

**Department of Legislative Services**  
Maryland General Assembly  
2018 Session

**FISCAL AND POLICY NOTE**  
**First Reader**

House Bill 385

(Chair, Judiciary Committee)(By Request - Departmental  
- Health)

Judiciary

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**Criminal Procedure - Incompetency and Criminal Responsibility**

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This departmental bill specifies that if a court orders the Maryland Department of Health (MDH) to examine a defendant to determine whether the defendant is incompetent to stand trial (IST) or to commit an IST defendant to a facility, the court must determine eligibility for and conditions of pretrial release in accordance with the Maryland Rules, unless the defendant is charged with a crime of violence. Additionally, MDH must admit an IST defendant to an appropriate facility within 21 days after the date of commitment and in accordance with MDH's facility and admission policy. The bill also specifies that a court must hold a hearing to determine the defendant's continued eligibility for commitment within 21 days after MDH sends a report that the defendant no longer qualifies.

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**Fiscal Summary**

**State Effect:** Potential minimal decrease in general fund expenditures, as discussed below. Revenues are not affected.

**Local Effect:** Potential minimal decrease in expenditures, as discussed below. Revenues are not affected.

**Small Business Effect:** MDH has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services (DLS) concurs with this assessment.

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## Analysis

**Current Law:** 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. 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.

### **Background:**

#### *Litigation*

In *Fredia Powell, et al. v. Maryland Department of Health, et al.*, No. 77, September Term 2016 (August 28, 2017), the appellants alleged that MDH violated statute and the appellants' constitutional due process rights by failing to comply with the timeline specified in a trial court's order of commitment. The trial court's order required MDH to place the appellants (who had been found IST and a danger to self or others) in a facility within 1 day of the issuance of the order; however, the appellants were admitted between 12 and 36 days later.

The Court of Appeals held that statute itself does not set a deadline for admission to a psychiatric hospital for IST defendants, nor does it authorize a circuit court to do so. In examining statute and relevant legislative history, the court noted that it could not find evidence of the Maryland General Assembly's intent that a court set a deadline for admissions in a commitment order. Thus, the court held that a delay in placing a criminal defendant by a deadline in a commitment order does not violate *statute* (although the delay may still violate the trial court's order). The court also held that an *unreasonable* delay violates a defendant's due process rights, but that what is considered "unreasonable" varies and depends on the particular circumstances of a case; given the limited record presented, the court was unable to reach a decision on this issue as a matter of law for the particular case at hand.

On September 28, 2017, a Baltimore City Circuit Court found MDH (and several MDH officials) in constructive civil contempt for failing to timely place the petitioners (for competency evaluations or for IST commitments) in accordance with court orders. The court found that, although there may not have been available beds for the petitioners, the lack of beds was due to MDH's actions (or lack thereof, as MDH had failed to take a series of corrective actions). The court ordered MDH and named officials to take remedial actions to "purge" the order of contempt, including fully staffing and admitting patients to certain facilities by December 31, 2017. MDH filed an appeal with the Court of Special Appeals in November 2017; as of January 2018, the appeal is pending.

### *Forensic Services Workgroup*

The State's system for delivering forensic services has been subject to increased scrutiny and growing concern in recent years. "Forensic services" include not only court-ordered evaluations and commitments of IST and "not criminally responsible" defendants (under the Criminal Procedure Article) but also court-ordered evaluations and commitments of individuals for substance abuse disorders (under the Health-General Article).

In 2016, former Secretary of Health Van T. Mitchell convened the Forensic Services Workgroup to develop and recommend system-wide changes to the delivery of forensic services in the State. The workgroup consisted of representatives from several State agencies, community providers, consumers, and advocates. In its final report, the workgroup noted several long-standing issues, including (1) lack of available beds in State facilities to complete court-ordered forensic evaluations and court commitments within statutory time requirements; (2) the length of time it takes for individuals who have been assessed as ready for release to return to court for disposition; (3) appropriate placement of incarcerated individuals ordered for evaluation and who are assessed, but not yet adjudicated, as IST; and (4) the impact on State facility staff from consistent overcapacity and care of a primarily forensic (rather than civil) population. The report also noted that one of the most "visible" issues was the inability for MDH to respond to court orders of

commitment within statutory timeframes due to a lack of available inpatient beds. However, the report noted that the lack of available beds was due not only to the actual numbers of beds available but was also a result of a complicated and inefficient system.

The workgroup made six primary recommendations: (1) increase bed capacity within MDH; (2) increase availability of community crisis services; (3) expand the capacity of the Office of Forensic Services; (4) increase outpatient provider capacity to meet the needs of forensic patients; (5) centralize MDH forensic processes; and (6) increase education to reduce stigma in both the general public and the mental health treatment community.

### *Maryland Department of Health – Updates*

In a November 2017 presentation entitled *Update on Forensic Services: Mental Competency and Substance User Disorders*, MDH outlined its actions in response to the Forensic Services Workgroup report. Among other actions, MDH reported that it (1) planned to open 95 beds of the recommended types from April 2017 to April 2018; (2) expanded the Office of Forensic Services with additional staff and hired consultants to help with procedural and system changes; and (3) created a Central Admissions Office (CAO) to serve as a single point of contact for submitting and inquiring about court orders and to handle all forensic evaluations and placements (CAO launched on October 13, 2017). MDH reported that, as of November 3, 2017, the backlog of court commitment orders was 13 (down from approximately 40 or 50 in June and July of 2017). MDH stated that, for mental competency-related proceedings, its objective was to place defendants and inmates into facilities within a *reasonable* time from the date of the court order.

MDH advises that the average wait time (between the date a court order is issued and the defendant is admitted to a facility) was approximately 12 days in November 2017 and was approximately 7 days for the first half of December 2017. Further, as of January 18, 2018, the waitlist was 19.

MDH's Behavioral Health Administration (BHA) additionally advises that its admissions policy states that "BHA will use its best efforts to admit patients in priority levels 1 or 2 within 30 days after receipt of a referral or court order." Commitment orders for IST defendants are considered "priority level 2." Defendants ordered for an IST evaluation are considered "priority level 3" and receive an evaluation within 7 days after the court order.

**State Expenditures:** MDH advises that the bill's impact is likely negligible, although operational efficiencies may be realized from improved IST evaluation and commitment placements under the bill. MDH specifically advises that the bill's provision relating to pretrial release conditions is intended to address delays between MDH assessment or commitment of an individual relating to IST and subsequent court dates for adjudication;

by requiring a court to set conditions of pretrial release upon an order for IST assessment or commitment, MDH can more efficiently place defendants in appropriate facility settings. MDH advises that a court retains the authority under the bill to reevaluate a defendant's conditions of pretrial release to incorporate any subsequent findings by MDH relating to IST.

DLS advises that, given the average wait time for court-ordered placements (12 days in November 2017) and the waitlist (19 as of January 2018), MDH can likely handle the bill's requirements within existing budgeted resources.

Additionally, general fund expenditures for State correctional facilities may decrease minimally, to the extent the bill results in operational efficiencies and improved turnover in available treatment beds for defendants who are confined in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,800 per month. Excluding overhead, the average cost of housing a new State inmate (including health care costs) is about \$870 per month. Excluding all health care (which is a fixed cost under the current contract), the average variable costs total \$210 per month.

**Local Expenditures:** Similarly, expenditures may also decrease minimally to the extent the bill results in operational efficiencies and improved turnover in available treatment beds for defendants who are confined in local detention facilities. Per diem operating costs of local detention facilities have ranged from approximately \$40 to \$170 per inmate in recent years.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Anne Arundel, Charles, Frederick, and Montgomery counties; cities of Havre De Grace and Frederick; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Maryland Department of Health; Department of Public Safety and Correctional Services; Maryland State Commission on Criminal Sentencing Policy; Department of Legislative Services

**Fiscal Note History:** First Reader - February 4, 2018  
mag/kdm

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**G. ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES**

**Department of Health**

**Session 2018**

**TITLE:** Criminal Procedure – Incompetency and Criminal  
Responsibility in Criminal Cases

**PREPARED BY:** Maryland Department of Health

**(Program\Unit):** Behavioral Health Administration

**PART A. ECONOMIC IMPACT RATING**

This agency estimates that the proposed bill:

  X   WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND  
SMALL BUSINESS

OR

       WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND  
SMALL BUSINESSES

**PART B. ECONOMIC IMPACT ANALYSIS**