



Governor's Advisory Council for Exceptional Citizens (GACEC)
516 West Lookerman St., Dover, DE 19904
302-739-4553 (voice) 302-739-6126 (fax) <http://www.gacec.delaware.gov>

MEMORANDUM

DATE: April 27, 2017

TO: The Honorable Members of the Delaware General Assembly

FROM: Dafne A. Carnright, Chairperson
GACEC

RE: **House Bill No. 100 (Substance Abuse Treatment)**

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill No. 100 which seeks to ensure that persons with private and public insurance coverage have the ability to insist that they receive the substance abuse coverage to which they are entitled by law and by their insurance plans. Council **endorses** the proposed legislation and would like to suggest that the sponsors of the legislation consider supplemental approaches to addressing denials of substance abuse treatment. We would also like to share the following observations.

First, the scope of the private insurers required to provide the notice would apparently be limited to those insurers subject to Delaware Department of Insurance jurisdiction. As the Synopsis recites, employer-funded health benefit plans are typically exempt from state regulation. Council believes that most health insurers providing coverage in Delaware are covered by federal Employee Retirement Income Security Act (ERISA) and therefore exempt from the jurisdiction of the Delaware Department of Insurance. However, the Department of Justice (DOJ) could still provide valuable assistance to aggrieved individuals under private plans not regulated by the Delaware Department of Insurance (line 25 and Synopsis).

Second, there is some potential for a conflict of interest since the DOJ represents the State Medicaid agency, the Division of Medicaid & Medical Assistance (DMMA). The Medicaid Managed Care Organizations (MCOs) are State contractors who are acting on behalf of the State. This potential conflict is mitigated in the Fair Hearing context since the MCO, not DMMA, presents the case and defends its decision. See 16 DE Admin Code 5304.3. However, a potential also arises in the following contexts:

A. A State DMMA employee serves as one of three decision-makers for internal MCO appeals. See excerpt from DMMA-MCO contract, §3.15.3.2.8.

B. DOJ advocacy to secure enhanced substance abuse services for a Medicaid beneficiary may result in fiscal obligations of the State Division of Behavioral Health Services or State Division of Substance Abuse & Mental Health which are represented by the DOJ. See excerpt from DMMA- MCO contract, §§3.4.10.9.1, 3.4.10.9.2, 3.8.9.9 and 3.8.9.10 and Appendix 1.

Third, the Synopsis suggests that the Sunset provision is intended to permit assessment of the effectiveness of the bill. Apart from authorizing DOJ assistance to individuals denied substance abuse treatment, policymakers could also consider supplemental options. For example, legislation or regulations could be prepared to:

- A. uniformly impose the burden of proof and persuasion on the insurer/MCO in disputes concerning substance abuse treatment;
- B. make the opinion of the treating prescriber controlling unless clearly erroneous as documented by production of clear and convincing evidence;
- C. require any benefit of doubt regarding prescribed substance abuse treatment to be resolved in favor of eligibility; and/or
- D. encourage a robust independent medical assessment if substance abuse treatment is denied (consistent with attached §3.4.7 of DHSS-MCO contract).

Compare House Bill No. 459 from the 142nd General Assembly.

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

CC: The honorable Matthew L. Denn, Delaware Attorney General