

Department of Legislative Services  
Maryland General Assembly  
2016 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 944  
Judiciary

(Delegate Vogt, *et al.*)

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**Criminal Law - Professional Counselors and Therapists - Misconduct (Lynette's Law)**

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This bill prohibits a “professional counselor or therapist” from engaging in a sexual act, sexual contact, or vaginal intercourse with a person who was receiving therapy or counseling from the professional counselor or therapist at the time of or within the two years preceding the act, contact, or intercourse. Violators are guilty of third-degree sexual offense and subject to the current maximum penalty of imprisonment for up to 10 years.

The bill also prohibits a “professional counselor or therapist” (which is defined differently than it is in the provision above) from knowingly, and with the intent to deceive, making a false statement concerning the person’s criminal record on an employment application. Violators are guilty of a misdemeanor, punishable by imprisonment for up to six months and/or a fine of up to \$500.

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**Fiscal Summary**

**State Effect:** Minimal increase in general fund revenues from fines imposed in the District Court. Minimal increase in general fund expenditures due to the bill’s incarceration penalties.

**Local Effect:** Minimal increase in local expenditures due to the bill’s incarceration penalties. Revenues are not affected.

**Small Business Effect:** None.

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## Analysis

**Bill Summary:** For purposes of the third-degree sexual offense provisions, the bill defines a “professional counselor or therapist” as a person who is licensed or certified to practice (1) marriage and family therapy, alcohol and drug counseling, or professional counseling by the State Board of Professional Counselors and Therapists under Title 17 of the Health Occupations Article; (2) psychology by the State Board of Examiners of Psychologists under Title 18 of the Health Occupations Article; (3) bachelor social work, graduate social work, certified social work, or certified social work-clinical by the State Board of Social Work Examiners under Title 19 of the Health Occupations Article; (4) as a nurse psychotherapist by the State Board of Nursing under Title 8 of the Health Occupations Article; or (5) as a physician by the State Board of Physicians under Title 14 of the Health Occupations Article.

For purposes of the prohibition on false statements on employment applications, the bill defines a “professional counselor or therapist” as a person who is licensed or certified to practice marriage and family therapy, alcohol and drug counseling, or professional counseling by the State Board of Professional Counselors and Therapists under Title 17 of the Health Occupations Article.

**Current Law:** Under the State’s prohibition against third-degree sexual offense, a person may not:

- engage in sexual contact with another without the consent of the other and (1) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon; (2) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime; (3) 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 (4) 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 of the victim’s condition;
- engage in sexual contact with another if the victim is younger than age 14, and the person performing the sexual contact is at least 4 years older than the victim;
- engage in a sexual act with another if the victim is age 14 or 15 and the person performing the sexual act is at least age 21; or
- engage in vaginal intercourse with another if the victim is age 14 or 15 and the person performing the act is at least age 21.

A violator is guilty of the felony of third-degree sexual offense and subject to imprisonment for a maximum of 10 years.

The following individuals are included in the definition of a “regulated counselor or therapist” under Title 17 of the Health Occupations Article: (1) licensed clinical alcohol and drug counselors; (2) licensed clinical marriage and family therapists; (3) licensed clinical professional art therapists; (4) licensed clinical professional counselors; (5) licensed graduate alcohol and drug counselors; (6) licensed graduate marriage and family therapists; (7) licensed graduate professional art therapists; (8) licensed graduate professional counselors; (9) certified professional counselor-alcohol and drug counselors; (10) certified associate counselor-alcohol and drug counselors; (11) certified supervised counselor-alcohol and drug counselors; (12) certified professional counselor-marriage and family therapists; and (13) certified professional counselors.

Code of Maryland Regulations 10.58.03.09 (Code of Ethics – Sexual Misconduct) outlines sexual misconduct rules for licensees and certificate holders under the board.

These regulations prohibit counselors and therapists from engaging in sexual misconduct with a client:

- engaging in sexual behavior with a client or an individual with whom the client has a close personal relationship if there is a risk of exploitation or potential harm to the client;
- engaging in sexual behavior with a former client unless the prior professional contact was brief, peripheral, consultative, or indirect and it did not constitute a therapeutic relationship;
- terminating professional services or a professional relationship with a client in order to enter into a nonprofessional, social, or sexual relationship with a client or an individual with whom a client has a close personal relationship;
- providing professional services to an individual with whom a counselor has previously engaged in sexual behavior;
- engaging in sexual activity with a client or an individual in a close personal relationship with a client, on the pretense of therapeutic intent or benefit;
- representing to a client or individual in close personal contact with a client that sexual contact or activity by or with a counselor is consistent with or part of a client’s therapy; or
- suggesting, recommending, or encouraging a client to engage in a sexually provocative act.

Violation of the board's code of ethics is 1 of 19 grounds for discipline under the Maryland Professional Counselors and Therapists Act (MPCTA), codified under Title 17 of the Health Occupations Article, for which the board can deny an application or discipline any licensee or certificate holder. Related grounds include commission of an act of immoral or unprofessional conduct in the practice of clinical or nonclinical counseling or therapy.

Pursuant to Chapter 348 of 2013, all applicants for a license or certificate from the State Board of Professional Counselors and Therapists must submit to a criminal history records check (CHRC). Beginning with the renewal cycle in 2015, the board must require CHRCs on (1) selected renewal applicants as determined by board regulations and (2) former licensees filing for reinstatement after failure to renew a license for a period of one year or longer. An additional CHRC must be performed every six years. The board is prohibited from issuing or renewing a license or certificate if the required CHRC information has not been received. Chapter 348 also added a nineteenth ground for disciplinary action under MPCTA if an applicant, licensee, or certificate holder fails to submit to a CHRC as required.

**Background:** In 2012, the State of New York enacted legislation (Chapter 365 of 2012) that requires investigators for health care licensing boards to report to the appropriate law enforcement official or authority if, during the investigation of a licensee's professional misconduct, there is a "reasonable belief" that an act that constitutes a sex offense has been committed by a licensee against a client or patient during a treatment session, consultation, interview, or examination. Under New York law, a client or patient of a health care provider or mental health care provider is incapable of consenting to sexual acts. Depending on the nature of the conduct, providers can be charged with various sexual offenses, including statutory rape (rape in the third degree).

**Exhibit 1** lists the total number of active licensees, registrants, and certificate holders in fiscal 2015 for each of the health occupations boards affected by the bill. Not all of the individuals listed below are subject to the bill's provisions.

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**Exhibit 1**  
**Total Number of Active Licensees/Registrants/Certificate Holders for Health**  
**Occupations Boards Affected by the Bill**  
**Fiscal 2015**

	<b>Active Licensees/Registrants/ Certificate Holders</b>
Nursing	341,002
Physicians (includes allied health professionals)	27,336
Professional Counselors and Therapists	6,938
Psychologists, Examiners of	3,642
Social Work Examiners	13,959

**Source:** *Statewide Managing for Results Strategic Plans - FY 2017*; Maryland Board of Nursing; Maryland Board of Physicians; Department of Legislative Services

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**State Revenues:** General fund revenues increase minimally as a result of the bill's monetary penalty provision for false statements on employment applications from cases heard in the District Court.

**State Expenditures:** General fund expenditures increase minimally as a result of the bill's incarceration penalties due to more people being committed to State correctional facilities and increased payments to counties for reimbursement of inmate costs. The number of people convicted of this proposed crime is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,300 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 State inmate (including variable health care costs) is about \$770 per month. Excluding all health care, the average variable costs total \$200 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 a State correctional facility. Prior to fiscal 2010, the State reimbursed counties for part of their incarceration costs, on a per diem basis, after a person had served 90 days. Currently, the State provides assistance to the counties for locally

sentenced inmates and for inmates who are sentenced to and awaiting transfer to the State correctional system. A \$45 per diem grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility. The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

**Local Expenditures:** Expenditures increase minimally as a result of the bill's incarceration penalties. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. A \$45 per diem State grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility. Per diem operating costs of local detention facilities have ranged from approximately \$60 to \$160 per inmate in recent years.

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### **Additional Information**

**Prior Introductions:** HB 908 of 2015 received an unfavorable report from the House Judiciary Committee. Its cross file, SB 617, received an unfavorable report from the Senate Judicial Proceedings Committee. HB 33 of 2014 and HB 60 of 2013, both similar bills, passed the House with amendments and received hearings in the Senate Judicial Proceedings Committee. No further action was taken on either bill.

**Cross File:** None.

**Information Source(s):** Maryland State Commission on Criminal Sentencing Policy, Judiciary (Administrative Office of the Courts), Office of the Public Defender, Department of Health and Mental Hygiene, Department of Public Safety and Correctional Services, Department of Legislative Services

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