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## POSITION ON PROPOSED LEGISLATION

**BILL: SB 43 - Maryland Department of Health - Forensic Review Board and Community Forensic Aftercare Program - Established**

**FROM: Maryland Office of the Public Defender**

**POSITION: Favorable with Amendments**

**DATE: Tuesday, January 28, 2025**

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The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on SB 43.

This bill will establish the Forensic Review Boards (FRB) and Community Forensic Aftercare Program (CFAP), which are existing entities within the Department of Health created by internal policy. The bill's purpose is to clarify and standardize existing best practices, most of which have existed for decades. Further, the bill provides additional notice and records requirements related to our clients' current conditions within institutional settings and in the community.

### **I. Forensic Review Board (FRB)**

Our clients have the right to an annual conditional release hearing during their commitment to a state facility. In every case where a patient has been found Not Criminally Responsible (NCR), they have the burden of proving eligibility for release by showing that they are not a danger to themselves, others, or the property of others. Currently, there is a lack of transparency in the process of obtaining conditional release. The Department relies on its internal policy to determine its position on each committed person's release. In most facilities, a Forensic Review Board (FRB) designated by the facility determines whether the Department is ready to recommend release (often with conditions) at a hearing. House Bill 32 will create a standardized approach for each Forensic Review Board's assessment to ensure that each committed person is entitled to the same due process, regardless of where they are held or the strength of their treatment team's advocacy.

There is no consistency or transparency in how the Department makes decisions about each committed person's case within each facility or between facilities. Often, a treatment team may have the opinion that a committed person is eligible for conditional release, but the FRB disagrees. In most facilities, the FRB is not required to explain its decision in the medical record, and the Department has withheld information and documentation on FRB decisions by claiming deliberative process privilege. Judges have ruled inconsistently on the issue. The Department allows each FRB to make decisions about our clients' fundamental right to liberty without providing their reasoning. We need access to the FRB's reasoning to understand our clients' barriers to release. This proposed bill will codify the FRB process so that, through a request for the medical record, all parties can have access to the reasons why a committed person may or may not be recommended for release.

## **II. Community Forensic Aftercare Program (CFAP)**

The Department also operates the Community Forensic Aftercare Program (CFAP) without enabling statutes or regulations. In every case, CFAP monitors are tasked with (1) coordinating and monitoring compliance with the treatment plan and conditions outlined in the conditional release order, including notifying all necessary agents expected to provide treatment or service, and (2) promptly notifying the State's Attorney and the Court if the committed person fails to comply with any of the stated conditions. CFAP monitors take various approaches to their work. We need more consistency and transparency for all parties.

CFAP monitors are social workers but are not in a treating relationship with the individuals they monitor. Therefore, CFAP monitors cannot make treatment decisions. Still, they approve or deny requests related to many aspects of our clients' lives, such as time with their families, career advancement opportunities, and access to education. Under the order of conditional release, CFAP is entitled to any and all information related to our clients' mental health treatment and anything in their life that could affect their condition. The orders grant broad authority, but there is no guidance in law or regulation to ensure that this broad authority is used appropriately. There have been cases where CFAP monitors had overridden medical recommendations from community providers.

Because CFAP does not exist in statutes or regulations, CFAP monitors are not required by law to meet with our clients, but many do, often virtually. Some clients are seen once per month, and others may be seen every 6 months. Some clients are very capable of advocating for themselves, and some clients are severely limited by their disabilities. Our clients also struggle to communicate with

their attorneys about the issues they face that could affect their conditional release and ability to continue to live in the community. Clients should have the right to designate an advocate of their choice to attend meetings with their CFAP monitor. Often, CFAP monitors invite our clients' treating providers, residential programs, and sometimes families to participate in meetings. All participants contribute based on their various perspectives and interests, and our clients can struggle to make their voices heard. It would benefit all parties, especially our clients, for our clients to designate an advocate to speak on their behalf.

The goal of CFAP and the Department should be to monitor clients and communicate with various stakeholders in a manner that assists them in maintaining their mental health and preserving their ability to remain safely in the community. The proposed bill would clarify CFAP's role and enable the Department to promulgate regulations to standardize CFAP's practices.

### **III. Bed Availability**

Both parts of this bill will ensure that our clients are only living in state hospitals and residential facilities if they are currently in need of institutional inpatient care or treatment because of their mental illness and/or intellectual disability. If our clients are not a danger to themselves, others, or the property of others, they are constitutionally entitled to live in the community under certain conditions. This bill will ensure that our clients have adequate information to understand what, if any, discharge barriers exist. This will allow them to have a better chance of overcoming these obstacles and clarify the reasoning behind the Department's position in preparation for a hearing on release.

It will also ensure that our clients are not unnecessarily brought into an institutional setting on a hospital warrant. If defense counsel receives notice of the facts related to alleged violations, we could solve problems in the community before a hospital warrant is issued and our client is uprooted from the community, often losing their housing, job, and existing support network because they were brought back to a state hospital or residential facility.

This bill will free up beds within our state facilities by shedding light on the reasons why our clients are in the facility or being brought back on a hospital warrant with the goal that only patients who are currently exhibiting dangerous behavior because of their mental illness or intellectual disability are being institutionalized as required under the Maryland Criminal Procedure Article and constitutional law.

#### **IV. Amendments**

OPD supports the sponsor amendments. The amendments further clarify existing practices and add certain protections to ensure adequate notice.

##### **A. Add language clarifying frequency of FRB reviews**

At page 2, line 16, INSERT:

(1) EACH FORENSIC REVIEW BOARD SHALL REVIEW NO LESS FREQUENTLY THAN ANNUALLY EACH COMMITTED PERSON'S ELIGIBILITY FOR RELEASE UNDER § 3-114 OF THIS SUBTITLE.

OPD supports this amendment because it would clarify that reviews can happen more frequently than annually. The goal should be to allow these reviews to be conducted as needed, but not less frequently than annually.

##### **B. Broaden to include additional FRB functions beyond eligibility for release**

Page 2, line, 14, ADD the following new sections:

(B) EACH FORENSICS REVIEW BOARD MAY MAKE DECISIONS AS TO ANY ISSUE RELATED TO THE RELEASE OR CONTINUED COMMITMENT OF PERSONS COMMITTED TO THE FACILITY UNDER THIS TITLE.

(C) THE DEPARTMENT SHALL PROMULGATE REGULATIONS TO GOVERN THE AUTHORITY OF FORENSIC REVIEW BOARDS.

FRB's already make decisions concerning various other issues, and the Department will need to establish regulations to clarify the functions of each FRB. We support this amendment so that the Department has the latitude to make decisions through the FRB's related to its position on release and other forensic issues in various kinds of cases.

##### **C. Add definition of Current Community Providers**

At Page 5, line 3, ADD:

(D) "MENTAL HEALTH TEAM" MEANS THE COMMITTED PERSON'S CURRENT COMMUNITY PROVIDERS.

OPD supports this amendment to clarify this definition as a term of art that is frequently used in these cases and in conditional release orders issued by the courts.

**D. Add CFAP's FRB**

At Page 5, line 8, ADD:

(C) THE COMMUNITY FORENSIC AFTERCARE PROGRAM SHALL ESTABLISH A FORENSIC REVIEW BOARD TO MAKE DECISIONS AS TO:

(1) RECOMMENDATIONS AS TO TERMINATION OF CONDITIONAL RELEASE;

(2) RECOMMENDATIONS AS TO EXTENSION OF CONDITIONAL RELEASE; AND

(3) OTHER DECISIONS AFFECTING THE ELIGIBILITY OF COMMITTED PERSONS TO REMAIN ON CONDITIONAL RELEASE.

(D) THE COMMUNITY FORENSIC AFTERCARE PROGRAM FORENSIC REVIEW BOARD SHALL MAINTAIN A WRITTEN RECORD CONTAINING ITS FINDINGS, REASONING, AND RECOMMENDATIONS.

The CFAP has an existing FRB, and this amendment would clarify its role. OPD supports this amendment because it will allow for the CFAP FRB to continue to make decisions on eligibility to remain on conditional release, but it will clarify that the Department's reasoning needs to be recorded in writing.

**E. Add counsel for committed persons to receive information related to violations.**

At Page 5, line 21, ADD:

(E) IF THE DEPARTMENT RECEIVES INFORMATION RELATED TO AN ALLEGED VIOLATION THAT COULD RESULT IN A REPORT TO THE APPROPRIATE STATE'S ATTORNEY'S OFFICE, THE COMMUNITY FORENSIC AFTERCARE PROGRAM SHALL PROVIDE ALL AVAILABLE INFORMATION TO COUNSEL OF RECORD FOR THE COMMITTED PERSON.

OPD supports this amendment so that we can obtain information related to the alleged violation before a hospital warrant is issued in case there is a way to adjust the treatment plan to address the issue in the community. Our clients are entitled to a hearing within 10 days of admission after a

hospital warrant is served. Defense counsel already receives notice that a violation has been reported to the appropriate state's attorney's office. We do not currently get any information related to the facts, and if we are not in contact with the client, it can be challenging to address the issue. CFAP currently takes 10 business days to respond to requests for records. This bill would require them to turn records over within 48 hours. By providing us with the facts associated with the violation, we would know where to start, and we could take steps to resolve issues in the community before our client is deprived of their liberty.

**F. Add appointment of an expert witness**

At Page 3, line 30, ADD:

(G) THE FORENSIC REVIEW BOARD SHALL APPOINT A REPRESENTATIVE EXPERT, WHO IS NOT A MEMBER OF THE COMMITTED PERSON'S TREATMENT TEAM, TO TESTIFY AS TO THE DEPARTMENT'S POSITION AT ANY HEARING ON RELEASE PURSUANT TO THIS TITLE.

OPD supports this amendment because it will protect our client's relationship with their treating psychiatrist from deteriorating. Even when a treating psychiatrist disagrees with the FRB, they are required to testify to the Department's FRB opinion at the hearing. This results in a breakdown of trust with their treating psychiatrist for our clients. They believed their psychiatrist was supporting their release and planning for their discharge, but at a hearing, the psychiatrist can only speak to the FRB's ultimate opinion on dangerousness and eligibility for release. Some facilities already use an FRB-designated expert to testify at a hearing, and this is a more ethical and functional approach. The FRB expert should be board-certified in forensic psychology or psychiatry so that they are trained to assess safety risks and discuss the reasoning behind the FRB's recommendation for or against release with or without conditions. The treating psychiatrist could still be called as a fact witness to speak to their current observations on the unit. This amendment would result in more clarity at hearings and appropriately distinguish the roles of the testifying expert and the treating clinician, which is essential for the client's progress. Where the Department currently uses an FRB expert to testify to its position, this strengthens and clarifies the department's position.

**G. Change advocate to include private counsel's designees.**

Page 5, line 19, CHANGE:

(2) A COMMITTED PERSON MAY APPOINT AN ADVOCATE, INCLUDING A ~~REPRESENTATIVE FROM THE OFFICE OF THE PUBLIC DEFENDER~~ DESIGNEE OF COUNSEL OF THE COMMITTED PERSON, TO ATTEND A MEETING HELD UNDER PARAGRAPH (1) OF THIS SUBSECTION.

OPD supports this amendment. Defense counsel of record should be able to send an advocate from their office to CFAP meetings. We already send our social workers and investigators to treatment team meetings as needed. This will allow our clients to do the same when they are having issues in the community or when we are litigating issues related to requests for modification of conditional release.

#### **H. Add meeting notifications section**

At Page 2, line 29, ADD:

(1) THE FORENSIC REVIEW BOARD SHALL NOTIFY THE COMMITTED PERSON AND COUNSEL OF RECORD 10 DAYS IN ADVANCE THAT THE FORENSIC REVIEW BOARD WILL BE HAVING A MEETING CONCERNING THEIR CASE.

(2) THE FORENSIC REVIEW BOARD SHALL NOTIFY THE COMMITTED PERSON AND COUNSEL OF RECORD OF THE RECOMMENDATION ON RELEASE WITHIN 10 DAYS OF THE MEETING.

(3) THE FORENSIC REVIEW BOARD SHALL INCLUDE THE WRITTEN RECORD OF ITS FINDINGS AND RECOMMENDATIONS IN THE MEDICAL RECORD WITHIN 10 DAYS OF THE MEETING.

OPD supports this amendment because it would provide advance notice of FRB meetings and recommendations so that we can prepare to discuss the outcomes of these meetings with our clients. We already rely heavily on medical records to assess the Department's position and discuss our client's options. This will ensure that we know whose case is coming up for review so that we can communicate with our clients about their right to a hearing, and we can discuss their progress toward release based on when we see in the FRB record after the meeting.

#### **I. Add a treatment plan implementation requirement**

At Page 3, line 24, ADD:

(F) THE TREATMENT TEAM SHALL IMPLEMENT THE RECOMMENDATIONS OF THE FORENSIC REVIEW BOARD AND MAKE ARRANGEMENTS FOR NECESSARY TREATMENT TO REHABILITATE THE COMMITTED PERSON IN ACCORDANCE WITH THE HEALTH - GENERAL ARTICLE, SECTION 10-706.

OPD supports this amendment because we often see that facilities lack the necessary treatment to overcome barriers to discharge. For example, substance use treatment and individual therapy often have waitlists because of a lack of counselors and psychologists. This will reinforce that the Department is obligated to provide necessary treatment as recommended by the FRB.

**For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on SB 43.**

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