AmericansFor SafeAccess
Advancing Legal Medical Marijuana Therapeutics and Research

February 28, 2014
Updated: March 7, 2014 with veterans' access amendment

Testimony on HB 881 and HB 1321

Position: **HB 1321 (Del. Glenn) – *Strongly* Support, with amendments.**
HB 881 (Del. Morhaim) – Support, with amendments.

Background/Problems with the Current Law:

Americans for Safe Access (ASA) is the nation's largest organization working exclusively on advancing safe and legal to access to marijuana for therapeutic and research purposes. ASA has been actively working to bring a viable medical marijuana program to Maryland for several years. When HB 1101 was passed by both houses and signed into law in 2013 to create the Natalie M. LaPrade Medical Marijuana Commission (Commission), ASA felt the bill fell short of achieving the goal of providing safe and legal access to medical marijuana because the we assessed that the distribution locations, Academic Medical Centers (AMCs), would not participate in the program. To date, this assessment has unfortunately proven to be true, and the likelihood of AMCs participating the program does not appear to be any greater under present federal law. Even if AMCs become willing to participate, there are serious questions as to how practical the approach would be, as no state has utilized this model before. With a cap of only 5 programs, and the likelihood that each program will only cover a single condition, many deserving patients would be not be able to participate either due to not having a condition that any of the limited AMC programs would cover, or patients who have condition that is covered by an AMC may simply live too far away (places such as Cumberland or Crisfield). This is of major concern to ASA, and we urge the state to adopt the proven distribution method of allowing patients who have a bona fide recommendation from their physician to purchase their medical marijuana at retail locations. This proven approach has been successfully been implemented in many medical marijuana states.

The silver lining in HB 1101 has turned out to be the Natalie M. LaPrade Medical Marijuana Commission itself. We are very encouraged by the work of the Commission to date in their mandated work to implement HB 1101. Moreover, we are confident that the appointed members of the Commission will implement whatever law they are tasked with, and do so in a manner that takes into consideration needs of Maryland's patient population. ASA thanks the General Assembly for the creation of the Commission, as well as Governor O'Malley for the thoughtful appointments.

This Year's Legislative Proposals: HB 881 and HB 1321

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Two proposals to fix last year's law are currently being considered by the General Assembly this year. The good news is that both HB 881 and HB 1321 would fix the fatal flaws of last year's bill; however, we think that HB 1321 creates the stronger of the two potential programs for Maryland patients.

<u>The primary advantages to HB 1321</u> are that it:

1) Creates strong but reasonable protections for patients against civil discrimination in the areas of housing, employment, education, organ transplants, and child custody;
2) Does not impose burdensome requirements upon physicians, as requirements similar to those in HB 881 have limited patient access in other states;
3) Provides a stronger framework for the Commission to implement the program so that patients can obtain their medicine in a timely manner;
4) More clearly defines the role of caregivers that provide better flexibility to patients and their loved ones, as multiple caregivers may be necessary to help assist a single patient; and
5) Authorizes independent testing laboratories to be regulated by the Commission that will help ensure Maryland patients are obtaining medicine of the highest quality.

For these reasons, ASA prefers the approach of Delegate Glenn's HB 1321, with limited amendments. We also support the concept behind Delegate Morhaim's HB 881, but we feel that it requires significantly more amendments to be as strong for Maryland patients, physicians, and caregivers as HB 1321.

First is a suggested amendment for either bill, followed by suggested amendments specifically for HB 881 or HB 1321.

Suggested Amendment for Either HB 881 or HB 1321

1. <u>Veteran's Access to Medical Cannabis</u>

Issue: Many armed services veterans receive their medical solely from Veterans Affairs (VA) medical facilities; however, due to current rules government VA medical providers, VA doctors and other VA staff are forbidden from filling out any paperwork that would specifically allow veterans to obtain medical cannabis from a state-authorized program, such as what would be created by either HB 881 or HB 1321. The VA directive that restricts VA providers from filling out paperwork does make it clear, however, that veterans who are registered and using medical marijuana under the rules of state-authorized program cannot be denied medical care from a VA facility. Therefore, the only roadblock for veterans is obtaining a physician's recommendation or written certification.

Solution: Allow veterans who are being treated by a VA facility for treatment of a qualifying condition to be able to register with the program through a 4-prong test to see if they are in

fact a veteran, and are in fact receiving care for the qualifying medical condition from that VA facility. This way, veterans, particularly veterans facing financial hardship, will not be excluded from the program. The language that is being offered was recently adopted by Illinois in their medical cannabis program.

> *13-3301 Definitions:*
> *"Veterans Affairs facility" or "VA facility" means (1) any hospital, Veterans Home, outpatient clinic, community-based outpatient facility, or any other medical facility operating under the auspices of the United States Veterans Health Administration, the United States Department of Veterans Affairs, or the Maryland Department of Veterans' Affairs or (2) any other facility certified by the United States Department of Veterans Affairs Medical Center in the State of Maryland.*
>
> *"Written Certification" means….*
>
> *….A veteran who has received treatment at a VA facility hospital shall be deemed to have a bona fide physician-patient relationship with a physician at a VA facility if the patient has been seen for his or her debilitating medical condition at the VA facility in accordance with VA facility protocols.*
>
> *13-33XX*
> *(A) A veteran who has received treatment at a VA facility is deemed to have a bona fide physician-patient relationship with a VA physician at a VA facility if the patient has been seen for his or her debilitating medical condition at the VA facility in accordance with VA a facility protocols. All reasonable inferences regarding the existence of a bona fide physician-patient relationship shall be drawn in favor of an applicant who is a veteran and has undergone treatment at a VA facility*
>
> *(B) Notwithstanding the provisions of subsection (a) of this Section, the Commission may deny an application or renewal of a qualifying patient's registry identification card if, in the case of an applicant submitting an application without a written certification because the applicant is a veteran receiving treatment for a debilitating medical condition at a VA facility, the Commission could not verify through reasonable means that the applicant is (i) a veteran, (ii) an Maryland resident, (iii) currently receiving any aspect of his or her treatment at a VA facility, and (iv) being treated for a debilitating medical condition.*

Suggested Amendment for HB 881

1. <u>No Civil Discrimination Protection</u>

Issue: A major flaw with HB 881 is that it does not contain civil discrimination protection for patients. This means that landlords can deny housing to patients simply because of the patient status. It means employers can fire employees without any other justification other than their patient status even if they were not intoxicated from their medicine on the job.[1]

[1] See *Ross v. Ragingwire*, 174 P.3d 200 (CA, 2008); *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970 (CO, 2011); *Casias v. Wal-Mart Stores, Inc.*, 695 F. 3d 428 (MI, 2012); *Johnson v. Columbia Falls*

It means that hospital can deny a patient an organ transplant simply because of their patient status, even if medical marijuana would not harm the transplant.[2] It means that patients with children can be denied custody and visitation simply due to their patient status, without any negligent or abusive parenting.[3]

Solution: ASA urges Maryland to adopt the civil discrimination protection contain in 13–3322(D) of HB 1321, as these address all areas of discrimination concern to patients. These protections would be limited so that employers, landlords, and educational institutions who must comply with federal law are not prevented from doing so.

2. 13-3301(C) - Physician Burdens

> "CERTIFYING PHYSICIAN" MEANS AN INDIVIDUAL WHO:
>
> (1) IS LICENSED BY THE STATE BOARD OF PHYSICIANS UNDER TITLE 14 OF THE HEALTH OCCUPATIONS ARTICLE TO PRACTICE MEDICINE; (2) IS ON STAFF AT A HOSPITAL OR WITH A HOSPICE PROGRAM IN THE STATE; AND (3) REGISTERS WITH THE COMMISSION TO MAKE MARIJUANA AVAILABLE TO PATIENTS FOR MEDICAL USE.

Issue: Requiring physicians to register with the state simply to be able to recommend medical marijuana to patients with a qualifying condition will have a chilling effect on the number of physicians who will be willing to participate in the program. As a result, this will make it more difficult for patients to obtain a recommendation from physicians with whom they have a long-standing bona fide patient-physician relationship. Medical marijuana jurisdictions such as New Jersey and the District of Columbia have had programs that were approved several years ago, but because they contain similar registration requirements, alarmingly few physicians are participating in their programs. For example, at the District's Medical Marijuana Advisory Committee meeting on January 31, 2014, the D.C. Department of Health stated that approximately 80 physicians had obtained recommendation forms, and that only approximately 150 patients had been enrolled in the program, meaning fewer than 1% of the District's population living with positive status for H.I.V. have been able to obtain a recommendation. Unnecessary burdens on physicians harm potential qualifying patients by preventing them from being able to access medical marijuana.

Solution: Strike 13-3301(C)(2)-(3). Additionally, strike other provisions in the bill that call for

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Aluminum, 2009 MT 108N, (MT 2009); *Emerald Steel Fabricators, Inc. v. BOLI OF LABOR AND INDUSTRIES*, 230 P. 3d 518 (OR, 2010); *Roe v. Teletech Customer Care*, 257 P.3d 586 (WA, 2011).

[2] See *Organ Transplant Denied To Second Medical Marijuana Patient*, San Francisco Chronicle (website) June 13, 2012, Forrest Rosenbach, available at http://blog.sfgate.com/smellthetruth/2012/06/13/organ-transplant-denied-to-second-medical-marijuana-patient/ (last accessed Feb. 27, 2014); and *Is medical-marijuana use reason to deny someone an organ transplant?*, Seattle Times, May 3, 2008, available at http://seattletimes.com/html/health/2004389825_liver03m.html (last accessed Feb. 27, 2014).

[3] See *Parents losing custody for medical-marijuana use*, San Diego City Beat, Dec. 11, 2013, available at http://www.sdcitybeat.com/sandiego/article-12502-parents-losing-custody-for-medical-marijuana-use.html (last accessed Feb. 27, 2014); *Another family's child custody threatened over medical marijuana license*, myFOXDetroit.com, Sep 18, 2013, available at http://www.myfoxdetroit.com/story/23469755/another-familys-child-custody-threatened-over-medical-marijuana-license#ixzz2uYgxwTBu (last accessed Feb. 27, 2014)

or reference the registration of physicians 13-3302(c)(5), and strike and replace "CERTIFIED" in 13-3308(2) with "AUTHORIZED."

3. <u>13-3301(H) - Physician Burdens</u>

> (H) "WRITTEN CERTIFICATION" MEANS A CERTIFICATION THAT:
>
> (1) IS ISSUED BY A CERTIFYING PHYSICIAN TO A QUALIFYING PATIENT WITH WHOM THE PHYSICIAN HAS A BONA FIDE PHYSICIAN–PATIENT RELATIONSHIP; AND
>
> (2) INCLUDES A WRITTEN STATEMENT CERTIFYING THAT, IN THE PHYSICIAN'S PROFESSIONAL OPINION, AFTER HAVING COMPLETED A FULL ASSESSMENT OF THE PATIENT'S MEDICAL HISTORY AND CURRENT MEDICAL CONDITION, THE PATIENT HAS A CONDITION:
>
> (I) THAT MEETS THE INCLUSION CRITERIA AND DOES NOT MEET THE EXCLUSION CRITERIA OF THE CERTIFYING PHYSICIAN'S APPLICATION; AND
>
> (II) FOR WHICH:
>
> 1. RECOGNIZED DRUGS OR TREATMENT WOULD NOT BE EFFECTIVE OR OTHER TREATMENT OPTIONS HAVE MORE SERIOUS SIDE EFFECTS OR A GREATER RISK OF ADDICTION; AND
>
> 2. THE POTENTIAL BENEFITS OF THE MEDICAL USE OF MARIJUANA WOULD LIKELY OUTWEIGH THE HEALTH RISKS FOR THE PATIENT.

Issue: Again, provisions that impose unnecessary burdens on physicians will restrict patient access. In the definition for "Written Certification," the burden comes by requiring physicians to establish rigid exclusion criteria. The requirement is redundant to the requirement that physicians must determine that the benefits of medical marijuana use would outweigh any health risks. However, the benefit/risk clause is more flexible and if it were to stand free of the exclusion criteria provision, it would allow physicians to determine qualifying patients on a case-by-case basis without being encumbered by exclusion criteria that might not fit a particularly patient's needs.

Solution: Strike 13-3301(H)(2)(I).

4. <u>13-3307 – Physician Burdens</u>

Issue: This section would create numerous burdens for physicians to overcome in order to recommend medical marijuana to their patients, including registration with the state, reporting paperwork, and developing rigid exclusion criteria that a physician may not deviate from even if it goes against the best interest of a particular patient. An additional burden is that physicians would have apply annually to have the right to recommend

medical marijuana, which could jeopardize their patient's ability to maintain a consistent supply of medicine for a chronic condition.

Solution: We suggest modifying this section to the following so that it will allow physicians to recommend medical marijuana for certain conditions. We also suggest preserving that clause that provides physicians with protection from criminal and civil penalties for conduct authorized by the law.

> *(a) A CERTIFYING PHYSICIAN MAY RECOMMEND MEDICAL MARIJUANA FOR THE FOLLOWING MEDICAL CONDITIONS:*
>
> *(1) A CHRONIC OR DEBILITATING DISEASE OR MEDICAL CONDITION THAT RESULTS IN A PATIENT BEING ADMITTED INTO HOSPICE OR RECEIVING PALLIATIVE CARE; OR*
>
> *(2) A CHRONIC OR DEBILITATING DISEASE OR MEDICAL CONDITION OR THE TREATMENT OF A CHRONIC OR DEBILITATING DISEASE OR MEDICAL CONDITION THAT PRODUCES:*
>
> *(I) CACHEXIA, ANOREXIA, OR WASTING SYNDROME;*
> *(II) SEVERE OR CHRONIC PAIN;*
> *(III) SEVERE NAUSEA;*
> *(IV) SEIZURES; OR*
> *(V) SEVERE OR PERSISTENT MUSCLE SPASMS.*
>
> *(b) THE COMMISSION MAY APPROVE ON A CASE BY CASE BASIS A RECOMMENDATION FOR A CHRONIC OR DEBILITATING DISEASE OR MEDICAL CONDITION THAT PRODUCES ANY OTHER CONDITION NOT LIST IN SUBSECTION (A) OF THIS SECTION IF IT IS SEVERE AND RESISTANT TO CONVENTIONAL MEDICINE IF THE SYMPTOMS REASONABLY CAN BE EXPECTED TO BE RELIEVED BY THE MEDICAL USE OF MARIJUANA.*
>
> *(c) A CERTIFYING PHYSICIAN SHALL BE PROTECTED FROM CIVIL AND CRIMINAL PENALTIES UNDER STATE AND LOCAL LAW FOR ACTIONS AUTHORIZED UNDER THIS SUBTITLE, INCLUDING THE ISSUANCE OF WRITTEN CERTIFICATIONS AND THE COLLECTION AND ANALYSIS OF DATA.*

5. <u>13–3313 - Lack of a Framework for the Commission</u>.

> THE COMMISSION SHALL ADOPT REGULATIONS TO IMPLEMENT THE PROVISIONS OF THIS SUBTITLE.

Issue: While this language is sufficient to authorize the Commission to create a program to allow qualifying patients with a physician's recommendation to purchase medical marijuana from a state-authorized supplier, there is no framework for how this program would be established. Additionally, there are no requirements for the Commission to implement the program in a timely manner so that patients are further denied access to medical marijuana.

Solution: This issue cannot be overcome with a single provision. The lack of a statutory foundation in HB 881 is a major reason why ASA favors the HB 1321 approach.

6. <u>Unclear Rules on Caregivers, Lacks Protection from Arrest for Caregivers</u>

Issue: HB 881 contains scant language on how caregivers would participate in new program and fails to provide protection from arrest for caregivers under 13-3310.

Solution: Adopt the language pertaining to caregivers from HB 1321. Make it clear that patients can be served by more than a single caregiver, and that caregivers are not restricted from serving more than one patient. At a minimum, HB 881 should at least add caregivers to the protection from arrest in 13-3310 of the bill.

7. <u>Does not Authorize Independent Testing Laboratories, Quality Assurance</u>

Issue: HB 881 does not include provisions that would authorize independent testing laboratories to test medicine for quality assurance and levels of THC or CBD in medicine that is made available to patients. Testing labs will benefit patients by helping to ensure that no mold or other contaminants end up in the medicine they consume.

Solution: Adopt the language pertaining to laboratories from HB 1321.

Suggested Amendment for HB 1321

1. <u>13–3311 – Timely Implementation of Treatment Centers</u>

> (C) (1) IN THE FIRST YEAR AFTER OCTOBER 1, 2014, THE COMMISSION MAY ISSUE REGISTRATIONS FOR UP TO 20 MEDICAL MARIJUANA TREATMENT CENTERS.
> (2) A MAXIMUM OF FIVE MEDICAL MARIJUANA TREATMENT CENTERS MAY BE LOCATED IN ANY ONE COUNTY OR BALTIMORE CITY.
> (3) IF THE COMMISSION DETERMINES ON OR AFTER OCTOBER 1, 2016, THAT THE NUMBER OF MEDICAL MARIJUANA TREATMENT CENTERS IS INSUFFICIENT TO MEET PATIENT NEEDS, THE COMMISSION MAY INCREASE OR MODIFY THE NUMBER OF REGISTERED MEDICAL MARIJUANA TREATMENT CENTERS.

Issue: For the most part, this language authorizing the Commission to license and register medical marijuana treatment centers (treatment centers) is sufficient enough to establish a workable program. However, patients have no safeguards in place that guarantee treatment centers will open in a timely manner. Additionally, patients should have some assurance that there will be reasonable geographic coverage so that patients or designated caregivers will not have to travel too great a distance in order to maintain a consistent supply of medicine.

Suggestion: We urge the inclusion of the following provisions to ensure timely implementation and reasonable geographic coverage of treatment centers for Maryland patients.

> *(5) No later than one year after the effective date of this article, provided that at least ten applications have been submitted, the Commission shall issue medical marijuana*

treatment center registrations to the ten highest-scoring applicants, except that the Commission may divide the state into geographical areas and grant a registration to the highest scoring applicant in each geographical area.

(6) No later than two years after the effective date of this article, the Commission shall issue registration to at least twenty medical marijuana treatment center registration to the next highest-scoring applicants, except that the Commission may divide the state into geographical areas and grant a registration to the highest scoring applicant in each geographical area.

2. 13–3301(Q) and 13–3319 – Age of Majority for Patients

(Q) "QUALIFYING PATIENT" MEANS A RESIDENT OF THE STATE WHO IS AT LEAST 21 YEARS OLD, UNLESS THE COMMISSION GRANTS AN EXCEPTION AT THE RECOMMENDATION OF THE PATIENT'S CERTIFYING PHYSICIAN...

and

THE COMMISSION MAY NOT ISSUE A REGISTRATION CARD TO A QUALIFYING PATIENT WHO IS UNDER 21 YEARS OLD UNLESS...

Issue: Patients who have reached the age of majority should not be restricted from accessing medical marijuana in the same manner that minors should. Many Maryland adults between the ages of 18 and 20 are responsible for their own well-being, and these adults may not have relationships with their parents that would allow them to have access if recommended by a physician.

Solution: Strike "21" and replace with "18," in conformity with the age of majority in Maryland.[4]

3. 13-3313 and 13-3315 – Conflicting Authority

page 14, lines 23 and 26; page 15, lines 4 and 16; and page 18, line 20

Issue: There are numerous references in these sections to the "Department" that likely were intended to be for the "Commission" instead. If the references to the "Department were kept" in these provisions, it would create conflicting authority.

Solution: Strike "Department" and replace with "Commission" at: page 14, lines 23 and 26; page 15, lines 4 and 16; and page 18, line 20.

[4] Note: We understand that the sponsor, Del. Glenn, has offered an amendment to change the age as requested, from 21 to 18.