

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

House Bill 33
Judiciary

(Delegate Smigiel)

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

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 a fourth degree sexual offense and subject to the current maximum penalties of one-year imprisonment and/or a \$1,000 fine for a first-time offender and three years imprisonment and/or a \$1,000 fine for specified repeat offenders. The statute of limitations for this offense is three years.

The bill also prohibits a “professional counselor or therapist” 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.

Fiscal Summary

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

Local Effect: Potential minimal increase in local revenues from fines imposed in circuit court cases. Potential minimal increase in local expenditures due to the bill’s incarceration penalties.

Small Business Effect: None.

Analysis

Bill Summary: 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: The crime of fourth degree sexual offense prohibits a person from (1) engaging in sexual contact with another without the consent of the other or (2) engaging in a sexual act or vaginal intercourse with a victim who is age 14 or 15 and the defendant is at least four years older than the victim. Chapter 317 of 2006 expanded the offense by specifying that, with certain exceptions, a “person in a position of authority” may not engage in a sexual act, sexual contact, or vaginal intercourse with a minor who, at the time of the act, contact, or intercourse, is a student enrolled at a school where the person is employed. Fourth degree sexual offense is a misdemeanor and carries maximum penalties of imprisonment for one year and/or a fine of \$1,000 for a first-time offender and three years imprisonment and/or a \$1,000 fine for specified repeat offenders. There is a three-year statute of limitations for prosecution of a fourth degree sexual offense involving sexual abuse of a minor by a person in a position of authority or sexual contact with a minor without the consent of the minor.

A “person of authority” is a person who (1) is at least age 21; (2) is employed as a full-time permanent employee by a public or private preschool, elementary school, or secondary school; and (3) because of the person’s position or occupation, exercises supervision over a minor who attends the school. A “person of authority” includes a principal, vice principal, teacher, or school counselor at a public or private preschool, elementary school, or secondary school.

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 adds a nineteenth ground for disciplinary action under MPCTA if an applicant, licensee, or certificate holder fails to submit to a CHRC as required.

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 after the initial CHRC is conducted.

The board is prohibited from issuing or renewing a license or certificate if the required CHRC information has not been received.

Background: The State Board of Professional Counselors and Therapists licenses and certifies professional counselors, alcohol and drug counselors, marriage and family therapists, and art therapists. In fiscal 2012, the board regulated a total of 5,192 individuals who would be subject to the bill.

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).

Additional Comments: While other professionals are authorized to conduct therapy or counseling services (*e.g.*, psychiatrists, psychologists, and licensed clinical social workers), these individuals are not governed by Title 17 of the Health Occupations Article. Therefore, these individuals would not be subject to the criminal penalties in the bill.

Additional Information

Prior Introductions: HB 60 of 2013 passed the House with amendments and received a hearing in the Senate Judicial Proceedings Committee. No further action was taken.

Cross File: None.

Information Source(s): Baltimore, Charles, Frederick, and Montgomery counties; Maryland State Commission on Criminal Sentencing Policy; Department of Health and Mental Hygiene; Judiciary (Administrative Office of the Courts); Department of State Police; Department of Public Safety and Correctional Services; State's Attorneys' Association; NBC New York; New York State Legislature; Department of Legislative Services

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