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POSITION ON PROPOSED LEGISLATION

BILL: HB1160– Mental Health Law – Reform of Laws and Delivery of Service

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 opposes this bill for the following reasons:

1) The current involuntary civil commitment system in Maryland works to capture the vast majority of at-risk, dangerously ill individuals in Maryland.

2) The proposed changes to the criteria for involuntary civil commitment violate constitutional protections established in the 1970's that are still in effect today, especially that a mentally ill person must be dangerous to themselves or others. The American with Disabilities Act and the Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), requires that individuals with disabilities receive treatment in the least restrictive setting.

3) There is insufficient evidence to support these changes that will lead to a massive curtailment of liberty for thousands of individuals with disabilities. The Workgroup convened by the Department of Health to study the involuntary commitment process declined to recommend the proposed changes in HB 1160.

4) The proposed standard is vague and speculative, leading to the same inconsistent application the proponents claim they are trying to correct.

5) The vague and speculative nature of the proposed language will make is easier for individuals to abuse the process for malicious reasons.

6) The current involuntary civil commitment process has a disparate racial impact, and the proposed criteria will likely cause even more people of color to be targeted for involuntary civil commitment.

7) The involuntary commitment of non-dangerous individuals, as permitted by the proposed changes to the involuntary commitment statute, would put a strain on the already overburdened mental health delivery system in Maryland.

8) Individuals suffering from mental illness face a myriad of issues, but the General Assembly will not improve the lives of patients or provide better care by redefining dangerousness and changing the criteria for involuntary commitment.

9) Patients face serious collateral consequences derivative of an involuntary commitment, and these weigh heavily against increasing the number of mentally ill individuals eligible for commitment.

I. THE CURRENT SYSTEM WORKS.

The current involuntary civil commitment system in Maryland works to capture the vast majority of at-risk, dangerously ill individuals in Maryland. The Maryland Public Defender's Office represented 9,612 individuals in civil commitment cases in 2020. That total does not include individuals who were taken to Maryland hospital emergency departments and evaluated for certification but were discharged from emergency departments because they did not meet criteria for involuntary admission. Maryland hospital staff have advised that approximately 60% of emergency evaluees are released from their emergency department because the evaluees do not have a mental illness, don't require inpatient care and treatment, aren't dangerous to self or others, or have less restrictive alternative placements available.

Maryland's current statute is the most flexible standard in the country, and it is also easy to understand and apply. Maryland judges at all levels take a very expansive view of danger. In *In Re: J.C.N,* 460 Md. 371 (2018), the Court of Appeals found that JCN's refusal to take psychiatric and thyroid medications, delusions that she could return to pursue her Ph.D at Yale, and her refusal to believe she had a mental illness were sufficient for an administrative law judge to find her dangerous. Of the approximately 9,612 individuals represented by the OPD in involuntary civil commitment cases in 2020, only 219 were released by administrative law judges at involuntary commitment hearings.[1] These numbers indicate that the statute is not being narrowly interpreted by law enforcement, mental health treatment professionals or judges. The fact that 60% of emergency evaluees were discharged from a major hospital's emergency department indicates that the opposite is true. Further , these numbers indicate the need for a robust training program for first responders and mental health treatment professionals.

The proponents of this bill argue that the current standard is inconsistently applied by first responders and mental health treatment professionals who have different interpretations of the current statute. The proposed bill will, if adopted, be subject to the same inconsistent interpretation. In fact, the language in the bill is open to even more inconsistent interpretation due to the language surrounding "indigence," "substantial deterioration," and "reasonable expectation." One hundred different first responders could easily have one hundred different interpretations of that language.

The Department of Health convened a Workgroup to review the involuntary civil commitment process. Based on the number of anecdotes presented to the Workgroup, families do not feel adequately served, but the data indicates that the system works to capture the vast number of at-risk, dangerously ill people. These families' stories are deeply painful, but they are rare. The system is collecting many at-risk people prior to public harm occurring. The Workgroup refused to recommend the changes being proposed in HB 1160.

The parties wishing to make a change to the statute have the burden of proving that the proposed language is needed, especially when that change will infringe on a vulnerable population's rights. What, if any, statistics exist to support the notion that the change in the definition of dangerousness

[1] Not all the judicial releases were on the merits of the case. Some were the result of due process violations in the commitment process.

had an impact in the states that made those changes? Where is the data from other groups to support their claims that making the definition more narrowly defined by including all these specific types of danger helped in some specific way? Data would help determine whether there is an issue with the current statute or whether, as suggested by many participants in the Workgroup, the issue is training.[2] Changes in legislation should be based on data, not anecdotal information.

II. RACIAL DISPARITY EXISTS IN THE INVOLUNTARY CIVIL COMMITMENT PROCESS.

Racial bias in the involuntary civil commitment process is a real concern. Statistics collected by the OPD over the last 6 months prove the disparities amongst racial groups. While the OPD may not have the resources to analyze the whole picture, we see these disparities daily and recognize the inequitable patterns in our data. A study reported in a 2021 article in the Journal of Psychiatric Services demonstrated that Black persons of Caribbean or African descent with their first episode of psychosis were significantly more likely to be forced into treatment than non-Black individuals. Refining the definition of dangerousness to satisfy individuals and organizations that seek to make more people eligible for involuntary civil commitment will have a disparate impact on people of color. More research is needed to explore the role of race in Maryland's involuntary admission process, and the role of racial prejudice in the assessment of dangerousness.

III. DEFINING THE DANGEROUSNESS STANDARD WILL NOT ADDRESS THE MYRIAD ISSUES THAT IMPACT THE LIVES OF INDIVIDUALS WITH SERIOUS MENTAL ILLNESS.

By defining the definition of dangerousness to potentially expand the number of individuals eligible for involuntary inpatient commitment, the General Assembly will not address the many concerns voiced by individuals and organizations supporting this change. The language would result in inappropriate, one-size-fits-all solutions (ie. institutional forced medical care regardless of complicating factors) for all situations. For example, a person might be schizophrenic and also experiencing housing or food insecurity. Involuntary hospitalization is not going to resolve this person's issues. The involuntary commitment model is not equipped to provide the solutions to large systemic problems such as limited affordable housing options, lack of community services, the Department of Social Services' inadequate placement options, lack of Partial Hospitalization Programs or rehabilitation placements, and limited outpatient resources which all can easily lead to difficult circumstances. There is no medication for homelessness, for example, and making it "dangerous" by definition, as long as the unhoused person is also mentally ill, seems to lead to a situation where a fundamental liberty is being infringed upon due to inadequate social support or limited financial means. HB 1160 would make it "dangerous" to be impoverished.

IV. THE PROPOSED CHANGES ARE UNCONSTITUTIONAL.

This bill changes the criteria for involuntary civil commitment and in doing so, violates

[2] It is also important to note that studies have shown, and psychiatrists who participated in the Department of Health Workgroup confirmed that "Clinicians are notoriously bad for predicting dangerousness." These psychiatrists further stated, "We need to be very clear that our ability to see someone's dangerousness is very limited." "The predictions on future danger are notoriously unreliable even for trained professionals." "We have seen studies that show they are slightly more reliable than chance." "Our ability to predict dangerousness in the near term (minutes, hours) is pretty good. Beyond that the accuracy of our predictions falls off very quickly." (Add Summary sentence)

constitutional protections in effect since the 1970's. The Supreme Court held in multiple cases that civil commitment for any purpose constitutes a severe deprivation of liberty. In *Vitek v. Jones,* 445 U.S. 480 (1980) the Supreme Court said:

> We have recognized that for the ordinary citizen, commitment to a mental hospital produces a "massive curtailment of liberty." *Humphrey v. Cady,* 405 U.S. 504, 509 (1972), and in consequence "requires due process protection." *Addington v. Texas,* 441 U.S. 425 (1979); *O'Connor v. Donaldson,* 422 U.S. 563, 580 (1975). The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital "can engender adverse social consequences to the individual" and that "[w]hether we label this phenomena 'stigma' or choose to call it something else… we recognize that it can occur and that it can have a very significant impact on the individual." *Addington v. Texas, supra* at 425-426. See also *Parham v. J.R.,* 442 U.S. 584, 600 (1979).

O'Connor v. Donaldson, is the landmark Supreme Court mental health civil rights opinion that established how a state's commitment laws should be framed to ensure a balance of liberty with the public good. In *O'Connor* at 563, 575–76, the Supreme Court found "no Constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." The court held that "the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution." *Addington v. Texas,* at 426-427, explicitly states that loss of liberty by confinement for mental illness requires a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior.

The proposed definition includes criteria that are not meaningful, will be difficult for first responders and mental health treatment professionals to accurately assess, and will permit the unconstitutional involuntary hospitalization of individuals who may or may not become dangerous in the future. Such an expansion of the dangerousness statute also increases the risk that a panoply of idiosyncratic behaviors may fall under the "dangerous" umbrella.

V. THE PROPOSED CHANGES INCREASE THE LIKELIHOOD OF ABUSE OF THE PROCESS FOR MALICIOUS PURPOSES.

The OPD is aware of numerous cases in which the involuntary commitment process was abused by individuals who were involved in divorce or child custody cases, perpetrators of domestic violence, or those attempting to gain control over an individual's wealth for malicious reasons. The proposed statute is vague and speculative and will make it easier for those willing to abuse the system for personal gain to succeed.

VI. THERE ARE SERIOUS COLLATERAL CONSEQUENCES DERIVATIVE OF INVOLUNTARY COMMITMENT THAT WEIGH HEAVILY AGAINST INCREASING THE NUMBER OF MENTALLY ILL INDIVIDUALS ELIBIBLE FOR COMMITMENT.

There are automatic and potential consequences stemming from an involuntary admission, including a broad range of legal, economic, and social impacts caused by an involuntary commitment. These include required registration with the Department of Public Safety and the FBI, restrictions against owning and purchasing a firearm under Maryland and federal law, disqualification from certain employment, and from serving as a guardian or custodian of a child in

need of assistance, loss of professional licenses, immigration consequences, loss of the right to vote, loss of a security clearance, and loss of a driver's license. Involuntary commitment can also impact child custody cases. Additionally, one of the greatest consequences is the social stigmatization as the result of having been declared in need of mental treatment and committed to a psychiatric facility. These collateral consequences apply to minors and adults, and these add additional burdens to vulnerable individuals with mental illnesses for the remainder of their lives.

VII. THE PROPOSED CHANGES RISK VIOLATING THE LEGAL REQUIREMENTS OF THE OLMSTEAD RULE.

Broadening the definition leads to even more resources spent in unproductive ways. The use of locked psychiatric units as a primary form of treatment is not supporting a "least-restrictive setting" standard of care and can lead the State of Maryland to be in violation of the mandates of the Americans with Disabilities Act and *Olmstead v. LC,* 527 U.S. 581 (1999). See *United States v. Mississippi,* 400 F. Supp. 3d 546 (S.D. Miss. 2019), where the U.S. District Court judge found that:

> On paper, Mississippi has a mental health system with an array of appropriate community-based services. In practice, however, the mental health system is hospital-centered and has major gaps in its community care. The result is a system that excludes adults with [SMI]("serious mental Illness") from full integration into the communities in which they live and work, in violation of the Americans with Disabilities Act (ADA).

More community-based care and social supports would be the best use of the State's dollars and time. Forced treatment has not been shown to increase outpatient compliance nor reduce readmission, and over-reliance on hospitalization is very expensive.

VIII. THE INVOLUNTARY COMMITMENT OF NON-DANGEROUS INDIVIDUALS WOULD PUT A STRAIN ON THE ALREADY OVERBURDENED MENTAL HEALTH DELIVERY SYSTEM.

There is no clear evidence supporting the concept that broadening the definition will aid more individuals. The number of people brought into hospitals involuntarily is large, showing that there is no persistent difficulty in getting people that are in crisis into a facility for care. The facilities are full and the Emergency Rooms hold people for long periods of time while looking for beds. The OPD recently represented clients who remained hospitalized in emergency departments for 60-90 days waiting for inpatient psychiatric beds. An increase in the number of individuals certified for involuntary admission will overburden an inpatient hospital system that cannot currently accommodate the number of people certified for admission.

CONCLUSION

The proponents of this bill argue that it is beneficial for individuals who suffer from mental illness to seek early treatment-that their clinical outcome is better with early treatment. The same can be said for dozens of other medical illnesses, but we do not involuntarily hospitalize individuals with those illnesses just because early intervention impacts the course of their disease. The fact that an individual is not seeking early treatment for a medical illness that might worsen in the future is not a reason to massively curtail the individual's liberty and subject them to the serious collateral consequences that follow an involuntary psychiatric commitment. By

broadening the definition of danger so extensively, Maryland will subject many more people to forced inpatient treatment that may result in deterioration and worse individual outcomes for patients in the future.

For the reasons outlined above, we request an unfavorable report on HB 1160.

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