



**Testimony for the House Judiciary Committee  
February 6, 2018**

TONI HOLNESS  
PUBLIC POLICY DIRECTOR

**HB 385 Criminal Procedure - Incompetency and Criminal Responsibility**

**UNFAVORABLE**

The ACLU of Maryland urges an unfavorable report on HB 385, which introduces an unacceptably liberal definition of ‘facility’ for treating persons found incompetent to stand trial (IST). The bill also creates a 21-day grace period for the Maryland Department of Health to place someone deemed IST in a facility after the Court has issued a commitment order.

Reforms are certainly needed to improve the treatment of persons with mental illness in the criminal justice system, however HB 385 threatens to undermine the potential for greater progress in this area.

AMERICAN CIVIL  
LIBERTIES UNION  
OF MARYLAND

MAIN OFFICE  
& MAILING ADDRESS  
3600 CLIPPER MILL ROAD  
SUITE 350  
BALTIMORE, MD 21211  
T/410-889-8555  
or 240-274-5295  
F/410-366-7838

WWW.ACLU-MD.ORG

COLEMAN BAZELON  
PRESIDENT

SUSAN GOERING  
EXECUTIVE DIRECTOR

ANDREW FREEMAN  
GENERAL COUNSEL

**The definition of ‘Facility’ is too broad**

HB 385 proposes that the Health department be given the flexibility to admit IST individuals to a loosely defined ‘facility.’ The bill defines ‘facility’ to include any public or private clinic, hospital, or other institution that provides or purports to provide treatment or other services for individuals who have mental disorders. Health Gen. Art. §10-101. This definition could include correctional facilities, many of which purport to provide treatment for mental illness. Such an allowance does nothing to require that persons who need treatment actually receive treatment in a sound setting. In other words, HB 385 could result—and very likely will result—in a situation wherein persons deemed IST continue to be warehoused in correctional facilities, with inadequate or no care at all.

A more appropriate definition of facility would exclude correctional facilities.

**Delayed health treatment may constitute an Eighth Amendment violation**

The state is obligated to provide inmates with adequate medical care and failure to do so may amount to a constitutional violation under the Eighth Amendment to the U.S. Constitution. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). This is true regardless of the agency or personnel providing the care. *West v. Atkins*, 487 U.S. 42, 57-58 (1988); *Richardson v. McKnight*, 521 U.S. 399 (1997).

Moreover, adequate healthcare means timely healthcare. Serious delays in access to medical personnel can constitute an eighth amendment violation.<sup>1</sup>

<sup>1</sup> *Estelle v. Gamble*, 429 U.S. at 104; *Weyant v. Okst*, 101 F.3d 845, 856-57 (2nd Cir. 1996) (delay of hours in getting medical attention for diabetic in insulin shock); *Natale v. Camden County*

Defendants in *Powell v. DMH*, were ordered to a treatment facility within one day of the court's order, but were not in fact placed in treatment until 12-36 days later. This delay is not only bad policy, but implicates the constitutional rights of the defendants.

HB 385 would allow the Health Department 21 days to arrange for an individual's placement in a treatment facility. 21 days is far too long. Since this matter has been under investigation, the Health Department has made great strides—in November 2017, the average wait time was 12 days; in December 2017, the wait was 7 days; and as of January 18, 2018, the wait was 19 days.<sup>2</sup> HB 385 proposes a 21-day limit, which is *longer* than the current average waiting period. A time limit that is longer than the current average is not a functional limit.

Moreover, the proposed language under HB 385 requires only that the Health Department 'arrange' for the defendant's admission to a facility. Under the bill, the individual need not actually be placed in a facility within 21 days, the Department simply must make arrangements for the individual's placement within 21 days. This language does nothing to protect mentally ill persons from continuing to languish in jail awaiting treatment.

### **Jails and prisons have become the mental health providers of last resort**

The dearth in treatment beds is both a Maryland problem and a national concern. According to a study published in the *Psychiatric Services* journal, more than 8 million Americans suffer from serious mental illness.<sup>3</sup> That study also found that between 2005–2010, the availability of psychiatric beds decreased by 14%.<sup>4</sup> This means that in 2010, there were only 14 beds available per 100,000 people.

According to the Health Department, a \$92.5 million 100-bed facility would need to be created to maintain year-round access to treatment beds ordered by the courts. It is unacceptable that the backlog of treatment has been allowed to worsen to the current situation in which the state is now forced to expend an inordinate amount of financial resources in one fall swoop, essentially to play catch up for years, perhaps decades of neglectfulness. This situation begs the question, in the absence of litigation, unfavorable media attention, and now legislation, what intention did the Department have for remedying this backlog?

---

*Correctional Facility*, 318 F.3d 575 (3rd Cir. 2003) (delay of 21 hours in providing insulin to diabetic); *Wallin v. Norman*, 317 F.3d 558 (6th Cir. 2003) (delay of one week in treating urinary tract infection, and one day in treating leg injury); *Murphy v. Walker*, 51 F.3d 714, 719 (7th Cir. 1995) (two-month delay in getting prisoner with head injury to a doctor).

<sup>2</sup> Maryland General Assembly, HB 385 Criminal Procedure - Incompetency and Criminal Responsibility, Fiscal and Policy Note (2018)

<sup>3</sup> Judith Weissman, Ph.D., J.D., Disparities in Health Care Utilization and Functional Limitations Among Adults With Serious Psychological Distress, 2006–2014 (April 17, 2017).

<sup>4</sup> NPR, How The Loss Of U.S. Psychiatric Hospitals Led To A Mental Health Crisis (November 30, 2017).

**The influx of persons with serious mental illness to jails and prisons is a symptom of broader criminal justice failures**

In many ways, the courts are the backstop to inadequate policing practices, which fail to identify and appropriately de-escalate encounters with persons suffering from serious mental illness. Between 2010 – 2014, thirty-eight percent of those who died (41 people) in police encounters presented in a way that suggested a possible medical or mental health issue, disability, substance use disorder or similar issue.<sup>5</sup> The Treatment Advocacy Network estimates that nationally, at least 1 in 4 fatal law enforcement encounters involves a person with serious mental illness.<sup>6</sup>

These statistics indicate that persons with mental illness are not appropriately identified and served at their first encounter with law enforcement, which results in this community being arrested, charged and detained instead of being redirected to treatment. It is therefore important that when these persons come before the courts, the courts offer a meaningful opportunity for treatment and not simply jail these persons, thereby compounding the ills of other aspects of the criminal justice system.

For the foregoing reasons, the ACLU of Maryland urges an unfavorable report on HB 385.

---

<sup>5</sup> ACLU of Maryland, Briefing Paper on Deaths in Police Encounters in Maryland, 2010 – 2014 (March 2015).

<sup>6</sup> Treatment Advocacy Center, Overlooked in the Undercounted, The Role of Mental Illness in Fatal Law Enforcement Encounters (December 2015).