



Testimony for the Senate Finance Committee
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**SB 864 – Health – Emergency Evaluatees and Involuntarily Admitted or
Committed Individuals - Procedures**

JOANNA DIAMOND
ADVOCACY CONSULTANT

SUPPORT

The American Civil Liberties Union of Maryland (ACLU) supports SB 864, which clarifies that the Office of the Public Defender (OPD) has the right to access patients' medical files in advance of those patients' involuntary commitment hearings, competency release hearings, and Not Criminally Responsible release hearings (collectively "the hearings").

Maryland and federal law require the OPD to have timely access to patients' medical files for involuntary commitment hearings, competency release hearings, and Not Criminally Responsible release hearings. It is well-established Maryland law that individuals are afforded the right to counsel at involuntary commitment hearings, competency release hearings, and Not Criminally Responsible release hearings.¹ Due process also requires OPD to represent individuals during the hearings.² The hearings "constitute[] a significant deprivation of liberty that requires due process protection"³ that require the right to counsel.⁴

However, this right can only be realized if there is effective assistance of counsel.⁵ Without timely access to medical files, OPD cannot provide effective assistance of counsel. During the hearings, medical assessments and medical

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

¹ Md. Code Ann., Health–Gen. § 10-631(a)(2) (2017) (expressly recognizing the right to counsel during involuntary commitment hearings and acknowledging the importance of the role played by OPD); See also Md. Code Ann., Crim. Proc. § 16-204(b)(1)(iv) (2017) (charging OPD with the task of representing "[i]ndigent defendants . . . [in] any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result"); Md. Code. Regs. 10.21.01.06 (2017) (requiring staff to give notice of "the availability of representation at the hearing through the Office of the Public Defender, Mental Health Division").

² *Johnson v. Solomon*, 484 F. Supp. 278, 292 (D. Md. 1979) ("Today there can be 'little doubt that a person detained on grounds of mental illness has a right to counsel, and to appointed counsel if the individual is indigent'") (quoting *Lessard v. Schmidt*, 349 F. Supp. 1078, 1097 (E.D. Wis. 1972); see also *Dorsey v. Solomon*, 435 F. Supp. 725, 733 (D. Md. 1977) ("[T]his court is satisfied that the requirements of both the due process clause and the equal protection clause call for the mandatory appointment of counsel in Maryland for indigent insanity acquittees.").

³ *Addington v. Texas*, 441 U.S. 418, 425 (1979).

⁴ The fact that individuals detained in mental facilities may lack capacity or are unable to manage any potential financial resources, those individuals are considered "indigent" for the purposes of OPD representation. Additionally, when an individual is detained in an emergency department or admitted to a mental facility, that individual's ability to make phone calls and access the internet is limited and under the discretion of facility staff. Individuals may even be physically restrained or secluded, unable to contact those outside the facility. Thus, each individual in the hearings has a right to representation by OPD.

⁵ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *State v. Flansburg*, 345 Md. 694, 703, 694 A.2d 462, 467 (1997) (the right to counsel contains within it the right to effective assistance of counsel).

records are the lynchpin of the case. The records contain information that directly pertains to the issues in the hearing, including information about clients' behavior, symptoms, and psychiatric illnesses. Additionally, medical records contain the legal files that formalize and document the process by which clients are detained.⁶ Each party also has the right "to offer evidence of his own."⁷ OPD must have access to these records with ample time for analyzing the records, contacting potential witnesses, consult with relevant experts,⁸ and preparing their client's case. Indeed, the Supreme Court has consistently found that counsel has a due process right to relevant information and that both sides must have "ample opportunity to investigate certain facts crucial to the determination."⁹ The ability to have swift access to medical records in order to provide ample opportunity for preparation is particularly relevant in Involuntary Admission (IVA) hearings, which must occur by law within 10 days.¹⁰ Counsel's access to relevant information is a bedrock principle of due process in the United States. OPD's only access to these crucial files is through the hospital. Without access to medical files, OPD cannot provide effective assistance of counsel as required by law.

There has been confusion as to whether the Health Insurance Portability and Accountability Act ("HIPAA") prevents mental facilities from providing access to the records. SB 864 clarifies this confusion. Any interpretation of HIPAA that prevents OPD from accessing these medical records is legally untenable. This would mean that OPD cannot prepare for their clients' hearings and that patients would not be provided effective assistance of counsel, in violation of their due process rights. Additionally, Maryland statute permits the disclosure of confidential medical information to "a government agency performing its lawful duties as authorized by an act of the Maryland General Assembly or the United States Congress."¹¹ Considering Maryland law expressly provides the right to counsel during involuntarily commitment hearings¹² and the effective of assistance to counsel implicit within this right, disclosure of medical records would be not only be permitted by law, but arguably mandated.

In order for OPD to provide their clients effective counsel at the hearings, they must be given timely access to clients' medical files in order to thoroughly review them in preparation for the hearings. Therefore, we respectfully request a favorable report on SB 864.

⁶ For example, emergency petitions, certificates, applications for involuntary commitment, notices of admission and advisement of rights, and notices of hearings all have specific statutory procedural requirements, and these files are routinely contained in the medical records.

⁷ *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

⁸ Consultation with experts is a "crucial" step as experts "know the probative questions to ask of the opposing party's psychiatrist and know how to interpret their answers." *Moore v. State*, 390 Md. 343, 380, 889 A.2d 325, 347 (2005) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985)).

⁹ *Williams v. Florida*, 399 U.S. 78, 82 (1970); see also *Md. Dep't of Human Resources v. Bo Peep Day Nursery*, 317 Md. 573, 597, 565 A.2d 1015, 1026 (1989) (one of the "essential elements" of due process is "a chance to confront and cross-examine witnesses or evidence to be used against the individual").

¹⁰ Md. Code Ann., Health-Gen. § 10-632(b) (2017).

¹¹ Md. Code Ann., Health-Gen. § 4-305 (2017).

¹² See Md. Code Ann., Health-Gen. § 10-631(a)(2).