

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

House Bill 290

(Delegates Pendergrass and Rosenberg)

Judiciary

Criminal Law - Sexual Offenses by Health Care Practitioners

This bill prohibits a health care practitioner from engaging in nonconsensual sexual contact with a patient or client under the pretense of diagnostic or therapeutic intent or benefit. A violator is guilty of the felony of third degree sexual offense and subject to the current law maximum imprisonment for 10 years.

Fiscal Summary

State Effect: Potential minimal increase in general fund expenditures due to the applicable incarceration penalty provisions.

Local Effect: Potential minimal increase in general fund expenditures due to the applicable incarceration penalty provisions.

Small Business Effect: None.

Analysis

Current Law: “Health care practitioner” means a person who is licensed, certified, or otherwise authorized under the Health Occupations Article to provide health care services in the ordinary course of business or practice of a profession. Physicians may be subject to license denial, reprimand, probation, suspension, or revocation on the grounds of immoral or unprofessional conduct.

Each health occupation board authorized to issue a license or certificate under the Health Occupation Article is required to have regulations that prohibit sexual misconduct and

provide for the discipline of a licensee or certificate holder found to be guilty of sexual misconduct. For the purposes of the applicable regulations, “sexual misconduct” must be construed to include, at a minimum, behavior where a health care provider:

- has engaged in sexual behavior with a client or patient in the context of a professional evaluation, treatment, procedure, or other service to the client or patient, regardless of the setting in which professional service is provided;
- has engaged in sexual behavior with a client or patient under the pretense of diagnostic or therapeutic intent or benefit; or
- has engaged in any sexual behavior that would be considered unethical or unprofessional according to the code of ethics, professional standards of conduct, or regulations of the appropriate health occupation board.

If an applicant, licensee, or certificate holder engages in sexual misconduct in violation of applicable regulations, a board may: (1) deny a license or certificate to the applicant; (2) reprimand the licensee or certificate holder; (3) place the licensee or certificate holder on probation; or (4) suspend or revoke the license or certificate. These provisions do not negate any other disciplinary action under a board’s statutory or regulatory provisions.

Each year, every health occupation board must submit a statistical report to the Secretary of Health and Mental Hygiene, indicating the number of complaints of sexual misconduct received and the resolution of each complaint. The report must cover the period beginning October 1 and ending the following September 30 and be submitted by the board not later than the November 15 following the reporting period. The Secretary must compile the information received from the boards and submit an annual report to the General Assembly no later than December 31 of each year.

Current State regulations (10.32.17.00-.03) prohibit sexual misconduct against patients or key third parties by licensed or certified physicians or physician assistants. Sexual misconduct is defined as a health care practitioner’s behavior toward a patient, former patient, or key third party, which includes “sexual impropriety;” “sexual violation;” or engaging in a dating, romantic, or sexual relationship which violates the code of ethics of the American Medical Association, American Osteopathic Association, American Psychiatric Association, or other standard recognized professional code of ethics of the health care practitioner’s discipline or specialty.

Third degree sexual offense is a felony and the prohibitions provide that a person may not:

- engage in sexual contact with another without the consent of the other;

- employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
- suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;
- threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or commit the crime while aided and abetted by another;
- engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual;
- engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least four years older than the victim;
- engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or
- engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

A violator is subject to maximum imprisonment for 10 years.

Fourth degree sexual offense prohibits a person from engaging in: (1) nonconsensual sexual contact with another; (2) a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least four years older than the victim; or (3) vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least four years older than the victim. A violator is guilty of a misdemeanor and subject to maximum penalties of imprisonment for one year and/or a fine of \$1,000.

A cause of action related to a fourth degree sexual offense must be brought within one year. A cause of action related to a third degree sexual offense may be brought at any time. Only first and second degree sexual offenses are included among the crimes of violence that may subject a violator to mandatory minimum sentencing.

Maryland has four categories of persons convicted of sexual offenses: (1) a child sexual offender; (2) an offender; (3) a sexually violent offender; and (4) a sexually violent

predator. Sexual offenders are required to register with the Crimes Against Children and Sexual Offender Registry for a term of either 10 years or life, depending on the offense.

Background: This bill results from a recommendation of the October 2005 sunset review of the Maryland Board of Physicians (MBP) by the Department of Legislative Services. As reported by MBP, from October 1, 1999 to September 30, 2005, MBP opened 63 complaints of sexual misconduct, a significant number of sexual misconduct cases for physicians.

Under current law, the crime for an act of sexual contact by a health care professional under the pretense of diagnosis or treatment without the consent of the other would be a fourth degree sexual offense rather than the more serious third degree sexual offense. The third degree offense requires one or more aggravating factors such as a threat of serious physical injury.

In the setting of a physical exam by a health care professional, in which the patient undresses and follows the directives of the practitioner to facilitate the exam, nonconsensual sexual contact on the part of the practitioner generally would not include any aggravating factors and, therefore, the act would only be considered a fourth degree offense.

State Expenditures: General fund expenditures could increase minimally as a result of the bill's incarceration penalty due to more people being committed to Division of Correction (DOC) facilities and increased payments to counties for reimbursement of inmate costs. Although it is not known whether this bill would prompt additional prosecutions for third degree sexual offense under the circumstances addressed by the bill, it is assumed that the number of people convicted of this proposed crime would not be significant.

In any event, persons serving a sentence longer than 18 months are incarcerated in DOC facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$1,974 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new DOC inmate (including medical care and variable costs) is \$341 per month. Excluding medical care, the average variable costs total \$134 per month.

Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or DOC. The State reimburses counties for part of their incarceration costs, on a per diem basis, after a person has served 90 days. State per diem

reimbursements for fiscal 2007 are estimated to range from \$17 to \$65 per inmate depending upon the jurisdiction. Persons sentenced to such a term in Baltimore City are generally incarcerated in DOC facilities. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Local Expenditures: Expenditures could increase minimally as a result of the bill's incarceration penalty. Counties pay the full cost of incarceration for people in their facilities for the first 90 days of the sentence, plus part of the per diem cost after 90 days. Per diem operating costs of local detention facilities are expected to range from \$33 to \$119 per inmate in fiscal 2007.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Health and Mental Hygiene (Board of Physicians), Department of Public Safety and Correctional Services (Division of Correction), Department of Legislative Services

Fiscal Note History: First Reader - February 1, 2006
nas/jr

Analysis by: Guy G. Cherry

Direct Inquiries to:
(410) 946-5510
(301) 970-5510