Department of Legislative Services

Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 188 (Delegate Morhaim, *et al.*)
Health and Government Operations Finance

Public Health - Advance Directives - Witness Requirements, Advance Directives Services, and Fund

This bill makes multiple changes regarding advance directives and funding for the Advance Directive Program. The bill (1) alters the definition of "advance directive"; (2) clarifies witness requirements for an electronic advance directive; (3) requires the Department of Health and Mental Hygiene (DHMH) to issue a request for proposals (RFP) from electronic advance directives services and authorizes it to contract with *multiple* services; (4) repeals the requirement that DHMH approve an electronic advance directives service and instead requires that the service be approved only by the Maryland Health Care Commission (MHCC); (5) repeals the requirement that DHMH review and verify specified information contained in an advance directive; (6) requires that an electronic advance directive *that is not witnessed* be submitted to an electronic advance directives service recognized by MHCC; (7) establishes the Advance Directive Program Fund and repeals the Spinal Cord Injury Research Trust Fund along with the State Board of Spinal Cord Injury Research; (8) includes a reporting requirement; and (9) makes clarifying and conforming changes.

The bill takes effect July 1, 2017.

Fiscal Summary

State Effect: As the bill primarily redirects funds from an existing special fund to a new special fund for the same purpose, the bill is not anticipated to materially impact State finances. However, because the new fund retains interest earnings, general fund revenues decrease minimally and special fund revenues increase commensurately. DHMH can handle the bill's reporting requirement and issue an RFP with existing resources and may realize efficiencies due to not having to approve electronic advance directives services or review and verify specified information.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: The bill expands the definition of "advance directive" to include an electronic document, voluntarily executed by the declarant, in which the declarant's identity is authenticated in accordance with a specified guideline established by the National Institute of Standards and Technology (NIST) or, if replaced, the replacement guideline. The bill also requires an electronic advance directives service to use such guidelines to authenticate a declarant's identity for an electronic advance directive that is not witnessed, and it specifies that MHCC may approve only advance directives services that use such guidelines.

The bill repeals the requirement that, before accepting an advance directive into an electronic advance directives service, DHMH review and verify (1) that the advance directive includes the signature of the declarant; (2) the date the advance directive was signed; and (3) the signature of two witnesses meeting specified requirements.

The bill establishes the Advance Directive Program Fund as a special nonlapsing fund to be administered by DHMH. The fund consists of $500,000 in insurance premium tax revenues transferred to the fund annually (this revenue source can currently be used to fund the program). Money in the fund must be used to carry out the purposes of the Advance Directive Program. Any interest earnings must be credited to the fund.

Uncodified language requires DHMH to report, by January 15, 2018, to the Governor and specified committees of the General Assembly on the implementation of the Advance Directive Program, including the costs to establish and maintain the program and the fees charged to registrants.

Current Law:

Witness Requirements for Electronic Advance Directives: A witness is not required for an electronic advance directive if the declarant's identity has been established in accordance with specified standards established by NIST. The State-designated health information exchange, the Chesapeake Regional Information System for our Patients (CRISP), is authorized to accept as valid an unwitnessed electronic advance directive in the form of a video record or file to state the declarant's wishes regarding health care for the declarant or to appoint an agent. However, the video record or file must be dated and stored in an electronic file by an electronic advance directives service recognized by MHCC. An individual is not required to submit an advance directive to an electronic advance directives service recognized by MHCC.

Advance Directive Program: DHMH must contract with an electronic advance directives service to connect with health care providers at the point of care through CRISP to facilitate the use of cloud-based technology for electronic advance directives. The electronic advance directives service must be approved by MHCC and DHMH and meet the technology, security, and privacy standards set by MHCC. DHMH must carry out appropriate educational and outreach efforts to increase public awareness of an electronic advance directives service.

Funding to Administer the Advance Directive Program: The Advance Directive Program may be administered with funds from the Spinal Cord Injury Research Trust Fund. The fund is overseen by the State Board of Spinal Cord Injury Research and is funded with $500,000 in insurance premium tax revenues annually. In addition to being used to administer the program, money in the fund may be used to make grants for spinal cord injury research that is focused on basic, preclinical, and clinical research for developing new therapies to restore neurological function in individuals with spinal cord injuries.

Background: Chapter 549 of 2013 required DHMH to take all steps necessary to make a registry of advance directives operational in the State by October 1, 2014. MHCC was tasked with implementing the registry. MHCC contracted with AD Vault Inc., the operator of MyDirectives.com, a free, secure, web-based system that allows individuals to document and store advance directives in a secure database to serve as the State's registry. Within MyDirectives.com, electronic advance directives may be created, signed, witnessed, stored, and shared electronically. The database was subsequently linked to CRISP, enabling practitioners using CRISP to access electronic advance directives along with a patient's other medical records. Today, when an individual creates an advance directive on MyDirectives.com, that individual is asked to enter the email addresses of two potential witnesses, who then receive an automated email requesting that they serve as witnesses. A potential witness who accepts is permitted to review the electronic advance directive and then electronically sign the document.

Chapter 501 of 2016 made several changes to laws related to advance directives, including (1) altering witness requirements for an electronic advance directive; (2) expanding the required contents of a specified advance directive information sheet; (3) expanding the scope of educational and outreach efforts to be undertaken by DHMH and other entities; (4) making changes to requirements for the distribution of the advance directive information sheet and the availability of electronic advance directives; (5) renaming the Advance Directive Registry to be the Advance Directive Program; and (6) establishing requirements related to accessing electronic advance directives by health care providers and in health care facilities. Chapter 501 also authorized the use of funds from the Spinal Cord Injury Research Trust Fund to administer the Advance Directive Program, codified current practice regarding the use of an electronic advance directives service to connect with health care providers at the point of care, and made conforming changes.

The State Board of Spinal Cord Injury Research was established by Chapters 512 and 513 of 2000 to award grants from the Spinal Cord Injury Trust Fund. No grants have been awarded since fiscal 2009. Budget reconciliation legislation transferred $1.6 million from the fund to the general fund in fiscal 2010, $1.0 million in fiscal 2011, and $500,000 in fiscal 2012. In fiscal 2013, the fund received no revenues; in fiscal 2014, revenues were provided but were not classified as special funds and, thus, reverted to the general fund. Budget reconciliation legislation in 2015 transferred $1.0 million ($500,000 in fiscal 2015 and $500,000 in fiscal 2016) from the fund to the general fund. As a result, the board has not met regularly since fiscal 2010 due to lack of funding. The fiscal 2017 State budget included $500,000 for the fund, and the fiscal 2018 budget includes $500,000. DHMH advises that there are currently no spinal cord injury projects supported by the fund, and there are no planned board activities in the future.

State Fiscal Effect: The Spinal Cord Injury Trust Fund is already authorized to be used to administer the Advance Directive Program and no other activities are planned for the State Board of Spinal Cord Injury Research; therefore, State operations and finances are not materially affected by repealing the fund and redirecting revenues to the new Advance Directive Program Fund. However, because the new fund retains interest earnings, which would otherwise accrue to the general fund, general fund revenues decrease minimally and special fund revenues increase commensurately. Any balance remaining in the Spinal Cord Injury Trust Fund not expended before July 1, 2017, is transferred to the new fund.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Health and Mental Hygiene; Maryland Insurance Administration; Department of Legislative Services

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