

Department of Legislative Services  
 Maryland General Assembly  
 2017 Session

FISCAL AND POLICY NOTE  
 First Reader

House Bill 1474 (Delegate Krebs)  
 Health and Government Operations

Office of Health Occupations

This bill establishes the Office of Health Occupations (OHO) in the Department of Health and Mental Hygiene (DHMH), which consists of 22 “health occupations boards,” including the renamed Natalie M. LaPrade State Board on Medical Cannabis and the renamed State Board on Kidney Disease. The director of OHO must be appointed by and be responsible directly to the Governor. The administrative oversight, duties, and responsibilities of the Secretary of Health and Mental Hygiene relating to the boards are transferred to the director. The bill also establishes a State Health Occupations Management Board (management board) in OHO to oversee the boards and the office.

The bill takes effect January 1, 2018.

Fiscal Summary

**State Effect:** DHMH expenditures increase by *at least* \$96,100 beginning in FY 2018 to establish OHO, assuming certain positions transfer to OHO. Special fund expenditures for the health occupations boards increase to reimburse for these expenses through the indirect cost assessment. Future years reflect annualization and elimination of one-time costs. Revenues are likely not affected

(in dollars)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Revenues	\$0	\$0	\$0	\$0	\$0
GF/SF Exp.	96,100	176,600	184,100	192,100	200,500
Net Effect	(\$96,100)	(\$176,600)	(\$184,100)	(\$192,100)	(\$200,500)

*Note: ( ) = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease*

**Local Effect:** None.

**Small Business Effect:** Minimal.

## Analysis

**Bill Summary:** “Health occupations board” means a board authorized to (1) issue a license, certificate, or registration to an individual to practice a health occupation or profession under the Health Occupations Article; (2) issue a license to a person to grow, process, or dispense medical cannabis; register certifying providers, medical cannabis grower agents, processor agents, dispensary agents, and independent testing laboratories; and issue identification cards to qualifying patients and caregivers to obtain medical cannabis; and (3) implement the Kidney Disease Program.

### *Office of Health Occupations*

On January 1, 2018, the bill transfers the responsibility for carrying out the licensing services for health occupations in the State from DHMH to OHO, along with all appropriations held by the boards and all functions, powers, duties, records, property, equipment, liabilities, and obligations. The bill does not impact the term of office for any board member in office on the date the bill goes into effect. The administrator or executive director of each board serves at the pleasure of the director and the management board. OHO includes the following 22 units, all of which are subject to the authority of the director of OHO rather than the Secretary of Health and Mental Hygiene:

- State Acupuncture Board
- State Board of Examiners for Audiologists, Hearing Aid Dispensers, and Speech-Language Pathologists
- State Board of Chiropractic Examiners
- State Board of Dental Examiners
- State Board of Dietetic Practice
- State Board on Kidney Disease
- State Board of Environmental Health Specialists
- State Board of Massage Therapy Examiners
- State Board of Morticians and Funeral Directors
- Natalie M. LaPrade State Board on Medical Cannabis
- State Board of Nursing
- State Board of Examiners of Nursing Home Administrators
- State Board of Occupational Therapy Practice
- State Board of Examiners of Optometry
- State Board of Pharmacy
- State Board of Physical Therapy Examiners
- State Board of Physicians
- State Board of Podiatric Medical Examiners
- State Board of Professional Counselors and Therapists
- State Board of Examiners of Psychologists
- State Board of Social Work Examiners
- State Board for Certification of Residential Child Care Professionals

The bill preserves composition and appointment procedures for each board, but it adds an additional avenue to nomination for a vacant position on specified health occupations boards – submission of a statement of nomination signed by at least 15 licensees regulated by that board.

### *Power of the Director*

The director may not engage in the clinical practice of a regulated health occupation or profession. The director must perform multiple specified duties, including (1) managing, supervising, and administering the office; (2) performing or consolidating any administrative services or functions; (3) reviewing and approving, modifying, or disapproving board plans, proposals, projects, and decisions; (4) reviewing, revising, and approving before final adoption any board regulations; (5) employing personnel as required for the performance of the office; (6) receiving any complaints against a health occupations board; (7) monitoring the status of actions taken by a health occupations board until the closure of each case; and (8) providing investigative and other services as needed to enforce the boards' respective statutes and regulations. The director of OHO may adopt regulations to implement the office.

### *State Health Occupations Management Board*

The management board consists of seven members appointed by the Governor, including one member each from the State Board of Physicians, the State Board of Nursing, the State Board of Dental Examiners, and the State Board of Pharmacy, and three members from three other health occupations boards. The director must select a chair from among the members. Management board members serve two-year terms, are limited to two consecutive full terms, and may be removed from the management board by the director for good cause. Members may not receive compensation but are entitled to reimbursement as provided in the State budget.

The management board must meet at least twice annually. The management board has several specified responsibilities. The management board must, among other actions, (1) evaluate all health care occupations and professions in the State, including those not regulated under the Health Occupations Article, to consider whether they should be regulated; (2) serve as a forum for resolving conflicts between boards; (3) consider the need to develop standards to evaluate the competence of the regulated professions represented by the health occupations boards; (4) review and comment on regulations proposed or adopted by individual boards; (5) review periodically the investigatory, disciplinary, and enforcement processes of OHO and the boards; (6) examine scope of practice conflicts involving regulated and unregulated health occupations and professions; and (7) determine compliance with practice acts in disciplinary cases before the health occupations boards and recommend appropriate actions against individuals for violations.

### *Other Provisions*

The State Commission on Kidney Disease is renamed the State Board on Kidney Disease and is transferred from the Health-General Article to the Health Occupations Article. The Natalie M. LaPrade Medical Cannabis Commission is renamed the Natalie M. LaPrade State Board on Medical Cannabis and is transferred from the Health-General Article to the Health Occupations Article. Likewise, the Natalie M. LaPrade Medical Cannabis Commission Fund is renamed the Natalie M. LaPrade State Board on Medical Cannabis Fund. The fund must be used to cover the actual documented direct and indirect costs of fulfilling the statutory and regulatory duties of the board as provided by the Health Occupations Article.

The bill repeals several specific provisions relating to the Secretary of Health and Mental Hygiene's authority and responsibilities relating to health occupations boards, including provisions relating to the State Board of Physicians. The bill specifies that the board must *hire* a sufficient number of investigators and hearing officers rather than be assigned a sufficient number of such staff by the Secretary.

**Current Law:** "Health occupations board" means a board authorized to issue a license, certificate, or registration under the Health Occupations Article.

The power of the Secretary of Health and Mental Hygiene over plans, proposals, and projects of units in DHMH does not include the power to disapprove or modify any decision or determination that a board or commission makes. The power of the Secretary to transfer staff or functions of units in DHMH does not apply to any staff of a board or commission or to any functions that pertain to licensing, disciplinary, or enforcement authority, or to any other authority specifically delegated by law to a board or commission. The bill repeals these provisions.

Generally, for each health occupations board any person aggrieved by a final decision of a board may not appeal to the Secretary (or in some cases the Board of Review) but may take a direct judicial appeal as provided by the Administrative Procedure Act. The bill repeals language specifying that the individual may not appeal to the Secretary (or the Board of Review).

The Secretary of Health and Mental Hygiene may set the compensation of an employee of the State Board of Physicians in a position that is unique to the board, requires specific skills or experience to perform the duties of the position, and does not require the employee to perform functions that are comparable to functions performed in other units of the Executive Branch of State government. The Secretary of Budget and Management, in consultation with the Secretary, must determine the positions for which the Secretary may set compensation. The board must be assigned a sufficient number of assistant Attorneys

General by the Attorney General and investigators and hearing officers by the Secretary of Health and Mental Hygiene.

**Background:** Under the Office of the Secretary of Health and Mental Hygiene, 20 health occupations boards regulate and discipline more than 300,000 individual health care professionals. The boards seek to protect the public by ensuring that practicing health professionals are properly credentialed and licensed to provide high-quality services to the citizens of Maryland. Each board also receives, investigates, and resolves complaints about regulated professionals and assists in establishing parameters for the practice of each regulated health profession.

Also under the umbrella of the health occupations boards (but within the Health-General Article) is the Maryland Commission on Kidney Disease. The commission certifies qualified dialysis and transplant centers, establishes fees, maintains a roster of certified centers, enforces current statute and regulations, adopts standards of practice, investigates complaints, and takes disciplinary action against centers where appropriate.

The Natalie M. LaPrade Medical Cannabis Commission is an independent, 16-member commission within DHMH (membership includes the Secretary of Health and Mental Hygiene and 15 other members appointed by the Governor) responsible for the implementation of the State's program to make medical cannabis available to qualifying patients in a safe and effective manner. The commission oversees licensing, registration, inspection, and testing related to the State's medical cannabis program and provides relevant program information to patients, physicians, growers, dispensaries, processors, testing laboratories, and caregivers. The commission is currently budgeted within the DHMH boards and commissions although it is established within the Health-General Article.

#### *North Carolina Board of Dental Examiners Ruling*

The U.S. Supreme Court's 2015 decision in *N.C. Board of Dental Examiners v. Federal Trade Commission* held that, in order to invoke state action immunity from federal antitrust liability, a state board on which a controlling number of decision makers are active market participants must satisfy the two-pronged test established in *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*: (1) clear articulation of state policy and (2) active supervision by the State.

In an October 1, 2015 memorandum, the Office of the Attorney General (OAG) addressed both prongs of the *Midcal* test as they relate to State licensing boards and commissions. First, the memorandum indicated that the General Assembly has clearly articulated a State policy that a variety of occupations and professions are best regulated by market

participants by establishing boards and authorizing them to establish requirements for licensure, issue licenses, and discipline licensees.

Regarding active supervision, the memorandum noted several instances where the adequacy of the State's supervision of boards and commissions could be considered insufficient in light of the *N.C. Dental* decision. The OAG memorandum presented two recommendations:

- *Executive Order:* The Governor should issue an executive order that requires active review by the appropriate Secretary (or the Secretary's designee), of regulations that (1) would discourage competition; (2) would unfairly restrict entry into a regulated profession or occupation; or (3) are otherwise contrary to the public interest. The executive order should also direct the Secretaries of Agriculture; the Environment; and Labor, Licensing, and Regulation (or their designees) to exercise their authority to supervise the boards in their departments to prevent anticompetitive actions. Finally, the executive order should direct the health occupations boards, whose actions are currently expressly outside the power of the Secretary of Health and Mental Hygiene to disapprove or modify, to carefully consider in consultation with board counsel whether proposed actions raise anticompetitive concerns and to document those discussions.
- *Statute:* A statute should be added to the Courts and Judicial Proceedings Article that expresses an intent that boards and their members are immune from antitrust liability for actions taken by the board under certain circumstances. The statute should also (1) require the Secretaries, or their designees, to review regulations; (2) authorize the Secretaries to revise or disapprove regulations and actions that would discourage competition, would unfairly restrict entry into a regulated profession or occupation, or are otherwise contrary to public interest; and (3) with respect to contested cases involving anticompetitive concerns or risks, require the Secretaries, or their designees, to review and approve board decisions to charge individuals with violations of practice acts.

The Federal Trade Commission (FTC) also issued guidance in October 2015 on active supervision of state regulatory boards controlled by market participants. FTC presented several factors that are relevant in determining whether the active supervision requirement has been met, including whether the supervisor issued a written decision approving, modifying, or disapproving the recommended action. FTC noted that a written decision demonstrates that the supervisor undertook the required meaningful review of the merits of the board's action.

**State Expenditures:** DHMH currently has an Office of Health Workforce Development under the Office of the Secretary that is intended to provide executive leadership, support,

and guidance to the health occupations boards and commissions. The office is funded with a combination of general and special funds (costs are reimbursed from the 18 special-funded boards). The office consists of two positions, an associate director and an administrator. The Department of Legislative Services (DLS) assumes that these two positions would be used for OHO, with the associate director position serving as the director of OHO. Given the required duties of OHO specified under the bill, additional staff are required to supplement these existing positions as discussed below.

OHO is required, among other duties, to review the plans, proposals, projects, and decisions of the boards; review and revise regulations; and receive complaints against the boards. OHO must also staff the management board, which is responsible for, among other duties, evaluating all health care occupations and professions to consider what degree of regulation, if any, is necessary; resolving conflicts between the boards; review board processes; and determine compliance with practice acts. Given the broad scope of OHO and the management board, DLS assumes that *at least* two additional positions are required: one full-time assistant Attorney General and one full-time health occupations analyst.

Thus, DHMH general fund expenditures increase by *at least* \$95,389 in fiscal 2018, which accounts for the bill’s January 1, 2018 effective date, and \$176,588 in fiscal 2019. This estimate reflects the cost of hiring two full-time positions to staff the office, in addition to the two existing positions in the Office of Health Workforce Development. It includes salaries, fringe benefits, one-time start-up costs, expense reimbursements for management board members, and ongoing operating expenses.

	<b><u>FY 2018</u></b>	<b><u>FY 2019</u></b>
New Positions	2	-
Salaries and Fringe Benefits	\$82,984	\$168,838
One-time Start-up Expenses	9,280	-
Ongoing Operating Expenses	<u>3,875</u>	<u>7,750</u>
<b>Total State Expenditures</b>	<b>\$96,139</b>	<b>\$176,588</b>

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses. To the extent that the breadth of duties for OHO necessitates more staff and/or existing staff does not transfer to OHO, costs are higher.

**Additional Comments:** House Bill 1471 of 2017 establishes the Office of Supervision of Occupational Boards in the Executive Branch to actively supervise specified occupational boards (including 20 of the 22 health occupations boards under this bill) to avoid liability under federal antitrust laws. That office must review and approve or reject any proposed occupational board regulation, policy, enforcement action, or other regulatory action before its adoption or implementation.

## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Governor's Office; Department of Budget and Management; Department of Health and Mental Hygiene; Department of Legislative Services

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