



Legislative and Regulatory Letters for March 2010

**Below are letters submitted from the most recent meeting,
commenting on proposed legislation and regulations.**

March 18, 2010

Susan Haberstroh, Education Associate
Regulation Review
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: DOE Proposed Unit Count Regulation [13 DE Reg. 1158 (March 1, 2010)]

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education's proposal to adopt several revisions to its unit count regulation. Council has the following observations.

First, §§1.3, 4.1.4., and 4.1.11 disallow counting of a student with a disability unless the student has an IEP in effect during the last week of school in September. There is some "tension" between this requirement and 14 DE Admin Code Part 925, §23.2 which provides schools thirty days to develop an IEP after initial identification. Thus, a student could be identified in early September, be awaiting development of an IEP, and not be counted as a student with a disability resulting in lack of qualification for federal IDEA funds. The requirement that a student have an IEP to be counted as a student with a disability also squarely conflicts with 14 Admin Code Part 925, §6.5.1, which recites as follows:

6.5.1. A child shall be entitled to receive special education and related services, and shall be eligible to be counted as a special education student for purposes of the unit funding system

established under 14 Del.C. Ch. 17, when the child’s team has determined that the child meets the eligibility criteria of at least one of the disability classifications in this section, and by reason thereof, needs special education and related services.

At a minimum, the DOE may wish to consider allowing newly identified students to be counted pending development of an IEP.

Second, §2.2 recites that “students with multiple disabilities shall be reported in the category that corresponds to their major eligibility category.” To conform to 14 DE Admin Code Part, 925, §6.5.3, as well as to conform to historical language, the DOE should consider referring to “primary disability classification” or “primary eligibility category”.

Third, in §1.3, the DOE deleted the requirement that students be reported by grade level. However, §2.4 still requires reporting by grade level. The DOE may wish to consider whether an amendment is necessary to reconcile these provisions.

Fourth, §3.1.3 misstates the legal standard for “good cause” transfer of an initial year charter school student to another public school. Section 3.1.3 recites as follows:

3.1.3. Districts and Charter Schools enrolling an intra-state transfer student during the last 10 school days of September during which students are required to be in attendance shall first determine if the student is currently obligated under a choice agreement or first year charter agreement before enrolling the student. If said obligation exists, “good cause” must be agreed upon by the sending and receiving district/charter school before the receiving district/charter school can enroll the student.

[emphasis supplied]

In contrast, Delaware statutory law identifies “good cause” for initial year transfer from a charter school as including several bases apart from the mutual agreement of the sending and receiving schools. See Title 14 Del.C. §506(d). An initial year charter student can withdraw from charter school “as of right” and irrespective of approval of the exiting charter school and the receiving school based on changes of residence, marital status, guardianship, etc.

Fifth, §4.1.6.2, as amended, is unclear. A word or words may be missing. It reads as follows:

4.1.6.2. Students shall the level of special education services as defined by the current IEP.

Sixth, the word “and” is duplicated in §4.1.11. It reads “(s)tudents who have been properly identified; and and have an IEP...”

Seventh, §6.2.1 disallows inclusion of students placed in distance education/twilight programs for behavioral reasons unless “currently suspended indefinitely or expelled by the district and enrolled in the district’s alternative placement program.” The reference to “indefinite suspension” is odd. Suspensions of students, particularly special education students, cannot be indefinite. See 14 DE Admin Code Part 926, §30.2. Moreover, students may be enrolled in an alternative placement program for behavioral reasons without being suspended or expelled. See Title 14 Del.C. §§1604 and 1605.

Eighth, §6.2.3 is convoluted and difficult to understand.

Ninth, Council would like the DOE to consider promoting a fall and spring unit count.

Thank you in advance for your time and consideration of our observations. Please do not hesitate to call me or Wendy Strauss should you have questions or concerns.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

CC: The Honorable Lillian Lowery, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Charles Michels, Professional Standards Board
Martha Toomey, DOE
John Hindman, Esq., DOE
Terry Hickey, Esq., DOE
Paula Fontello, Esq., DOE

March 30, 2010

Mary T. Anderson, M.S.W.
Director of Policy Development
Division of Developmental Disabilities Services
26351 Patriots Way
Georgetown, DE 19947

RE: DDDS Proposed Appeal Process Regulation [13 DE Reg. 1164 (3/1/10)]

Dear Ms. Anderson:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Developmental Disabilities Services (DDDS) proposal to adopt a regulation defining its appeal process. Council has the following observations.

First, DDDS is to be applauded for publishing a proposed regulation in this context as juxtaposed to a "policy". Although its enabling legislation [Title 29 7909A] contemplates DDDS issuance of regulations, it has only adopted a single regulation since its inception, i.e., its eligibility standards which have been amended a few times. See 16 DE Admin Code 2100.

Second, DDDS should consider overlapping appeal processes apart from Medicaid. For example, if DDDS proposes action covered by the long-term care bill of rights (Title 16 Del.C. §1121) (e.g. changing a roommate in group home or Stockley), the client could initiate a "grievance" with Delaware Health and Social Services (DHSS) pursuant to Title 16 Del.C. §1121(28) and 1125. Moreover, if an applicant desired institutional versus Home and Community Based Services (HCBS) care (covered by §2.1 of the DDDS policy), and the decision was Preadmission Screening and Annual Resident Review (PASARR)-related, a DSS hearing is available to even non-Medicaid beneficiaries. See 16 DE Admin Code Part 5000, Section 5304.1. Therefore, it would be prudent to include a non-supplanting provision in the DDDS regulation. Consider the following amendment to §11.0:

11.0 A DDDS Appeal shall not be a pre-requisite for requesting a DSS Medicaid Fair Hearing nor shall the availability of a DDDS appeal supplant or preclude access to appeal and review processes otherwise available under law or Departmental policy.

Third, §3.0 could be interpreted as categorically requiring exhaustion of informal resolution methods prior to appealing to DDDS. This could be problematic since it could result in dismissal of an appeal based on perceived "insufficient efforts" to resolve the dispute informally. Moreover, literally, it would require a client dissatisfied with the outcome of a rights complaint to try to negotiate a different disposition with Chris Long prior to appeal. It would be preferable to "encourage" but not categorically "require" resolution efforts prior to filing for appellate review.

Fourth, in §3.0, the reference to "an appeal DDDS" makes no sense. Consider substituting "an appeal under this regulation."

Fifth, in §9.0, the comma after the word “appealed” should be deleted.

Sixth, in §10.0, the comma after the word “disposition” should be deleted.

Seventh, in §4.0, consider adding the following amendment: “The implementation..., unless it has already been implemented *or by agreement of the appellant and DDDS.*” There may be situations in which the parties agree to “roll back” action pending the processing of the appeal. It would be preferable to authorize DDDS discretion in this context.

Eighth, under §5.0, the 90 day time period to request a Medicaid hearing is not tolled during the pendency of the DDDS appeal. It would be preferable to reach an accord with DSS that would allow tolling. A January 27, 2000 policy letter from Medicaid Director, Phil Soule, authorizes tolling of the 90 day Medicaid fair hearing request period during pendency of internal MCO review.

Ninth, in §2.4, it would be preferable to insert “limitation” after “reduction,”. Compare 18 DE Admin Code Part 1403, §2.0, definition of “adverse determination” and 18 DE Admin Code Part 1301, §2.0, definition of “adverse determination”.

Tenth, in §2.0, it would be preferable to include the following: “2.6. Decisions involving the content or implementation of an ELP”.

Eleventh, in §2.0, it would be preferable to include a “catch-all” such as “2.7 . Other adverse DDDS action or refusal to act with significant impact on appellant.”

Thank you for your time and consideration of our comments and recommendations. Please feel free to contact me or Wendy Strauss should you have questions in regard to the comments above.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

CC: The Honorable Rita Landgraf, Secretary of DHSS
Terry Reilly, ARC of Delaware
Theda Ellis, Autism Delaware

March 30, 2010

Sharon L. Summers
Policy Program and Development Unit
Division of Social Services
1901 North DuPont Highway
P.O. Box 906
New Castle, DE 19720-0906

RE: DMMA Proposed Medicaid Prior Authorization regulation [13 DE Reg. 1166 (3/1/10)]

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Medicaid and Medical Assistance (DMMA) proposal to amend a Medicaid prior authorization "policy". It proposes to delete an existing policy with specific standards in favor of revising a general policy which then cross references sixteen separate policy manuals (§1.21.6). The GACEC would like to share the following observations.

First, DMMA is required to issue its standards as regulations in conformity with the Administrative Procedures Act. See Title 29 Del.C. §§10161(b), 10111, and 10113. The preface to the proposal indicates that DMMA is amending "the Delaware Medical Assistance Program (DMAP) General Policy Provider Manual." At 1166. The preface then invites comments on "the proposed new regulations". Id. Unfortunately, it is, at best, unclear that the Manual is a regulation.

The Delaware Administrative Code is available on-line and contains an index for "Title 16 Health & Social Services" at <http://regulations.delaware.gov/AdminCode/title16/index.shtml>. The index lists DDDS, DLTCRP, DPH, DSS, and DSAMH, but not DMMA. The DSS site includes the DSSM (containing Medicaid regulations) but does not include DMAP provider manuals. If someone accesses the DHSS website, clicks DMMA, and then clicks "regulations", you are referred to the Administrative Code (which lacks a DMMA entry) and the DSSM. Only if you click "manuals", then "downloads", then "manuals" again on the DMMA website will you discover the 186-page General Provider Manual and thirty-one (31) policy provider specific manuals containing a host of prescriptive, substantive standards.

There are multiple problems with this system:

A. The manuals should be adopted as regulations consistent with the APA since they contain many substantive standards. If they are regulations, they should appear in the Administrative Code.

B. The manuals are very difficult to locate without an extensive search.

C. If the manuals are not regulations, they can be changed without the benefit of publication for public comment.

Second, Section 1.21.6 contains a list of sixteen (16) contexts in which prior authorization is required. However, it also recites that the list is “not all-inclusive” and directs the reader to the twenty-one manuals for more specific information. This is not very informative or “user-friendly”. A Medicaid beneficiary will often be unable to determine whether prior authorization is required due to the “maze” of standards and the catch-all recital that the list is “not all-inclusive.” A provider who fails to obtain prior approval when required by these obtuse standards is not paid. See §1.21.2. The unpaid provider may then pressure the beneficiary to pay. Although an informed beneficiary could rely on §1.16.1 protections, this presupposes the beneficiary somehow locates the manual. Moreover, providers can nevertheless pressure payment through other means (e.g. threatening to “drop” as patient).

Thank you in advance for your time and consideration of our observations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

March 30, 2010

Sharon L. Summers
Policy Program and Development Unit
Division of Social Services
1901 North DuPont Highway
P.O. Box 906
New Castle, DE 19720-0906

**RE: DSS Proposed Cash Assistance Overpayments and Food Supplement Program (FSP)
Household Claims Reg. [13 DE Reg. 1174 (3/1/10)]**

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Social Services (DSS) proposal to adopt separate regulatory standards in the cash assistance program in the "7000" section and the Food Supplement Program (FSP) in a new "9095" section. The GACEC would like to share the following observations.

First, in Section 7003.1, the word "claim" should be deleted.

Second, in other contexts, it is common to waive recovery of overpayments if relatively small in amount or collection is not cost effective. For example, the Social Security Administration will waive an overpayment up to \$1,000. The FSP authorizes non-collection if the overpayment is \$125 or less [§9095.5] or a claim balance is less than \$25 [§9095.11C]. This concept is absent from Part 7000. Therefore, DSS staff would have no discretion but to process small overpayments of even \$1.00. DSS should consider incorporating an authorization to disregard overpayments if the amount is small and/or collection would not be cost effective.

Third, §7003.1 is confusing. It may be interpreted in two ways based on the use of bullets and co-equal references to "and" and "or":

A. One interpretation is that there are three independent bases for referral to the Department of Justice (DOJ):

1. intentional violation and net overpayment exceeds \$1000; or
2. interstate fraud; or
3. repeat offender of \$500 or more.

B. Another interpretation is that there is one basis for referral with three subparts. Referral would occur only if there is intentional violation characterized by one of the following:

1. net overpayment exceeds \$1,000;
2. interstate fraud; or
3. repeat offender.

A repeat non-intentional offender over \$500 would be referred to the DOJ under the first interpretation but not the second interpretation.

Fourth, the FSP regulation (§9095.10) includes an authorization to “compromise a claim” to facilitate DSS collection within a reasonable period of time. This concept is absent from the Part 7000 regulation for cash assistance overpayments. DSS should consider incorporating an authorization in Section 7004.1 (which covers restitution and reimbursement) to consider “compromise of claim”.

Fifth, Council believes the reference to “7004.2 Case Changes” should be deleted. Moreover, there are duplicate references to “7004.1 Methods of Collecting Cash Assistance Overpayments”.

Sixth, §9095.1C) recites that each adult member of a household is responsible for paying an “overpayment” claim. This is based on 7 C.F.R. 273.18(a)(4). See also §9095.6D.2. Section 9095.6C recites that notice of the claim is effected by providing “the household with a one-time notice of adverse action...”. This is based on 7 C.F.R. 273(e). Our concern is that a single notice to a “household” may not reach an 18 year old adult living with parents or relatives. The 18 year old would not be notified of the time period to request a hearing which then lapses. The 18 year old would then be subject to wage attachment, state tax intercept, etc. based on §9095.13G without effective notice and opportunity to challenge the underlying “claim”. Recognizing that DSS is adopting the federal regulation verbatim, it still may be the better practice to send separate notices to each adult member of a household. Otherwise, there may be a lack of due process.

Thank you in advance for your time and consideration of our observations and recommendations. Should you have any questions please feel free to contact me or Wendy Strauss.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

March 30, 2010

Sharon L. Summers
Policy Program and Development Unit
Division of Social Services
1901 North DuPont Highway
P.O. Box 906
New Castle, DE 19720-0906

RE: DSS Proposed Food Supplement Program (FSP) Income Deductions regulation [13 DE Reg. 1174B (3/1/10)]

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) reviewed the Division of Social Services (DSS) proposal to amend the income deduction standards of the Food Supplement Program (FSP). As the "Summary of Proposed Changes" indicates, there are two major changes which are highlighted below. Since the changes benefit recipients, Council **endorses** the amendments. However, we would like to clarify that references to income in the initial section refer to "gross" income, not "net" income. The superseded regulation (e.g. §9060B) explicitly referred to "gross" income.

DSS is opting to treat child support payments as an income exclusion from gross income rather than a deduction from net income. This favors the obligor and expands eligibility. The relevant federal regulations, 7 C.F.R. 273.9(b)(17) and 273.9(d)(5), provide states with this option.

Second, DSS is opting to allow a shelter deduction of \$143 for homeless households with limited shelter expenses. This should result in an increase in benefits to affected households.

Thank you in advance for your time and consideration of our comments. Please feel free to call me or Wendy Strauss should you have any questions.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

March 30, 2010

Mitch Crane, Esquire
Delaware Department of Insurance
841 Silver Lake Boulevard
Dover, DE 19904

RE: Department of Insurance Proposed Long Term Care (LTC) Insurance Claim Processing Reg. [13 DE Reg. 1181 (3/1/10)]

Dear Mr. Crane:

The Governor's Advisory Council for Exceptional Citizens (GACEC) reviewed the Department of Insurance proposal to adopt standards for the prompt, fair, and equitable settlement of claims for long-term care insurance. The GACEC would like to share the following observations.

First, in §4.5, second sentence, the word "an" should be "a".

Second, most of the definitions in §3.0 are extraneous since they are not used in the text of the regulation. Specifically, the terms "institutional provider", "policyholder", "insured", "subscriber", and "provider" are absent from the balance of the regulation.

Third, overall, the regulation is less comprehensive and "weaker" than the Department's comparable "Standards for Prompt, Fair and Equitable Settlement of Claims for Health Care Services" codified at 18 DE Admin Code Part 1310. The following are examples.

A. Section 6.0 of the "Health" regulation requires an insurer to pay an undisputed part of a claim and to notify the provider or policyholder why the remaining portion of the claim is not being paid. In contrast, Section 4.0 of the "LTC" regulation effectively authorizes an insurer to simply deny an entire claim even if it only questions a small part of it.

B. Section 7.0 of the "Health" regulation establishes a rebuttable presumption of an unfair practice based on three instances of a carrier's failure to comply with the regulation within a 36-month period. In contrast, Section 4.7 of the "LTC" regulation has no rebuttable presumption and will be more difficult to enforce.

C. Section 4.0 of the "Health" regulation lists some claims that are "clean claims" as a matter of law (e.g. those using Medicare forms). The "LTC" regulation contains no such standards.

D. Section 5.0 of the "Health" regulation clarifies that both a "provider" or "policyholder" may submit a "claim" to which the regulation applies. There is no analog in the "LTC" regulation.

Council encourages the Department to adopt standards analogous to the Part 1310 standards. Most of the individuals insured under the LTC policies will be senior citizens who need the protection of comprehensive regulatory protections more than the general population. Thank you in advance for your time and consideration of our observations. Should you have questions or concerns in regard to the comments above, please feel free to contact me or Wendy Strauss.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

CC: Honorable Members of the Delaware Senate Insurance Committee
Honorable Members of the Delaware House Economic Development/Banking/Insurance/
Commerce Committee

March 1, 2010

The Honorable (All Legislators)
Legislative Hall
411 Legislative Avenue
Dover, DE 19901

RE: House Bill No. 229 (Hand-held Cell Phone Ban)

Dear Representative/Senator:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill 229, with Amendment Number 1. Based on a January 7, 2010 amendment, the bill would ban hand-held cell phone use while operating a vehicle in motion. Law enforcement, emergency personnel, and school bus drivers would be exempt. A driver could avoid the fine by proving that use was based on an emergency. The GACEC **endorses the concept** of banning hand-held cell phone use while suggesting that the bill could be improved by adding a pre-emption provision. Council would like to share the following observations.

First, this bill differs from similar legislation in a few respects:

A. Given the fines, a two thirds vote is necessary for enactment. Bills which adopt a "civil penalty" approach [e.g. H.S. No. 1 for H.B. No. 40 (banning texting)] only require a majority vote.

B. This bill would not affirmatively preempt municipal or county ordinances. Contrast H.S. No. 1 for H.B. No. 40 [preempting local ordinances]. Consistent with the attached articles, a uniform state law in this context would be preferable. Wilmington and Elsmere have already adopted hand-held cell phone bans and a "patchwork" approach in which different exemptions and penalties would apply across the State is undesirable.

Second, consistent with recent articles, hand-held cell phone bans appear to be gaining momentum across the Nation given studies demonstrating the incidence of accidents linked to cell phone use. Such bans therefore merit support to reduce the number of traffic accidents which often result in spinal cord and traumatic brain injuries.

Thank you in advance for your time and consideration of our comments. Please feel free to contact me or Wendy Strauss at the GACEC office should you have questions.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

March 1, 2010

The Honorable (All Legislators)
Legislative Hall
411 Legislative Avenue
Dover, DE 19901

RE: House Bill No. 298 (Hand-held Cell Phone Ban)

Dear Representative/Senator:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill 298 which prohibits operation of a motor vehicle while using a hand-held cell phone. There is an exemption for law enforcement personnel. There is also an exemption for school bus operators who are subject to Title 21 Del.C. §4176B. A violation results in a civil penalty of up to \$50.00. Subsequent violations subject the driver to a \$100 civil penalty. The GACEC **endorses the concept** of banning hand-held cell phone use while suggesting that the bill could be improved by adding a preemption provision. The GACEC would also like to share the following observations.

First, this bill is similar to H.S. No. 1 for H.B. No. 40 (barring texting) insofar as it adopts a civil penalty approach rather than authorizing a criminal fine. H.B. No. 229 (barring hand-held cell phone use) adopts a criminal fine approach to enforcement. Using the civil penalty approach would permit enactment by a majority vote rather than a 2/3 vote. Reasonable persons could differ on the merits of a civil versus criminal approach to enforcement.

Second, the word "and" should be inserted in line 7 between the words "enforcement" and "emergency". Compare H.B. No. 229 at line 4.

Third, the exemption for school bus drivers is appropriate since 12 Del.C. §4176B already bans school bus operators using cell phones in a non-emergency and imposes fines for violations.

Fourth, consistent with recent articles, hand-held cell phone bans appear to be gaining momentum across the Nation given studies demonstrating the incidence of accidents linked to cell phone use. Such bans therefore merit support to reduce the number of traffic accidents which often result in spinal cord and traumatic brain injuries.

Fifth, this bill would not affirmatively preempt municipal or county ordinances. Contrast H.S. No. 1 for H.B. No. 40 [preempting local ordinances]. Consistent with recent media articles, a uniform state law in this context would be preferable. Wilmington and Elsmere have already adopted hand-held cell phone bans and a "patchwork" approach in which different exemptions and penalties would apply across the State is undesirable.

Thank you for your time and consideration of our comments and position. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

March 1, 2010

The Honorable (All Legislators)
Legislative Hall
411 Legislative Avenue
Dover, DE 19901

RE: House Bill No. 302 (Financial Exploitation Reporting)

Dear Representative/Senator:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill 302 which intends to establish civil and criminal immunity for persons reporting financial exploitation of the elderly and "infirm". The GACEC would like to share the following observations.

First, the bill only covers the financial exploitation of adults and not children. Children are also subject to financial exploitation. However, it does appear that immunity for reporting exploitation of children may be already available under Title 16 Del.C. §§903 and 908 and Title 10 Del.C. §901(1) and 901(11). Therefore, with the possible exception of pediatric nursing home residents [Title 16 Del.C. §1119B], the bill should not result in any major gap in reporting immunity.

Second, in lines 17-18, the sponsors should consider deleting the following words: "with respect to any act, omission, failure to act or failure to report pursuant to such reporting program". Otherwise, the bill literally provides immunity to persons who fail to comply with a reporting duty or fail to take steps to protect a victim!

Third, the definition of "person" in lines 10-11 only explicitly refers to private entities and omits any reference to public bodies. As a result, government-required reporting policies would not be covered by the bill since the definition of a "reporting program" is limited to one adopted by a "person" (line 6). Thus, reporting pursuant to the attached DHSS PM 46 policy would not be covered by the bill. Parenthetically, it appears that there are gaps in immunity protections for persons reporting pursuant to statute. For example, persons reporting long-term care financial exploitation pursuant to Title 16 Del.C. §1132 are civilly and criminally immune pursuant Title 16 Del.C. §1135. Likewise, persons generally reporting to APS enjoy both civil and criminal immunity pursuant to Title 31 Del.C. §3910. However, persons reporting to the DHSS long-term care Ombudsman pursuant to Title 16 Del.C. §1152(5) are only given civil but not criminal immunity pursuant to Title 16 Del.C. §1154. Moreover, persons reporting financial exploitation to DHSS pursuant to Title 16 Del.C. §2224 are given no immunity at all. The sponsors may wish to amend the bill to resolve these gaps.

Fourth, the sponsors may wish to consider adding a second sentence to the definition of "financial exploitation" at lines 12-14 to read as follows: Without limitation, the term "financial exploitation" includes acts encompassed by Title 16 Del.C. §§1131(5) and Title 31 Del.C. §3902(5)." This would obviate any argument that the definition of "financial exploitation" created by the new Section 8146 is narrower than these other statutes and therefore immunity only applies to a subset of reporters of "financial exploitation" under these statutes.

Fifth, the term “infirm adult” in line 9 is an outdated reference which could be construed as pejorative. It is also unduly limiting. Consider that the bill covers all “elderly” persons irrespective of capacity. Thus, reporting the financial exploitation of an astute sixty-two year old stockbroker would be covered by the bill while reporting the financial exploitation of persons with disabilities would only be covered if the person were “substantially impaired in the ability to provide adequately for the person’s own care and custody.” The sponsors may wish to consider adopting a more inclusive term.

Sixth, lines 24-25 could be problematic. Literally, any “person” could adopt an “internal policy” for reporting financial exploitation which would disembowel even the attorney-client privilege for consultation on actions occurring in the past. See e.g., Delaware Lawyers’ Rules of Professional Conduct, Rule 1.6, Comments 8 and 12.

Seventh, line 27 should be deleted or amended. There are existing statutes and regulations which require agencies to have policies on reporting financial exploitation. To avoid a conflict with such statutes and regulations, line 27 could be amended to read as follows: “Nothing in this section shall be construed to require any person to adopt a reporting program.”

Thank you in advance for your time and consideration in reviewing our observations. If you have any questions please feel free to contact me or Wendy Strauss at the GACEC office.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

CC: The Honorable Rita Landgraf, Secretary of Delaware Health & Social Services (DHSS)
Deborah Gottschalk, DHSS
Susan C. Del Pesco, Director, Division of Long Term Care Residents Protection (DLTCRP)

March 1, 2010

The Honorable (All Legislators)
Legislative Hall
411 Legislative Avenue
Dover, DE 19901

RE: House Bill No. 304 (Rape by Persons in Position of Trust, Authority or Supervision)

Dear Representative/Senator:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill No. 304, with House Amendment No. 1 which would enhance the authorized penalties for sexual assaults on students committed by teachers and school employees. The GACEC **endorses** the bill.

Delaware Code [Title 11 Del.C. §770] currently characterizes the following conduct as a class C felony:

A person is guilty of rape in the fourth degree when the person:
...(4) Intentionally engages in sexual intercourse or sexual penetration with another person, and the victim reached that victim's sixteenth birthday but has not yet reached that victim's eighteenth birthday and the defendant stands in a position of trust, authority, or supervision over the child, or is an invitee or designee to a person who stands in a position of trust, authority or supervision over the child.

The bill, as amended, would not affect the elements of the crime described above. Instead, it amends the Code [Title 11 Del.C. §771] to characterize the same conduct, if there is at least a 4 year age difference between perpetrator and victim, as a Class B felony:

A person is guilty of rape in the third degree when the person:
...(3) Intentionally engages in sexual intercourse or sexual penetration with another person, and the victim reached that victim's sixteenth birthday but has not yet reached that victim's eighteenth birthday and the defendant is at least 4 years older than the victim and the defendant stands in a position of trust, authority, or supervision over the child, or is an invitee or designee to a person who stands in a position of trust, authority or supervision over the child.

The difference in authorized penalty is significant. The term of incarceration for a Class C felony is up to fifteen years with no minimum. The term of incarceration for a Class B felony is two to twenty-five years. See Title 11 Del.C. §4205(b).

Persons with disabilities are disproportionately victims of violent crimes, including sexual assaults. Since the bill would increase the authorized penalty for sexual assaults by persons in a position of trust, authority, or supervision of 16-17 year old teens, the GACEC is supportive of this legislation.

Thank you in advance for your time and consideration of our observations. Please feel free to contact me or Wendy Strauss at the GACEC office should you have any questions.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

CC: The Honorable Beau Biden, Attorney General, Delaware Department of Justice
Delaware Victims' Rights Task Force (VRTF)

March 1, 2010

The Honorable (All Legislators)
Legislative Hall
411 Legislative Avenue
Dover, DE 19901

RE: Senate Bill No. 14 (VCAP Coverage of Property Crimes)

Dear Senator/Representative:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed Senate Bill No. 14, which as amended, is intended to expand the availability of awards by the Victim's Compensation Assistance Program (VCAP) to non-violent property crimes. Such awards could not exceed \$2,500 per individual and would require proof of pecuniary or economic loss (line 69). Consumers would be precluded from filing claims for losses of entertainment equipment, clothing, art objects, and jewelry (lines 14-17). The VCAP would be precluded from expending an aggregate of \$500,000 in any fiscal year on property claims. The GACEC recommends deferral of the pilot project given the fiscal concerns identified below in Par. 1 and the prospect for overtaxing the ability of the VCAP to effectively transition to the system envisioned by the new enabling legislation. The GACEC would also like to share the following observations.

First, the bill raises fiscal issues. The Delaware Victims' Rights Task Force (VRTF) sent the attached January 27, 2010 letter to Senator McBride, the prime sponsor, outlining financial concerns with the bill. The VRTF notes that the rate of payouts for violent crimes has increased by 40% in the latest 6-month period. Moreover, it is predictable that the Sussex pediatrician case may prospectively generate many claims against the fund. Finally, the VRTF observes that only three other states compensate property crime victims under very limited circumstances. See attached summary for specifics. The attached fiscal note (Par. 4) recites that the normal 60% federal reimbursement for violent crime victim awards would not be available for property crime victim awards. The VRTF's fiscal concerns are reinforced by the attached financial overview corroborating a 49% increase in VCAP claim expenditures between FY 09 and FY 10.

Second, the attached House Committee report identifies other concerns. For example, the bill's pilot program would require a report by March 1, 2010 and sunset on June 30, 2010. The Committee recommended an amendment to establish the pilot project in FY 11. Moreover, the Committee noted that amendments would be necessary to refer to the VCAP as juxtaposed to the Violent Crimes Compensation Board. Indeed, the legislation is ostensibly based on the 2008 version of the statute which was overhauled by H.B. No. 133 (signed by the Governor on August 24, 2009) and H.B. No. 253 (signed by the Governor on July 31, 2009).

Third, given the recent overhaul of the enabling legislation, the VCAP is still working on regulations and systems. Moreover, the Victim's Compensation Assistance Program Advisory Council, charged with issuing new regulations pursuant to Title 11 Del.C. §9004, has only met twice as of February 2, 2010. Adding a pilot project to the recently overhauled system may unduly tax the ability of the VCAP to effectively transition to the system contemplated by the new enabling legislation.

However, if the sponsors nevertheless wish to promote enactment, the bill should be amended to establish an FY 11 pilot period and conform to the current Code as amended by H.B. No 133 and H.B. No. 253. Alternatively, it would be preferable to simply establish the pilot project through budget epilog to obviate the bill's four pages of statutory amendments effective for a one year period. For example, the budget epilog could include a provision authorizing the VCAP, notwithstanding any contrary law, to initiate a pilot project and issue awards of up to \$2,500 for non-violent property crimes not to exceed an aggregate of \$500,000 in FY11.

Thank you for your time and consideration of our comments and recommendations. Please feel free to contact me or Wendy Strauss should you have questions or concerns.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

CC: Victims Compensation Assistance Program (VCAP)
Victims Right Task Force (VRTF)

Enclosures

March 1, 2010

The Honorable (All Legislators)
Legislative Hall
411 Legislative Avenue
Dover, DE 19901

RE: Senate Bill No. 162 (Pharmacy Fee)

Dear Senator/Representative:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed Senate Bill No. 162, which is an attempt to provide an incentive for pharmacies to participate in the Medicaid prescription drug program. The GACEC **endorses the concept** of the bill because it would provide an incentive for pharmacy participation in the Medicaid prescription drug program.

In the past, some pharmacies threatened to discontinue participation in the Medicaid program based on low profit margins. This bill would impose an additional gross receipt license fee for a pharmacy refusing to fill Medicaid prescriptions. The additional fee is substantial, i.e., 2% of the aggregate sales of all products sold by the pharmacy. Council considers that this fee may be too high. The GACEC would also like to know which goods are subject to the gross receipt tax.

Thank you in advance for your time and consideration of our position and comments. Please feel free to contact me or Wendy Strauss should you have questions or concerns.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

MEMORANDUM

DATE: March 30, 2010

TO: The Honorable Members of the 145th Delaware General Assembly

FROM: Robert D. Overmiller, chairperson
Governors Advisory Council for Exceptional Citizens (GACEC)

RE: Senate Bill No. 204 (Autism Spectrum Disorders Insurance Coverage)

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Autism Spectrum Disorders Insurance Coverage bill. This bill requires private health insurers to cover the costs of diagnosis and treatment of autism spectrum disorders. The GACEC **endorses** this bill.

This bill is patterned on a national model promoted by Autism Speaks. Fifteen other states have now passed similar legislation, including Pennsylvania and New Jersey. Coverage of up to \$50,000 for applied behavior analysis for persons with such disorders would be required. The advantages of early identification and intervention for persons with autism spectrum disorders are well documented.

Thank you for time and consideration of our position. Please feel free to contact me or Wendy Strauss should you have questions or concerns.

March 5, 2010

Carol Post
DCADV
100 W. 10th Street, Suite 703
Wilmington DE, 19801

Dear Ms Post:

The Governor's Advisory Council for Exceptional Citizens (GACEC) strongly endorses the submission of the OVW Education, Training and Enhanced Services to End Violence Against and Abuse of Women with Disabilities Grant Program (CFDA 16.529) application by the Delaware Coalition Against Domestic Violence (DCADV). We are very excited that DCADV is partnering with The Center for Disabilities Studies (CDS) and the National Alliance on Mental Illness in Delaware (NAMIDE) to create a multi-disciplinary collaborative team to address systemic changes that will result in effective services for women with disabilities who are victims of sexual assault, domestic violence, dating violence and stalking. This grant will provide an opportunity for DCADV, CDS and NAMIDE to concentrate efforts, which will increase the understanding of this critical issue and support the creation of appropriate safe interventions and supports.

The mission of the Governor's Advisory Council for Exceptional Citizens' (GACEC) is to serve as the Individuals with Disabilities Education Act (IDEA) advisory panel to agencies providing educational services/programs for children (birth through age 21) and agencies providing services for adults with disabilities in Delaware. The GACEC serves as the review board for policies, procedures and practices related to the delivery of services for all citizens with exceptionalities in Delaware. The GACEC's primary function is advisory, with an advocacy byproduct when necessary to achieve our mission. The Council is aware that research shows that individuals with disabilities are victims of crime at a much higher rate than the rest of the public. We understand this grant will focus on sexual assault, domestic violence, dating violence, and stalking against individuals with disabilities due to the proliferation of such crimes. The GACEC can assist the above named agencies in advocating for systemic change and outreach.

We are excited about this opportunity and are looking forward to supporting the Delaware Collaborative Team in this initiative.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc