



LAWRENCE J. HOGAN, Jr.
GOVERNOR

OFFICE OF THE PUBLIC DEFENDER
MENTAL HEALTH DIVISION
200 WASHINGTON AVENUE, SUITE 303
TOWSON, MARYLAND 21204
Ph. (410) 494-8130 Fax (410) 769-7887
Toll Free: 1 (877) 430-5187
Email: OPD.MHD@MARYLAND.GOV

PAUL B. DeWOLFE
PUBLIC DEFENDER
 VACANT
ACTING DEPUTY PUBLIC DEFENDER
 CARROLL L. McCABE
CHIEF ATTORNEY
 VACANT
DEPUTY CHIEF ATTORNEY

BILL: HB728
 Position: Support
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Background:

The proposed bill makes changes to statutes that apply to the conditional release process for individuals who are committed to the Maryland Department of Health after a finding of Not Criminally Responsible (“NCR”). Case law in Maryland shows that conditional release is a “therapeutic release of a mentally ill individual from a psychiatric hospital as part of a continuing course of treatment.” *Bergstein v. State*, 322 Md. 506 (1991). It is not intended as punishment, but rather to maintain the safety of the community and individual when the individual is released from the hospital. The NCR committee have the right to request a hearing annually, and can choose to have the hearing before an administrative law judge, the committing judge, or a jury. Regardless of which venue is chosen, the NCR committee always bears the burden of proving their eligibility for conditional release.

HB728 does not shift the burden from the patient to prove their eligibility for conditional release, nor would it provide for the release of patients who present as a danger to themselves, others, or the property of others. Patients will not be released from the hospital unless they are able to prove their eligibility for release in a judicial proceeding.

As noted in a long line of cases in the U.S. Supreme Court and Maryland’s Court of Appeals, confinement in a psychiatric hospital, whether civilly or criminally, must rest on a finding of dangerousness to self or others. *O’Connor v. Donaldson*, 422 U.S. 563, 574-575 (1975), *Jones v. United States*, 463 U.S. 354, 368 (1983), *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992), *Hawkes v. State*, 433 Md. 105, 132-133 (2013). Maryland’s current conditional release statute explicitly adopts this standard – requiring that an individual prove, by a preponderance of the evidence, that she would not be dangerous to herself or others due to a mental illness if released.

HB728 ends the practice of frivolous appeals of NCR release cases by litigants who declined to appear or present evidence before the Maryland Office of Administrative Hearings. These appeals (exceptions) are never successful, and only cause needless delays in the individual’s release from the hospital. At a minimum, these delays take months to resolve, but the Maryland Office of the Public Defender has been involved in cases where the individual is waiting in the hospital for more than a year as they await resolution of the appeal by litigants who did not appear at the initial hearing. The costs incurred by these delays is substantial as every three months of inpatient care costs the State approximately \$70,000.

This bill will have the salutary effect of expanding state inpatient psychiatric bed space by avoiding unnecessary delay and ensuring appropriate discharge of only those patients that are most ready for release.

By providing for the civil rules of discovery to be applied to all conditional release hearings regardless of the venue, HB728 affords the committee the due process rights that they are currently able to assert by seeking a jury trial, without tying up the circuit court dockets with jury trials.

This bill also changes portions of two different statutes that apply to NCR committees *after* they have been conditionally released. Criminal Procedure Article 3-121 governs the protocol for violations of conditional release. Subsection (a) outlines the initial steps the Office of the State's Attorney must take if it receives allegations that a committed individual has violated one or more conditions of their release. In theory the State's Attorney could choose whether or not to file a Petition for Revocation and seek an individual's re-hospitalization. It must determine whether there is a "factual basis to believe that the committed person has violated the terms" *and* that "further action by the court is necessary."

In practice, many Offices of the State's Attorney rubber stamp the allegations of the Department of Health's monitor. It is a matter of record that in some offices, "we don't make a determination on our own whether somebody should be, for the lack of a better term, prosecuted. We just pass it along to the court and ask for a hospital warrant in every situation."

Offices of the State's Attorney often receive an unsigned draft Petition for Revocation from the Department, sign it and file it with the Court. This system undermines due process for the individual on conditional release. It minimizes the role of the State and counsel for the individual. For a violation of a technical nature – a missed appointment or being caught smoking in a group home – a Petition for Revocation is issued, a warrant signed, and an individual is taken into confinement. Even in cases where the Department, the Assistant Attorney General, the hospital treatment team and the ALJ all agree that the individual remains eligible for conditional release, the length of confinement as a result of the hospital warrant is routinely at least two months. In many cases individuals are confined for several months, resulting in a loss of access to their outpatient services like housing and day programming.

Sufficient due process for someone facing hospitalization is determining whether the individual poses a *bona fide* danger to self, others or property. Considering the pressure on inpatient beds for acutely ill pre-trial detainees, and that hospitalization within a state psychiatric hospital can average as much as \$264,067.00 per year, it is of vital importance to make certain that individuals being confined truly need it. Providing the OPD notice of a client's alleged violation prior to their re-hospitalization affords the OPD the opportunity to investigate the allegations and work with the Office of the State's Attorney and court to ensure that individuals who are psychiatrically stable, not dangerous, and are alleged to have committed minor "technical" violations remain in the community under appropriate conditions of release.

HB728 also permits a committing court to hold a hearing, upon request, on Petitions to Change the Terms of Conditional Release. It also explicitly authorizes the committing court to shorten the conditional release term. In circumstances where an individual requests a change in their conditions of release, or opposes changes requested by the Department of Health or Office of the State's Attorney, some courts have noted that there is no explicit right to a hearing in the statute. While many grant a hearing, others deny the individual an opportunity to be heard despite a specific request. This bill would clarify an individual's opportunity to be heard and make certain that any party who moves for a change in conditions is heard.

HB728 does not change the notice requirement for hearings, shift the burden of proving eligibility for conditional release away from the patient, or afford any preferential treatment to the patient. SB216 would provide improved access to the fundamental due process rights that everyone is entitled to.