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May 2, 2014

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: House Bill 592 and Senate Bill 620, "Mental Health – Approval by Clinical Review Panel of Administration of Medication – Standard"

Dear Governor O'Malley:

House Bill 592 and Senate Bill 620 make identical changes to section 10-708 of the Health-General ("HG") Article to expand the circumstances under which a hospital may medicate a patient involuntarily admitted under title 10 of the Health-General Article or committed by a court under title 3 of the Criminal Procedure Article. We have determined that the bills are not clearly unconstitutional and, therefore, are appropriate for your approval. We write, however, because it is likely that there will be challenges to the constitutionality of new sections 10-708(g)(3)(i)(2) and (3), as well as (g)(3)(ii)(2) and (3).

Background

Currently, section 10-708 of the Health-General Article describes the circumstances under which a psychiatric patient may be medicated without the patient's consent and the process for determining whether medication without consent is appropriate. First, the patient must be an involuntary admission or committed by a court for treatment. For those patients who refuse to consent to take prescribed medication, a panel consisting of the facility's clinical director or designee, a psychiatrist, and a mental health professional other than a physician may approve the administration of medication without the patient's consent if it determines the following:

> (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 substantial risk of continued hospitalization because of:
>
> > (i) Remaining seriously mentally ill with no significant relief of the mental illness symptoms that cause the individual to be a danger to the individual or to others;
> >
> > (ii) Remaining seriously mentally ill for a significantly longer period of time with mental illness symptoms that cause the individual to be a danger to the individual or to others; or
> >
> > (iii) Relapsing into a condition in which the individual is in danger of serious physical harm resulting from the individual's inability to provide for the individual's essential human needs of health or safety.

Md. Code Ann., Health-Gen'l § 10-708(g) (Supp. 2013).

In *Department of Health and Mental Hygiene v. Kelly*, 397 Md. 399, 416 (2007), the Court of Appeals held that sections 10-708(g)(3)(i) and (ii) required a showing that the patient "is, because of his mental illness, dangerous to himself or others in the context of his confinement within the institution" before the patient may be medicated without the patient's consent.[1] Since the *Kelly* decision, State hospitals have not been able to medicate without consent patients who were admitted to the hospital involuntarily under title 10 of the Health-General Article or committed by a court under title 3 of the Criminal Procedure Article, but who do not exhibit in the hospital any dangerous

[1] The *Kelly* case was decided exclusively on statutory grounds. Although Mr. Kelly raised constitutional issues in his appeal, the Court of Appeals expressly declined to address them "[b]ecause we decide this case on a non-constitutional ground." 397 Md. at 418 n.6.

behavior due to their mental disorder. Without treatment, it is unlikely that certain patients will be able to leave the hospital because they continue to exhibit the same symptoms of serious mental illness that caused them to be involuntarily admitted or committed.

To address this inability to treat certain patients, HB 592 and SB 620 amend section 10-708(g)(3)(i) and (ii) to allow a clinical review panel to authorize the involuntary administration of medication because the patient is at substantial risk of continued hospitalization because the patient remains seriously mentally ill and:

- The mental illness causes the patient to be a danger to self or others in the hospital;
- The patient still exhibits the symptoms of the mental illness that caused the patient to be involuntarily admitted or committed by a court; or
- The patient still exhibits symptoms of mental illness that would cause the patient to be a danger to self or others if released from the hospital.

HB 592 at 2-3; SB 620 at 2-3.

Constitutionality of HB 592/SB 620

In a trio of cases, the United States Supreme Court established that individuals have a liberty interest protected by the Fourteenth Amendment to the United States Constitution in avoiding unwanted psychiatric medication. That liberty interest must be balanced, however, against the State's interest in medicating the individual to determine whether the requirements of substantive due process are met. *See Sell v. United States*, 539 U.S. 166 (2003); *Riggins v. Nevada,* 504 U.S. 127 (1992); *Washington v. Harper,* 494 U.S. 210 (1990). If there is "a finding of overriding justification and a determination of medical appropriateness," medication without the consent of the individual does not violate the Constitution. *Riggins*, 504 U.S. at 135.

In *Harper,* state policy allowed medication of mentally ill inmates without their consent if the inmates presented a danger to themselves or others. The Court found "overriding justification" for that policy in the State's "obligation to provide inmates with medical treatment consistent with the inmates' medical needs" as well as the obligation to take reasonable measures to protect the prison staff and the inmates. 494 U.S. at 225. In *Riggins*, the Court suggested that Nevada "might have been able to justify medically appropriate, involuntary treatment . . . by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means." 504 U.S. at 135. Finally, in *Sell*, the Court held that, under certain circumstances, the Constitution permits the government to medicate a criminal defendant involuntarily to restore competency to stand trial if it "is necessary significantly to further important governmental trial-related interests." 539 U.S. at 179. Together, these cases stand for the proposition that a mentally ill inmate's right to refuse medication may constitutionally be overcome by certain overwhelming state interests.

None of these cases states or even suggests that State interests other than those before the Court might also justify involuntary medication. Nonetheless, it is our view that the State's statutory obligation to treat patients in its hospitals[2] and its obligation to provide care in the most integrated setting[3] provide a similarly "overriding justification" for the involuntary administration of medication under the limited circumstances allowed

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[2] The State has a statutory and constitutional obligation to treat patients in its facilities. *See Youngberg v. Romeo*, 457 U.S. 307, 319 (1982); Md. Code Ann., Crim. Proc. §§ 3-106, 3-112(a); Md. Code Ann., Health-Gen'l § 10-204(b). *See also Williams v. Wilzack*, 319 Md. 485, 494 (1990) ("Manifestly, the institution is charged with a statutory duty to treat Williams for his mental disorder to permit him to rejoin society."). The bill's amendments to section 10-708 further the State's interest and obligation to treat patients in its facilities by allowing, in limited circumstances, the involuntary medication of patients who otherwise would be untreated and confined to the hospital indefinitely.

[3] The State also has an established policy of providing care in the most integrated setting feasible and of limiting inpatient admissions to those most in need of inpatient care and treatment. *See* Md. Code Ann., Hum. Serv. § 7-132; 2012-2015 State Disabilities Plan (available at www.mdod.maryland.gov/uploadedFiles/Publications/2012-2015%20State%20Disabilities%20Plan%20for%20IADB%20Approved%20Final.pdf); FY 2014 Annual State Mental Health Plan (www.mdod.maryland.gov/uploadedFiles/Publications/2012-2015%20State%20Disabilities%20Plan%20for%20IADB%20Approved%20Final.pdf. The amendments to section 10-708 promote that policy by allowing involuntary medication if the lack of treatment would mean a lengthy hospitalization.

by HB 592 and SB 620. Therefore, it is our view that HB 592 and SB 620 are not clearly unconstitutional.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable Delores G. Kelley
The Honorable Dan K. Morhaim
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro