NATASHA DARTIGUE
PUBLIC DEFENDER
KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER
MELISSA ROTHSTEIN
CHIEF OF EXTERNAL AFFAIRS
ELIZABETH HILLIARD
ACTING DIRECTOR OF GOVERNMENT RELATIONS

POSITION ON PROPOSED LEGISLATION

BILL: HB0823 Mental Health Law – Assisted Outpatient Treatment Programs

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: 2/21/2023

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on Senate Bill 0480 for the following reasons:

1. **HB0823 violates fundamental constitutional rights including the right to due process.**
2. **HB0823 is not evidence-based and will have negative collateral consequences for Marylanders.**
3. **HB0823 contains numerous procedural and logistical limitations that render this bill unrealistic and ineffectual in practice.**

Due to the seriousness of the above-listed issues, our office cannot support legislation that would impact our clients in such ways. Each of these points is detailed in the following paragraphs.

1. **HB0823 violates fundamental constitutional rights including the right to due process.**

The right to refuse mental health treatment is well-established through constitutional amendments and by both the Supreme Court of the United States and the Supreme Court of Maryland.[1] The exception to this fundamental right is extremely limited and narrowly tailored to preserve an individual's right to bodily integrity: psychiatric treatment may be involuntarily administered only if an individual with a mental illness presents a danger to themselves or others. HB0823 introduces a far broader exception to this fundamental right by allowing any individual living in the community with a history of a "lack of compliance with treatment" to be petitioned to appear in court to determine if the individual should be forced into mental health treatment. While HB0823 does include a set of criteria that must be met by clear and convincing evidence to force treatment, the requirements are overly broad and are not indicative of whether the individual is so in need of treatment that his/her fundamental rights ought to be violated. For example, § 10-6A-04(A)(5) states that the individual must be in need of treatment "in order to prevent a relapse or deterioration that would likely make the respondent a danger to the life or safety of the

[1] 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).

respondent or others." This standard is not only exceedingly vague but also requires that the court make a determination about the individual based on speculative future mental health decline rather than the individual's present state.

§ 10-6A-03 allows for any adult "who has a legitimate interest in the welfare of the respondent" to submit such a petition for forced treatment, thereby initiating this legal process. Allowing any interested party to file such a petition introduces opportunities for malicious filings, a practice that is regular under the current context of involuntary inpatient commitment and most common in situations involving domestic violence, divorce and custody proceedings, and control over familial assets. Under HB0823, the petition need only be accompanied by an affidavit from a psychiatrist who is willing to testify that s/he has reason to believe the individual meets the requirements for forced treatment. Notably, HB0823 specifically does NOT require that the psychiatrist has successfully evaluated the individual in order to file a petition.

§ 10-6A-06(A)(2) provides that a hearing be held not later than 3 business days after the date the petition is received by the court, and § 10-6A-06(B)(2) provides that respondents unable to afford an attorney will be provided representation by an entity the county designates. Both state and federal courts have held that the right to counsel means the right to *effective* assistance of counsel.[2] Effective assistance of counsel in hearings pursuant to HB0823 demands that the attorney obtain and review up to four years of medical and psychiatric treatment records (including criminal records), locate/interview collateral witnesses, and retain expert psychiatrists to evaluate respondents, review said records, and provide expert testimony. Three days does not allow for any attorney to provide effective assistance of counsel in these cases and therefore violates the fundamental constitutional right to such counsel in cases involving deprivations of liberty.

Per § 10-6A-06(D), the court may hold a hearing in absentia if the respondent fails to appear at the hearing. The Maryland Court of Special Appeals (now called the Maryland Court of Appeals), in an unreported opinion, *Dennehy v. Risk Management Baltimore Washington Medical Center*,[3] held that permitting Dennehy to discharge counsel, denying her a postponement, then ordering her removal from the hearing room and excluding her entirely from participating in the proceeding, failed to provide her with minimally sufficient due process. The judgment involuntarily committing her to an inpatient psychiatric hospital was reversed. While this decision is not legal precedent, it calls into question the constitutionality of this provision.

§ 10-6A-06(E)(3)(I) and (II) permit a judge to have a respondent taken into custody by law enforcement and transported to an appropriate facility for examination by a psychiatrist if the respondent does not consent to an examination or has not appeared at a hearing. This seizure can

[2] *See e.g., Cirincione v. State*, 119 Md.App. 471(1998) " We have long recognized that the right to counsel entitles individuals to more than the mere presence of someone who happens to possess a law degree. The right to counsel is the right to effective assistance of counsel, the benchmark of which is whether counsel's advocacy was sufficient to maintain confidence that the adversarial process was capable of producing a just result." *Coles v Peyton*, 389 F.2d 224 (1968) The Fourth Circuit Court of Appeals held that "Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial."

[3] *Dennehy v. Risk Mgmt. Balt. Wash. Med. Ctr*., No. 1948 (Md. Ct. Spec. App. Jan. 29, 2021)

Maryland Office of the Public Defender, Government Relations Division, 45 Calvert St, Suite 108, Annapolis MD 21401
For further information please contact Elizabeth Hilliard, Elizabeth.hilliard@maryland.gov 443-507-8414.

be authorized without a finding that the respondent is dangerous or the issuance of an Emergency Petition pursuant to HG 10-622. The respondent can be detained for 24 hours. These provisions of the statute violate the 4th amendment of the U.S. Constitution which protects individuals from unreasonable searches and seizures. The Supreme Court of the United States and The Supreme Court of Maryland have made clear the extremely limited exceptions to our 4th amendment protections. Failing to appear at a civil hearing and refusing a psychiatric examination are not exempted conduct.

Perhaps most concerning is that, should an individual be ordered by the court to submit to forced treatment, § 10-6A-08(A) indicates that the administration of medication may be included in the course of the individual's forced treatment. Even when an individual is involuntarily hospitalized, forced medication requires additional scrutiny by a clinical review panel who must consider every alternative treatment option as well as the health risks associated with taking the medication before compelling an individual to be forcibly medicated. HB0823 contains no such protections for individuals if they are forced into treatment, thereby functionally rendering this bill a way to forcibly medicate individuals in the community who do not pose a risk of dangerousness.

2. HB0823 is not evidence-based and will have negative collateral consequences for Marylanders.

In addition to constitutional violations, HB0823 outlines procedures for implementing forced mental health treatment that lack any clinical justification. In fact, research shows that forced treatment in this context is no more effective than voluntary, readily available community mental health services. Further, the mere understanding that the treatment is compulsory undermines the therapeutic alliance between the individual and the provider, thereby introducing an inherent barrier to any potential therapeutic progress. This suggests that funding for HB0823 is far better spent increasing the availability of intensive community services and improving the quality of existing outpatient programming.

Notably, the World Health Organization published a report in 2022 regarding guidelines for mental health treatment that includes a discussion of the harms associated with forced mental health treatment.[4] The report expressly promotes *supported* decision-making over *substitute* decision-making (i.e. forced treatment) as an evidence-based practice that allows the individual to receive mental health support without employing coercive practices. Marylanders would undoubtedly benefit from this progressive approach to mental health care.

Proponents of HB0823 have repeatedly pointed to studies that suggest forced treatment in the community results in improved patient outcomes, but this argument lacks nuance. Such studies are based on a review of all sources of forced outpatient mental health treatment, including treatment that is mandated in a *forensic* context. In contrast, HB0823 concerns individuals in a *civil* context who have not committed a crime that would initiate a judicial proceeding; as such, upon review of studies limited to outpatient civil commitment outcomes, this argument fails. Similarly, proponents of HB0823 assert that Maryland is one of only a handful of states that has not enacted legislation that mandates outpatient mental health treatment; rather, Maryland does

[4] World mental health report: Transforming mental health for all. Geneva: World Health Organization; 2022. https://www.who.int/publications/i/item/9789240049338

Maryland Office of the Public Defender, Government Relations Division, 45 Calvert St, Suite 108, Annapolis MD 21401
For further information please contact Elizabeth Hilliard, Elizabeth.hilliard@maryland.gov 443-507-8414.

have legislation that allows for mandatory outpatient mental health treatment, and like many other states, Maryland has limited such treatment to a forensic context.

Significantly, it has been well-established that Black Marylanders are not only more likely to be subjected to Petitions for Emergency Evaluation, but they are also more likely to be retained at involuntary commitment hearings as compared to their white peers. HB0823 is likely to exacerbate this racial disparity among Marylanders. Evidence shows that similar legislation ("Kendra's Law") in New York State has resulted in exactly this – 77% of those who have been forced into outpatient treatment since the introduction of this legislation in New York City are Black and Brown individuals; this disparate impact has been observed in other states as well.

It is also important to note that forced outpatient treatment would have the same collateral consequences as involuntary inpatient treatment. Civil commitment statutorily limits individuals from engaging in certain occupations, places restrictions on one's immigration status, potentially impacts driving privileges, can have implications in child custody disputes, restricts an individual's right to own a firearm, and prohibits individuals from serving on a federal jury. In addition to these consequences, individuals must also live with the social stigmatization of mental illness, which can deter individuals from voluntarily seeking out subsequent treatment.

3. HB0823 contains numerous procedural and logistical limitations that render this bill unrealistic and ineffectual in practice.

The following is a list of just some of the procedural and logistical limitations that would not only undermine the spirit of this bill but also contribute to the severity of both constitutional and social justice concerns described above:

A. Per § 10-6A-02, counties "may" establish programs to implement forced treatment. If some counties do not opt to establish this programming while others do, jurisdictional issues will arise. For example, a resident of one county could avoid a hearing altogether by simply moving to a county that has opted out of establishing such programming.
B. HB0823 does not provide any source of funding for forced treatment programming should a county wish to establish such programming, nor does it state whether psychiatrists involved in providing treatment would be employed by the county or serve as independent practitioners, thereby introducing ethical considerations for psychiatrists who participate in such programming.
C. HB0823 also lacks a source of funding for individuals who do not have health insurance, which is typically a significant portion of the population that HB0823 aims to impact. Since individuals cannot be compelled to apply for subsidized social assistance programs such as Medicaid, it is unclear how forced treatment will be provided to these individuals or whether an individual will be considered "non-compliant" with their treatment plan if they are unable to afford it, thereby potentially exacerbating existing disparities among individuals with limited income.
D. HB0823 does not define "compliance," first referred to in § 10-6A-04(A)(3), leaving excessive ambiguity as to how the court should interpret a respondent's "lack of compliance with treatment." Since the outcome of hearings under HB0823 is entirely dependent on the court's understanding of whether or not a respondent has complied with treatment, such ambiguity will lead to, at best, inconsistency in application, and at worst, significant violations of a respondent's constitutional rights.

Maryland Office of the Public Defender, Government Relations Division, 45 Calvert St, Suite 108, Annapolis MD 21401
For further information please contact Elizabeth Hilliard, Elizabeth.hilliard@maryland.gov 443-507-8414.

E. Similarly, HB0823 leaves other significant terms undefined: "hospitalization" and "mental disorder" for the purposes of qualifying an individual for forced treatment under § 10-6A-04, are broad terms that, left open to interpretation, are likely to result in inconsistent standards and thus, inequitable outcomes.

F. § 10-6A-06(E)(I) allows for a respondent who declines a psychiatric examination or declines to attend their hearing to be detained at an "appropriate facility" for up to 24 hours for evaluation. HB0823 does not define what kind of facility might be deemed appropriate, whether it be a mental health facility or correctional facility, thus introducing further ambiguity that will contribute to the overcrowding of both Maryland hospitals and correctional institutions (in addition to the constitutional concerns arising from this provision that are detailed above).

G. Per § 10-6A-06, the court must schedule a hearing no later than 3 business days following receipt of a petition. Counties do not have the authority to designate Maryland District Courts to hear these cases so hearings pursuant to HB0823 would be held in the Circuit Court where the civil rules of procedure, discovery and evidence apply. This provision is logistically impossible given the time frames outlined in the rules of civil procedure, not to mention the current delay in nearly all Circuit Court proceedings across the state.

H. Also per § 10-6A-06, if the respondent cannot afford counsel, "representation shall be provided by an entity that the county designates." In past versions of this bill, the Office of the Public Defender has been designated to provide representation; not only is it likely that counties would want to designate our office to provide such representation if HB0823 is passed, but counties neither have the authority to do so nor it is feasible for our office to handle the increased caseload that would result without significantly increasing the number of attorneys, social workers, and support staff in the Mental Health Division.

I. § 10-6A-10 provides that an order for involuntary outpatient treatment can be extended for a year. HB0823 does not state that a new hearing is required. Forced mental health treatment is a serious deprivation of liberty that requires due process protections; again, HB0823 lacks such protections by not delineating a timeframe under which the court must review an individual's need for forced treatment.

J. HB0823 effectively renders guardianship valueless, as it merely allows an individual's guardian to have an "opportunity" to participate in the development of a forced treatment plan, rather than the opportunity to make decisions about the individual's need for treatment, as is purpose of guardianship. Similarly, HB0823 does not require forced treatment plans to honor an individual's mental health advance directive if the treating psychiatrist does not agree that the directives are in the best interest of the respondent.

K. The preamble to this bill states, "A small but persistent subset of individuals with severe mental illness struggle to adhere voluntarily to treatment…" This language makes it appear and its proponents have argued that the bill is only intended to apply to a small group of people. This bill is not narrowly drafted to apply to a small subset of people. The Mental Health Division of the Public Defender's Office has represented a little over 30,000 people in involuntary civil commitment cases in the past 4 years. These clients were certified for involuntary admission because they had a mental illness and were a danger to self or others. This bill casts and extremely large net and many thousands of individuals with mental currently meet most of the eligibility criteria for forced outpatient treatment.

Maryland Office of the Public Defender, Government Relations Division, 45 Calvert St, Suite 108, Annapolis MD 21401
For further information please contact Elizabeth Hilliard, Elizabeth.hilliard@maryland.gov 443-507-8414.

In sum, the constitutional issues that arise from HB0823 are highly concerning and the lack of evidence to support the implementation of forced outpatient treatment programming suggests that HB0823 would cause Marylanders far more harm than good. Considering that many Marylanders are voluntarily seeking treatment and are unable to access it, legislative efforts to improve mental health outcomes are better focused on improving the quality of and access to voluntary mental health services in our communities.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on HB0823.

Submitted by: Maryland Office of the Public Defender, Government Relations Division
Authored by: Carroll McCabe
Chief Attorney, Mental Health Division
Maryland Office of the Public Defender
200 Washington Avenue, Suite 300
Towson, Maryland 21204
Office: 410-494-8130

Lindsey Balogh, LCSW-C
Advanced Social Worker, Mental Health Division
Maryland Office of the Public Defender
200 Washington Avenue, Suite 300
Towson, Maryland 21204
Office: 410-999-8279