



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: February 24, 2017

TO: The Honorable Debra Heffernan
The Honorable Harris McDowell
The Honorable Nicole Poore
The Honorable Melanie George Smith

FROM: Dafne A. Carnright, Chairperson
GACEC

RE: **House Bill No. 21 (Organ Transplant Discrimination)**

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed **House Bill No. 21** which would disallow covered entities from engaging in discrimination in the organ transplant system. Council **endorsed** the proposed legislation in a letter to the full General Assembly; however, there were a couple of concerns that we felt should be communicated to you directly as the prime sponsor of the bill.

1. Lines 76-77 disallow a "covered entity" from declining "insurance coverage" for a transplant or post-transplantation care. However, the definition of "covered entity" (lines 61-64) does not cover health insurers. If you, the sponsor wished to reach State-regulated insurers, it may be preferable to consider amending the Insurance Code, Title 18. For example, the Insurance Code includes discrimination bans based on mental illness (18 Del.C. §§ 3343, 3576 and 3578) and pre-existing conditions (18 Del.C. §§3361 and 3573). Conceptually, a ban on insurer discrimination in organ transplants based on disability could be added to the Insurance Code.

2. Council identified two concerns with House Amendment (H.A. 1), added to the bill on January 19.

A. There is a significant inconsistency between lines 5 and 17. Line 5 only authorizes an individual to file an action "for injunctive or other equitable relief" while line 17 authorizes the court to award monetary damages. This creates ambiguity in the law concerning the authority of the Chancery Court to award damages.

B. The focus of most litigants seeking to challenge discrimination under the bill would likely be injunctive relief to obtain access to a transplant rather than damages. The most critical aid in this context would be the availability of attorney's fees to a successful litigant. The availability of attorney's fees should preferably be made explicit at line 17 of HA. No. 1.

These overlapping concerns could be addressed as follows:

- a. Amend line 5 as follows: "the Court of Chancery for ~~injunctive or other equitable~~ relief authorized by subsection (c) of this section.
- b. Amend lines 17-18 as follows: "Award such other relief as the court considers appropriate, including monetary damages and attorney's fees to aggrieved persons.

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

CC: The honorable Matthew Denn, Attorney General