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POSITION ON PROPOSED LEGISLATION

BILL: SB 453 - Mental Health – Emergency Evaluation and Involuntary Admission Procedures and Assisted Outpatient Treatment Programs

FROM: Maryland Office of the Public Defender

POSITION: Informational

DATE: February 20, 2024

The Maryland Office of the Public Defender offers this information for this committee's consideration when they issue a report on Senate Bill 453.

The Maryland Office of the Public Defender ("MOPD") recognizes that through the Assisted Outpatient Treatment ("AOT") workgroup last session and attention to the concerns for the individuals whose bodily autonomy and liberty are being infringed by the assisted outpatient treatment process. We understand that numerous amendments are coming, some of which will address concerns we have previously articulated, but it is our understanding that the remaining concerns and proposed changes we have outlined below will not be addressed by the amendments. Since we cannot offer a full opinion until we see the finalized amendments being discussed, we are weighing in informationally at this time.

Our number one concern is the absence of funding in the bill for the critical MOPD attorney, staff, and experts necessary to implement this bill. MOPD has submitted a separate testimony to further explain the budget and resource concerns for our agency.

Assisted Outpatient Treatment Provisions

First, it is MOPD's understanding that the committee will be including a voluntary option in the bill, which is not currently reflected but will match voluntary language added from the workgroup last year. We are extremely supportive of this amendment. Forced medication can undermine the therapeutic relationship between clients and providers causing individuals to distrust their providers and avoid treatment in the future. And, studies show that compulsory community treatment does not reduce readmission or length of inpatient hospital stays nor increase the likelihood of better service use, social functioning, mental state or quality of life.[1]

[1] Compulsory Community Treatment to Reduce Readmission to Hospital and Increase Engagement with Community Care in People with Mental Illness; Community Treatment Orders for Patients with Psychosis (OCTET): A Randomized Controlled Trial.

I. Senate Bill 453 does not currently require assessment of or provision for access to services.

Access to services is the most efficient and effective way to ensure individuals with mental health concerns have improved outcomes. Thus, MOPD would like to see provisions in the bill that start planning for rural or underserved areas to get access to necessary services. We know that vulnerable clients frequently struggle to get to appointments and afford get their medications. Lack of services is why people end up in the hospital, and a court order will not change that. Studies show that in communities with well-coordinated mental health services the imposition of compulsory supervision does not reduce the rate of readmission of psychotic patients.[2] Accordingly, if Maryland chooses to implement an AOT program, it should also ensure that there are congruent assessments of availability of community services.

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.[3] 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.

II. Senate Bill 453 has a too narrow definition of "treatment plan."

We know that crisis services, licensed professional services, and peer support are critical for the success of individuals managing their mental illness in the community. Johns Hopkins Medicine has seen improvement in compliance with treatment for individuals diagnosed with Schizophrenia and related conditions through their text message program.[4] MOPD has also seen improved outcomes through our own grant-funded peer support services for justice involved clients with a substance use disorder and parents at risk of losing their children. Since AOT is focused on long-term mental health management for individuals in the community, we believe the specific articulation of crisis support and licensed professional services, along with peer support should be ensured in the bill.

To ensure such services, MOPD suggests numerous additions to and one subtraction from the definition of a "Treatment Plan" outlined in Senate Bill on pages 6-7. Suggested language for including in definition of "Treatment plan" is bolded and underlined:

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[2] https://pubmed.ncbi.nlm.nih.gov/23537605/; https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(15)00231-X/fulltext; https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(18)30382-1/fulltext; https://pubmed.ncbi.nlm.nih.gov/28303578/

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

[4] https://clinicalconnection.hopkinsmedicine.org/news/text-message-intervention-may-prevent-relapse-in-patients-with-schizophrenia

(2) Includes, at a minimum:

(I) Services of a treating psychiatrist;

(II) Services of a licensed social worker or licensed professional counselor;

(III) Community-based 24/7 crisis support services;

(V) Case management or Assertive Community Treatment services; and

(IV~~) [If resources permit]~~ Services of a certified peer recovery specialist;

(VI) **Services of a substance use disorder specialist as needed.**

III. Senate Bill 453 does not sufficiently protect respondent's rights.

Civil jury trial rights and enumerated rules of civil procedure to protect the respondent are not adequately protected in the bill. The right to refuse mental health treatment is well-established in the U.S. Constitution and by both the Supreme Court of the United States and the Supreme Court of Maryland.[5] Currently, the only 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.

Senate Bill 453 and the Assisted Outpatient Treatment program introduces a far broader exception to this fundamental right by authorizing any individual living in the community with a history of a "lack of compliance with treatment" to be required to appear in court to determine if the individual should be forced into mental health treatment. Health General Article § 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. That petition begins the AOT legal process at the end of which the respondent may be ordered into forced outpatient care, potentially including an order to take medication that the individual does not want to take. Allowing *any interested party* to file such a petition may open the process to 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. Thus, we must ensure that all the protections available in a civil proceeding apply to individuals being petitioned.

Even among well-meaning individuals, there is a grave possibility that forced treatment will be sought due to the petitioner's discomfort with the respondent's lawful choices rather than for a legitimate safety need. The law requires that such an intrusion on fundamental rights happen only with counsel and due process protections.[6] Effective assistance of counsel in

[5] 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).

[6] 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,

hearings pursuant to Senate Bill 453 demands that the attorney obtain and review 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. Any procedure that may erode the rights of the respondent, whether it be the timeline of the case or the absence of independent experts, would be at odds with the effective representation that must go into the preparation of an AOT case.

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. Again, when such fundamental liberties and important rights are at risk, the proceedings must clearly afford due process to the respondent.

a) Expediency requirements in Senate Bill 453 erase critical protections.

On page 11, there is a provision applying the rules of civil procedure, yet this articulation of rights is immediately undermined by an exception for "procedures or timeliness." Right now the bill has expediency requirements that may be read to override the civil jury trial rights of the respondent. On page 11 there are expediency requirements that would significantly hinder an individual's ability to prepare a case and demand a jury trial. The expediency requirements on page 11 should be struck. To further protect civil jury rights, the references to the court decision making should be revised to "fact finder."

MOPD understands that there may be circumstances in which a person may need immediate, emergency medical care. Maryland already has the emergency petition process that can be pursued by a court, mental health professional, or law enforcement if a person decompensates to the point that they are a danger to themselves or others. Thus, there does not need to be an expediency requirement that could override the respondent's critical civil discovery and jury trial rights. The expediency provision may create a disparity in the amount of due process a person is afforded. If a respondent is just a little sick and the court accordingly determines that the case does not need to be rushed, they get all of their rights, but if a respondent is very ill, the court may decide to expedite the process, potentially eroding critical procedural protections.

There are numerous ways to ensure a clear codification of a jury trial right for the individuals who face deprivation of their bodily autonomy. One suggestion is modify the references to court decision making to "fact finder." This ensures that judges will not interpret the law to mean that a respondent is not entitled to a jury trial upon request merely because of the reference to the "court" making findings. Respondents in AOT proceedings must be allowed a jury of their peers to adequately evaluate the allegations that infringements on their fundamental right to bodily autonomy.

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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."

b) Every respondent needs to be entitled to an expert in every case.

Individuals being petitioned for forced outpatient treatment should have access to their own independent experts.

Suggested language:

> **(D) The respondent shall be permitted to have an examination conducted by an independent expert who may testify at trial and shall be provided for by the State if the respondent is indigent**.

AOT cases must be centered around long-term care and sustainable mental illness management. The rights of the respondent to fully investigate, call witnesses, and have their own expert are important due process protections that require an attorney and state funding if the respondent is indigent. Those who are not represented by MOPD are unlikely to be able to hire their own expert, their financial circumstances should not impact their ability to have an adequate, independent evaluation. Respondents in an AOT case must be able to fully evaluate the validity of the petitioner's psychiatrist's opinions and this cannot occur without the ability to retain their own expert. To ensure this right is not compromised by someone's financial status, MOPD suggests the above language.

IV. Senate Bill 453 definition of "serious mental illness" needs additional protections.

It is the understanding of MOPD that there is a forthcoming amendment to ensure the "serious mental illness" definition matches the language that the workgroup included for "serious **and persistent** mental illness" in the last iteration of 2023's House Bill 823. We appreciate that amendment and agree that it is critical for the inclusion of the language from the workgroup last year. However, we further encourage the committee to ensure that substance use is explicitly excluded from the consideration of whether a respondent has a "serious and persistent mental illness." This is necessary for psychiatric care to be effective, and this is consistent with how substance use is addressed in cases of certification for involuntary admission to inpatient units. Ensuring that substance use is not part of the consideration would not exclude individuals with co-occurring mental illness and substance use disorders from being found to have a serious and persistent mental illness. Instead, excluding substance use as a factor in deciding "serious and persistent mental illness" would merely ensure that for individuals to be petitioned for AOT, the primary diagnosis must be a mental illness and not their substance use. Maryland has made great strides in acknowledging the need to destigmatize and effectively treat substance use as a health condition, failing to explicitly exclude substance use in the evaluation for AOT qualifications could result in a conflation of mental health disorders and addiction that may harm patients long term outcomes.

V. Failed compliance with AOT should not be considered for emergency petitions.

Senate Bill 453 on page 14, lines 23-29 should be removed. Currently, the bill language states that an individual's failed compliance may be used as a factor for consideration in involuntary admission. Last year, pursuant to the workgroup's recommendation, the language was changed so that an individual's failure to comply with an AOT order was not permitted to be

subsequently considered when determining whether an emergency petition is warranted.

VI. Senate Bill 453 currently allows for indefinite applications of AOT orders.

MOPD would request that the language in Senate Bill 453 be altered to match the language in House Bill 823 last year that was amended per suggestion by the workgroup:

10–6A–10.

~~(A)~~ **WITHIN 30 DAYS BEFORE THE EXPIRATION OF AN ORDER OF ASSISTED OUTPATIENT TREATMENT,** ~~**A PETITIONER MAY PETITION THE COURT TO ORDER CONTINUED ASSISTED OUTPATIENT TREATMENT FOR A PERIOD NOT TO EXCEED 1 YEAR FROM THE DATE OF THE EXPIRATION OF THE CURRENT ORDER**~~ **THE RESPONDENT'S CARE COORDINATION TEAM SHALL PROVIDE THE RESPONDENT WITH A PLAN FOR CONTINUED TREATMENT, IF CONSIDERED NECESSARY.**

~~(B) IF THE COURT'S DISPOSITION OF THE PETITION FILED UNDER SUBSECTION (A) OF THIS SECTION DOES NOT OCCUR BEFORE THE DATE OF THE EXPIRATION OF THE CURRENT ORDER, THE CURRENT ORDER SHALL REMAIN IN EFFECT UNTIL THE DISPOSITION.~~

~~(C) THE PROCEDURES FOR OBTAINING ANY ORDER UNDER THIS SECTION SHALL BE IN ACCORDANCE WITH THE PROVISIONS OF THIS SUBTITLE.~~

The above language ensures that any plan for continued treatment will only be issued if it is considered necessary.

VII. Senate Bill 453 must include data collection and reporting requirements to ensure transparency, accountability, and equity.

Senate Bill 453 should require reporting of the outcomes of the AOT cases. This data should not only track cases and an individual's subsequent involuntary hospitalizations and readmissions, but also racial disparity data. 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. Senate Bill 453 has the potential 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.[7] Black individuals are up to four times more likely than whites to receive a schizophrenia diagnosis – even after controlling for all other demographic variables[8]

[7] https://www.nyclu.org/sites/default/files/field_documents/2022-nyclu-onepager-kendraslaw.pdf; https://static.prisonpolicy.org/scans/Kendras_Law_04-07-05.pdf.

[8] Barnes, A., Race, schizophrenia, and admission to state psychiatric hospitals (2004), Administration and Policy in Mental Health, Vol.31, No.3; Barnes, A., Race and Hospital Diagnosis of schizophrenia and mood disorders (2008), Social Work, Volume 53, Num 1.

– and more than twice as likely to be involuntarily committed to state psychiatric hospitals.[9]

Provisions in Senate Bill 453 not related to Assisted Outpatient Treatment

VIII. We must continue to require physician evaluation for Emergency Petitions.

Senate Bill 453 permits Psychiatric Nurse Practitioners to be the first person to evaluate a patient who is confined against their will by Emergency Petitioner. MOPD has serious concerns about the removal of the requirement that a physician be the first to evaluate an individual being confined involuntarily. It is critical that all individuals brought to a hospital for involuntary confinement, under an emergency petition need to be brought to an Emergency Room and seen by a physician that can rule out serious medical conditions like brain tumors, encephalitis, UTI, delirium, and others which can all be deadly if left untreated. Many of these serious conditions may have side effects that can be conflated with serious mental illnesses. The evaluation in the Emergency Room is the first time a respondent is evaluated by a medical professional, so for the individual's safety, it must be a physician who is qualified to rule out other potential illnesses. It is critical that these emergency medical evaluations are conducted by the most highly trained medical personnel to because they are making decisions about a person's health, safety, and liberty. For these reasons, we ask the committee to reject this portion of Senate Bill 453.

VI. Senate Bill 453 removes critical time limits on placement for individuals subject to involuntary admission.

Senate Bill 453 removes the 6-hour rule for admission to an appropriate facility. The 6-hour rule is necessary to ensure that individuals who are being involuntarily admitted will continue to be entitled to an evaluation within 6 hours of their arrival at the emergency facility. Maryland already has the longest wait times in the country. Violation of this rule will not result in an individual in need of treatment being released, in other words an individual cannot be released based solely on the department's failure to provide an evaluation within six hours.

The Maryland Office of the Public Defender thanks the Committee for considering the above information as they work to improve the bill and before they issue a report on Senate Bill 453.

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

[9] Lewis, A., Davis, K., Zhang, N., Admissions of African Americans to state psychiatric hospitals, International Journal of Public Policy (2010). Volume 6, Number 3-4, pp. 219-236; Lawson, W.B., Heplar, H., Holladay,J., Cuffel, B. (1994) Race as a factor in inpatient and outpatient admissions and diagnosis. Hospital and community psychiatricy, 45, 72-74.