



**Governor's Advisory Council for Exceptional Citizens (GACEC)**  
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### **MEMORANDUM**

**DATE:** March 21, 2022

**TO:** The Honorable Members of the Delaware General Assembly

**FROM:** Terri Hancharick, Vice Chairperson  
GACEC

**RE:** **House Bill No. 324 Criminal Penalties for Assault of Health Care Workers**

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed **House Bill No. 324**, which will broaden the statutory definition of assault in the second degree at 11 Del. C. § 612 to include qualifying offenses committed against a wider range of health care workers. Council would like to share the following observations and concerns.

We appreciate the intent of the bill to protect the well-being of healthcare workers but are concerned about unintended consequences.

Prior to the passage of HB 214 in 2016, an assault that would otherwise be considered a third-degree assault (a misdemeanor) would automatically be considered a second-degree assault (a felony) in cases where the perpetrator had recklessly or intentionally caused injury to a law enforcement officer, first responder, or public transit operator. See 11 Del. C. § 612(3)). In 2016, HB 214 expanded the automatic re-designation to assault in the second degree to include cases in which the perpetrator had intentionally caused physical injury to "the operator of an ambulance, a rescue squad member, licensed practical nurse, registered nurse, paramedic, or licensed medical doctor while such person is performing a work-related duty," as well as "any other person... rendering emergency care." See 11 Del. C. § 612 (4)-(5).

HB 324 proposes to further expand the conditions in 11. Del. C. 612 (3)-(4), to include hospital constables, in addition to "any person providing health care treatment or employed by a health care provider while such person is performing a work-related duty." This language is extremely broad, and in many cases would essentially include anyone employed by a particular facility or program. This would potentially also include direct service professionals serving individuals with disabilities in community settings, as well as all employees at facilities such as group homes

and psychiatric hospitals. Presumably the perpetrator in the vast majority of such cases would be a patient or service recipient, a person with a disability, most likely a behavioral health related disability. As second-degree assault is considered a felony, the consequences could be significant for individual defendants in terms of sentencing as well as the collateral consequences of a felony conviction.

Council notes that a nearly identical bill, HB 144, was introduced in March of 2020 just prior to the COVID-19 pandemic. At that time, The News Journal published two op-eds relating to the bill. The first, by Karen Lantz, Esq. of the ACLU of Delaware, and Jack Guerin of the ACLU's Coalition for Smart Justice, criticized the bill, stating that it "[would move] Delaware in the wrong direction on criminal justice reform." They also referred to the alternative strategy of "workplace violence prevention programs" and mentioned that legislation has passed in numerous other states requiring hospitals to have workplace violence prevention programs as opposed to increasing criminal penalties for assault. A rebuttal, penned by Wayne Smith of the Delaware Healthcare Association and Marcy Jack of Beebe Healthcare, contended that the strategies of workplace violence prevention and broadening the criminal statute are complementary and should be pursued together. Mr. Smith and Ms. Jack cited statistics regarding the widespread occurrence of assaults on health care workers and asserted that not amending the statute to include all health care workers would result in a situation where workers are not equally valued, as the same incident occurring within a health care facility would be considered a felony in some cases and not in others, depending on the job title of the victim. Finally, the rebuttal emphasized that acts covered by the statute would need to be "intentional" to be considered assault, and therefore the amended statute would not unfairly target individuals experiencing a behavioral health crisis.

While an act must be "intentional" to be deemed an assault in the second degree, this threshold would not clearly protect individuals with behavioral health conditions from unnecessary criminalization in all situations. There is no explicit exception in the statute for individuals with mental health conditions or other conditions that may impact behavior in circumstances that may increase the likelihood of such incidents. Acts of aggression can at times be a manifestation of an individual's disability and to hold someone criminally liable for an act that was not in their power to avert is inappropriate. Some individuals may be easily agitated or prone to bursts of aggression as a result of their condition but could still legally be found to have "intentionally" caused injury to another person. Incidents involving individuals receiving inpatient care at psychiatric facilities are already often reported to police; expanding when such incidents would be considered felonies may encourage further reporting of these incidents and increasing criminalization of these individuals, as opposed to focusing on treatment and supporting the development of appropriate behaviors and coping skills.

Broadening the definition of healthcare worker to include "any person providing healthcare treatment or employed by a healthcare provider" has risk. Is a direct support professional working in a group home for individuals with intellectual disabilities included in this definition? If the group home resident experiences a behavioral incident associated with their disability and harms the direct support professional, would they be considered to have committed a crime?

In programs and facilities serving individuals with disabilities, inadequate staffing and poor training of direct care staff often contribute to incidents escalating to the level of physical assault. Staff may not be paying sufficient attention to an increasingly agitated individual or may not feel empowered to de-escalate conflict when an individual starts behaving aggressively. In these

situations, the alleged perpetrators should not face greater punishment for not receiving the appropriate care. Further, as the ACLU's op-ed regarding the prior bill pointed out, alleged perpetrators of assault in these circumstances would still face consequences such as prison time or a fine for the misdemeanor charge. Saddling often-vulnerable individuals with felony convictions would potentially create larger obstacles to employment as well as certain types of housing and residential programs.

In Massachusetts, after similar legislation was enacted, advocates proposed an amendment making it clear that any individual who was being transported or held in a psychiatric facility under the provisions of the state's civil commitment law or has otherwise been "determined by mental health providers to need psychiatric evaluation or treatment" could not be charged with a felony under the Massachusetts statute.

Balancing the safety of health care workers with the rights and wellbeing of the individuals they serve is always a delicate balance. Without language such as that which appears in the Massachusetts bill, Council is concerned about the harm that will occur to individuals with disabilities. Council would also recommend language be introduced to further clarify that the new provisions would not apply in certain circumstances where an individual is actively receiving psychiatric treatment or other behavior related support.

Thank you for your time and consideration of our observations and concerns on this proposed legislation. Please feel free to contact Pam Weir or me at the GACEC office should you have any questions on our comments.