

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative & Regulatory Initiatives

Date: April 5, 2010

I am providing my analysis of eighteen (18) legislative and regulatory initiatives in anticipation of the April 8 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DSS Final Child Care Subsidy Program Sanction Regulation [13 DE Reg. 1337 (April 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in February, 2010. The Councils shared only one (1) recommendation, i.e., to insert the phrase “without good cause” in DSSM 11003.2.1. The Division of Social Services has now adopted a final regulation incorporating the suggested amendment.

Since the regulation is final, and DSS adopted the Councils’ only suggestion, I recommend no further action.

2. DSS Final Child Care Subsidy Program Special Need Reg. [13 DE Reg. 1339 (April 1, 2010)]

The SCPD, DDC, and GACEC commented on the proposed version of this regulation in February, 2010. The Councils shared only one (1) recommendation, i.e., to insert the word “gross” in Par. 2 of the new regulatory section. The Division of Social Services has now adopted a final regulation incorporating the suggested amendment.

Since the regulation is final, and DSS adopted the Councils’ only suggestion, I recommend no further action.

3. DLTCRP Final Adult Abuse Registry Regulation [13 DE Reg. 1308 (April 1, 2010)]

The SCPD, DDC, and GACEC commented on the proposed version of this regulation in February, 2010. The Division of Long-term Care Residents Protection has now adopted a final regulation incorporating 1 of 2 suggestions proffered by the Councils.

First, the Councils suggested retaining some variation of a conditional hiring authorization in the event the website were unavailable. The Division agreed and inserted 2 subparts within Section 2.0.

Second, the Councils suggested the addition of some privacy-related provisions in the regulation. The Division declined to adopt the suggestion.

Since the regulation is final, and the Division adopted 1 of 2 suggested amendments prompted by the Councils' commentary, I recommend no further action.

4. DLTCRP Final LTC Facility Crim. Background Check Reg. [13 DE Reg. 1314 (April 1, 2010)]

The SCPD, DDC, and GACEC commented on the proposed version of this regulation in February, 2010. The Councils proffered only one (1) recommendation, i.e., to include the clause "which shall conform in format and content to Division standards" in §10.16. The Division of Long-term Care Residents Protection has now adopted a final regulation. The Division agreed with the Councils' suggestion and incorporated the clause verbatim within §10.16.

Since the regulation is final, and the Division adopted the only amendment promoted by the Councils, I recommend no further action.

5. DLTCRP Final Home Health Crim. Background Check Reg. [13 DE Reg. 1317 (April 1, 2010)]

The SCPD, DDC, and GACEC commented on the proposed version of this regulation in February, 2010. Similar to its commentary on the above LTC Criminal Background Check regulation, the Councils proffered only one (1) recommendation, i.e., to include the clause "which shall conform in format and content to Division standards" in §3.3.9. The Division of Long-term Care Residents Protection has now adopted a final regulation. The Division agreed with the Councils' suggestion and incorporated the clause verbatim within §3.3.9.

Since the regulation is final, and the Division adopted the only amendment promoted by the Councils, I recommend no further action.

6. DLTCRP Final Assisted Living Regulation [13 DE Reg. 1328 (April 1, 2010)]

The SCPD, DDC, and GACEC commented on the proposed version of this regulation in February, 2010. The Delaware Health Care Facilities Association also commented. The Division of Long-term Care Residents Protection has now adopted a final regulation with some changes.

First, the proposed regulation included the following salutary provision: "If an applicant is rejected, the facility shall provide clear reasons for the rejection in writing." The Delaware Health Care Facilities Association objected to the requirement. In response, the Division noted that an existing regulation already contained the requirement. However, the Division agreed to dilute the standard such that facilities would only provide reasons for rejection upon request.

At 1329. This is an unfortunate dilution of the standard. The Councils may wish to consider

legislative and other options to address the dilution.

Second, the Councils recommended retention of semi-annual resident satisfaction surveys. The Division rejected retention based on the following rationale:

Semi-annual surveys have not been demonstrated to be an effective tool. Experience indicates that number of residents who respond is small. The facilities obligation to maintain a quality assurance program is preserved in Section 15.1 (renumbered 15). The facility has the burden of finding the most effective method of implementing quality assurance. Section 15 reads:

The assisted living facility shall develop, implement, and adhere to a documented, ongoing quality assurance program that includes an internal monitoring process that tracks performance and measure resident satisfaction.

At 1329. This is effectively another dilution of regulatory protection. The semi-annual survey requirement was precise and easily enforced. If response rates were low, this could easily be attributed to lack of facility promotion of responses since they could demonstrate facility deficiencies. The new regulation is more obtuse and merely requires some undefined assessment of “resident satisfaction”. There are no timelines and no guidance. A facility could simply have a “suggestion box” in the hallway and claim compliance.

Third, the Councils recommended adoption of more flexible medication standards. The Division adopted some conforming revisions, including allowing a locked “cabinet” and allowing residents to keep some medication on their person.

Fourth, the Councils recommended reconsideration of deletion of a requirement that the prescribing practitioner’s identity and phone number be kept in the medication log. The Division effected no amendment based on the observation that other regulations require such record-keeping in the facility’s data system. Unfortunately, the cited regulations do not specifically address medications at all:

19.1. The assisted living facility shall be responsible for maintaining appropriate records for each resident. These records shall document the implementation of the service agreement for each resident.

19.3. The assisted living facility resident clinical records shall be retained for a minimum of 5 years following discharge before being destroyed.

Fifth, the Councils recommended incorporation of a regulation implementing Title 16 Del.C. §1119C(b). The Division did not address the comment within its regulation. However, it informally consulted with the DLP and the Division will ostensibly consider issuing a conforming regulation at a later time.

Since the regulation is final, I recommend no further action apart from consideration of

legislative and other options to promote a more consumer-oriented system.

7. DLTCRP Final SNF & ICF Regulation [13 DE Reg. 1322 (April 1, 2010)]

The SCPD, DDC, and GACEC commented on the proposed version of this regulation in February, 2010. The Delaware Health Facilities Association also proffered comments. The Division of Long-term Care Residents Protection has now adopted a final regulation with some amendments.

First, the Councils noted that the proposed regulation erroneously provided a 28 day comment period in violation of the APA. The Division did not address the comment.

Second, the Councils expressed concern that many consumer-oriented standards were being deleted in favor of cross referencing federal standards. The Division responded that “the incorporation of the federal regulations provides protection equal to or greater than that in the state regulation.” No changes were made.

Third, the Councils noted that they had objected in 2008 to deletion of a requirement that a nurse be present on third shift. The Councils observed that the proposed deletion of a requirement of a CNA qualified to assist with medications on the third shift further weakened resident care. The Division responded that a CNA is not permitted to assist with medications in an SNF or ICF. The Division did not address the obvious problem, i.e, the absence of any staff on the third shift who can assist with medications. An SNF or ICF can operate with no RN or LPN on the third shift and now, under the revised regulation, no CNA either.

Fourth, the Councils observed that a provision weakening nursing standards for facilities admitting pediatric patients conflicted with independent pediatric nursing home standards. The Division corrected the reference to conform to the pediatric nursing home regulation.

Fifth, the Councils recommended incorporation of a regulation implementing Title 16 Del.C. §1119C(b). The Division did not address the comment within its regulation. However, it informally consulted with the DLP and the Division will ostensibly consider issuing a conforming regulation at a later time.

Since the regulation is final, I recommend no further action unless the Councils wish to address the “Third” concern through other channels.

8. DOE Final School Based Intervention Services Regulation [13 DE Reg. 1301 (April 1, 2010)]

The SCPD and GACEC commented on the initial version of this regulation in November, 2009. This resulted in publication of a revised proposed regulation in February which incorporated some, but not all, of the Councils’ suggestions. The Councils proffered three (3) concerns with the February draft. I attach the SCPD’s February 25 letter for facilitated reference. The Department of Education has now adopted a final regulation with no changes.

First, the Councils recommended deletion of a bar to school-based intervention students for

student “eligible” for alternate school placement. The DOE responded as follows:

The Department interprets section 1.0 to require districts to provide services to disruptive students who are not eligible for placement in consortia discipline alternative school pursuant to 14 DE Admin. Code 611. The intent is for students whose behavior disrupts the classroom setting and creates distractions to be served first in the district/school based programs prior to going to the CDAP, which is for chronic and severe infractions. Further, district/school based intervention programs are not designed for students who are ineligible (sic “eligible”) for CDAP placement because of a serious violation of the criminal code (see 14 DE Admin Code 611 §2.0).

At 1301.

The problem with the DOE approach is that students are eligible for alternative school placement if they are “subject to expulsion” or if they have manifested “serious violations of the local district discipline code.” See Title 14 Del.C. §1604. There is no requirement that behaviors be chronic. There is no requirement that the behaviors be manifested in school (e.g. possession of 1 marijuana joint outside of school may justify expulsion). Given “zero tolerance” discipline codes, students are “subject to expulsion” for a wide array of behaviors. Given the expansive scope of eligibility for alternate school placement, the DOE regulation rigidly constrains district and charter school discretion to place students in school-based intervention programs.

Second, the Councils recommended inclusion of parents in school based placement teams. The DOE declined to adopt the suggestion: “(T)he Department declines to make parents mandatory members of the school based intervention team as districts must have the flexibility to act quickly.” At 1301. This is a “weak” rationale and demeans the role of the parent in providing both valuable input and reinforcement of the team decision. The repudiation of parental involvement is at odds with pending legislation (H.B. No. 350) which is based on the premise that parental involvement in schools should be encouraged, not diminished.

Third, the Councils recommended reinstatement of a staffing regulation which provided a hiring priority of staff qualified to teach special education. The DOE did not comment on the suggestion.

Since the regulation is final, I recommend either no further action or informally sharing the Council’s “second” concern with proponents of H.B. No. 350, including the Lt. Governor and prime sponsors (Sen. Sokola and Rep. Schooley).

9. DSS Prop Child Care Subsidy Program Review/Redetermination Reg [13 DE Reg. 1279 (4/1/10)]

The Division of Social Services proposes to revise its standards related to eligibility reviews and redeterminations for its child care subsidy program.

I have the following observations.

The changes generally favor beneficiaries. Once approved, eligibility continues for 12

months in the absence of a material change in circumstances. The categorical requirement of an in-person annual face-to-face review is deleted. Six month interim reports from beneficiaries are only required for “child care/food benefit cases”, not families eligible due to TANF participation.

I have only one recommended amendment. The regulation being deleted contained the following requirement: “Do not allow an authorization to end without first ensuring the parents/caretakers were given timely and adequate notice.” This concept is absent from the proposed regulation. It should be reinstated. Otherwise, the regulation literally directs workers to automatically “close the child care case” based on any of several occurrences (e.g. child moves; parent does not cooperate; parent fails to submit 6 month report). Advance notice would be required by 16 DE Admin Code Part 5000, §5301.

I recommend sharing the above observations and suggested amendment with the Division.

10. DSS Prop. Food Supp. Program Income Exclusions Reg. [13 DE Reg. 1277 (April 1, 2010)]

The Division of Social Services proposes to revise its regulation defining the exclusions from countable income in its Food Supplement Program.

The list of exclusions is detailed and lengthy (12 pages). Without engaging in comprehensive research, I did not identify any deficiencies. My only recommendation is in the context of §9059U.20 which contains the following exclusion:

20. Crime Act of 1984, P.L. 103-322, exclude payments to a victim from a crime victim compensation program from income and resources.

In Delaware, the crime victim compensation program, codified at Title 11 Del.C. Ch. 90, is known as the “Victims’ Compensation Assistance Program” or “VCAP”. I attach a descriptive pamphlet. To provide guidance to DSS workers, it would be preferable to add the following sentence to Par. 20: “In Delaware, the primary crime victim compensation program is created by statute [Title 11 Del.C. Ch. 90] and is known as the “Victims’ Compensation Assistance Program”.

I recommend sharing the above observations and recommendation with the Division.

11. DMMA Prop. Citizenship, Alienage & Deemed Newborn Reg [13 DE Reg. 1273 (4/1/10)]

The Division of Medicaid and Medical Assistance proposes to adopt changes to both Medicaid and CHIP (a/k/a Delaware Healthy Children Program) eligibility standards. The major changes are outlined at 13 DE Reg. at 1274-1276.

First, some pregnant women and children previously disqualified from federally-subsidized Medicaid and CHIP (children only) during a 5-year waiting period will now be eligible for full Medicaid benefits.

Second, newborns will be continuously eligible for full Medicaid benefits for 1 year after

birth regardless of whether they remain in the mother's household and regardless of whether the mother is Medicaid-eligible.

Since some of these individuals are currently covered only by a State-funded program, the availability of eligibility in federally subsidized programs is expected to result in annual cost savings of \$555,600.00. At 1276. Overall, the 35 pages of revisions are relatively technical and appear to match the drafters' intent. Moreover, while they contemplate acquisition of verification of identity, citizenship, qualified alien status, and/or lawful alien status as required by federal law, they provide applicants with a 90-day period to obtain the requisite proof during which period coverage is provided. See §14390.1.

Since the regulation expands access to medical care, I recommend endorsement subject to consideration of 1 minor amendment, i.e., substituting "individuals with disabilities" for "disabled individuals" in §14400G.

12. H.B. No. 328 (Special Education "FAPE" Definition)

This bill was introduced on February 18, 2010. It passed the House with a DLP-authored amendment on April 1, 2010 with strong support (37 yes, 0 no, 0 abstention, and 4 absent). For background, I am attaching February 20 and February 23 News Journal articles and a February 18, 2010 press release.

This is a very important bill. As reflected in the press release, the Lieutenant Governor prepared the legislation to ensure that public schools, special education panels, and the courts use the definition of a free, appropriate public education ("FAPE") adopted by the Third Circuit Court of Appeals. The Third Circuit's precedents interpreting federal law are binding on Delaware but public schools often refer to FAPE descriptions adopted in other jurisdictions which are less student-oriented. For example, districts often invoke a 6th Circuit decision opining that students are "not entitled to a Cadillac-style education but one that is equivalent to a serviceable Chevrolet". The bill essentially codifies the Third Circuit's standards in State law. The DLP amendment clarifies that the standard applies to both the "specialized instruction" and "related services" prongs of a "FAPE".

I recommend strong support for the bill.

13. H.B. No. 345 (ASL as "World Language")

This bill was introduced on March 25, 2010. As of April 4, it remained in the House Education Committee.

The brief legislation would add the following provision to the Delaware Code: "American Sign Language shall be recognized as and considered a World Language for purposes of school curriculum and any course of instruction, involving any school district or public school in the State of Delaware".

In 2006, the SCPD, DDC, and GACEC submitted comments on proposed Department of

Education regulations amending high school graduation standards. At that time, the DOE noted that “(b)eginning with the class of 2013 two (2) credits in a world language will be required for graduation.” See attached 10 DE Reg 547 (September 1, 2006). The Councils recommended that the Department adopt a definition of “world language” which included ASL. The Department responded as follows:

The Department will be forming a committee to define World Language in the context of this regulation and the concerns will be included when the issue is discussed. The committee will certainly consider the inclusion of American Sign Language as part of the definition.

At 548. Based on my inquiry, a DOE representative confirmed through an April 1, 2010 email that the Department committee was formed and recommended inclusion of ASL in the definition of World Language. Therefore, no opposition to this legislative initiative is envisioned.

I recommend a strong endorsement of the bill. It recognizes the prevalence of ASL usage and should result in prompting more students to pursue vocational training as interpreters and interpreter-tutors. However, the sponsors may wish to also assess whether local colleges and universities will “count” ASL or ASL proficiency as meeting foreign language requirements. If local colleges and universities treat ASL coursework differently than foreign language coursework, high school students will be deterred from enrolling in ASL classes. Moreover, if local colleges and universities do not offer ASL or advanced ASL courses, but only foreign language courses, this would also deter high school student enrollment in ASL courses. The Councils may wish to affirmatively assess these issues in conjunction with logical partners, including CODE, CDS, and Sterck. A copy of the Councils’ commentary on H.B. No. 345 could be shared with the latter agencies. Alternatively, the sponsors of H.B. No. 345 could consider legislation to amend Title 14 Del.C. Ch. 53 (akin to §5303) covering the University of Delaware and comparable statutes affecting Delaware State University and Delaware Technical & Community College.

14. S.B. No. 221 (DDDS Consent for Elective Surgery)

This bill was introduced on March 25. As of April 4, 2010, it remained in the Senate Finance Committee.

Consistent with the attached engrossed version of legislation adopted in 1984, the Superintendent of the Stockley Center was granted the authority to consent to elective surgery for Stockley Center residents as an alternative to guardianship and court proceedings. The authority was expanded in 2001 (S.B. No. 144) to allow the Division Director to consent to elective surgery for persons “receiving services from the Division of Developmental Disabilities Services”. See attached version from 2003 Code. Consistent with the synopsis, the new bill (S.B. No. 221) is intended to authorize the DDDS Director to consent to diagnostic services, expand the scope of relatives who qualify as alternative decision-makers, and clarify who is covered by the law.

I have the following observations.

First, the current law is unclear on its application to non-residential DDDS clients. The synopsis to the attached 2001 legislation merely refers to expanding DDDS consent authority to persons “being supported in community-based programs”:

This Act (also) allows for the Director of the Division of Developmental Disabilities or his/her designee to give consent for elective surgery if specific criteria are met. The current Delaware Code assigns this responsibility to only the Superintendent of Stockley Center. As a greater percentage of people are now being supported in community-based programs, it would be prudent to broaden the scope of administrators who are permitted to give consent for elective surgery.

See also current §5531(a)(1)(2)(3) which variously refers to a “person receiving services” and “person receiving residential services”.

Lines 10-11 of S.B. No. 221 attempt to clarify that “persons receiving services” means “persons served within the residential program of the Division.” This would ostensibly include group homes; apartments; shared living (foster homes); and emergency temporary living arrangements (“ETLAs”). However, if the sponsors intend to truly limit the scope of the statute to residential DDDS clients, it would be preferable to substitute “means” for “includes” in line 10. Otherwise, the statute could be interpreted as “including but not limited to”. The bill creates ambiguity since it sometimes refers to “residential services” (synopsis) and sometimes refers to “services” (lines 15 and 20). The existing statute is also inconsistent in sometimes referring to “residential services” [§5531(a)(1)(3)] and sometimes referring to “services” [§5531(a)(2)]

Second, Section 1 of the bill amends the scope of alternative decision makers. However, this section is not consistent with the advanced health care directives statute, Title 16 Del.C. §2507(b)(2). It adds an adult aunt or uncle. Moreover, the existing statute disqualifies spouses if “the patient has filed a petition or complaint alleging abuse, as defined in §1041(1) of Title 10, of the patient by the spouse.” This is absent from the advanced health care directive statute. It would be preferable for the list of relatives to be identical to the advance health care directives statute. This could be achieved by amending S.B. No. 221 to effect an amendment to §5530(a) which cross references and adopts the standards in Title 16 Del.C. §2507(b)(2). Alternatively, if the sponsors prefer, the bill could be expanded to amend §2507(b)(2) to add an aunt or uncle and exclude spouses against whom an abuse complaint has been filed.

Third, for grammatical reasons, it would be preferable to substitute “recommendation” for “recommendations” in §5531(a)(2) since only 1 health care provider recommendation will be necessary under the bill.

I recommend sharing the above observations with policymakers.
15. H.B. No. 351 (Delaware Aging & Disability Resource Center)

This “fast-track” bill was introduced on March 30, 2010. It was approved by the House Health & Human Development Committee on March 31 and passed the House on April 1. For background, I am attaching an excerpt from Guy Perotti’s March 4, 2010 presentation to the JFC on the DSAAPD budget. As it indicates, DSAAPD received a \$685,000 grant to establish an Aging and Disability Resource Center with partner agencies, including the SCPD. The Division is establishing a new call center, a searchable online database for services regarding care and support options, and an automated system to accept online applications.

Overall, the relatively brief bill contains benign provisions establishing the Center in the Code and outlining its functions. It could be improved as follows:

First, in line 7, the word “adult” should be “adults”.

Second, line 20 could be improved by substituting the following: “b. Provide hospital and institution discharge planning supports which include community-based alternatives.” When read in conjunction with line 12, it appears that the Division will solely promote discharge planning from hospitals to nursing homes (“long-term care services”). In contrast, the JFC presentation indicates that the Center is intended to “facilitate the timely and successful transition of persons who are leaving acute care or other facilities and returning to the community.” [emphasis supplied]

Third, federal grants often “grade” applications based on the presence of absence of State law provisions which support grant conditions. It would therefore be preferable to add the following Par. “e” to §3502: “e. Fulfill such other functions as may be delegated by the Director of the Division of Services for Aging and Adults with Physical Disabilities.” This would provide flexibility in adjusting the functions of the Center without having to enact new legislation. The existing list of functions (lines 18-22) is brief and could prove unduly limiting as federal grant conditions and expectations evolve.

I recommend sharing the above observations with the DHSS Secretary, DSAAPD Director, and policymakers.

16. H.B. No. 343 (Prosthetic Insurance Coverage)

This bill was introduced on March 30, 2010. As of April 4, it remained in the House Economic Development, Banking, Insurance, and Commerce Committee. There is a fiscal note.

This bill is part of a nationwide effort to establish “parity” for persons needing orthotic and prosthetic devices. The campaign includes both federal and state legislation. The national initiative is being promoted by the Amputee Coalition of America. The ACA indicates that states which have enacted such legislation have not experienced increases in insurance premiums and have reduced Medicaid costs. I am attaching background information, including an excerpt from the “Delaware Amps” website and materials describing states which have already passed such legislation. H.B. No. 343 (lines 7-8) recites that 11 states had enacted such laws as of 2008. Consistent with the attachments, several more states adopted laws in 2009, including Arkansas, Maryland, Iowa, Missouri, Virginia, Texas, and Illinois.

H.B. No. 343 would require state-regulated health insurers to cover devices at a CMS

reimbursement rate. I have the following technical observations.

First, there is a word or words missing in lines 30 and 91 prior to the word “Secretary”.

Second, in lines 77 and 79, §3571D already exists. Substitute §3571E.

Third, in lines 74-75 and 135-136, Pars. (6) and (9) appear to be redundant.

Subject to the above technical observations, I recommend endorsing the concept of the bill. Legislation in other states has not been uniform. See, e.g., attached Maryland and Illinois bills. Reasonable persons could differ on some aspects of the Delaware bill. For example, consistent with line 44, should artificial ears and noses be excluded?

17. H.B. No. 350 (Parent-School Compact)

This bill was introduced on March 25, 2010. As of April 4, the bill remained in the House Education Committee. Background on the bill is provided in the attached March 26, 2010 News Journal article and March 25, 2010 Lt. Governor press release.

I have the following observations.

First, current law already encourages parental involvement in their children’s education within the public school system. See attached Title 14 Del.C. §157. Unfortunately, the Department of Education has not uniformly supported such involvement. A good example is the DOE regulation adopted this month in which the DOE rejected the Councils’ recommendation to include parents in meetings to determine eligibility for school-based intervention services [13 DE Reg. 1301 (April 1, 2010)]. Initiatives to foster a parent-school “partnership” approach to education merit endorsement.

Second, the current statute [§157(d)] requires the DOE to “encourage” public schools to adopt the Parents’ Declaration of Responsibilities as local policy. In contrast, the bill mandates that public schools adopt the Declaration or similar document. This may result in more widespread adoption and use of Declarations. Parents would be encouraged, but not required, to sign a Parent/School agreement.

Third, the bill (Section 2) amends the “education profile” statute [Title 14 Del.C. §124A] to require public schools to publish the percentage of parents signing a Parent/School agreement, a description of use of federal funds to promote parental involvement, and their parental involvement policy. This may prompt schools to provide a greater focus on parental involvement and facilitate access to information.

I recommend endorsement subject to one amendment. My concern is that the Declaration and Parent/School Agreement is “one-sided” and lacks a reciprocal statement of commitments. For example, lines 16-17 focus exclusively on parental duties and facilitating exercise of parental duties

with no corresponding description of public school duties: “Such Declaration shall identify responsibilities for parents and families, as well as the responsibilities the public schools have to help parents meet such responsibilities.” The sentence could be improved as follows: “Such Declaration shall identify responsibilities of parents and families, as well as the commitment of the public schools to actively collaborate in promoting student success.”

I recommend sharing the above observations and recommendations with policymakers.

18. H.B. No. 348 (Crime Against the “Vulnerable” or “Infirm”)

This bill was introduced on March 30. H.A. No. 1 was placed with the bill on March 31. There is a fiscal note. As of April 4, it remained in the House Judiciary Committee.

The bill is designed to increase penalties for crimes committed against “vulnerable” or “infirm” adults. Crimes that would be misdemeanors would be treated as felonies. Crimes that would be class C, D, E, F, or G felonies would be elevated to one class higher felonies. Crimes that would be a class A or B felony would result in a doubling of the minimum sentence.

I have the following observations.

First, as the drafters were informed prior to introduction, the term “infirm adult” is outdated and pejorative. It is considered an insulting term which should be avoided in contemporary legislation. The Guidelines for Reporting and Writing About People with Disabilities, 5th edition, recites as follows:

PUT PEOPLE FIRST, not their disability....Crippled, deformed, suffers from, victim of, the retarded, infirm, the deaf and dumb, etc. are never acceptable under any circumstances.

See attachment. The definition of “infirm” is “decrepit, lacking bodily or muscular strength or vitality; lacking firmness of will or character or purpose; feeble; weak and incapacitated.” See attachment. Expediently cross referencing a 1970's statute [Title 16 Del.C. §1102(4)] which contains the outdated term is no excuse for inserting an insulting term in 2010 legislation. Other State agencies are affirmatively introducing bills to delete outdated terminology. See, e.g., H.B. No. 254 and pending H.S. No. 1 for H.B. No. 254 (DOE deleting many references to “disabled children”, “disabled person”, “seriously emotionally disturbed”); and S.B. No. 221 (DHSS deleting references to “mental retardation”).

Second, conceptually, the Legislature has already defined acceptable penalties for crimes in the criminal code. Query whether it makes sense to increase the penalties for sixty (60) crimes, as this bill does, if the victim is a “vulnerable adult” as juxtaposed to a “vulnerable child”. Query also if it makes sense to double minimum sentences based on somewhat subjective criteria such as being influenced by fear. Delaware has a well-respected judiciary who are in the best position to consider aggravating and mitigating circumstances when imposing sentences. Doubling minimum mandatory sentences, in contrast, removes judicial discretion in many contexts.

I recommend sharing the above observations with policymakers.

Attachments

2g:p&l/410bils
F:pub/bjh/legis/2010p&l/410bils