

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 640

(Senators Zucker and Miller)

Rules

Appropriations and Rules and Executive
Nominations

**State Government - Office of Program Evaluation and Government
Accountability and Maryland Program Evaluation Act**

This bill establishes the Office of Program Evaluation and Government Accountability (OPE) in the Department of Legislative Services (DLS). The office has similar powers and responsibilities to the Office of Legislative Audits (OLA), but with respect to conducting performance evaluations instead of audits. The Joint Audit Committee is renamed the Joint Audit and Evaluation Committee (JAEC) to reflect its expanded roles in directing and reviewing performance evaluations and monitoring the performance evaluation process. The bill also eliminates the required evaluations under the Maryland Program Evaluation Act (MPEA), although the termination dates for the various entities subject to MPEA are maintained. Instead, those entities currently subject to MPEA may be evaluated in accordance with a DLS work plan, while responsibility to introduce reauthorizing legislation is placed on the entities. **The bill takes effect July 1, 2019.**

Fiscal Summary

State Effect: DLS can establish OPE with existing budgeted resources, as discussed below. Any additional costs for State agencies to assist OPE in its evaluations are assumed to be minimal and absorbable within existing budgeted resources. The bill does not otherwise materially affect State finances or operations.

Local Effect: Minimal. OPE is authorized to conduct performance evaluations of local school systems. Separately, OPE must conduct investigations of fraud, waste, or abuse of the use of State resources, which could also conceivably involve a local entity. The bill does not otherwise materially affect local government finances or operations.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Office of Program Evaluation and Government Accountability

OPE is established as a unit in DLS. The head of the office is the director, who is appointed by the executive director, with the approval of the Presiding Officers and in consultation with minority leadership. Subject to the policies and directives of the Presiding Officers, JAEC, and the overall supervision and control of the executive director, the OPE director has general administrative control of the operation of OPE. With the approval of the executive director, the OPE director may also appoint a deputy director and other professional staff and may contract with consultants as authorized representatives.

Definitions and Scope

“Performance evaluation” means the review of a governmental activity or unit used to determine:

- whether the governmental activity or unit, if subject to termination, should be reestablished or terminated (a “sunset evaluation”); and
- what, if any, statutory or nonstatutory changes should be recommended to the General Assembly to improve the operations and efficiency of the governmental activity or unit.

“Unit” includes each State department, agency, unit, and program, including each register of wills and each local school system. It does not include a department, an agency, or a unit in the Legislative or Judicial Branch of State government.

A performance evaluation conducted by OPE that is not conducted under MPEA may include:

- evaluating the efficiency, effectiveness, and economy with which resources are used;
- determining whether desired program results are achieved;
- determining whether a program aligns with the unit’s mission;
- evaluating whether a program duplicates another program or activity within another unit;

- evaluating whether the governmental activity or unit under evaluation operates (1) in an open and accountable manner, with public access to records and meetings, safeguards against conflicts of interest, and opportunity for public participation and (2) in a fair and nondiscriminatory manner that complies fully with law and State policy; and
- determining the reliability of specified performance measures.

A performance evaluation of a local school system may include:

- evaluating whether or not the school system is complying with federal and State laws and regulations;
- analyzing grading standards, graduation requirements, assessments, procurement, and equitable use of resources among the schools within the system evaluated; and
- identifying instances of fraud, waste, and abuse.

Authorized and Required Evaluations and Investigations

Generally, OPE must conduct performance evaluations, investigations of fraud, waste, or abuse, and/or sunset evaluations. Except for sunset evaluations, on the completion of each performance evaluation, the OPE director must submit a full and detailed report to JAEC, subject to specified requirements.

Performance Evaluations – Generally

Generally, OPE must conduct performance evaluations of units of State government in accordance with a work plan developed by the OPE director in consultation with JAEC. In addition, OPE (1) must conduct a performance evaluation of a unit when directed by JAEC or the executive director or when otherwise required by law and (2) may conduct a performance evaluation of a unit on a request by the Legislative Auditor.

Performance Evaluations – Entities Receiving State Funds

If directed by JAEC, OPE must conduct a performance evaluation of a corporation or an association to which the General Assembly has appropriated money or that has received funds from an appropriation from the State Treasury.

Performance Evaluations – Local School Systems

If directed by JAEC, the executive director, the director, or when otherwise required by law, OPE must conduct a performance evaluation of a local school system. The performance evaluation may be performed concurrently with or separately from a local

school system audit conducted by OLA. OPE must provide information regarding the performance evaluation process to the local school system before the performance evaluation is conducted.

Fraud, Waste, or Abuse Investigations

When directed by JAEC, the executive director, or the director, OPE must conduct a separate investigation of an act or allegation of fraud, waste, or abuse in the obligation, expenditure, receipt, or use of State resources. The director must determine whether an investigation is conducted in conjunction with an audit undertaken by OLA or separately.

Scoping Evaluations

JAEC may direct OPE to conduct an assessment or a scoping performance evaluation of a unit of State government in order to determine whether the unit should undergo a more comprehensive performance evaluation. Based on those findings, JAEC may waive the unit from a more comprehensive performance evaluation.

Sunset Evaluations

OPE may conduct performance evaluations in accordance with MPEA, discussed further below.

Report Contents, Preparation, Review, and Follow Up

A full and detailed report prepared by OPE must include:

- a summary of significant legislative and regulatory changes;
- the findings of the performance evaluation;
- specific recommendations for making the program or activity more efficient or effective, including recommendations for consolidation or elimination of any duplicative programs or activities;
- an estimate of the costs or savings, if any, expected from implementing the findings and recommendations;
- recommended legislation needed to implement the findings and recommendations; and
- any response of the unit or body that is the subject of the report, subject to procedures approved by JAEC.

A draft report must be provided to the unit or body that is the subject of the report for the purpose of soliciting the response of the unit or body that must be included in the

final report. The OPE director must review each unit's response and advise the unit of the results of the review. There are other specified requirements and procedures for submitting and transmitting draft and final reports.

The OPE director must advise JAEC when:

- a unit does not submit a response to a recommendation;
- a unit does not indicate action, as relevant, to be taken in response to a recommendation;
- a unit requests a modification of, or a waiver from, a recommendation; or
- the response by the unit is not considered appropriate to carry out the recommendation.

The executive director or JAEC may direct the OPE director to undertake a review to determine the extent to which action has been taken by a unit to implement a report recommendation.

With respect to performance-related findings and recommendations, JAEC may make recommendations to the Governor or propose legislation after reviewing a unit's response to a recommended action. The Governor must implement systems and processes to monitor the efforts of the Executive departmental units to address performance evaluation findings reported by OPE.

Within nine months of a performance evaluation report, any unit directed to do so must report to OPE for each finding or recommendation in the report:

- the actions taken to address the finding or recommendation; or
- a schedule for when specific actions will be implemented.

Access to Records and Confidential Information

Except as prohibited by the Internal Revenue Code, and subject to specified disclosure requirements, the employees and authorized representatives of OPE must have access to confidential records with respect to any matter under the jurisdiction of the office, including records of contractors and subcontractors that perform work under State contracts.

Each officer or employee of the unit or body that is subject to a performance evaluation must provide any information that the OPE director determines to be needed for the examination of that unit or body, or of any matter under the authority of the office, including information that otherwise would be confidential under any provision of law.

The OPE director may issue process that requires an official of a State unit or school system that is subject to performance evaluation to produce a record that is needed for the performance evaluation, subject to enforcement by the circuit courts.

A person is guilty of a misdemeanor and on conviction is subject to a fine of up to \$1,000 if the person fails to comply promptly with process that the OPE director issues or violates confidentiality disclosure requirements.

Treatment of Confidential Information

Generally, confidential information that an employee or authorized representative of OPE or the Office of Policy Analysis (OPA) obtains during a performance evaluation (1) remains confidential and (2) may not be disclosed except to another employee or authorized representative of OPE or OPA. However, information obtained during a performance evaluation may be provided in a format that protects the confidentiality of individuals as necessary.

The OPE director may authorize the disclosure of confidential information obtained during a performance evaluation only to the following:

- another employee of DLS, with the approval of the executive director;
- federal, State, or local officials, or their auditors, who provide evidence to the OPE director that they are performing investigations, studies, or audits related to that same examination and who provide justification for the specific information requested; or
- JAEC, if necessary to assist the committee in reviewing a report issued by OPE.

Except for suspected criminal violations, if information that an employee or authorized representative obtains during a performance evaluation also is confidential under another law, the employee, authorized representative, or the OPE director may not include in a report or otherwise use the information in any manner that discloses the identity of any person who is the subject of the confidential information.

Suspected Illegal or Criminal Activity

The OPE director must report an apparent violation of law by a unit of State government or other body that is examined to JAEC, the executive director, the unit or body that is the subject of the report, and the Office of the Attorney General (OAG).

Further, if the OPE director discovers any alleged criminal violation by a person during the course of a performance evaluation, the director must report the alleged violation to the Attorney General and the appropriate State's Attorney, asking them to take appropriate

action. Unless the Attorney General or State's Attorney decides to prosecute an alleged criminal violation reported under this subsection, the Attorney General and State's Attorney must keep the report confidential. OAG must respond, in writing, to a report received from the OPE director. The response of the Attorney General must include what actions, if any, were taken as a result of the findings of the director.

The Attorney General may investigate and prosecute alleged criminal violations reported by OPE under the bill and has all the powers and duties of a State's Attorney, including the use of a grand jury in any county, to investigate and prosecute the alleged violation.

Sunset Review

The executive director may designate which DLS office is responsible for evaluations under MPEA. When directed by the Legislative Policy Committee (LPC), JAEC, the executive director, the OPA director, or the OPE director, the designated office must conduct an evaluation of a specified governmental activity or unit and the statutes related to the governmental activity or unit. The entities specified in the bill are the same as those currently subject to evaluation under MPEA.

The designated office, in consultation with the committees of jurisdiction, must develop a work plan for such evaluations. An evaluation must be consistent with the work plan and may address the governmental activity's or unit's efficiency, effectiveness, role in protecting consumers, sufficiency of resources, and accomplishment of legislative objectives. On completion, DLS must submit each evaluation report, including draft legislation to implement any recommended statutory changes, to the committees of jurisdiction.

Each unit subject to termination or responsible for the governmental activity subject to termination must ensure that legislation is requested to extend the termination date of the unit or governmental activity. The legislation may not propose a reestablishment period of more than 10 years.

The bill also specifies that it is the intent of the General Assembly that DLS:

- by December 1, 2019, conduct an evaluation of the State Board of Veterinary Medical Examiners as approved by LPC in December 2018; and
- by January 1, 2020, make recommendations to the committees of jurisdiction on a new termination date for the board.

Current Law/Background: OPE is modeled off of the existing OLA and has similar powers, duties, and reporting requirements, but with respect to performance evaluations instead of audits. Generally, OLA conducts fiscal compliance and performance audits of

State entities, performance audits of local school systems, and fraud, waste, and abuse investigations. Typically, OLA conducts fiscal compliance audits on a three- or four-year cycle, depending on assessed risk. Local school systems are audited on a six-year cycle, while other performance audits and fraud, waste, and abuse investigations are conducted as needed or directed. OLA audits are conducted in accordance with generally accepted government auditing standards.

Of note, the anticipated size of OPE (about 4 permanent positions, with supplemental temporary staff from OPA as needed during the interim) is significantly smaller than OPA, which has more than 100 positions.

Performance Evaluations vs. Performance Audits

Although they may appear similar, performance audits and performance evaluations differ in their overall approaches and assessments. Generally, performance audits are designed to ascertain whether a particular program/unit is meeting a particular standard. In contrast, performance evaluations are designed to ascertain how a program/unit is performing and the reasons why that is so, and may recommend programmatic and/or legislative changes. Performance audits are also subject to government auditing standards, while performance evaluations are not, although there are guidelines and best practices.

In contrast to what a performance evaluation conducted by OPE may include under the bill, a performance audit conducted by OLA may include:

- evaluating the efficiency, effectiveness, and economy with which resources are used;
- determining whether desired program results are achieved; and
- determining the reliability of certain performance measures.

Sunset Review

There are approximately 70 regulatory entities and activities currently subject to periodic evaluation under MPEA. The Act establishes a process better known as “sunset review” as most entities evaluated are also subject to termination. The sunset review process traditionally begins with a preliminary evaluation conducted by DLS on behalf of LPC, although a few entities are subject to direct full evaluation. LPC decides whether to waive an entity from further (or full) evaluation. If waived, reauthorizing legislation is typically introduced on behalf of the entity and subsequently enacted. Otherwise, a full evaluation usually is undertaken the following year.

State Fiscal Effect: DLS advises that it intends to transfer four open OLA positions to OPE for the office’s full-time staff. During the interim, OPA staff will be temporarily

assigned to supplement OPE as necessary. Travel and other miscellaneous costs will be absorbed within existing budgeted resources. Any additional costs for State agencies to assist OPE in its evaluations are assumed to be minimal and absorbable within existing budgeted resources. The bill does not otherwise materially affect State finances or operations.

Additional Information

Prior Introductions: None.

Cross File: HB 1113 (Delegates Hettleman and Busch) - Appropriations and Rules and Executive Nominations.

Information Source(s): Maryland Department of Agriculture; Maryland Department of Health; Department of Labor, Licensing, and Regulation; Department of Legislative Services

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