

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
Revised

House Bill 1036

(Delegate Mandel, *et al.*)

Health and Government Operations

Finance

Assisted Living Programs - Prohibited Acts, Penalties, and Quality Account

This bill establishes that knowingly and willfully operating, maintaining, or owning an unlicensed assisted living program is a felony and sets related criminal penalties. The bill also establishes civil money penalties for false representation and creates a special fund within the Department of Health and Mental Hygiene (DHMH) into which civil money penalties must be paid.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues and expenditures due to the bill's criminal penalty provisions. Potential increase in general fund revenues for any additional licensing fees collected as a result of this bill. Potential minimal increase in DHMH special fund revenues and expenditures due to the bill's civil penalty provisions.

Local Effect: Potential minimal increase in revenues and expenditures due to the bill's criminal penalty provisions.

Small Business Effect: Meaningful for small business assisted living programs upon which criminal and/or civil penalties are imposed and for any small businesses that receive grants from the new special fund.

Analysis

Bill Summary: A person convicted of knowingly operating, maintaining, or owning an assisted living program without a license is subject to: for a first offense, maximum

penalties of a \$10,000 fine and/or five years imprisonment; for a subsequent offense, maximum penalties of a \$20,000 fine and/or five years imprisonment.

If DHMH finds an assisted living program in violation, DHMH must send written notice to the program 30 days before the State files charges in order to give the program an opportunity to come into compliance with licensure requirements. A person may not be subject to felony penalties established under the bill if the person has applied in good faith to DHMH for an assisted living program license, is awaiting a decision from DHMH regarding the application, and has not been denied an assisted living program license on a prior occasion.

In recommending the criminal penalty amount, the State must consider factors including the nature, number, and seriousness of the violations and the program's ability to pay the penalty.

The bill prohibits a person from advertising, representing, or implying to the public that an assisted living program is authorized to provide a service that it is not licensed, certified, or otherwise authorized by DHMH to provide. A person may not advertise a program in a misleading or fraudulent manner. A violator of these provisions is subject to a maximum \$10,000 civil penalty for each offense. In setting the civil penalty amount, the Secretary of Health and Mental Hygiene must consider factors including the nature, number, and seriousness of the violations and the program's ability to pay the penalty. An assisted living program may request an appeal of a civil penalty. An appeal hearing must be held according to the Administrative Procedure Act and DHMH regulations.

The bill also establishes a continuing, nonlapsing Health Care Quality Account for Assisted Living Programs in DHMH. The account is funded with civil penalties paid by programs and other penalties DHMH's Office of Health Care Quality (OHCQ) may assess. (This transfers civil money penalties that are currently paid into DHMH's Health Care Quality Account into the Health Care Quality Account for Assisted Living Programs.) Any unspent portions of the account may not be transferred or reverted to the general fund but must remain in the account. Account funds must be used for training, grant awards, demonstration projects, or other purposes designed to improve the quality of care. DHMH must adopt regulations for distributing account funds.

Current Law: An assisted living program is a residential or facility-based program that provides housing and supportive services, supervision, personalized assistance, health-related services, or a combination of these services to individuals who are unable to perform or who need assistance performing the activities of daily living.

An assisted living program does not include a nursing home, a State mental health facility, a program licensed by DHMH to provide services to individuals with developmental disabilities or mental health services, a hospice care program, services provided by family members, or services provided in an individual's home.

Statute requires hospitals and related institutions to be licensed in order to operate in Maryland. An assisted living program is a related institution. An assisted living program license is valid for two years. A related institution that operates without a license is guilty of a misdemeanor and on conviction is subject to maximum penalties of a \$1,000 fine for a first offense and a \$10,000 fine for each subsequent conviction for a violation of the same provision. Each day a violation is continued after the first conviction is a subsequent offense. Additionally, the Secretary of Health and Mental Hygiene may impose a maximum civil penalty of \$10,000 for each offense.

Chapter 488 of 2000 allows DHMH to impose civil money penalties against a nursing home. A civil money penalty may not exceed \$5,000 per day in which serious or life threatening deficiencies exist and may not exceed \$50,000 total. It also established a Health Care Quality Account within DHMH. The account is funded by civil money penalties paid by nursing homes and other penalties that OHCQ assesses. Any unspent portions of the fund may not be transferred or reverted to the general fund of the State, but must remain in the fund to be used for specified purposes.

Background: There are approximately 1,580 licensed assisted living programs in Maryland and approximately 570 known unlicensed programs. OHCQ is aware of these unlicensed programs because of complaints it has received. OHCQ works with these providers to try to bring them further into compliance with State laws and regulations. OHCQ further advises that often local State's Attorneys are hesitant to prosecute an unlicensed program because it currently is a misdemeanor offense to operate without a license.

OHCQ expects that, by increasing the penalty for operating an unlicensed assisted living program from a misdemeanor to a felony and increasing the criminal fine amount, unlicensed programs will either become licensed or close their businesses.

In fiscal 2005, DHMH imposed 27 sanctions on assisted living providers. DHMH advises that generally these are the most egregious cases when residents have been abused or neglected.

In a 2006 assisted living report, OHCQ recommended: increasing the criminal penalty for programs operating without a license from a misdemeanor to a felony and making violators subject to maximum penalties of five years imprisonment and/or a maximum

\$10,000 fine; imposing a maximum administrative penalty of \$10,000 for providers that willfully or purposefully falsely advertise; and creating a health care quality account for assisted living funded by civil money penalties imposed for violations of standards.

The report acknowledged the emergence of “get rich quick” scams based on obtaining government funding for health care services. The goal of these programs is to get a license and bill for as many services as possible, whether they were delivered or not. This phenomenon supports the DHMH position that current penalties have not been an effective deterrent to the proliferation of unlicensed facilities providing assisted living services.

In addition to unlicensed operating, some assisted living facilities falsely advertise services that they do not or cannot provide. There are currently no penalties for false representations.

The fiscal 2007 budget includes \$464,691 in the Health Care Quality Account which is comprised of OHCQ-imposed civil money penalties.

State Revenues: General fund revenues could increase to the extent this bill encourages unlicensed assisted living programs to become licensed for which a fee is imposed. The licensing fee for assisted living programs is \$25 per year if the program is inspected by the Department of Human Resources or the Department of Aging. If the program is inspected only by DHMH, the fee is \$100 a year plus \$6 per bed for each bed over 15 beds.

General fund revenues could increase minimally as a result of the bill’s criminal monetary penalty provisions from cases heard in the District Court. DHMH special fund revenues could increase minimally as a result of the bill’s civil monetary penalty provisions.

State Expenditures: Changing crimes from misdemeanors to felonies means: (1) that such cases will likely be filed in the circuit courts rather than the District Court; and (2) some persons could eventually serve longer incarcerations due to enhanced penalty provisions, applicable to some offenses, for prior felony convictions. It is not known whether, under this bill’s provisions, the prospect of a jury trial might spur more plea bargains and affect actual sentencing practices for this offense.

In any case, this bill would shift some unknown number of cases from the District Court to the circuit courts. In any event, general fund expenditures could increase minimally as a result of the bill’s incarceration penalties due to more people being committed to Division of Correction (DOC) 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 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.

DHMH special fund expenditures could increase minimally for any funds awarded for training, grants, demonstration projects, or other purposes to improve the quality of care provided in assisted living programs.

Local Revenues: Revenues could increase minimally as a result of the bill's criminal monetary penalty provisions from cases heard in the circuit courts.

Local Expenditures: Expenditures could 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 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): Judiciary (Administrative Office of the Courts); Department of Health and Mental Hygiene; *Maryland's Assisted Living Program 2005 Evaluation: Final Report and Recommendations*, Office of Health Care Quality, January 2006; Department of Legislative Services

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