

April 30, 2012

Deborah Harvey
Division of Public Health
417 Federal Street
Dover, DE 19901

RE: DPH Proposed Medical Marijuana Code Regulation [15 DE Reg. 1424 (April 1, 2012)]

Dear Ms. Harvey:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Public Health proposal to adopt regulations implementing Delaware's law on medical use of marijuana enacted in May, 2011. The GACEC would like to share the following observations.

First, the regulations, including definitions, generally track the statute.

Second, § 5.3.1 is somewhat vague and should be more clear in specifying the scope of information to be reported to the Division of Long Term Care.

Third, §5.3.6 authorizes a \$150 civil penalty if a patient or caregiver cardholder fails to report a change in name, address, physician, disability condition, medical status, etc. This is consistent with Title 16 Del.C. §4912A. However, the regulation should include due process to contest the penalty. Compare §§8.2.5 (record review available to challenge suspension of registry identification card); and 8.4 (hearing available to challenge suspension or revocation of registry identification card).

Fourth, §8.5.3 recites that "(a)ll hearings held pursuant to this section shall be open to the public." Such hearings would typically involve confidential medical records and otherwise sensitive evidence. The statute explicitly contemplates that such information is confidential and protected, not "open to the public". See Title 16 Del.C. §4920A. For similar reasons, §8.14.4 is problematic since it makes a final hearing decision "public information" without redaction. . Cf. 16 DE Admin Code 5000, §5502 [DHSS hearing decisions can be published but in redacted form].

Fifth, in §8.8, substitute "bear" for "endure".

Sixth §8.11 imposes the burden of proof on the patient or caregiver in all hearings. The traditional approach in administrative hearings is to impose the burden of proof on the "consumer" for denials of initial applications while imposing the burden of proof on the agency for terminations. The rationale is that there must be some change in circumstances to justify a termination. The agency should have the burden of showing the change in circumstances.

Seventh, the word “Secretary” should be capitalized in §§8.14.1, 8.14.2, and 8.14.3.

Eighth, §8.14.3 contemplates the hearing officer’s issuance of a “recommended decision” which is subject to the Secretary’s revision. Since the Secretary was not involved in the hearing, it is unclear as to why this approach is being taken. The general DHSS approach is to authorize its hearing officers to issue a final decision. Compare 16 DE Admin Code 5000, §5304.5.

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

Sincerely,

Terri A. Hancharick
Chairperson

TAH:kpc