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POSITION ON PROPOSED LEGISLATION

BILL: HB406, Children in Out-of-Home Placements – Placement in Medical Facilities

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: 02/15/2022

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on HB406.

Today, there are multiple foster children being held in hospital emergency departments and inpatient psychiatric units without medical need due to DHS' failure to ensure appropriate placements. This practice is illegal and inhumane. This practice further traumatizes already traumatized and vulnerable children. The Mental Health Division of the Office of the Public Defender represents these children. The vast majority of the children we represent are in the custody of DSS. Since 2017, the OPD has worked with hospitals around the State to address the issue of children remaining in emergency departments after discharge and in involuntary inpatient psychiatric units after discharge or judicial release. After a number of unsuccessful attempts to resolve this issue in Maryland courts, the MHD sought the assistance of two law firms, Venable, and Brown, Goldstein and Levy, and Disability Rights Maryland, to pursue civil rights litigation on behalf of these foster children in Federal Court. We also worked with Maryland legislators to develop legislative solutions to this issue. We are now in 2022, and despite being aware of the problem for years, the adults who have the responsibility to care for the most vulnerable of our children are not doing their jobs and the children are still suffering.

“What’s past is prologue.” If the State agencies responsible for caring for these vulnerable foster children aren’t forced to take action, they won’t.

The Mental Health Division (MHD) of the Office of the Public Defender (OPD)

supports this bill for the following reasons:

1. Since at least 2017, children in local DSS custody are languishing in inpatient psychiatric units after discharge or judicial release because DSS, citing lack of available placement options, refuses to remove them.
2. Prolonged hospital stays are very destructive to children who already are highly traumatized due to physical abuse, sexual abuse, or neglect.
3. Foster children who needlessly occupy scarce inpatient psychiatric beds cause other children and adults to suffer longer stays in emergency departments waiting for scarce beds to open.
4. DHS has been aware of this problem since at least 2017, but has done little to resolve the issue.
5. Neither the hospitals nor the courts have been able to solve this issue.
6. Current federal and State laws require DSS to remove a child from an inpatient psychiatric unit or emergency room when the child no longer requires inpatient medical intervention or care. DSS flagrantly violates these laws. HB 406 sanctions DSS if they fail to follow current law.
7. DSS is currently keeping children in the most restrictive environment with the highest cost. HB 406 incentivizes DSS to locate outpatient placements.
8. This bill clarifies that no overlapping jurisdiction exists which would allow various county DSS agencies or courts to sidestep the Maryland Health-General Article requirements for receiving involuntary inpatient care.
9. This bill protects the constitutional rights of foster children.

Children are Languishing in Inpatient Psychiatric Units

Since 2018, the MHD has represented over 100 children who were either bounced from emergency department to inpatient psychiatric unit to emergency department or who remained hospitalized in hospital emergency departments or inpatient psychiatric units after discharge or judicial release because DSS refused to remove them. That number is not the total number of all foster children who remain hospitalized beyond medical need. Maryland law currently requires that OPD receive notice of a subset of those children - children who have been certified for involuntary civil commitment. This bill requires that OPD received notice of all foster children who are detained in emergency departments and inpatient psychiatric units beyond medical necessity.

This Bill Protects the Constitutional Rights of Hospitalized Children

The Supreme Court in several cases, including, *O'Connor v. Donaldson*, *Addington v. Texas*, *Olmstead V. L.C.* and *Vitek v. Jones*, defined the due process rights of individuals facing involuntary civil commitment in a psychiatric facility. These Supreme Court cases provide that an individual cannot be involuntarily detained in a psychiatric facility or emergency department if they do not meet criteria for involuntary civil commitment. Maryland law currently provides that emergency evaluatees may not be kept in an emergency department for more than 30 hours. (Md. Code Health-General, 10-624) These Supreme Court cases, The Americans with Disabilities Act, and Maryland law also require that individuals with disabilities, including mental illness, be treated in the least restrictive setting. Detaining foster children in emergency departments and inpatient psychiatric units when they do not meet criteria for involuntary civil commitment or beyond medical necessity, regardless of the reason, violates their constitutional rights, and these children have actionable claims in federal court.

Prolonged Hospital Stays are Destructive to Children

Prolonged hospital stays are very destructive to children. Foster children have already been traumatized by abuse and neglect. Many of them have been abandoned by their biological parents. Many foster children have behavioral difficulties derivative of the trauma they suffered. These children, who feel abandoned yet again, begin to deteriorate emotionally and behaviorally when DSS refuses to remove them from the hospital after they have been discharged or judicially released. Children who have been unnecessarily hospitalized can become angry and act out impulsively. The lack of schooling and the isolation from friends, siblings, and other family can cause children to lag behind peers when they return to school, and can impact their social development. Inpatient psychiatric units and hospital emergency departments are acute care units and are not designed to provide long term care. Accordingly, these units typically do not provide educational programs or other age appropriate therapeutic activities that would be available to foster children in appropriate long term placements. The State is failing these vulnerable children.

DSS is Keeping Children in the Most Restrictive and Costly Placement

In a Letter of Information to the Legislature in 2020, Johns Hopkins hospital advised that each day that a child is hospitalized in an inpatient psychiatric unit costs \$2,109.00. Medical insurance does not pay the cost of hospital stays beyond medical necessity. When children remain

hospitalized beyond medical necessity, hospitals obtain reimbursement of their costs from the Department of Health - not DSS. OPD was recently made aware of 1 patient who remained hospitalized for a year after medical necessity because DSS refused to pick up the child when the child was ready for discharge. Using the 2020 rate, the cost for keeping that child in an inpatient psychiatric hospital was approximately \$764,000.00. Another child at the same hospital remained for 6 months after medical necessity, costing approximately \$380,000.00. The total cost of providing unnecessary inpatient treatment in a setting found to be harmful for those two children was over **One Million Dollars**. It is inconceivable that Maryland State agencies have not found the money to provide other appropriate, less expensive, less restrictive placements.

Inpatient Psychiatric Bed Shortage

There is currently a severe shortage of inpatient psychiatric beds for children in Maryland. Children may stay for days or weeks in emergency departments waiting for beds in inpatient units. This shortage is even more acute for children with autism spectrum disorder or other neurocognitive disorders. Warehousing children who do not meet the criteria for involuntary commitment in inpatient psychiatric units exacerbates this shortage. Just by way of example, since October of 2021, the OPD represented a client who remained in a hospital emergency department for 95 days waiting for an inpatient bed, a client who remained in an emergency department for 36 days waiting for a bed, and another client who has been in an emergency department for 90 days and is still waiting for a bed. Many more individuals spent days or weeks in emergency rooms waiting for inpatient beds to open. Multiple studies have shown that emergency department boarding is harmful to child and adult patients.

Courts and Hospitals Alone Cannot Fix This Issue

The use of hospitals to warehouse children is illegal, but hospitals cannot safely discharge minor foster children to the streets. Hospitals have worked with the OPD to file Petitions for Writs of Habeas Corpus seeking the release of these children in Circuit Courts around the State. Circuit Court judges have been reluctant to act on these Petitions. Most courts have been unwilling to order DSS to remove the illegally held child, frequently relying on the existence of a concurrent CINA case to avoid hearing the merits of the Habeas Petition. This bill clarifies that no overlapping jurisdiction exists which would allow various county DSS agencies or courts to sidestep the Health General

requirements for receiving involuntary patient care, and gives hospitals a statute to rely on when DSS abandons their wards despite a physician ordering discharge or a judge ordering release.

DSS is Aware of this Issue

DSS has been aware of this issue since at least 2017, and has seemingly done little to resolve this issue. DSS continues to warehouse foster children in emergency departments, sometimes moving children from emergency department to emergency department, and in inpatient psychiatric units simply because they have no other placements available. Despite the current publicity surrounding this issue and the interest shown by legislators and child welfare organizations, DSS continues (as recently as today) to unnecessarily hospitalize these children. This bill sanctions DSS directly if they leave children in emergency departments and inpatient hospital settings beyond medical necessity.

We understand and acknowledge the concerns that various stakeholders have raised about this bill further overwhelming the child welfare system. To that end, we recommend that DHS, and MDH, along with other family serving agencies work together to materialize the recommendations from the 2019 Post Acute Discharge Planning Workgroup Report. The report details the barriers related to hospital discharge for adults and children with complex mental health needs and provides recommendations to address the shortage of robust community based services.

For example, it was recommended that BHA and DHS take the lead on evaluating the effectiveness of available in-home/respite care services to determine an effective model to consider to address inappropriate hospitalization while also providing relief to caregivers. HB 406 requires that a task force be convened to further study these issues and develop a plan to address them.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on HB 406.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

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