



STATE OF MARYLAND
DHMH

Maryland Department of Health and Mental Hygiene

201 W. Preston Street • Baltimore, Maryland 21201

Martin O'Malley, Governor – Anthony G. Brown, Lt. Governor – Joshua M. Sharfstein, M.D., Secretary

January 24, 2011

The Honorable Joan Carter Conway
Chair, Education, Health and Environmental
Affairs Committee
2 West Miller Senate Office Building
Annapolis, MD 21401

The Honorable Peter Hammen
Chair, Health and Government
Operations Committee
240 House Office Building
Annapolis, MD 21401

RE: HB 114 and SB 291/Chapters 534 and 533, of the Acts of 2010

Dear Chairs Conway and Hammen:

Pursuant to HB 114 and SB 291/Chapters 534 and 533, of the Acts of 2010 the Department in consultation with the Health Occupation Boards submit this report, an analysis of state expungement practices and recommendations concerning whether under certain circumstances it may be appropriate to expunge disciplinary proceedings from a licensee's file after a specified period of time.

We hope this report is useful and if you have any questions please contact Ms. Wynee Hawk, Director of the Office of Governmental Affairs, at 410-767-6481.

Sincerely,

Joshua M. Sharfstein, M.D.
Secretary

Health Occupation Boards

Enclosure

cc: Wendy Kronmiller
Paula Hollinger
Health Occupation Boards
Wynnee Hawk
Sarah Albert, MSAR #8292

Expunging Disciplinary Proceedings from a Licensee's File after a Specified Period of Time

Report to
the Senate Education, Health, and
Environmental Affairs Committee
and
the House Health and Government
Operations Committee

January 24, 2011

Executive Summary

The Department of Health and Mental Hygiene (“DHMH”) in collaboration with the State’s Health Occupations Boards (“Boards”), which are authorized to issue licenses, certificates, and to register certain practitioners, studied if, under certain circumstances, it may be appropriate to expunge disciplinary proceedings from a licensee’s file after a specified period of time.¹ DHMH and the Boards surveyed other states to determine the national trend in this area. They also solicited comments from and considered comments submitted by numerous stakeholders.

DHMH and the Boards concluded that there is no evidence to support expungement, to the extent that it would change the current scope of retaining disciplinary records and making them available to the public. In reaching this conclusion, DHMH and the Boards weighed the comments received both in support of and against expungement of records, and reviewed and considered the Boards’ paramount obligation to protect the health and safety of people. DHMH and the Boards also considered that: the Boards currently do not post or make public preliminary or advisory findings that may be publicly available in other states; charging documents determined subsequently by a Board to be unsupported are not posted to the Boards’ websites; and records that are posted on each Board’s website include only final public orders. Moreover, the Boards take their mandate to protect the public very seriously and do not believe that this mission can be adequately accomplished by expunging disciplinary proceedings from the records of practitioners.

Nevertheless, DHMH and the boards had discussions concerning review of this process in the future. We do acknowledge the capacity of any professional to change his or her practices over time. This is clearly a goal of a professional Board when a decision is made to permit the health professional to retain his or her license to practice. Practices used by the Boards to assure fairness and equity in the disciplinary process will strike the balance of fairness to the professional and continuing to protect the public.

Charge

HB 114 of the 2010 Legislative Session directed DHMH and the Boards to collaboratively study if under certain circumstances it may be appropriate to expunge disciplinary proceedings from a licensee’s file after a specified period of time. DHMH and the Boards were finally charged with reporting to the Senate Education, Health and Environmental Affairs Committee and the House Health and Government Operations Committee by December 31, 2010.

DHMH staff were advised that a few states are considering enacting legislation that would authorize licensing boards such as the health occupations boards to make a previously publicly available disciplinary action non-disclosable to the public under certain circumstances. In these cases, a public board order would become confidential if the practitioner completes certain stipulations or after a certain period of time.

¹ A complete list of Maryland Health Occupations Boards may be found in Appendix 1

Process

DHMH and the Boards, which are authorized to issue licenses, certificates, and to register certain practitioners, undertook a review of how other states address the issue of expungement. To ensure that DHMH and the Boards understood the full scope of options available, the term “expungement” was defined as applying to different measures, which may be based upon the nature of the regulatory action, severity of conduct, whether an action is removed altogether, or whether it is public.

A workgroup of representatives of four of the Boards met throughout the summer and fall of 2010, including on July 20, 2010, and September 2, 2010. All the Boards sought input from their counterparts in other states, reviewed their responses, and compiled information about the current thinking on expungement.

On October 22, 2010, DHMH also sent a letter to the individuals and organizations listed in Appendix 2 seeking their opinion to understand the scope and breadth of views and opinions on this important matter. The letter sought feedback on any aspect of expungement, including the experience in other states or agencies and any evidence with which to evaluate the impact of expungement upon safety and quality of care.

Study Results

DHMH and the Boards reviewed the information, statutes, and regulations, and solicited input from health occupation boards across the country. The vast majority of Boards across the nation do not expunge records. However, there are a few exceptions under limited circumstances as outlined in Appendices 3 and 5 that permit expungement for minor infractions, such as continuing education violations in the case of Kentucky’s physician board. These types of minor infractions in Maryland do not appear as public orders.

See Appendix 3 for a chart of practices of physician licensing boards and Appendix 4 for a chart of practices of nursing licensing boards.

Considerations

Factors DHMH and the Boards considered for maintaining the current system of not expunging records included:

(1) The Boards’ obligation to protect the public health and safety. It is DHMH’s and the Boards’ mandate to protect the health and safety of Marylanders. The Boards are statutorily responsible for taking action against licensed health care providers for misconduct and making public orders about those disciplinary actions available to the public. This enables the public to obtain the most accurate information about a licensee’s qualifications in deciding to obtain health care from that individual.

(2) Neither the National Practitioner Data Bank nor the Healthcare Integrity and Protection Data Bank expunge disciplinary information. Where mandated, licensing board sanctions must be reported to the National Practitioner Data Bank (“NPDB”) and the Healthcare

Integrity and Protection Data Bank (“HIPDB”). Even if Maryland, or another state, would permit or require a licensing board to expunge a disciplinary action from its own records, these laws cannot require the NPDB and HIPDB to remove a report of the action from their Data Banks. Federal Data Bank policy permits a reporter to retract a report only in certain circumstances. Therefore, so long as an adverse action was accurately reported to the NPDB and the HIPDB, met the reporting criteria of the NPDB and HIPDB at the time it was submitted, and was not subsequently overturned by the board or a court, that report would remain in the data banks. Therefore, it is not entirely clear if there would be a benefit to a health care practitioner to expunge their state record of an adverse action, as hospitals, other states, and other employers, would still have access to the federal data banks. However, the consumer has no access to the federal data banks and would not be privy to this information.

(3) Complaints are not public. Complaints filed against a licensee are not public documents. Accordingly, there would be no need to expunge them.

(4) All charging documents, with the exception of those issued by the Board of Physicians (MBP), are not public. The Board of Physicians charging documents are not posted on the physician’s profile online, but documents are available upon request. If the MBP ultimately dismisses the charges after finding them unwarranted, all records relating to the charge are automatically removed after 3 years pursuant to §14-406(b) of the Health Occupations Article, Annotated Code of Maryland. The MBP also permits a physician to request an earlier expungement. None of the other Boards disclose charging documents to the public. However, DHMH believes that perhaps consideration should be given to immediate expungement of MBP charging documents if charges are not sustained by the board versus a physician having to request an earlier expungement.

(5) Advisory letters, letters of education, letters of concern, or letters of admonishment are not public. Most state health occupation boards issue “letters of concern” to practitioners when concerns are raised about the provider. In Maryland, these are called “advisory letters”, and, with the exception of the Board of Nursing, are not public documents and are not considered formal disciplinary matters. Accordingly, there would be no need to expunge them.

(6) Hospital and other employer reliance on information. Hospitals and other employers rely on the Boards to inform them of problems with a licensee that occur outside the walls of the hospital or their premises. Employment, privileges, and other hiring decisions could be undermined if the licensee’s file was expunged as the hospital, or other employer, could make decisions about a licensee’s competency or professionalism without the full knowledge of the licensee’s history.

(7) Challenges to answering questions about past sanctions or disciplinary actions. As the vast majority of states do not permit expungement, it is unclear how an expunged record would be treated in those states. A health professional who applies for a license in another state would likely be asked in filling out a form “Are you now or have you ever been subject to an action by a health occupations board?” If another state does not permit expungement of records, it is not clear how the practitioner could answer that question.

(8) There are single standard of care violation programs available. Subtitle 1-605 of the Health Occupations Article permits a Health Occupations Board to establish a program for licensees or certificate holders who commit a single standard of care violation as an alternative to a formal hearing. The program must provide training, mentoring, or other forms of remediation as determined by the Board.

Factors that DHMH considered that would indicate the need to change the current system and permit some form of expungement included:

(1) Limitations on practice. Third party payors can use a sanction as a reason to drop a practitioner from its participation panel. When a Board sanctions or disciplines a health professional, such sanction or discipline could have an impact on the practitioner's ability to participate in a third party payor's panel or obtain adequate medical malpractice insurance.

(2) Sanctions in question are not representative of current practice. It is possible that a licensee may have had some initial difficulties early in their professional practice that warranted a sanction or other disciplinary action. However, those underlying problems may not represent the current practice of the licensee. Commenters suggested that it may not be appropriate or fair to forever stigmatize or tarnish a licensee's record or reputation for actions that occurred a long time ago that do not reflect the licensee's current practice.

Conclusion

DHMH and the Boards have a statutory obligation to protect the public's health and safety. The public needs to be well informed of the disciplinary history of a practitioner in order to make well informed decisions regarding health care. Employers, such as hospitals, also need to be well informed before hiring or granting privileges. The vast majority of occupational health boards across the nation do not permit expungement. Therefore, there are no data to support Maryland permitting expungement of records.

DHMH further recognizes that health care professionals can make mistakes. Moreover, DHMH recognizes that HB 114 has introduced important measures to make more uniform and transparent actions of the various health occupations boards. To some degree, there will remain inherent differences due to the difference of the nature of each professional license and the consequent vast differences in the number and scope of disciplinary actions on the part of the different boards. DHMH believes that the Boards should agree to continue to extend the practice of not publishing charges that are not supported by the Board, and not publishing advisory letters when there is no charged violation of conduct.

Thank you to the people that took the time to respond to our requests for information and input. The evaluation and study of expungement has been a worthy task.

APPENDICES

Appendix 1 – List of Health Occupations Boards in Maryland

- Board of Acupuncture
- Board of Audiologists, Hearing Aid Dispensers & Speech-Language Pathologists
- Board for the Certification of Residential Child Care Program Professionals
- Board of Chiropractic and Massage Therapy Examiners
- Board of Dental Examiners
- Board of Dietetic Practice
- Board of Morticians and Funeral Directors
- Board of Nursing
- Board of Examiners of Nursing Home Administrators
- Board of Occupational Therapy Practice
- Board of Examiners in Optometry
- Board of Pharmacy
- Board of Physical Therapy Examiners
- Board of Physicians
- Board of Podiatric Medical Examiners
- Board of Professional Counselors & Therapists
- Board of Examiners of Psychologists
- Board of Social Work Examiners

Appendix 2

List of Individuals and Organizations Contacted About Expungement

AARP Maryland, Hank Greenberg
Administrators in Medicine, WV, Robert Knittle
Black Nurses Association of the Greater Washington, DC Area, Patricia Tompkins
Citizen Advocacy Center, David Swanking
Deans and Directors Association of Schools of Nursing, Katherine Cook
Delegate Brian Feldman
Delegate Pete Hammen
Delegate Wade Kach
Delegate Dan Morhaim
Delegate Shane Pendergrass
Delegate Shirley Nathan Pulliam
Delegate Luiz Simmons
E. Suddath
Federation of State Medical Boards, Lisa Robin
Health Facilities Association of Maryland (HFAM), Joe DeMattos
Kaiser Permanente, Alan Friedman
Lifespan, Dana Kauffman
Maryland Board of Nursing, Shirley Devaris
Maryland Consumer Rights Coalition, Marceline White
Maryland Coalition of Certified Nurse Practitioners, Lorraine Diana
Maryland Health Care for All Coalition, Vinnie DeMarco
Maryland Hospital Association, Valerie Overton
Maryland LPN Association, Wahnita Hawk
Maryland Nurses Association, Patricia Travis, Ed Suddath
Maryland Pharmacists Association, Mr. Howard Schiff
Maryland State Council on child Abuse and Neglect, Ellen Mugmon
Medchi, Gene Ranson
Medchi, S. Johnson
National Association of Boards and Pharmacy, Mr. Carmen Catizone
Nurse Practitioners Association of Maryland, Sandy Nettina
Ober, Kaler, Grims and Shriver, Marc Cohen
Public Citizen, Rebecca Kahn

Appendix 3 – Expungement Practices for Physician Licensing Boards

- Two states allow the physician licensing board to remove the discipline from the board’s website or other public posting after 10 years, although the underlying action is itself not expunged;
- Two states allow for expungement for physicians’ minor offenses or infractions;
- One state permits expungement of sanctions against a physician, but the State has never granted the physician’s request; and
- Information was not available from three states about expungement of actions against physicians.

<i>State</i>	<i>Current practice on expungement</i>
California	Requires board to remove discipline from website 10 years after it has been posted, beginning 1/1/03.
Colorado	Does not permit expungement.
Connecticut	Does not permit expungement but seals portions of medical/behavioral/treatment records.
Georgia	Does not permit expungement.
Indiana	Does not permit expungement.
Kansas	Does not permit expungement.
Kentucky	Expungement process provided on case by case for minor infractions. (201 KAR 9:350)
Massachusetts	Does not permit expungement, but for administrative purposes removal from public profile after ten years, although the sanction remains available on request.
Nevada	Does not permit expungement.
New Hampshire	Does not permit expungement. ²
New Jersey	Does not permit expungement.
New Mexico	Does not permit expungement.
North Carolina	Does not permit expungement.
Ohio	Does not permit expungement.
Oklahoma	Does not permit expungement.
Oregon	Does not permit expungement.
Pennsylvania	Does not permit expungement.
Tennessee	Does not permit expungement.
Texas	Does not permit expungement.
Utah	Does not permit expungement.
Virginia	Does not permit expungement.
Washington	Does not permit expungement.
West Virginia	Does not permit expungement.
Wyoming	Does not permit expungement.

² The N.H. Medical Board is considering a proposal to allow for removal of "a letter of concern" under certain conditions. The Maryland Board of Physicians does not make such letters public. At the point that a disciplinary action is public, the physician has already had the opportunity to submit evidence at an evidentiary hearing.

Appendix 4 – Expungement Practices of Nursing Licensing Boards

Alabama	Does not permit expungement.
Arizona	Does not permit expungement.
Arkansas	Does not permit expungement.
California	Does not permit expungement.
Connecticut	Seals portions of medical/behavioral/treatment records, but not disciplinary actions or records.
Delaware	Does not permit expungement.
Florida	Has vacated orders, but law is very clear that “once disciplined, always disciplined” for the life of the license.
Georgia	Does not permit expungement.
Hawaii	Does not permit expungement.
Idaho	Does not permit expungement.
Iowa	Does not permit expungement.
Kansas	Does not permit expungement.
Kentucky	Expungement means all records are sealed and proceedings are considered never to have happened; does not report expunged cases; nurses are advised not to disclose that their records have been expunged; types of offenses eligible for expungement include: consent decrees at least 5 years old, agreed orders and decisions at least 10 years old resulting in a reprimand provided no subsequent action and all terms of order are met, agreed orders & decisions 20 years old provided no subsequent orders and all conditions met.
Louisiana	Does not permit expungement.
Maine	Does not permit expungement.
Massachusetts	Does not permit expungement.
Minnesota	Has corrective action, where a complaint can be dismissed upon successful completion by individual corrective action. Completed a report in 2006 saying that “status offenses” (license revocation due to tax delinquency, failure to pay child support/student loans, practicing w/out current registration or license & failure to meet CE requirements) were most appropriate for expungement. Also, the report states that actions against a licensee due to a single, isolated practice incident were not considered appropriate for expungement.
Mississippi	Does not permit expungement.
Missouri	Expunges only with regard to inmate complaints.
Montana	No sealed records, has withdrawn matters reported to National Data Bank (before entry of a final order) when matter was subsequently dismissed.
New Hampshire	Does not permit expungement.
New Jersey	Does not permit expungement. Only seals patient records or patient ID info in connection with a complaint.
New York	Does not permit expungement.
North Carolina	No sealing, expungement done only with regard to reprimands relating to practicing without a license or employing unlicensed individuals. Nurse is advised to report reprimand if seeing to practice in other states.
Ohio	Seals Records.
Oklahoma	Does not permit expungement.
Tennessee	Does not permit expungement.
Utah	Does not permit expungement.
Vermont	Does not permit expungement.
Washington, DC	Does not permit expungement.
West Virginia	LVN Board has never expunged or sealed a record; RN Board has a rule permitting expungement of dismissed complaints 3 years after dismissal if no other complaints have been filed; in 2 cases records were sealed due to frivolous complaints.
Wyoming	Does not permit expungement.

Appendix 5 – Expungement Practices of Other Licensing Boards

- The majority of the responding states did not expunge disciplinary records (exceptions for physician boards noted in Appendix 2).
- The Board of Physical Therapy Examiners received responses from 13 states. Of those states that responded, none expunge orders;
- The Board of Dental Examiners received responses from three boards, all responding that they do not permit expungement;
- The Board of Examiners of Nursing Home Administrators reported that all 23 states who responded do not permit expungement;
- The Board of Psychologists reported that all 13 states that responded do not permit expungement;
- The Board of Social Worker Examiners reported that of 17 states that responded, none permit expungement;
- The national organization of the Board of Morticians and Funeral Directors is not aware of any state that expunges;
- The Board for the Certification of Residential Child Care Program Administrators does not have a board counterpart in any other state in the country.