

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Legislative & Regulatory Initiatives

Date: June 11, 2012

I am providing my analysis of seventeen (17) legislative and regulatory initiatives in anticipation of the June 14 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive. An initial draft of the analysis of four bills [S.B. No. 225; H.B. No. 348; H.B. No. 317; and H.B. No. 365] was previously submitted to the SCPD, DDC, and GACEC on June 4 to facilitate submission of comments in advance of the June 14 meeting.

1. DMMA Final HCBS Waiver Regulation [15 DE Reg. 1718 (June 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2012. The Councils endorsed the proposed regulation subject to adopting three (3) non-substantive amendments.

The Division of Medicaid and Medical Assistance has now acknowledged the endorsements and adopted a final regulation which incorporates the three (3) suggested amendments. Since the regulation is final, and the Division adopted all of the Councils' suggestions, I recommend no further action.

2. DMMA Final Estate Recovery & Managed Care Reg. [15 DE Reg. 1721 (June 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2012. The Councils noted that the regulatory changes were required to comport with federal CMS standards. The Councils endorsed the proposed regulation.

The Division of Medicaid and Medical Assistance has now acknowledged the endorsements and adopted a final regulation which conforms to the proposed version. I recommend no further action.

3. DMMA Final DSHP Plus Regulation [15 DE Reg. 1716 (June 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2012. The Councils endorsed the proposed regulation.

The Division of Medicaid and Medical Assistance has now acknowledged the endorsements and adopted a final regulation which conforms to the proposed version. I recommend no further action.

4. DSS Final Child Care Subsidy Program Income Regulation [15 DE Reg. 1759 (June 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2012. The Division of Social Services proposed to delete a single regulation since its content was redundant, i.e., the content was covered by other regulations. The Councils confirmed that the content was covered by other regulations and endorsed the proposed regulation.

The Division has now acknowledged the endorsements and adopted a final regulation which conforms to the proposed version. I recommend no further action.

5. DPH Final Medical Marijuana Code Regulation [15 DE Reg. 1728 (June 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2012. A copy of the GACEC's April 30 letter is attached for facilitated reference. The Division also received comments from eight (8) other organizations and individuals. The Division has now adopted a final regulation which incorporates some changes prompted by the commentary. The Division's response to the Councils' comments is compiled at pp. 1733-1736.

First, the Councils noted that the definitions generally tracked the statute. No amendment was recommended.

Second, the Councils observed that §5.3.6 was somewhat vague. DPH revamped the section for clarity.

Third, the Councils recommended inclusion of procedural due process prior to imposition of a penalty in §5.3.6. DPH disagreed in concept but did change the automatic revocation of the registry card to a discretionary revocation of the card.

Fourth, the Councils objected to a provision reciting that all hearings held pursuant to §8.5.3 would be open to the public as contrary to the statute. The Division disagreed and effected no change. The Division incredibly included the following protocol: "The hearing officer will guide this process, requesting people not to disclose information as part of the public hearing, ...". In other words, the hearing officer will "encourage" persons in attendance to not share sensitive and personal information outside the hearing.

Fifth, the Councils recommended substituting “bear” for “endure” in §8.8. DPH agreed and effected the substitution.

Sixth, the Councils objected to placing the burden of proof on the consumer in termination cases. DPH deleted the section in its entirety in favor of cross referencing the APA.

Seventh, the Councils recommended capitalization of the word “Secretary” in three (3) sections. The Division agreed and made the corrections.

Eighth, the Councils questioned a protocol of issuance of a hearing officer’s recommended decision which would then be subject to revision by the Secretary. DPH retained the procedure.

Since the regulation is final, and DPH incorporated several changes based on the Councils’ comments, I recommend no further action.

6. DOE Final Participation in Extracurricular Activities Reg. [15 DE Reg. 1714 (June 1, 2012)]

In April, 2012, the Department of Education proposed to readopt a 1-paragraph regulation covering academic eligibility for extracurricular activities (including sports) with no changes based on its 5-year review schedule. The SCPD and GACEC took the opportunity to resubmit commentary forwarded in December of 2011 identifying concerns with strict DIAA academic standards applied to individuals seeking to engage in sports. For example, the attached April 30 GACEC letter contained the following commentary:

Fourth, p. 5 contains a lengthy (21 paragraph) list of conditions which automatically disqualify a student from participating in sports. A number of them would disproportionately impact students with disabilities. For example, Par. 7 bars student participation based on the following criteria:

If you do not pursue a regular course of study and pass at least five credits per marking period (equivalent to four credits in junior high/middle school), two credits of which must be in the areas of Mathematics, Science, English, or Social Studies.
IF YOU ARE A SENIOR, YOU MUST PASS ALL COURSES WHICH SATISFY AN UNMET GRADUATION REQUIREMENT (Reg. 1008.2.6; Reg. 1009.2.6.1).

The GACEC had not received a response to this critique and noted that the strict DIAA standards were inconsistent with the emphasis on “flexibility” in academic eligibility standards applicable to students with disabilities.

The Department has now adopted a final regulation with no changes. However, the Department did respond to the GACEC’s December letter through the attached May 11, 2012 letter. The Department commented as follows:

The language is an overview of the general requirements and does not reference all the possible exceptions. However, the regulations related to interscholastic sports provides for exceptions to the stated language above in recognition of students with IEPs. The exception provides that when a student's IEP provides for modifications to the course of study or grading, the student need only be making satisfactory progress in accordance with the student's IEP to maintain academic eligibility. Please see 14 DE Admin Code 1009, Section 2.6.1.1. The DIAA will review the "Protect Your Athletic Eligibility" form for clarity regarding exceptions.

At 4.

I recommend no further action.

7. DOE Prop. Early Childhood Teacher Regulation [15 DE Reg. 1665 (June 1, 2012)]

The Professional Standards Board proposes to adopt revised certification standards for early childhood teachers. The changes are intended to be predominantly non-substantive. The synopsis recites as follows:

It is necessary to amend this regulation in order to facilitate proper and current formatting trends. There are no changes in certification requirements other than clarifying the requirements for those educators who seek this certification as their first Standard Certificate and those adding this Standard Certificate to one or more previously issued on their license.

At 1665.

I only identified the following grammatical and formatting concerns.

First, in §4.1.1, insert a comma after "3.1.5.1". A comma is required after a lengthy introductory adverb clause. The comma was properly inserted in §4.1.2 but omitted in §4.1.1.

Second, §§4.1 and 4.2 contain plural pronouns ("their") with singular antecedents ("the educator"). The error is easily corrected by substituting "a" for "their" with no loss of meaning.

Third, there is a lack of punctuation in §§4.1.1.1- 4.1.1.5 and 4.2.1.1 - 4.2.1.5. Consider adding the following:

- A. semicolon after §§4.1.1.1, 4.1.1.2, 4.1.1.3, 4.2.1.1, 4.2.1.2, and 4.2.1.3;
- B. "; and" after §§4.1.1.4 and 4.2.1.4; and
- C. period after §§4.1.1.5 and 4.2.1.5.

I recommend endorsement subject to the Board adopting the above revisions.

8. DSS Prop. "Transitional Services to Relative Caregivers" Reg. [15 DE Reg. 1670 (June 1, 2012)]

The Division of Social Services (“DSS”) proposes to rename and revise the regulations covering the “Kinship Care Program”.

As background, this State-funded program is established by the attached enabling statute, Title 31 Del.C. §356. The program provides up to \$500 in covered items (e.g. clothes; dressers; school supplies) to non-parent relatives caring for children within the first 180 days of placement. The regulations define eligibility, scope of services, and appeal rights.

In general, the standards are not rigid and appear to be consumer-oriented.¹ I did not identify any barriers to caregiver access to the program not authorized by the enabling law. I recommend endorsement.

9. DSS Prop. Child Care Subsidy Program Income Regulation [15 DE Reg. 1674 (June 1, 2012)]

The Division of Social Services proposes to revise its “income eligibility” standard in its child care subsidy regulation. It changes the heading of the section and clarifies that “(f)amilies referred by and active with the Division of Family Services do not have to meet the income limit.”

I did not identify any concerns with the revised standards. I recommend endorsement.

10. DOE Proposed Charter School Regulation [15 DE Reg. 1652 (June 1, 2012)]

The Department of Education has published a 12-page revised regulation covering charter schools. The GACEC convened an ad hoc committee which informally compiled some observations and recommendations on the proposed standards. See attached list of five (5) “main concerns”. I have considered the observations in developing this critique. However, I have not addressed the subsidiary forms implementing the regulation.

¹There is actually some “tension” between the enabling legislation and regulation. For example, the statute authorizes a “1 time emergency financial subsidy” [§356(d)] which the regulation implements by allowing a \$500 subsidy to be awarded “per child per transition period per year”. Moreover, the statute requires the caregiver to “have guardianship of the child or actively pursue guardianship” [§356(b)(2)] which is not directly mentioned in the regulation. Section 2.A does cross reference the attached DSSM 3004. Section 3004 defines “guardian” as including a caregiver of a child placed by an authorized agency. However, the regulation does not explicitly restrict access to the program to caregivers accepting children pursuant to agreement with DFS or other agency.

First, §3.6 authorizes a “Highly Successful Charter School Operator” to bypass any annual ban on new charter school applications to address the needs of students whose current charter school is closing. The definition of “Highly Successful Charter School” is included in §2.1. This is a salutary concept which is loosely based on Title 14 Del.C. §511(n). See also Title 14 Del.C. §511(e)(2). My concern is that there are charter schools which focus on “at risk” students. See §4.2.1.5. If such a charter school were closing, it would be logical for another charter school serving “at risk” students to be solicited to apply for a charter to cover the students in the school which is closing. This would be undermined by the definition of “Highly Successful Charter School” which categorically requires above average performance on student assessment tests. The DOE should consider modifying the definition of “Highly Successful Charter School” to allow a charter school for “at risk” students to qualify without meeting the “above average performance” standard. Parenthetically, I also recommend not capitalizing “Operator” in §3.6.

Second, in §3.2, the DOE should reconsider whether the word “Renewal” should be capitalized. References to renewal are not capitalized in the balance of the regulation. See, e.g., §§3.6 and 3.9.

Third, §4.3.1 “red flags” the need for a charter school to include the capacity for “summer school”, “extra instructional time”, and other remedial services for underperforming students in its program based on Title 14 Del.C. §512(6). It would be preferable to add another sentence to implement the recently adopted Title 14 Del.C. §122(b)(24). This is a new statute which requires charter schools to offer supportive instruction (e.g. homebound; instruction in hospitals) which charter schools could easily overlook. It does not appear in Title 14 Del.C. Ch. 5. The following sentence could be added: “The educational program shall include the provision of supportive services conforming to 14 Del.C. §122(b)(24).”

Fourth, in §4.5.1.1, the reference and citation to the Gun Free Schools Act does not match that in the DOE’s “Compliance with the Gun Free Schools Act” regulation, 14 DE Admin Code 603.

Fifth, in §10.4, it would be preferable to include a recital that the results of the Performance Review would also be published on the DOE’s Website. For example, the second sentence could be amended to read as follows: “The Department shall provide the results of the Performance Review to the school and publish the results on the Department’s Website.”

Sixth, §12.0 literally requires a new member of the charter school’s board of directors to directly submit the member’s criminal background check results to the DOE. This raises two (2) concerns.

A. Title 14 Del.C. §511 (q) recites that the criminal background results are “confidential and may only be disclosed to the chief officer and one additional person in each authorizing body.” Read literally, the statute arguably precludes the DOE from issuing a regulation requiring the submission of the results to the DOE. The DOE may wish to assess whether it needs to have the

results versus some verification that the check has been completed and the member is not disqualified.

B. If the results are to be shared with the DOE, it would be preferable for the charter school, not the member, to submit the results to the DOE. Title 11 Del.C. §8571 contemplates the criminal background check results being supplied to the charter school. Although Title 14 Del.C. §511(q) envisions the criminal background check results also being shared with the board member, it would still be preferable for the charter school to share the results with the DOE to reduce prospects for fraud.

Seventh, the overall regulation is somewhat myopic in focusing on academic performance to the exclusion of other factors which make a school “successful”. For example, Section 4.2 contains multiple references to the State Assessment System. Section 4.2.1.4 defines the scope of the Performance Agreement as only covering organizational, academic, and financial performance. Charter school are intended to be “innovative” and not “cookie cutter” institutions. See Title 14 Del.C. §501 and 506(b)(3)c. If a school focuses on the arts (dancing; acting; singing), solely evaluating that school based on academics ignores the primary reason students attend the school. Similarly, for a military charter, it would be logical to assess what percentage of the student body who choose to apply to enlist in the Armed Services are accepted. Other factors to consider in assessing “performance” would include statistics on discipline, attendance, graduation, participation in extracurricular activities, substantiated special education and non-special education complaints to DOE, student satisfaction, and parent satisfaction.

Eighth, neither the statute nor §4.2.1.5 define “students at risk of academic failure”. The DOE may wish to include a definition to provider guidance in this context.

I recommend sharing the above observations and recommendations with the Department.

11. S.B. No. 225 (Helmets for Horseback Riders)

This bill was introduced on May 16, 2012. As of June 11, it remained in the Senate Public Safety Committee.

The legislation is relatively straightforward. It would require individuals under age 18 riding a horse or pony in public areas to wear an ASTM/SEI certified helmet. Some provisions are patterned on the bicycle helmet statute, Title 21 Del.C. §4198K. A first offense results in a \$25 fine and a second offense results in a \$50 fine to the parent. All charges may be dismissed if the parent produces evidence that the requisite helmet has been obtained. The synopsis recites that “(h)ead injuries are the most common cause of death for people who ride horses or ponies according to the American Medical Equestrian Association.”

Since the bill would reduce prospects for head, spinal cord, and other fatal and non-fatal injuries, I recommend endorsement subject to some technical corrections.

First, lines 19-20 should be underlined.

Second, the heading of the subchapter in which the new §4198P is inserted is “underinclusive”. Subchapter XII should be revised as follows:

OPTION 1

Subchapter XII. Operation of Bicycles and Other Human-Powered Vehicles; Operation of Electric Personal Assistive Mobility Devices; Equestrian Helmet Requirement

OPTION 2

Subchapter XII. Operation of Bicycles and Other Human-Powered Vehicles; Operation of Electric Personal Assistive Mobility Devices; Helmet Requirement for Horseback Riding

I prefer the first option.

I recommend sharing the above observations and recommendations with policymakers.

12. H.B. No. 348 (Elections)

The SCPD endorsed the proposed version of this legislation through the attached April 24, 2012 memo to the prime sponsors. The legislation was then introduced as H.B. No. 348 on May 15. As of June 11, it had been released from the House Administrative Committee and awaited action by the full House. The DLP drafted provisions in Section 5 (lines 35-43) to conform State law to federal law. The April 24 SCPD memo included a recommended amendment in the “Second” paragraph which the sponsors have incorporated into the final bill. I recommend that the SCPD share an endorsement of the legislation which incorporates the following commentary.

The State Council for Persons with Disabilities has reviewed House Bill No. 348 which effects some discrete changes to election standards.

The most significant feature for individuals with disabilities is the “long-overdue” removal of a restriction on voting assistance (line 40) and substitution of the federal standard. As background, effective January 1, 1984, the federal Voting Rights Act of 1965 was amended to authorize voter assistance in federal elections [42 U.S.C. §1973aa-6]. Voters requiring assistance due to blindness, disability, or illiteracy may opt for such assistance from an individual of their choice who is not affiliated with their employer or union. Current Delaware law [Title 15 Del.C. §4943(a)] is more restrictive (e.g. it disallows assistance based on illiteracy and only permits another adult voter to provide accompaniment). In practice, the State Commissioner of Elections has promoted compliance with the federal law. The bill conforms the Delaware statute to the federal law.

Second, the bill incorporates a definition of “signature” which encompasses traditional, digital and electronic signatures (lines 3-5). The definition is based on that used in other sections of

the Delaware Code. See, e.g., Title 1 Del.C. §302(23), Title 6 Del.C. §12A-102(9), and Title 25 Del.C. §181(e).

Third, the bill changes the time frame for political parties to opt out of a Presidential Primary election (lines 16-20).

Fourth, it modestly changes the number of voting machines per polling place from 1 machine per 600 registered voters to 1 machine per 650 registered voters in a general election. For a primary election, the number of voting machines per polling place is changed from 1 machine per 750 registered voters to 1 machine per 800 registered voters. See lines 49-54.

Fifth, it revises the date that citizens can first apply for an absentee ballot before a Presidential Primary (lines 53-58).

Sixth, it permits local departments of election to run absentee ballots through tabulators beginning the Friday before an election but bars them from extracting or reporting results before the polls have closed (lines 62, 89-90).

The Council endorses H.B. No. 348.

13. H.B. No. 317 (Kindergarten Readiness)

This bill was introduced on May 1, 2012. It passed the House with one amendment on May 10. It was approved by the Senate Education Committee on June 6. As of June 11, it awaited action by the full Senate.

The legislation requires the Department of Education to establish a common statewide readiness tool to assess a child's readiness for learning upon entering kindergarten (lines 37-38). The assessment would occur in the first 30 days of entering kindergarten (H.A. No. 1). The tool would ostensibly be "piloted" in the Fall of 2012, 2013, and 2014 with statewide implementation no later than the Fall of 2015 (H.A. No. 1).

The bill appears to be somewhat "bare-bones" enabling legislation. The DOE would be expected to provide specifics through regulation (lines 37 and 56-57). The bill could have been improved. Consider the following:

A. The bill could have encouraged adoption of a "tool" which would also contribute to Childfind screening to facilitate implementation of Title 14 Del.C. §3122 and pending S.B. No. 207.

B. The bill could have including "reasoning" among the assessed domains. See attached University of Delaware kindergarten readiness report, "Children Who Entered Public School Kindergarten in Delaware in the Fall of 2009 (April, 2010) at p. 15.

C. The bill could have required the “tool” to account for cultural and language (e.g. Spanish; Deaf) differences.

Since it would be useful to collect information statewide on kindergarten readiness, I recommend endorsement of the legislation while sharing the above observations.

14. H.B. No. 365 (Special Education “Costs” Legislation)

Wendy and I participated in a June 4 teleconference to describe this legislation to the press sponsored by Lt. Governor Matt Denn and Rep. Q. Johnson. The bill was subsequently formally introduced on June 5 and passed the House on June 7. The House Committee report is attached. As of June 11, the bill remained in the Senate Education Committee.

The IDEA was amended in 1986 to authorize a court to award a parent prevailing in IDEA administrative or judicial proceedings to cover attorney’s fees and costs. However, 20 years later, in 2006, a split Supreme Court narrowly interpreted the law to disallow recovery of expert witness fees and costs of tests and evaluations. Senator Harkins includes the following summary in the attached “Statement of Senator Harkin on Introducing the IDEA Fairness Restoration Act, S.613, on March 17, 2011”:

When Congress amended IDEA in 1986 it recognized the financial barriers that parents face in pursuing due process to resolve disagreements with their school and specified in the Conference Committee Report that when the court finds in favor of the parents a judge could award attorney’s fees, including “reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian’s case.” For years, parents who prevailed in judicial proceedings were awarded these fees, as Congress intended. But in 2006, the U.S. Supreme Court ruled in *Arlington Central School District v. Murphy* that courts could no longer award these fees because Congress made its intention explicit in the Conference Report rather than in the statute. As a result, many parents are discouraged and even prevented from pursuing meritorious cases to secure the rights of their children. Low- and middle- income families are particularly hard hit.

At 1.

Federal legislation was first introduced in 2007 and most recently in 2011 to enable parents to recover their expert witness and evaluation costs. See attached Wikipedia article. The article provides many examples of other laws authorizing recovery of expert witness fees, including the ADA. Unfortunately, statistics show that only 3% of all Senate bills are enacted. See attached summary in www.govtrack.us/congress/bills/112/s613. Thus, the federal IDEA Fairness Restoration Act has scant prospects for enactment in 2012.

H.B. No. 365 would achieve the effect of the federal bill for Delaware IDEA students. Consistent with the attached DOE Website excerpt, only a few due process administrative hearings are decided each year and parents “win some and lose some”. Therefore, the bill will not result in numerous awards of expert witness and evaluation costs against public schools. However, the low

number of hearings underscores parental discouragement with challenging public schools given the disparity in resources. The Harkins' Statement cites some statistics showing that more than 1/3 of children with disabilities lived in households with incomes of \$25,000 or less. Thus, any action that would help "level the playing field" would enhance the viability of the administrative hearing process.

I recommend a strong endorsement.

15. S.B. No. 214 (Physical Activity for Elementary School Students)

This bill was introduced on May 3, 2012. It passed the Senate on June 7. As of June 11, it awaited House Committee assignment.

The preamble to the bill includes the following observations:

1) students who are physically fit perform better academically and have fewer suspensions days and absenteeism;

2) national guidelines recommend that children accumulate a minimum of 60 minutes of moderate physical activity daily; and

3) 40% of children ages 2-17 in Delaware are overweight or obese.

These observations are consistent with the findings and commentary in the attached articles. Additional background is contained in the attached June 8, 2012 News Journal article which highlights the support of the Nemours Foundation for the bill.

Effective with the 2014-2015 school year, the legislation would require public schools to provide a minimum of 150 minutes of moderate to vigorous physical activity to all K-5 students weekly. A student's program of physical activity would be consistent with any IEP. Each elementary school would include a physical activity plan in its school profile submitted to the Department of Education. Finally, the DOE would issue implementing regulations.

The Councils have historically been strong proponents of physical education and physical activities as part of Delaware's public education program. I recommend endorsement.

16. S.B. No. 216 (Criminal Background Checks)

This 22-page bill was introduced on May 3, 2012. As of June 11, it remained in the Senate Health & Social Services Committee.

The legislation is designed to revise existing criminal background and drug screening laws applicable to long-term care facilities, the Delaware Psychiatric Center, personal assistance agencies, hospice, and home health agencies. One of the principal purposes of the bill is to convert to an electronic background check system. The attached fiscal note contemplates a \$150,000 annual cost which would be offset by a \$15.00 fee based on 10,000 background checks annually.

The bill has several substantive and technical flaws.

First, it may be “underinclusive” in coverage. For example, the Department licenses adult day care facilities pursuant to Title 16 Del.C. §122(3)s. The implementing Division of Public Health Regulations are codified at 16 DE Admin Code Part 4402. They include the following standards:

13.1 Adult day care providers must comply with the special employment practices relating to health care and child care facilities (19 Del.C. §708 and 11 Del.C. §8563) and adult abuse registry check (11 Del.C. §8564) and the regulations promulgated by the Department of Labor regarding same.

13.2 No employee shall be less than 18 years of age and no person shall be employed who has been convicted of a crime where the victim was a person regardless of whether the crime was a felony or misdemeanor.

The bill does not apply to adult day care providers.²

Second, the bill contains multiple immunity references (lines 19-20 and 49-51). Such immunity is not granted in current criminal background check statutes. See Title 11 Del.C. §§8560-8564 and 8570-8572. Although the synopsis recites that “(l)imited liability is provided”, this is misleading. The immunity provided to employers is “unlimited”:

An employer that uses the Background Check Center to secure background information is immune from liability when making decisions in reliance on the Background Check Center data. (lines 19-20)

(1) No Employer or facility shall be subject to suit directly, derivatively, or by way of contribution, for any civil damages resulting from a hiring decision made in reliance on information provided by the BCC. (lines 50-51)

Literally, this gives employers carte blanche to refuse to hire based on an arrest without conviction and violate federal and State anti-discrimination laws. For example, the attached News Journal article describes the recent adoption of EEOC policy which counsels that “an arrest without a conviction is generally not an acceptable reason to deny employment.” The article confirms that there is nationwide concern of employer use of criminal background checks to prevent the employment of minorities, noting that “1 in 3 black men and 1 in 6 Hispanic men will be incarcerated during their lifetime” compared to 1 in 17 white men. See also attached May, 2012 News Journal article, “Philadelphia Limits Questions About Criminal Records”; and March 24, 2012 News Journal article, “Making Probation a Positive Recognized at Awards Event”.

Persons with mental disabilities are also disproportionately involved in the criminal justice system. The attached August 12, 2011 letter memorandum from the Bazelon Center includes the following observations:

²The SCPD may or may not wish to also identify employers involved in the attendant services program as outside the purview of the bill. Compare Title 16 Del.C. §9405(b)(c).

Frequently people with mental illnesses are arrested for “nuisance” crimes related to their disabilities, such as disorderly conduct or trespass. Adults with mental illnesses are arrested more than twice as often as adults without mental illness. The arrest of individuals with mental illnesses often reflects individuals’ inability to access needed mental health services, and/or police officers’ lack of knowledge about the symptoms of mental illness.

At 3.

In June, 2011, the Governor signed S.B. No. 59 into law. Consistent with the attachment, it authorized Delaware’s 39 professional licensing boards to allow reinstatement of licenses after 5 years have passed since the conviction. The rationale is that ex-offenders cannot secure employment and should not be unduly penalized if they have paid their debt to society. S.B. No. 216 undermines S.B. No. 59 since an applicant could have a license restored under S.B. No. 59 after 5 years and an employer could arbitrarily refuse to hire the applicant solely based on the conviction appearing in the BCC. See also 16 DE Admin Code 3105, §6.0, excluding “old” convictions from the definition of “disqualifying crimes” and contemplating individualized consideration of certain factors in assessing crimes (§7.0).

The immunity section in S.B. No. 216 invites employers to refuse employment based on arrest record without conviction, minor convictions, convictions for crimes with no relationship to patient safety, convictions which have been pardoned, and very old convictions. There is also some “tension” between the immunity section’s authorization to not hire based on anything in the background check and the adoption of a list of crimes which are deemed related to patient care and disqualifying. See lines 130-131, 194-195, 419-420, 529-532. The immunity provisions are unnecessary components of the legislation and should be stricken.

Third, there are multiple references to “mental retardation” (lines 34 and 89). Compare both H.A. No. 1 to H.B. No. 245, amending Title 11 Del.C. §8564(a), and H.B. No. 214. The updated language should be used.

Fourth, the comma between “16 Del.C.” and “Chapter 11” in line 38 should be deleted.

Fifth, it would be preferable to “link” the concepts of strict confidentiality (lines 149-150) and record-keeping (lines 52-53). For example, the Division could add a provision that the employer must adopt safeguards to maintain the confidentiality of the data obtained from the BCC.

Sixth, in lines 100 and 203, consider substituting “obtaining” for “getting”.

Seventh, the bill ostensibly creates a conflict with Title 16 Del.C. §122(3)07 and 8. The latter statute would allow civil penalties of less than \$1,000 for violations based on consideration of several factors. The bill (lines 138-139 and 339-342) categorically requires at least a \$1,000 penalty and does not mention the factors.

Eighth, the bill (lines 169-178, 230-231, 401-402, 490-492, 571-572) imposes strict liability on an applicant who does not comply with the criminal background check standards with a \$1,000

minimum civil penalty. This is “overbroad”. Someone applying as a dishwasher in a nursing home who does not know about the requirement of a criminal background check and is hired by the employer violates lines 169-170 and 177 despite lack of fault. There should be some requirement that the violation be “knowing and willful”. Compare line 607, requiring the violation to be “willful”. See also the comparable Title 11 Del.C. §8572:

Any person seeking a license under Chapter 12 of Title 14 or employment with a public school who knowingly provides false, incomplete or inaccurate criminal history information or who otherwise knowingly violates the provisions of §8571 of this title shall be guilty of a class G felony and shall be punished according to Chapter 42 of this title.

[emphasis supplied]

Ninth, in lines 186, 411, and 580, the reference should be to Title 11 Del.C. §1911.

Tenth, there is an odd reference to “provide these things for himself or herself” at lines 256-257. There is no definition or description of “these things” and the reference makes no sense.

Eleventh, lines 309-310 authorize private individuals to obtain a Criminal History “at the individual’s expense”. It would be preferable to clarify that the cost should not exceed the fee determined by lines 43-48.

Twelfth, lines 458-459 conflict with lines 482-483.

I recommend sharing the above observations with the Legislature, NAMI, the DTLA and the ACLU.

17. H.B. No. 331 (Absentee Voting)

Laura Waterland, a DLP Senior Attorney, prepared the following critique of this legislation:

This bill amends Titles 14 and 15 of the Delaware Code to expand absentee voting eligibility to all registered Delaware voters and allows the required affidavit to be self-administered by every applicant. The bill also extends eligibility for permanent absentee status to any voter who applies.

The current law, 15 Del. Code §5502, restricts eligibility for voting absentee to people in public service working overseas, people in the armed services, people absent from Delaware due to vacation, people whose occupation requires absentee voting (including familial home-based caretakers), people who are “sick or physically disabled,” or people who can’t vote for religious reasons. If a voter does not meet one of these criteria, then absentee ballots are not available.³

³ This statute mirrors the companion Constitutional provision. Art V, Section 4A, Delaware Constitution as amended. Arguably, the Constitution will have to be amended in order to affect this change in the law. It is worth noting that the statute does not technically extend absentee voting to voters with cognitive impairments, unless they are considered “sick,” which is certainly not ideal statutory language.

I recommend that the Council endorse this bill. Absentee ballots are a useful alternative to polling place voting for people with disabilities. While voting at the polls is still the primary method of voting, and one that most may prefer, for many people, especially people with disabilities, voting by absentee ballot may be the only viable method. Moreover, it is more convenient for everyone, and the trend nationwide appears to be going toward absentee and other forms of “remote” voting. More people with disabilities will vote if absentee voting is more readily available.

Statistics show that voters with disabilities are more likely to vote if absentee voting is available. A recently published academic study⁴ establishes that in general, voters with disabilities are less likely to vote than voters without disabilities. However, among voters with disabilities, individuals who experience the most difficulty leaving home or who do not want to negotiate noise and crowds are the least likely to vote. Having accessible polling places and machines, which are part of CLASI’s ongoing advocacy effort, will not address the needs of this group.

Absentee ballots are the most effective way for these individuals to access the voting system. Individuals with self-care and independent living difficulties voted absentee at twice the rate of voters without disabilities in 2010. The study found that in states offering absentee voting, 27% of voters with disabilities voted, while only 10% voted in states without absentee voting.

All states have absentee voting, but policies differ from state to state. Delaware’s statute sets a number of criteria that a person has to meet in order to vote absentee. Other states have no requirements, and are called “No-Excuse” states. In 1972 only two states offered “No-Excuse” absentee balloting, while in 2011, 27 states offered such an option.⁵ Clearly the trend is to make absentee ballots available to everyone.

Many believe that eventually, all states will go to all absentee voting, either by mail or by electronic voting, so that people can vote privately at home. Electronic voting is mandated by federal law for voters in the armed services. Legislation (HB 196) has been introduced in Delaware which would expand the availability of electronic transmission of absentee ballots to individuals who are “sick or physically disabled.”

HB 196, however, does not expand the categories of individuals who are eligible for absentee ballots. HB 331 extends absentee voting to everyone, and should be endorsed because it expands

⁴ Thad E. Hall and R. Michael Alvarez, *Defining the Barriers to Political Participation for Individuals with Disabilities*, The Information Technology and Innovation Foundation, May 12, 2012 Washington D.C. (<http://elections.itif.org/reports/AVTI-001-Hall-Alvarez-2012.pdf>).

⁵ Absentee and Early Voting, National Conference of State Legislatures, www.ncls.org/legislatures-elections/absentee-and-early-voting.aspx (June 8, 2012).

voting opportunities for people with disabilities.

Attachments

F:\pub\bjh\legis\2012\612bils