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**COMMITTEE:** Budget & Taxation

**FROM:** Maryland Office of the Public Defender, Mental Health Division

**BILL:** HB 406 – Children in Out-of-Home Placements – Placement in Medical Facilities

**POSITION:** Favorable with Amendments

**DATE:** 03/30/22

The Maryland Office of the Public Defender respectfully requests a favorable report from Budget and Taxation on HB 406. We are grateful to sponsor Delegate Kirill Reznik for facilitating collaboration among numerous stakeholders to arrive at the amended version. HB 406 is the first step toward accountability for the Departments and redressing the continuing harm perpetrated in cases where vulnerable foster children have been failed by the State.

**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 Department of Social Services (DSS) custody are languishing in emergency departments and inpatient psychiatric units after discharge or judicial release because DSS refuses to remove them, citing a lack of placements. The Department of Human Services (DHS) has failed to provide housing placements in the least restrictive setting, which these children are entitled to under state and federal law, as well as the U.S. Constitution.
2. DSS is currently keeping children in the *most* restrictive environment with the highest cost. HB 406 incentivizes DSS to provide outpatient placements and facilitates an implementation planning process.
3. Foster children needlessly occupy scarce inpatient psychiatric beds, causing children and adults who need these inpatient beds to suffer longer stays in emergency departments.
4. Prolonged hospital stays are extremely harmful to children who already are highly traumatized due to physical abuse, sexual abuse, or neglect.
5. Neither the hospitals nor the courts have been able to solve this issue.
6. 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.

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 inhumane and illegal practice retraumatizes vulnerable children. The Mental Health Division of the Office of the Public Defender represents these children. Since 2018, OPD 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 because OPD does not get notified of all of these cases where children are eligible for representation. 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—often after judicial release or discharge is ordered. As a result of HB 406, OPD will be able to provide these children with the representation to which they are entitled, which is the first step toward holding the Departments accountable for providing placements.

Since 2017, OPD has worked with hospitals around the State to address the issue of children remaining in emergency departments and involuntary inpatient psychiatric units after discharge or judicial release. After a number of unsuccessful attempts to resolve this issue in Maryland courts, OPD 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. Now, despite being aware of the problem for years, the Departments continue to fail in their responsibility to care for the most vulnerable of our children. 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.

Foster children—who already suffer from trauma due to abuse and neglect—are devastated by prolonged involuntary hospital stays. Many of them have been abandoned by their biological parents and suffer behavioral difficulties derivative of trauma. These children 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, impacting their social development. Inpatient psychiatric units and hospital emergency departments are acute care units and not designed to provide long term care. Accordingly, these units typically do not provide educational programs or age-appropriate therapeutic activities available to foster children in appropriate long-term placements. The State is failing these vulnerable children who understand that they have been effectively abandoned after a physician or judge orders their release and DSS refuses to pick them up from the hospital.

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 it gives hospitals a statute to rely on when DSS abandons their wards despite a physician ordering discharge or a judge ordering release.

Additionally, children in need of inpatient beds suffer from Maryland's severe shortage. 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. For example, since October of 2021, the OPD represented a client who remained in a hospital ED for 95 days waiting for an inpatient bed, a client who remained in an ED for 36 days waiting for a bed, and another client who was in an ED for at least 90 days 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 ED boarding is harmful to child and adult patients.

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. HB 406 requires the Department of Health or Department of Human Services to reimburse hospitals the prevailing Medicaid rate. Although this reimbursement rate is much less than the cost of care, the state is currently warehousing children beyond medical necessity without paying for care. 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 appropriate, less expensive, less restrictive placements.

HB 406 requires the Departments to provide placements, but it also facilitates the cooperation necessary to accomplish the task. The bill creates a Coordinator to ensure compliance and cooperation between the Departments, Courts, hospitals, and OPD. The bill also provides for more collaboration on placement solutions. The 2019 Post Acute Discharge Planning Workgroup Report detailed 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, the report 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 address inappropriate hospitalization while also providing relief to caregivers. HB 406 requires a task force for further study on the issues and implementation.

We respectfully request a favorable report on HB 406 as a step toward government accountability, solving complex problems associated with housing placement, and providing for foster children as already required by law.

Respectfully Submitted,

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