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POSITION ON PROPOSED LEGISLATION

BILL: HB 779 - Correctional Services - Medication Review Committee - Administration of Psychotropic Medication to an Incarcerated Individual

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: Tuesday, February 18, 2025

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on HB 779.

House Bill 779 proposes to create Licensed Mental Health Infirmaries and permit them to forcibly medicate incarcerated people. OPD's concerns with this bill are five-fold. First, administering medications against a person's will is dangerous, and there is a high risk of harm and this bill does not sufficiently mitigate those risks. Second DPSCS already has a poor track record of administering health care and OPD urges this committee to be briefed by the Office of Legislative Audits before issuing a favorable report. Third, HB 779 does not comport with existing Maryland Law regarding forcibly medicating hospital patients. Fourth, this bill does not adequately protect the constitutional rights of the people being forcibly medicated. Fifth, this bill will be costly as people are entitled to counsel at forcible medication hearings. Sixth, the bill implies, but does not specify, these actions to be undertaken in a "Licensed Mental Health Infirmary". Moreover, the Office of Health Care Quality (OHCQ) does not license "Mental Health Infirmaries", although they have licensed Health Facilities within a Correctional Institution.

1. Forcibly medicating people is dangerous and carries with it high risks of harm.

Forcibly medicating incarcerated people will require Corrections Officers to physically extract people from cells and hold them down so that medical staff can forcibly inject them. This process itself is inherently dangerous to both the incarcerated individuals and staff. Additionally many psychotropic medications have dangerous side effects that require monitoring by physicians and nurses. There is no indication that DPSCS could or would provide adequate oversight to ensure

the safety and well being of patients being forcibly medicated as contemplated in HB 779. The Department of Legislative Audits released a report on its fiscal audit of DPSCS healthcare contracts in November 2024[1], and gave a presentation to the Joint Audit and Evaluation Committee regarding this audit as well as the audit of DPSCS Central Operations in December 2024.[2] The audit found that DPSCS could not support that staffing levels were sufficient to provide all required services[3]. What's more DPSCS expressed concern with the contractors ability to recruit and retain the necessary levels of staff *prior* to awarding the contracts.[4] Assuming that DPSCS would create a Licensed Mental Health Infirmary in most if not all of its facilities, there is no evidence to suggest that DPSCS either already has medical staff required to do this, or that they will be able to have sufficient staff by October 2025.

Additionally, forcibly medicating people requires oversight and monitoring in an inpatient psychiatric setting in order to ensure the safety and well being of all involved. Currently the Office of Health Care Quality and Disability Rights Maryland conduct on site inspections of hospitals, this bill makes no provision for the oversight needed when forcibly administering medications.

2. DPSCS already has a poor track record of administering health care.

As the Legislative Audit concluded, DPSCS has routinely failed to provide for critical physical and mental health examinations. DPSCS “did not follow up with the mental health contractor to ensure that missing screenings and incomplete physical exams were completed.”[5] The Audit found that in just three months, DPSCS’s mental health contractor failed to evaluate an incarcerated individual for suicide risk 548 times. In the same three months, the contractor failed to examine an incarcerated individual’s mental health 682 times.[6] Accordingly, the Audit concluded that DPSCS consistently failed to provide adequate oversight for the evaluation of clients’ physical and mental health. The Department’s failure to ensure routine evaluations and examinations indicates that the Department cannot and would not adequately provide treatment as complex and precarious as managing and forcibly administering psychotropic medication. In short, DPSCS has inadequate protections to monitor patients side effects, adverse reactions, or the risk of long term and permanent damage from psychotropic medications.

3. HB779 does not comport with existing Maryland Law regarding forcibly medicating hospital patients.

In the analogous Health General statute (HG § 10-708), which provides the process for administering compelled medication in MDH facilities, the panel must “[a]ssist the individual and the treating physician to arrive at a mutually agreeable treatment plan” before determining whether

to approve the administration of medication. HB 779, under subsection (J), includes no such requirement to support a collaborative relationship between the incarcerated individual and their doctor; this intimates a preference for compelled medication. HB 779 fails to provide the level of transparency seen in HG § 10-708. For instance, HB 779 requires the committee to make a decision in private; per HG 10-708, the decision can be made in private or public, including in the presence of the patient. Critically, HB 779 allows a committee to compel medication where alternative treatments are possible, where HG §10-708 would not.

4. HB 779 does not adequately protect the constitutional rights of the people being forcibly medicated

All people, including those who are incarcerated, have a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth amendment.[7] This includes the right to an appeal and the right to counsel. HB 779 provides no meaningful appeal. By comparison, HG§10-708 708 provides for de novo review by an Administrative Law Judge. Appeals as provided in HB 779 are reviewed by the Clinical Services Management Team, including the Director of Mental Health who appoints the committee members and other individuals who likely supervise committee members. Accordingly, review is not impartial. Further, the bill provides no comparable guidance as to the assessment of appeals. Nor does HB 779 provides no right to an administrative hearing. By contrast, HG § 10-708 expressly provides an administrative hearing to appeal a decision to compel medication. Lastly, HB 779 makes no provision for a supplying people with counsel, which is a constitutional right given the deprivation of liberty involved.

5. HB779 is unclear about where the forced medication would take place.

HB 779 uses the phrase “Licensed Mental Health Infirmary”, which appears no where in Maryland Code or COMAR. However, OHCQ has licensed three Health Facilities Within a Correctional institution. Those facilities are located at the Patuxent Institution, Maryland Correctional Institution for Women and Baltimore City Booking and Intake Center. Assuming, for the sake of argument that these are the facilities contemplated in HB779’s “Licensed Mental Health Infirmary” the bill fails to specify whether a person must be housed within one of these facilities in order to be forced medicated. Another reading of the proposed bill is that medication review panels would be located within a Licensed Mental Health Infirmary, but the forcible medication itself could take place at any DPSCS location. For all of the reasons outlined above, OPD strongly opposes that potential practice.

6. Costs associated with forced medication proceedings.

While the bill does not expressly provide the right to counsel, the Due Process Clause of both the United States and Maryland constitutions require it where there is the deprivation of a liberty interest.[8] In similar hospital situations Legal Aid and private attorneys have contracts to provide counsel at these hearings. The Office of the Public Defender has no information about the number of people DPSCS would be likely to forcibly medicate. However, if forced medication hearings were to happen only at the three currently licensed Health Facilities within Correctional Institutions this would require at least one secretary and three attorneys depending on the number and frequency of hearings. The cost for those staff would be approximately \$334,000. In addition to attorneys and support staff, we would need to consult with experienced psychiatrists regarding the medical necessity of the proposed medication. All told we estimate that this could cost the Office of the Public Defender approximately \$500,000 for the first year that this bill were in effect.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on HB 779.

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

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[1] Audit Report. Department of Public Safety and Correctional Services Incarcerated Individual Healthcare Contracts. November 2024.
<https://dls.maryland.gov/pubs/prod/NoPbITabPDE/DPSCS-HealthCont24.pdf>

[2] Department of Legislative Services, Office of Legislative Audits. Presentation to Joint Audit and Evaluation Committee. December 10, 2024. All reports and a pdf of the presentation and meeting video can be found :
<https://www.ola.state.md.us/Search/Report?keyword=&agencyId=&dateFrom=&dateTo=>

[3] Audit Report at page 11.

[4] Id. At page 12.

[5] Audit at page 16.

[6] Audit at page 17.

[7] *Washington v. Harper*, 494 U.S. 210 (1990); *Williams v. Wilzack*, 319 Md. 485 (1990).

[8] *Williams v. Wilzack*, 319 Md. 485 (1990).