

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 654 (Delegates Rosenberg and Hubbard)
Health and Government Operations and
Judiciary

Clinical Review Panels - Psychiatric Medication - Correctional Facilities

This bill requires a clinical review panel to approve the administration of psychiatric medication prescribed for the treatment of a mental disorder to an individual who refuses the medication while the individual is in the custody of a facility under the jurisdiction of the Department of Public Safety and Correctional Services (DPSCS).

Fiscal Summary

State Effect: Potential significant increase in general fund expenditures for DPSCS at all correctional facilities, including the Patuxent Institution, depending on the frequency that clinical review panels are convened. Revenues are not affected.

Local Effect: None.

Small Business Effect: Potential meaningful increase in business opportunities for physicians, psychiatrists, mental health professionals, and lawyers.

Analysis

Bill Summary: The bill prohibits psychiatric medication from being administered except when (1) in an emergency, a physician deems it a matter of danger to life and safety; or (2) in a nonemergency, the medication has been approved by a clinical review panel. The three panel members are appointed by the managing official of the correctional facility or the managing official's designee, and consist of (1) the clinical director of the psychiatric unit if the clinical director is a physician or, if the clinical

director is not a physician, a physician designated by the clinical director; (2) a psychiatrist; and (3) a mental health professional other than a physician.

The bill requires the managing official of the facility or the managing official's designee to give the individual refusing the medication and a lay adviser at the facility at least 24-hours written notice before convening a panel. The lay adviser is an individual at a facility who is knowledgeable about mental health practice and who assists individuals with rights complaints.

The bill gives the individual refusing medication the right to attend any meeting of the panel other than a private meeting, present information and witnesses, ask questions of any person presenting information to the panel, request assistance from a lay adviser, and be informed of information about the lay adviser, the individual's diagnosis, and an explanation of the clinical need for the medication, including potential side effects, material risks, and benefits of taking or refusing the medication.

Before deciding whether to approve the administration of medication, the bill requires the panel to review the individual's clinical record, assist the individual and the treating physician to arrive at a mutually agreeable treatment plan, and meet to receive information and clinically assess the individual's need for medication. In the assessment, the panel must consult with the individual regarding the reason for refusal and the individual's willingness to accept alternative treatment, consult with facility personnel responsible for initiating and implementing the individual's treatment plan, receive information, provide the individual with an opportunity to ask questions of anyone presenting information to the panel, and review the potential consequences of administering the medication and of withholding the medication.

To approve the administration of medication or recommend and approve alternative medication, the panel must determine that (1) the medication is prescribed by a psychiatrist for the purpose of treating the individual's mental disorder; (2) the administration of medication represents a reasonable exercise of professional judgment; and (3) without the medication, the individual is at a substantial risk of remaining seriously mentally ill with no significant relief or for a significantly longer period of time with the mental illness symptoms that cause the individual to be a danger to the individual or others or of relapsing into a condition in which the individual is in danger of serious physical harm resulting from the individual's inability to provide for essential human needs of health or safety.

The bill requires the panel to base its decision on the panel's clinical assessment of the information in the individual's record and on information presented to the panel. The panel is authorized to meet privately to reach a decision. In approving the administration of medication, the panel's decision must specify the medication approved and the dosage

and frequency range, the duration of approval not exceeding 90 days, and the reason that alternative treatments, if any, were rejected by the panel. The bill also requires a decision approving the administration of medication to include notice of the right to request a hearing, notice of the right to request representation or assistance of a lawyer or other advocate, and the contact information of the State protection and advocacy agency and the Lawyer Referral Service. If the individual requests a lawyer, the bill requires DPSCS to pay the costs associated with representation. If a panel approves the administration of medication, the lay adviser is required to inform the individual of the individual's right to appeal, ensure the individual has access to a telephone, and, if the individual requests a hearing, notify the managing official of the facility or the managing official's designee and give the individual written notice of the date, time, and location of the hearing.

The bill prohibits the panel from approving the administration of medication if alternative treatments are available that are acceptable to both the individual and to the facility personnel responsible for implementing the individual's treatment plan. The panel is required to document its consideration of the issues and the basis for its decision and provide its written decision to the individual, the lay adviser, and the individual's treatment team for inclusion in the individual's medical record.

A panel decision authorizing the administration of medication is stayed to allow an individual to request an administrative hearing to appeal the panel's decision. The individual must file the request with the managing official of the facility or the managing official's designee within 48 hours of receipt of the panel's decision. If a request for a hearing is filed, the stay remains in effect until a decision is issued in the administrative hearing. The managing official or the managing official's designee must forward the request to the Office of Administrative Hearings (OAH) within 24 hours of receipt and OAH must conduct a hearing and issue a decision within seven calendar days of the panel's decision.

The administrative law judge is required to conduct a *de novo* hearing to determine if the standards and procedures required by the bill are met. The individual representing the facility must prove by a preponderance of the evidence that the requirements of the bill are met. The determination of the administrative law judge is a final decision for the purpose of judicial review under the Administrative Procedure Act.

The bill authorizes the individual to further appeal the decision of the administrative law judge within 14 calendar days from the decision to the circuit court on the record from the hearing conducted by OAH. The bill requires the circuit court review to be on the audiophonic tape of the hearing without transcription unless a request for transcription is made at the time the appeal is filed, with costs borne by the party requesting the transcription. The bill requires the circuit court to hear and issue a decision on an appeal within seven calendar days from the date the appeal was filed.

If an individual continues to refuse medication administered after approval by the panel, the bill authorizes a panel to be convened to decide whether renewal is warranted. If the renewal is approved, the administration of medication does not need to be interrupted if the individual appeals the renewal.

The bill requires the treating physician to document at least every 15 days any known benefits and side effects to the individual of medication that is ordered for the individual. The bill also requires DPSCS to submit an annual report, by October 1, to the Governor and the General Assembly on the number of clinical review panels convened each year and the decisions made by each panel.

Current Law: In *Williams v. Wilzack*, 319 Md. 485 (1990), the Maryland Court of Appeals found that statutory provisions governing the forced administration of antipsychotic medication to involuntarily committed mental patients in nonemergency situations did not give the patient the requisite procedural due process protections. Chapter 385 of 1991 addressed that by providing procedural due process protections for involuntarily committed patients in nonemergency situations in both State and private hospitals. Medication may not be administered to an individual who refuses the medication, unless: (1) in an emergency, a physician deems it a matter of danger to life and safety; or (2) in a nonemergency, the individual is hospitalized involuntarily or committed for treatment by court order and the medication is approved by a clinical review panel. The panel may approve medication if it is prescribed by a psychiatrist for treating the individual's mental disorder, represents a reasonable exercise of professional judgment, and the individual is at substantial risk of continued hospitalization without the medication. An individual may request an administrative hearing to appeal the panel's decision if the request is made within 48 hours of the decision. OAH must conduct a hearing and issue a decision within seven days of the panel decision.

Background: DPSCS operates correctional facilities through the Division of Correction (DOC) and the Patuxent Institution. The average daily population at DOC facilities is estimated at 21,700 in fiscal 2012; whereas, the average daily population at Patuxent is estimated at 873 in fiscal 2012. The Patuxent Institution operates as a maximum security, treatment-oriented correctional facility that also addresses the needs of mentally ill offenders throughout the correctional system.

The number of inmates housed at the Patuxent Institution has increased 15.8% between fiscal 2006 and 2010; the majority of that growth has been inmates sentenced to DOC who need acute mental health services provided at Patuxent facilities.

As part of a 2010 *Joint Chairmen's Report* request, the department examined the potential benefits of consolidating the Patuxent Institution within DOC. Although

DPSCS determined that the consolidation would be more costly than beneficial, the report also included a review of mental health services for the entire inmate population to determine which additional services are needed using the existing clinical resources provided at Patuxent. As a result of the review, DPSCS enhanced the Step-Down/Transition Unit and created a Mental Health Assessment Center to improve service delivery to inmates under the jurisdiction of DOC and the Division of Pretrial Detention and Services.

Mental health services for DPSCS is currently provided by MHM Services, Inc. (MHM) which is headquartered in Vienna, Virginia and employs over 2,000 clinical, management, and support staff nationwide.

State Fiscal Effect: The bill is likely to have a significant fiscal impact on DPSCS, as well as MHM, for mental health care services at DPSCS facilities. Although convening the required clinical review panel would only occur when an individual in the custody of a DPSCS facility refuses a psychiatric medication, there tends to be a significant number of persons in correctional facilities with mental disorders, or who have co-occurring disorders, and who may refuse prescribed medications. Accordingly, the use of clinical review panels under the bill may occur with some frequency. While quantifying such an impact cannot be reliably predicted without some direct experience under the bill, the per diem cost of a physician/psychiatrist ranges from at least \$350 to \$400. *For purposes of illustration only*, if clinical review panels were convened for 1,000 persons and a determination made in one day, per diem costs could be between \$1.1 million and \$1.2 million. Although these per diem costs may be mitigated to some extent via the systemwide contract with MHM, they may still be significant for DPSCS.

The bill may also more directly impact the Patuxent Institution if an individual exercises the right to a hearing before an Administrative Law Judge. The hearing costs for such a hearing are borne by the agency and not by the Office of Administrative Hearings. However, Legislative Services assumes that hearing requests by individuals in such circumstances would tend to be few in number.

The Patuxent Institution also indicates that any expenses associated with the use of “lay advisor” may have to be borne by the Patuxent Institution, rather than MHM, in order to avoid a possible conflict of interest. Legislative Services assumes that such an advisor would be a person already available to the facility, or a person reasonably accessible by the mental health services contractor.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor's Office of Crime Control and Prevention, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Office of Administrative Hearings, Department of Public Safety and Correctional Services, Department of Legislative Services

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