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February 22, 2019

The Honorable Paul G. Pinsky, Chair
The Honorable Shirley Nathan-Pulliam, Vice Chair
Senate Education, Health, and Environmental Affairs Committee
Maryland General Assembly
2 West
Miller Senate Office Building
Annapolis, MD 21401

RE: Opposition to Senate Bill 372 — Physicians – Discipline – Procedures and Effects

Dear Chairperson Pinsky and Vice Chairperson Nathan-Pulliam:

Public Citizen, a nonprofit consumer advocacy group with more than 11,000 members and supporters in Maryland and more than 500,000 members and supporters nationwide, strongly urges the Maryland Senate's Education, Health, and Environmental Affairs Committee to soundly reject Senate Bill 372 (SB 372) and give it an unfavorable report because it would (a) seriously compromise patient access to nearly half of the information about important disciplinary actions taken by the Maryland Board of Physicians (the "Board") against physicians who may have been found to have engaged in serious misconduct, (b) make it more difficult for the Board to investigate and discipline physicians under certain circumstances, and (c) ultimately, undermine patient safety protections in Maryland.

Most troubling is the provision of the legislation that would require the Board to expunge all records of a public reprimand or probation issued under Health Occ. § 14-404 of the Medical Practice Act three years after final disposition of the case. Of note, among the more than 40 reasons that the Board may reprimand a licensed physician or place a licensed physician on probation under § 14-404(a) are the following:

- Immoral or unprofessional conduct in the practice of medicine
- Professional, physical, or mental incompetence
- Abandonment of a patient
- Habitual intoxication
- Addiction to or habitual abuse of any narcotic or controlled dangerous substance
- Provision of professional services while under the influence of alcohol or while using any narcotic or controlled dangerous substance or other drug that is in excess of therapeutic amounts or without valid medical indication
- Promotion of the sale of drugs, devices, appliances, or goods to a patient so as to exploit the patient for financial gain
- Gross overutilization of health care services

- Failure to meet appropriate standards as determined by appropriate peer review for the delivery of quality medical and surgical care performed in an outpatient surgical facility, office, hospital, or any other location in Maryland
- Failure to keep adequate medical records as determined by appropriate peer review

Currently, Health Occ. § 14-411.1 of the Medical Practice Act requires the Board to disclose on its website a description of any disciplinary action taken by the Board, including a copy of the public order, for at least 10 years, and patients and other members of the public can download from the Board's website the orders for all disciplinary actions taken by the Board against any physician licensed in Maryland. Expunging all records of a public reprimand or probation after three years would deprive patients of the right to know a physician's complete disciplinary history, information that is clearly relevant to making a fully informed decision when choosing a physician. Indeed, research has shown that physicians who have been disciplined by state medical boards have a high rate of recidivism and are far more likely to be disciplined again than physicians who have never been disciplined.¹

Our analysis of deidentified data in the National Practitioner Data Bank's (NPDB's) public use file shows that over the last 10 years (2009 through 2018), a total of 1,687 licensure actions were reported by the Board to the NPDB. Of these, 342 (20 percent) involved probations and 471 (28 percent) involved reprimands or censures. Thus, if SB 372 is enacted, nearly half of all disciplinary actions taken by the Board over the last 10 years would be expunged from the public record. Notably, among the reasons for the Board's actions in the 342 probation cases reported to the NPDB, 107 (31 percent, or nearly a third) involved "substandard or inadequate care"; another 40 (12 percent) involved the catchall category "other unprofessional conduct," and an additional two cases involved sexual misconduct. Likewise, among the reasons the Board took action in the 471 cases involving reprimands or censures, 122 (26 percent, or more than a quarter) involved "substandard or inadequate care," and another 58 (12.3 percent) involved "other unprofessional conduct."

These are serious matters about which patients in Maryland and the public have a right to know, even after three years. Who wouldn't want to know that physicians they were considering seeing for treatment have been reprimanded or placed on probation by the Board for providing substandard or inadequate care or for engaging in various types of unprofessional conduct, including even sexual misconduct? Why, considering the rights and welfare of Maryland patients, would the Maryland General Assembly want to limit patient access to such critical information to a brief three-year period?

The Maryland General Assembly must not make patients in Maryland less safe by denying them permanent access to information needed to make rational and informed decisions when choosing a physician.

The legislation also would make it more difficult for the Board under certain circumstances to investigate and discipline physicians who allegedly failed to meet appropriate standards as determined by appropriate peer review for the delivery of quality medical and surgical care.

¹ Grant D, Alfred KC. Sanctions and recidivism: An evaluation of physician discipline by state medical boards. *J Health Polit Policy Law*. 2007;32(5):867-885.

Under current law, a disciplinary panel assigned to review such an allegation is required to obtain two peer review reports for the allegation. SB 372 instead would require that if one of the two peer review reports finds that a licensed physician did not fail to meet appropriate standards for the delivery of quality medical and surgical care, the disciplinary panel must either vote by a two-thirds majority to obtain a third peer review report or dismiss the complaint. The proposed language in SB 372 essentially dismisses and devalues one of the two peer review reports, opting in favor of the physician under investigation. In the interest of public protection, both peer review reports should have similar weight. The report of one peer reviewer concluding that the standard of care was not violated should not result in a mandated set of options that may not be appropriate for the circumstances. Requiring dismissal of the complaint in such circumstances unless a supermajority of the Board agrees to obtain a third peer review report would place unreasonable constraints on the Board's ability to investigate and discipline physicians who engage in substandard practice and would endanger patients treated in Maryland.

Finally, SB 372 would prohibit carriers and malpractice insurers from taking adverse action against a physician based solely on the fact that the physician was placed on probation under Health Occ. § 14-404 of the Medical Practice Act if the probation has ended. Since disciplinary action by a state medical board, including placement on probation, is a clear risk factor for future disciplinary action, it would be nonsensical to prohibit carriers or malpractice insurers from taking prior probation actions into consideration when they establish provider panels or make coverage decisions and set premiums, respectively.

The mission of any state medical board is to protect the public's health, safety, and welfare through the proper licensing, disciplining, and regulation of physicians. SB 372 — which apparently was crafted by MedChi, the Maryland State Medical Society^{2,3} — is a clear attempt to undermine the Board's mission. The legislation would protect potentially dangerous doctors who practice in Maryland and harm the public by withholding information about highly relevant disciplinary actions against doctors after three years.

In closing, Public Citizen urges the Maryland Senate's Education, Health, and Environmental Affairs Committee to place the health interests of Maryland patients above the protection of incompetent and unprofessional physicians by giving SB 372 an unfavorable report.

² MedChi, the Maryland State Medical Society. House of Delegates. Resolution 38-18: Expungement of the Public Reprimands and Probation on a Physician's Public Record. Adopted September 22, 2018. <https://www.medchi.org/Portals/18/files/Events/18HODFall/Resolution%2038-18%20FINAL%20adopted.pdf?ver=2018-10-15-113052-057>. Accessed February 20, 2019.

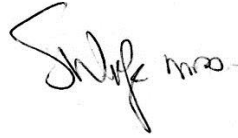
³ MedChi, the Maryland State Medical Society. House of Delegates. Resolution 39-18: Peer Review Findings in a Board of Physicians Investigation. Adopted September 22, 2018. <https://www.medchi.org/Portals/18/files/Events/18HODFall/Resolution%2039-18%20FINAL%20adopted.pdf?ver=2018-10-15-113145-650>. Accessed February 20, 2019.

Thank you for considering our views on these important patient rights and safety issues.

Sincerely,



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Cc: Members of the Senate Education, Health, and Environmental Affairs Committee