PAUL DEWOLFE
PUBLIC DEFENDER
KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER
MELISSA ROTHSTEIN
DIRECTOR OF POLICY AND DEVELOPMENT
KRYSTAL WILLIAMS
DIRECTOR OF GOVERNMENT RELATIONS DIVISION
ELIZABETH HILLIARD
ASSISTANT DIRECTOR OF GOVERNMENT RELATIONS DIVISION

POSITION ON PROPOSED LEGISLATION

BILL: HB1017 Frederick County – Mental Health Law – Assisted Outpatient Treatment Pilot Program

FROM: Carroll McCabe, Mental Health Division Chief Attorney, Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: 3/7/2022

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 1017. This bill establishes a process to impose forcible outpatient treatment on individuals who do not meet the standard for involuntary hospitalization, and in doing so, violates constitutional protections and relies on ineffective measures to improve outcomes for people with mental illness.

Bodily integrity is among the most fundamental constitutional rights, and the right to refuse treatment is a tenet of our medical and mental health ethos with well-established constitutional protections. See, e.g., U.S. Const. Amends. 5, 14*; O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979); *Vitek v. Jones*, 445 U.S. 480 (1985); *Mercer v. Thomas Finan Center*, 476 Md. 652 (2021). The limited, narrowly tailored exception to the prohibition on involuntary psychiatric treatment is if, by clear and convincing evidence, the person has a mental illness and is an immediate danger to themselves or others. Even when the standard for involuntary hospitalization is met, the additional liberty infringement of forced medication requires further protections, and both involuntary hospitalization and forced medication are subject to ongoing scrutiny to limit their duration to the shortest possible period and in the least restrictive setting.

HB1017 would authorize forced treatment without any of the necessary requirements or limitations. The criteria proposed are speculative and vague: "The Respondent, if not adherent to outpatient treatment, is likely to deteriorate to the extent that the Respondent will come to present a danger to the life or safety of the Respondent or others." No current danger need exist. Rather, it merely requires judges to speculate about future dangerousness. HB1017 also lacks sufficient due process to meet constitutional muster: the Court can order forced outpatient treatment for up to one year, and the Petitioner can request an extension at the end of the year for another year. There is no mention of any sort of hearing on the requested extension. Failure to comply can result in involuntarily commitment to a psychiatric hospital, as the statute permits a

psychiatrist to consider the Respondent's failure to comply as pertinent information in determining whether a Petition for Emergency Evaluation is warranted.

In addition to violating constitutional principles, speculative determinations about potential future dangerousness will exacerbate racial disparities. Consistent with national studies, data from my Divisions' representation at involuntary commitment hearings indicate that Black Marylanders are more likely to be retained at as compared to white peers. Studies of involuntary outpatient civil commitment programs in New York and North Carolina revealed similar racial disparities in the implementation of their programs.

Moreover, HB 1017 allows any interested party over the age of 18 to file a Petition asking the court to order forced outpatient psychiatric treatment for another individual. Vague and speculative criteria make it easier for "interested parties over the age of 18" to successfully litigate false Petitions. In the emergency petition and involuntary commitment context, we regularly see petitions that are filed for malicious purposes in domestic violence cases, divorce and custody battles, and where a family member wants to take control of another family member's money. Individuals with developmental disabilities, brain injuries, and physical disabilities are also more likely to be faced with coercive and involuntary treatment, due to stigma and the lack of adequate community support services.

Beyond the legal concerns, forced treatment simply does not work. Multiple studies provide strong evidence of the efficacy of intensive community mental health services, not coercion. Mandated treatment is not a substitute for quality services and cannot overcome inadequacies in an under resourced state mental health system. In Maryland, there are currently inadequate treatment resources to meet the needs of people willing to participate voluntarily in mental health treatment. Allocating scarce resources to provide intensive mental health services to individuals mandated to participate in outpatient civil commitment will divert resources from significant portions of the population who voluntarily seek mental health services. People who cannot access treatment are at a higher risk for inpatient hospitalization.

While HB1017 does not make clear who will fund the mandated outpatient treatment, it is a costly endeavor. The funds required here would be better spent developing robust community treatment options and making them more available to individuals in urban and rural areas. My office represents clients released from inpatient psychiatric units with a "discharge plan" that consists of a bus token and a list of shelters. Resources would be better served dedicated to a proper continuum of care for these individuals.

Deputy Public Defender Keith Lotridge has submitted separate testimony on this bill addressing in greater detail the resource infeasibility for OPD to provide the representation called for here. The Mental Health Division, which I oversee, does not have the staff to represent clients in forced outpatient civil commitment cases.

The process proposed is also unrealistic for any attorney to provide effective assistance of counsel. The hearing is to be held not later than 3 days after the Petition is received by the court, with a limited right to postponement. It is impossible to hire an expert, obtain and review the

client's inpatient and outpatient medical records and interview collateral sources within that time frame.

The Bazelon Center for Mental Health Law has described involuntary outpatient services as "a dangerous formalization of coercion within the community mental health system." It diverts resources away from effective services, undermines the treatment provider-consumer relationship, and with the threat of forced medication with harmful side effects can deter people from voluntarily seeking treatment.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on HB 1017.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.
Authored by: Carroll McCabe, Director of Mental Health Division, carroll.mccabe1@maryland.gov, 410-767-9853.