

Department of Legislative Services
 Maryland General Assembly
 2011 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 308

(Senator Brinkley, *et al.*)

Judicial Proceedings

Health and Government Operations and
 Judiciary

**Medical Marijuana - Affirmative Defenses - Maryland Medical Marijuana Model
 Program Workgroup**

This bill establishes medical necessity as an affirmative defense in a prosecution for the use and possession of marijuana.

In addition, the bill requires the Secretary of Health and Mental Hygiene to convene a workgroup to develop a model program for facilitating patient access to marijuana for medical purposes. By December 1, 2011, the Secretary must report on the workgroup’s findings – including draft legislation that establishes a program to provide access to marijuana in the State for medical purposes – to the committees specified in the bill.

The bill takes effect June 1, 2011, and provisions of the bill pertaining to the workgroup terminate May 31, 2012.

Fiscal Summary

State Effect: General fund expenditures increase by \$49,300 in FY 2012 for the Department of Health and Mental Hygiene (DHMH) to hire one full-time, contractual employee to staff the workgroup. The estimate assumes a one-month implementation delay and reflects the workgroup’s May 31, 2012 termination date. Minimal decrease in general fund fine revenues due to the bill’s establishment of medical necessity as an affirmative defense.

| (in dollars) | FY 2012 | FY 2013 | FY 2014 | FY 2015 | FY 2016 |
|----------------|------------|---------|---------|---------|---------|
| GF Revenue | (-) | (-) | (-) | (-) | (-) |
| GF Expenditure | \$49,300 | \$0 | \$0 | \$0 | \$0 |
| Net Effect | (\$49,300) | \$0 | \$0 | \$0 | \$0 |

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: In a prosecution for the use or possession of marijuana or related paraphernalia, it is an affirmative defense that the defendant used or possessed marijuana or related paraphernalia because (1) the defendant has a debilitating medical condition that has been diagnosed by a physician with whom the defendant has a bona fide physician-patient relationship (*i.e.*, a relationship in which the physician has an ongoing responsibility for the assessment, care, and treatment of a patient’s medical condition); (2) the debilitating medical condition is severe and resistant to conventional medicine; and (3) marijuana is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition. The affirmative defense may not be used if the defendant was either using marijuana in a public place or in possession of more than one ounce of marijuana.

“Debilitating medical condition” means a chronic or debilitating disease or medical condition, or treatment thereof, that produces one or more of the following (as documented by a physician with whom the patient has a bona fide physician-patient relationship): (1) cachexia or wasting syndrome; (2) severe or chronic pain; (3) severe nausea; (4) seizures; (5) severe and persistent muscle spasms; or (6) any other condition that is severe and resistant to conventional medicine.

The bill retains current provisions of law relating to medical necessity as a mitigating factor in a prosecution for the possession or use of marijuana or related paraphernalia. Thus, defendants who cannot meet the affirmative defense standard for a not guilty verdict may still have medical necessity considered for imposition of penalties on conviction.

The Maryland State Board of Physicians may not reprimand, place on probation, or suspend or revoke the license of a licensee for providing a patient with medical records, testimony, or a written statement that, in the licensee’s professional opinion, the patient is likely to receive therapeutic or palliative relief from marijuana. However, a licensee still has a duty to exercise a professional standard of care when evaluating a patient’s medical condition.

DHMH and the Governor’s Office of Crime Control and Prevention (GOCCP) must provide staff for the workgroup created by the bill. A member of the workgroup may not

receive compensation, but is entitled to reimbursement for expenses under the standard State travel regulations, as provided in the State budget.

In developing its proposal, the workgroup may consult with experts and stakeholders and must strongly consider a program model that is analogous to a compassionate use protocol for unapproved drugs. The workgroup's draft legislation must outline key elements of the program model and include provisions that:

- establish oversight and responsibility by programs located in academic medical research institutions in the State;
- address the licensing of a program by the State;
- establish a program application and review process that includes consideration of best practices and procedures for obtaining review input that is external to DHMH;
- expand the base of information on the use of marijuana for medical purposes on a scientific and policy implementation basis; and
- implement a program as soon as feasible and incorporate the goals of (1) regulations adopted and applications received by September 1, 2012, and (2) program operation beginning in January 2013.

In addition, the workgroup must provide guidance on the criteria for assessing program applications, including any applying program's plans for:

- determining the medical conditions to be treated and the duration of therapy proposed;
- identifying sources of marijuana;
- determining patient eligibility and informed consent;
- conducting any associated research projects;
- reporting data and outcomes;
- instituting strict controls against illegal diversion; and
- securing grants or other sources of funding to facilitate the affordability of the program.

Current Law: An individual charged with possession or use of marijuana (a Schedule I controlled dangerous substance) or related paraphernalia may introduce evidence related to medical necessity; if the person is convicted and the court finds there was medical necessity, the maximum punishment is limited to a fine of \$100.

Otherwise, a violator of prohibitions against simple possession or use of marijuana is guilty of a misdemeanor and subject to fines of up to \$1,000 and/or imprisonment for up to one year. A violator of prohibitions against use or possession with intent to use drug paraphernalia is guilty of a misdemeanor and subject to fines of up to \$500; for each

subsequent violation, a violator is subject to fines of up to \$2,000 and/or imprisonment for up to two years.

Background: In 1996, California became the first state to allow the medical use of marijuana. Since then, 15 other states have enacted similar laws. These states generally have some form of patient registry and provide protection from arrest for possession of up to a certain amount of marijuana for medical use. Maryland is an exception; State law simply allows evidence of medical use as a mitigating factor but does not provide protection from arrest or a means for patients to actually obtain marijuana.

Marijuana is classified as a Schedule I controlled substance at the federal level, making distribution a federal offense. In October 2009, however, the Obama Administration sent a memorandum encouraging federal prosecutors not to prosecute individuals who distribute marijuana for medical purposes in accordance with state laws.

State Revenues: General fund fine revenues decrease minimally due to the bill's establishment of medical necessity as an affirmative defense (rather than only a mitigating factor) in a prosecution for the use or possession of marijuana or related paraphernalia. Any decrease in fine revenues is expected to be minimal and is not anticipated to have a material effect on State finances.

State Expenditures: Given the extensiveness of the workgroup's charge and the relatively short timeline specified in the bill, DHMH advises – and Legislative Services concurs – that one full-time contractual position is necessary to implement the bill. Thus, general fund expenditures increase by \$49,301 in fiscal 2012 for DHMH to hire one full-time, contractual administrator to staff the workgroup. (GOCCP advises that it can handle its workgroup staffing responsibilities with existing resources.) The estimate includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

| | |
|-----------------------------------------|-----------------|
| Administrator | 1 |
| Salary and Fringe Benefits | \$42,835 |
| Operating Expenses | 2,401 |
| One-time Start-up Costs | <u>4,065</u> |
| Total FY 2012 State Expenditures | \$49,301 |

The estimate assumes a one-month implementation delay and reflects the workgroup's May 31, 2012 termination date. The estimate does not account for (1) any potential costs that may arise from the workgroup's proposals and/or draft legislation; or (2) the possibility that the contractual position necessitated by this bill might be converted to a permanent position by subsequent, related legislation.

Additional Information

Prior Introductions: None.

Cross File: HB 291 (Delegate Morhaim, *et al.*) - Health and Government Operations and Judiciary.

Information Source(s): National Conference of State Legislatures, Colorado Department of Public Health and Environment, Colorado Department of Revenue, Office of the Attorney General, Maryland Department of Agriculture, Commission on Criminal Sentencing Policy, Department of Health and Mental Hygiene, Maryland Insurance Administration, Judiciary (Administrative Office of the Courts), Department of State Police, Office of the Public Defender, Department of Public Safety and Correctional Services, State's Attorneys' Association, Department of Legislative Services

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