeping Foster Children in Psychiatric Hospital Facilities When They Do Not Require Hospitalization.

During 2019, the OPD represented one child who had been wrongly hospitalized on seven different occasions. Some children were hospitalized three or four times. As we speak here today, there are foster children who are stuck in a surreal, highly illegal *Cuckoo's Nest* world. In Baltimore City, where a federal consent decree prohibits use of hospitals as ersatz foster care placements, seven different children have overstayed in hospitals since the beginning of the year—less that two months. One of these children is only *six years old*.

This is a disaster. In my 35 years of representing foster children in Baltimore, I have never seen anything this bad. That includes children sleeping in hard chairs in DSS office buildings without showers or bathing facilities; dozens of children sheltered in a motel run by social services without adequate supervision; and children stuck in residential treatment centers because less restrictive placements are not available.

Children have been discharged by their treating psychiatrists or released by administrative law judges because they do not meet the criteria for involuntary hospitalization but remain stuck in the hospital because the local DSS refuses to pick up the children, stating that no placement is available. Juvenile judges have resorted to ordering the placement of children in private psychiatric hospitals for no reason other than the lack of an appropriate placement. Children have

moved from E.R. to E.R., staying days and sometimes weeks at a time, for no reason other than the lack of an appropriate placement.

Hospitals are not licensed child placement agencies. These placements are illegal and unconstitutional, yet they persist because DHS lacks adequate placements. Federal legislation, the Families First Services Prevention Act of 2018, prohibits use of congregate-care placements for foster children, yet here in Maryland we are using the very worst, the absolutely most restrictive types of placements—psychiatric wards and E.R.s—for our most vulnerable, highest need children. A psychiatric hospital is a terrible place for a child: he or she does not go to school, does not have contact with the community, is separated from family and friends. These children already are highly traumatized, highly vulnerable children, and yet we traumatize them further.

Children are kept in hospitals because Maryland has a shortage of adequate foster care placements. It has failed to develop an appropriate array of supportive services that can allow children to live in community placements without disruptive hospitalizations. DHS has failed to plan for the actual needs of its foster care population, failed to acknowledge the problem, and failed to budget for services that would fix the problem. Its preferred course of holding children in hospital while waiting for beds to open up in out-of-state residential treatment centers, is the worst possible response.

This past September, Health Management Associates, on behalf of MDH's "Post-Acute Care Workgroup," prepared and submitted to MDH a comprehensive report addressing the problem of child and adult hospital overstays and recommended many reforms, including budget reforms, that would help ease the problem. To my knowledge, no action has been taken by MDH or DHS despite having been presented the report months ago.

B. HB 1032.

These egregious violations of the children's civil rights. both constitutional (substantive due process under the Fourteenth Amendment) and statutory (the ADA and Section 504 of the Rehabilitation Act of 1973) have occurred for at least the last two years, and yet the State has failed to act. Because the State will not take steps to fix the problem, it is up to the General Assembly to step in and enact strong measures that will prevent DSS agencies from continuing to mistreat foster children in this way. HB 1382 addresses four aspects of the problem: (1) providing legal clarity and financial protection to hospitals, (2) imposing clear prohibitions and enforceable sanctions on local DSS agencies, (3) ensuring that juvenile courts do not mistakenly commit children to hospitals who have already been determined not to meet the medical criteria for involuntary hospitalization, and (4) providing accountability by requiring prompt reports and disclosure of pertinent information.

1. *Hospitals*. HB 1032 strengthens the Health-General Article provisions regarding involuntary hospitalizations. (a) It prohibits E.R.s from keeping foster children beyond the 30-hour limit under current law in cases where a local DSS cannot find an appropriate alternative placement for the child. (b) The odious practice of shuttling foster children from E.R. to E.R. will be stopped, as hospital E.R.s will be prohibited from admitting children who do not exhibit new behaviors or who have been discharged from another E.R. within the last seven days. (c) Equally essential, the bill requires immediate removal of a child from a psychiatric hospital no later than four hours after the medical staff determines that the child does not meet the criteria for hospitalization or discharges the child, or an administrate law judge orders discharge of the child. DSS must pick up the child within this four-hour window. (d) If a local DSS seeks to hospitalize a child, it must provide the hospitals with full information about prior hospitalizations and relevant history within the preceding seven days so that it will know if the child previously was found not to require hospitalization or if DSS is pursuing serial hospitalizations to evade legal limitations. (e) If, despite these protections, a child ends up hospitalized inappropriately, the State no longer can profit from the hospitalization by failing to reimburse the hospital for the cost of care (which typically is denied by insurance and Medical Assistance because it is not medically necessary).

2. *DSS agencies*. In addition to requiring the local DSS to pick up children in their custody who have been discharged or found appropriate for discharge from a hospital, HB 1382 would impose further requirements. (a) It would prohibit DSS from seeking hospitalization for a child less than seven days after the child was previously determined not to require hospitalization. (b) For any foster child admitted to a hospital for inpatient mental health evaluation, DSS must begin placement planning immediately. That planning must include short or long-term plans as appropriate, identification of relatives willing to participate in clinical and discharge planning and in-program activities for the child, and accommodations necessary for successful placement of children with disabilities. (c) DSS must submit this plan to the juvenile court within seven days of hospitalization, unless the child has been determined to need ongoing inpatient treatment, in which case the court may extend the deadline.

3. *Juvenile courts*. The current practice of some juvenile courts to override the legal decisions of administrative law judges or clinical decisions by the hospital's medical staff that the child does not meet the criteria for involuntary hospitalization would be halted. Juvenile courts could not override these decisions and commit the child. Finally, should DSS refuse to pick up a child who has been discharged by a hospital or been determined not to meet the criteria for involuntary hospitalization, the juvenile court must enter a finding that the local DSS has not made "reasonable efforts" for the child, which results in a federal sanction (temporary loss of federal Title IV-E subsidy) against DSS. This will provide the necessary deterrent to ensure that the agency does not suspend its duty to care for the child due to the assumption (usually proven false) that a placement is not available.

4. *Accountability*. The bill also addresses the lack of accountability that has allowed these violations (and related overstay issues discussed below) to persist and accelerate. (a) For children who are not placed within seven days of hospitalization, DSS must report to the juvenile court and the child's CINA attorney on its efforts to find a placement. (b) The names of all such children must be reported to the DHS Secretary every thirty days. (c) DHS must annually report to the General Assembly the number of children who were kept in hospitals when medical criteria for discharge were not met. (d) All residential child care centers (group homes, diagnostic facilities, and residential treatment centers) and RICA facilities must report to Disability Rights Maryland on a monthly basis the names of all foster children who have "overstayed" past license limits or clinical recommendations.

5. *Amendments*. In several places, HB 1382 conflates the separate issues concerning E.R.s and psychiatric hospitals. The Office of the Public Defender has proposed technical amendments fixing these issues and several others. I strongly support these technical amendments.

C. The Broader Placement Crisis in Maryland.

The Committee should understand that the hospital overstay problem is one facet of a much larger placement shortage. Too often, foster children are stuck in limbo, placed on waiting lists for foster homes, therapeutic foster homes, and other placements; sometimes they stay for months in a short-term "diagnostic facility" that is supposed to be limited to 30 or 60-day stays. These overstays then clog up the system for the next group of children. Indeed, before the current crisis involving hospitals had occurred, BCDSS was using its office buildings as illegal overnight shelters, a practice once used during a prior placement crisis fifteen years ago. These are symptoms of a broader shortage of placements and a lack of appropriate supportive services to facilitate stability in placements. In Baltimore City, children change placements at more than twice the national average. (The actual rate is impossible to know because BCDSS does not accurately record placement changes.)

I represent the class of Baltimore City foster children in the custody of the Baltimore City Department of Social Services ("BCDSS") in the federal class action, *L.J. v. Massinga*. Since 1988, the Department of Human Services ("DHS") and BCDSS have been subject to a federal consent decree, as substantially modified and expanded in 2009, governing conditions and services for the foster children and their families. Defendants have never been in substantial compliance, and they are far from compliance now. The modified consent decree ("MCD") prohibits placement of Baltimore foster children in hospitals, offices, and other unlicensed placements. Despite the MCD's clear prohibition of the practice, Defendants never disclosed that they have been using hospitals as illegal placements. I first learned of it when the OPD sounded the alarm nine months ago. But for the OPD, this practice would have remained a State secret.

Indeed, DHS does not collect accurate information about the practice. Its end-of-year JPR report to the General Assembly is inaccurate, ignoring several hospitals where children have been placed, apparently not counting children who had been placed in E.R.s, and indicating progress that is contradicted by the Office of the Public Defender's own caseload. At a formal *L.J.* meeting last summer, Defendants reported that no Baltimore City foster children had been inappropriately hospitalized in the preceding three months when in fact three children had been kept in hospitals despite not meeting the criteria for involuntary hospitalization. BCDSS has promised to stop the practice yet seven children already have been wrongly hospitalized in 2020.

DHS and MDH need to procure a realistic assessment of the placement shortage, a plan for addressing it, and a realistic budget for the services and placement array that would ensure that all of Maryland's thousands of foster children live in safe, appropriate, and lawful placements in the community. Their current budget is wholly insufficient to meet that need. Among other things, DHS should have more emergency foster homes, more funds for paying for DDA placements, and funds available to pay for children to stay in hotels (with appropriate supervision by aides), a practice used in the 90's with considerable success.

The State's budget for legal counsel representing these children in juvenile court also is insufficient. Even though the psychiatric health of these children often is in dispute, the children's counsel lack resources to pay for experts to testify that hospitalization is unnecessary and harmful. The OPD has such resources and often is able to prevail in administrative hearings as a result. It makes no sense for juvenile courts to determine whether hospitalizations are needed without the benefit of expert opinions to challenge the oft-erroneous opinions of local departments.

Though extensive reform is needed, HB 1382 would, if enacted, curb the worst aspects of the crisis. No foster child should be warehoused in a psychiatric hospital or an emergency room merely because the State has failed to take steps to develop appropriate placements for the children. This is a clear dereliction of our *parens patriae* responsibility to care for these abused and neglected children as if they were our own.

Very truly yours,

/s/ Mitchell Y. Mirviss