



DISABILITIES LAW PROGRAM

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MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative and Regulatory Initiatives

Date: June 8, 2013

I am providing my analysis of sixteen (16) legislative and regulatory initiatives in anticipation of the June 13 meeting. Given time constraints, the commentary should be considered preliminary and non-exhaustive. Since there are only a few weeks left in the current legislative session, the Councils may wish to issue letters on legislative initiatives prior to the June 13 meeting.

1. DMMA Final Medicaid Prescription Drug Regulation [16 DE Reg. 1270 (June 1, 2013)]

The SCPD and GACEC commented on the proposed version of this regulation in April. A copy of the GACEC's April 25 letter is attached for facilitated reference.

First, the Councils endorsed a change in approach to Medicaid coverage of benzodiazepines since required by federal law.

Second, the Councils expressed concern with a significant reduction in quantity limits for opioid analgesics. The Councils requested clarification of the rationale for the reduction and the availability of an "override" based on compelling circumstances. Two other organizations (Delaware Cancer Consortium; American Cancer Society Cancer Action Network) echoed the Councils' concerns about restricting access to opioid analgesics. For example, the Delaware Cancer Consortium included the following observation: "The proposed regulation dosage limit would equate to just two doses per day, however in most cases cancer patients are prescribed and frequently require dosing every three to four hours of immediate release opioids for control of chronic cancer pain and acute cancer pain."

DMMA responded to the concerns as follows:

DMMA is sensitive to the differentiation of need between cancer and non-cancer patients (and other equivalent medical conditions) and will cover additional quantities of opioids when prior approved through a timely verbal or written request by the treating physician prior to the expiration of the existing prescription. This exception procedure is currently in place and processed in real time. We believe this process will continue to serve the needs of our patient population and the administration of the pharmacy benefit in the most appropriate manner.

Consistent with its response, the Division adopted the regulation with no further changes.

Since the regulation is final, I recommend no further action.

2. DSS Final Child Care Subsidy Definitions Regulation [16 DE Reg. 1276 (June 1, 2013)]

The SCPD and GACEC commented on the proposed version of this regulation in April. A copy of the April 25, 2013 GACEC letter is attached for facilitated reference.

First, the Councils noted that the actual text of the proposed regulation omitted a revised definition of “child care center”. In response, DSS observed that the omission was due to a publication error. The Division also clarified that the revision was available through a link in the proposed regulation. The link does include conforming language.

Second, the Councils noted that the proposed definition of “large family child care home” did not match the definition adopted by the Office of Child Care Licensing (OCCL). DSS corrected its definition by adopting the OCCL standard verbatim.

Since the regulation is final, and the Division responded to all concerns identified by the Councils, I recommend no further action.

3. DOE Prop. Administrator Appraisal Process Repeal Reg. [16 DE Reg. 1253 (June 1, 2013)]

As background, Department of Education regulations include two (2) sets of appraisal standards covering administrators, Part 108 and Part 108A. The latter (Part 108A) version took effect with the 2011-2012 school year. Indeed, §1.1 of Part 108A recites as follows:

1.1. The Administrator Appraisal Process, Delaware Performance Appraisal System (DPAS II) Revised shall be effective for all school districts and charter schools beginning with the 2011-12 school year, and shall, at such time, replace the current 14 DE Admin Code 108 Administrator Appraisal Process Delaware Performance Appraisal System (DPAS II).

Since the Part 108 standards have been superseded, the DOE is repealing them in their entirety.

I recommend endorsement of this “housekeeping” initiative.

4. DOE Prop. Teacher Appraisal Process Repeal Reg. [16 DE Reg. 1234 (June 1, 2013)]

As background, Department of Education regulations include two (2) sets of appraisal standards covering teachers, Part 106 and Part 106A. The latter (Part 106A) version took effect with the 2011-2012 school year. Indeed, §1.0 of Part 106A recites as follows:

1.0. The Teacher Appraisal Process, Delaware Performance Appraisal System (DPAS II) Revised shall be effective for all school districts and charter schools beginning with the 2011-12 school year, and shall, at such time, replace the current 14 DE Admin Code 106 Teacher Appraisal Process Delaware Performance Appraisal System (DPAS II).

Since the Part 106 standards have been superseded, the DOE is repealing them in their entirety. Parenthetically, the DOE is proposing some revisions to the Part 106A standards this month as analyzed below.

I recommend endorsement of this “housekeeping” initiative.

5. DOE Prop. Teacher Appraisal Process Revision Reg. [16 DE Reg. 1235 (June 1, 2013)]

The Department of Education proposes to revise its teacher appraisal standards effective with the 2013-14 school year. I have the following observations.

A. “Weakening” of Appraisal Process

As background, the Legislature and Governor have recently stressed the need to “raise the bar” for the teaching profession in Delaware. See attached May 18, 2013 News Journal article describing enactment of legislation establishing more rigorous standards for prospective public school teachers. Statistically, Delaware student achievement is lagging, resulting in recognition that the status quo approach to promoting the caliber of Delaware’s teaching profession must be dramatically changed. See, e.g., the attached 2012 presentation by WSFS Bank Board Chair to Delaware State Chamber of Commerce.

The SCPD and GACEC have previously criticized the DOE’s teacher appraisal process as “overly generous” or “misleading”. See, e.g., the attached October 19, 2011 GACEC letter which shared the following concerns:

Third, DOE has established five appraisal components in §5.0: 1) planning and preparation; 2) classroom environment; instruction; 4) professional responsibilities; and 5) student improvement. The last component, student improvement, is new. Teachers are rated in these five contexts resulting in an overall classification of highly effective, effective, needs improvement, and ineffective. See §6.0. The classification system could be characterized as “overly generous” or “misleading” in some contexts. For example, a teacher scoring a satisfactory rating in only three of the five components inclusive of student improvement

(60%) is characterized as “effective”. Reasonable persons might view such a characterization as a distortion of the plain meaning of “effective”. Likewise, a teacher scoring a satisfactory rating in only one of the five components inclusive of student improvement (20%) is euphemistically characterized as “needs improvement”. DOE may wish to revisit the qualifications for “effective” and “needs improvement” to more closely align to the plain meaning of the terms.

The “overly generous” characterization of an “effective” teacher was recently underscored in the DOE dispute with the Christina School District over teacher bonuses paid with “Race to the Top” funds. Consistent with the attached April 12 and May 17, 2013 News Journal articles, Christina wished to provide the bonuses to all teachers with an “effective rating”, a standard so low that more than 99% of its teachers were expected to qualify.

Unfortunately, the DOE’s proposed regulation further dilutes the already “overly generous” teacher appraisal standards. The following are examples.

1. The current regulation (§5.1) contains four (4) appraisal contexts apart from student achievement: 1) planning and preparation; 2) classroom environment; 3) instruction; and 4) professional responsibilities. There are a total of eighteen (18) subparts under these four (4) appraisal contexts. Under the proposed regulation, districts and charter schools are authorized to “waive” one subpart under each of the four (4) appraisal contexts. No permission is needed, i.e., the district or charter school simply notifies DOE of its decision in August. This results in the option to disregard 22% (4/18) of appraisal components, including the following ostensibly important measures:

5.1.3.3. Communicating Clearly and Accurately: Verbal and written communication is clear and appropriate to students’ ages, backgrounds, and levels of understanding. (Optional)

5.1.1.1. Selecting Instructional Goals: Teacher selects instructional goals that are aligned with the DE content standards and the district or charter school’s curricula. Goals are appropriate for the learners and reflect high expectations for all students, consistent with State Assessment levels of performance where applicable. (Optional)

5.1.1.3. Demonstrating Knowledge of Content and Pedagogy: Teacher shows his or her knowledge of content and how to teach it to a variety of learners. The teacher’s plans include natural connections among content areas that deepen student learning. The content that he or she teaches is aligned to the district or charter school’s curricula. (Optional)

Since each district and charter school can waive different components, valid comparisons of data among districts and charter schools is not possible. Each district and charter school will be using different criteria.

2. The DOE proposes to no longer require improvement plans for teachers with an “unsatisfactory” rating during an observed lesson. Such improvement plans will be optional:

8.1.1. An Improvement Plan ~~shall also~~ may be developed if a teacher's overall performance during an observed lesson is unsatisfactory. This unsatisfactory performance ~~shall~~ may be noted by the ~~evaluator on the Formative Feedback form~~ Evaluator on the required forms by noting "PERFORMANCE IS UNSATISFACTORY" and initialing the statement.

B. Unannounced Observations

One proposed change in the standards merits endorsement. The revised standards contemplate more "unannounced" versus "announced" observations of teachers. See §§3.1, 3.2, and 3.4. This should result in enhancing the validity and reliability of assessments.

C. Miscellaneous

The word "evaluator" in §8.4, second sentence, should be capitalized.

I recommend sharing the above commentary with the DOE, Governor, Lt. Governor, and select policymakers.

6. DOE Prop. Specialist Appraisal Process Repeal Reg. [16 DE Reg. 1244 (June 1, 2013)]

As background, Department of Education regulations include two (2) sets of appraisal standards covering teachers, Part 107 and Part 107A. The latter (Part 107A) version took effect with the 2011-2012 school year. Indeed, §1.0 of Part 107A recites as follows:

1.0. The Specialist Appraisal Process, Delaware Performance Appraisal System (DPAS II) Revised shall be effective for all school districts and charter schools beginning with the 2011-12 school year and shall, at such time, replace the current 14 DE Admin Code 107 Specialist Appraisal Process, Delaware Performance Appraisal System (DPAS II).

Since the Part 107 standards have been superseded, the DOE is repealing them in their entirety. Parenthetically, the DOE is proposing some revisions to the Part 107A standards this month as analyzed below.

I recommend endorsement of this "housekeeping" initiative.

7. DOE Prop. Specialist Appraisal Process Revision Reg. [16 DE Reg. 1245 (June 1, 2013)]

The Department of Education proposes to revise its specialist appraisal standards effective with the 2013-14 school year. I have the following observations.

A. "Weakening" of Appraisal Process

The SCPD and GACEC have previously criticized the DOE's specialist appraisal process as "overly generous" or "misleading". See, e.g., the attached October 19, 2011 GACEC letter which shared the following concerns:

Third, DOE establishes five appraisal components in §5.0: 1) planning and preparation; 2) professional practice and delivery of services; 3) professional collaboration and consultation; 4) professional responsibilities; and 5) student improvement. Unlike the teacher appraisal regulation, these five components are included in the current regulation last revised in May of 2010. Specialists are rated in these five contexts resulting in an overall classification of highly effective, effective, needs improvement, and ineffective. See §6.0. The classification system could be characterized as “overly generous” or “misleading” in some contexts. For example, a specialist scoring a satisfactory rating in only three of the five components inclusive of student improvement (60%) is characterized as “effective”. Reasonable persons might view such a characterization as a distortion of the plain meaning of “effective”. Likewise, a specialist scoring a satisfactory rating in only one of the five components inclusive of student improvement (20%) is euphemistically characterized as “needs improvement”. DOE may wish to revisit the qualifications for “effective” and “needs improvement” to more closely align to the plain meaning of the terms.

Unfortunately, the DOE’s proposed regulation further dilutes the already “overly generous” teacher appraisal standards. The following are examples.

1. The current regulation (§5.1) contains four (4) appraisal contexts apart from student achievement: 1) planning and preparation; 2) professional practice and delivery of services; 3) professional collaboration and consultation; and 4) professional responsibilities. There are a total of eighteen (18) subparts under these four (4) appraisal contexts. Under the proposed regulation, districts and charter schools are authorized to “waive” one subpart under each of the four (4) appraisal contexts. No permission is needed, i.e., the district or charter school simply notifies DOE of its decision in August. This results in the option to disregard 22% (4/18) of appraisal components, including the following ostensibly important measures:

5.1.2.3. Communicating Clearly and Accurately: Verbal and written communication is clear and appropriate to students’ or clients’ ages, backgrounds, needs, or levels of understanding. (Optional)

5.1.1.2. Demonstrating Knowledge of Best Practice and Models of Delivery: Specialist uses practices and models of delivery that are aligned with local and national standards. (Optional)

5.1.4.2. Recording student data in a Record System: Specialist keeps student or client records relevant to their services and shares information with appropriate school personnel. (Optional)

Since each district and charter school can waive different components, valid comparisons of data among districts and charter schools is not possible. Each district and charter school will be using different criteria.

2. DOE proposes to reduce the number of “observations” of novice specialists. Currently, three (3) observations (2 announced; 1 unannounced) are required. See §3.4. This is reduced to two (2) observations (1 announced; 1 unannounced) in the proposed regulation.

3. The DOE proposes to no longer require improvement plans for specialists with an “unsatisfactory” rating during an observation. Such improvement plans will be optional:

8.1.1. An Improvement Plan ~~shall also~~ may be developed if a specialist’s overall performance during an observation is unsatisfactory. This unsatisfactory performance ~~shall~~ may be noted by the ~~evaluator on the Formative Feedback form~~ Evaluator on the required forms by noting “PERFORMANCE IS UNSATISFACTORY” and initialing the statement.

B. Unannounced Observations

One proposed change in the standards merits endorsement. The revised standards contemplate more “unannounced” versus “announced” observations of specialists who have earned a rating of “highly effective” or “effective”. See §§3.1 and 3.4. This should result in enhancing the validity and reliability of assessments for such specialists.

C. Miscellaneous

The word “evaluator” in §8.4, second sentence, should be capitalized.

I recommend sharing the above observations with the DOE.

8. DPH Prop. Communicable and Other Disease Conditions Reg. [16 DE Reg. 1255 (June 1, 2013)]

Legislation (H.B. No. 403) was enacted in 2012 to expand the role of DPH in disease control and reporting to specifically include long-term care facilities, freestanding surgical centers, dialysis centers, and psychiatric facilities. The Division is now issuing revised regulations to address changes prompted by the legislation. The regulations are lengthy (17 pages) and prescriptive.

I have the following observations.

1. Section 7.6.1 does not conform to the Delaware Administrative Code Style Manual. In the context of definitions, Section 3.1.2 “provides the following guidance: immediately after the defined word or term, insert the word “means”. Definitions compiled in §7.6.1 do not conform to this protocol. For example, the reference to “Department” is as follows:

“Department” The Department of Health and Social Services.

Inserting “means” would enhance the “readability” of the definitions.

2. In §7.6, definition of “CDC”, the second sentence merits review for grammar. It recites as follows:

The CDC focuses national attention on developing and applying disease prevention and control (especially infectious diseases) recommendations for chronic and infectious diseases, environmental health, occupational safety and health, health promotion, prevention, and education activities designed to improve the health of people in the United States.

3. In §7.6, definition of “Freestanding surgical center”, the second sentence has 103 words with many subparts and inappropriate punctuation. It should be reformatted and reworded. See Delaware Administrative Code Style Manual, §6.2.4. The references to “, or;” merit revision. The reference to “and/or” should be converted to “or”. See Delaware Administrative Code Style Manual, §6.6.1.

4. In §7.6, definition of “Healthcare Facility”, substitute “other facility” for “other facilities”.

5. In §7.6, definition of “Psychiatric facility”, capitalize “facility” and substitute “persons with mental illness” for “mentally ill persons”. See Title 29 Del.C. §608.

6. There are multiple references to “and/or the AHRQ, to name a few”. See, e.g. §§7.6.5.2, 7.6.6.2, and 7.6.6.2. Consider substituting “or the AHRQ”. See Delaware Administrative Code Style Manual, §6.6.1.

7. Section 7.6.14 purports, by State regulation, to supersede contrary federal law. DPH ostensibly lacks the authority to supersede federal law by promulgation of a State regulation.

I recommend sharing the above observations with the Division.

9. DFS Prop Res. Child Care Facility & Day Treatment Prog. Reg. [16 DE Reg. 1257 (June 1,2013)]

As background, the Governor issued Executive Order No. 36 on January 4, 2012 establishing a schedule for agencies to solicit input from the public on regulations in effect for more than three years. DFS notes that it received few comments on its “Delacare” standards covering residential child care facilities and day treatment programs. It intends to initiate a comprehensive review of its standards in the Fall of 2013. In the meantime, it is proposing to adopt a few “housekeeping” revisions to the existing 37-page set of standards which are summarized at 16 DE Reg. 1258.

I have only a few “technical” observations.

First, the Division is substituting “regulation” for “requirement” throughout the standards. The substitutions are generally acceptable. However, in a few contexts, the substitution results in “odd” or incomplete references. See, e.g., reference to “Regulations of 1.0, 2.0, 3.0 and 4.0” (§5.1.1 and §7.1.1); and reference to “Regulations of 1.0, 2.0, and 3.0” (§8.1.1). I suspect the Division intended to refer to “Regulations of Chapters 1.0, 2.0, ...”. Compare §9.1.1, §10.1.1, and §11.1.1.

Second, the Division may wish to reconsider the substitution of “regulations” for “requirements” in §10.4.2.

Third, §11.11 requires all toys to be confirmed to be “of safe construction, non-toxic, and free of hazards” and checked with a “choker tube” to ensure parts cannot be swallowed by a child under age 3. Section 11.11.2.8 disallows the presence of any toy in a crib or playpen when an infant is asleep. There is no definition of “infant” but the OCCL licensing regulations for day care centers (Part 101) define an infant as a child under age one. My concern is that some infants may be very “attached” to a particular toy as a “comfort” item and may not be predisposed to sleep without it. If all toys are checked for hazards, query whether the presence of a single toy in a crib or playpen is a realistic danger. DFS may wish to reconsider the total ban on any toy in a crib or playpen when an infant is asleep.

I recommend sharing the above observations with the Division.

10. H.B. No. 125 (Reinstatement of Parental Rights)

This legislation was introduced on May 8, 2013. As of June 8, it had been approved by the House Health & Human Development Committee and awaited action by the full House.

Conceptually, this is a relatively simple bill. Current law authorizes the termination of parental rights (“TPR”) based on multiple grounds. Some of the authorized bases for a TPR do not implicate fault. For example, a parent can consent to a TPR and a parent could be determined, due to mental illness, to be simply unable to fulfill parental responsibilities. See Title 13 Del.C. §§1103(a)(1), 1101(9), and 1103(a)(3). H.B. No. 125 would authorize the Family Court to “reinstate” parental rights if the Court determines that reinstatement would be in the child’s best interests (lines 27-28) and seven (7) conditions are met (lines 9-17). These are not “involuntary” actions - the child and parent or parents must consent (lines 14-15). The Court must find that adoption “is not possible or appropriate” (line 13).

I recommend endorsement of the legislation subject to consideration of amendments.

First, line 22 characterizes the action as one brought “against one or both parents”. This is an “odd” approach since the petition cannot be filed without parental consent (line 15). It would be preferable to amend line 22 as follows: “...~~against one or both parents~~ in the interests of the child”.

Second, the legislation amends a definition in Title 13 Del.C. Ch. 11, including §1101. Section 1101(9) contains pejorative disability-related references:

(9) “Mentally incompetent” shall be interpreted as referring to a parent who is unable to discharge parental responsibilities by reason of mental illness, psychopathology, mental retardation, or mental deficiency.

Section 1103(a)(3) then refers to “the alleged incompetent”.

The Legislature attempted to delete such pejorative references through adoption of H.B. No. 91 and H.B. No. 214 in the 146th General Assembly. The above references were overlooked. Since this bill is amending Ch. 11, it does provide an opportunity to include a “housekeeping” amendment to remove objectionable language in §1101(9) and §1103(a)(3). Indeed, consistent with the attached Policy Research Brief, justifying a TPR based on a mental diagnosis or “competency” focuses undue attention on a diagnosis rather than behavior. The Brief notes that fourteen (14) states do not refer to a parent’s disability in their state TPR statutes. At 4.

I recommend sharing the above observations with policymakers, including the prime sponsor, Rep. Smith; and Rep. Heffernan. The SCPD may wish to informally share the above observations with the above representatives for feedback prior to broader dissemination since there is potential for separate legislation to address the justification for a TPR based on mental condition.

11. H.B. No. 163 (Transitional Foster Care Supports)

This legislation was introduced on May 30, 2013. As of June 8, it had been released from the House Health & Human Development Committee and awaited action by the full House. The attached \$515,000 fiscal note indicates that the funds are included in the budget prepared by the Joint Finance Committee.

As background, H.J.R. 18 from the 146th General Assembly resulted in an assessment of problems experienced by youth transitioning from foster care. The final 50-page report was issued in September, 2012 and is available at <http://udspace.udel.edu/handle/19716/12527>. As the preamble to H.B. No. 163 recites, individuals transitioning from foster care at age 18 are at high risk. The following statistics are highlighted: 1) 82% of males are arrested by age 21; 2) 22% become homeless; and 3) females remaining in care to age 21 had a 38% reduction in the incidence of pregnancy before age 20.

H.B. No. 18 implements the recommendations in the report. Existing law (lines 46 - 50) already permits the Family Court to extend services to youth in DSCY&F custody to age 21. The legislation requires DSCY&F to “create and maintain a developmentally appropriate, comprehensive program that fully integrates independent living services from ages 14 to 21 that will assist youth with their successful transition into adulthood (lines 94-96, 160-163). The bill contemplates the provision of enhanced independent living services to promote financial stability, housing supports, medical supports, employment and training, education, and connection to resources.

There is a high prevalence of disability among youth in foster care. Indeed, the preamble (lines 14-15) recites that many youth aging out of the foster care system “reported lifetime prevalence of Post-Traumatic-Stress Disorder similar to that of many U.S. war veterans”. I recommend a strong endorsement.

12. H.B. No. 164 (Mental Health Parity)

This legislation was introduced on May 30, 2013. As of June 8, it remained in the House Economic Development/Banking/Insurance/Commerce Committee.

As background, federal mental health parity legislation was first enacted in 1996. Delaware followed up with enactment of its original mental health parity legislation through H.B. No. 156 in 1998. The State law covers insurance coverage for both serious mental illness as drug and alcohol dependency. In the meantime, federal legislation was adopted in 2008 to close loopholes in the 1996 federal parity law and expand the scope of protections for group insurance plans covering more than 50 employees. See attached U.S. DOL and APA summaries of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act. States are permitted to provide more protections than the federal law. The regulations are published at 45 C.F.R. Part 2590 and available at <http://www.gpo.gov/fdsys/pkg/FR-2010-02-02/pdf/2010-2167.pdf>

H.B. No. 164 would have two effects.

First, it updates the mental health parity law covering large (50+ employee) groups to require compliance with the 2008 federal law (lines 4-5).

Second, it requires such plans to cover a minimum of 30 consecutive calendar days per benefit year at an inpatient medical or residential facility that is approved by the Joint Commission on Accreditation of Healthcare Organizations (lines 11-13). The rationale for this change is highlighted in the synopsis:

Carriers only provide a limited amount of consecutive days in an inpatient facility (many times, 5 consecutive days) before requiring an insured to seek outpatient therapy. Oftentimes, 5 days is not a sufficient amount of time to diagnose and treat serious mental illness or to detoxify from an alcohol or drug addiction.

I recommend a strong endorsement.

13. H.B. No. 155 (Distracted Driving: Wearable Computer with Head Mounted Display)

This legislation was introduced on May 30, 2013. As of June 8, it remained in the House Public Safety and Homeland Security Committee.

Background on the bill is provided in the attached June 2, 2013 News Journal article. Google has developed a wearable multi-function computer ("Google Glass") which is worn like glasses with access to the Internet. It is a "hands-free" device. Some traffic safety proponents are concerned that individuals will be distracted if driving with the device. Background on "Google Glass" is provided in the attached Wikipedia article.

H.B. No. 155 would ban operation of a motor vehicle on the highway while using an electronic communication device while the motor vehicle is in motion. Similar legislation was introduced in West Virginia in March, 2013. See attached H.B. No. 3057.

There are pros and cons to the legislation. Detractors can cite to enforcement difficulties in trying to ascertain if the device is actually being operated while driving. They can also argue that the device is "safer" to use than a dashboard mounted GPS device or referring to a Smartphone screen for directions. Proponents can cite to the greater potential for distracted driving as operators drive while directing attention to a video screen only inches from their eyes to watch movies, read email, etc.

I recommend endorsement of the concept of the bill. While some drivers might only use the devices for GPS directions, I suspect the majority would use it for extraneous multi-tasking, including checking emails. In turn, this will lead to more accidents.

14. S.B. No. 99 (Dependent Children)

This legislation was introduced on May 30, 2013. As of June 7, it remained in the Senate Children, Youth and Families Committee.

The legislation would have the following effects.

First, while current law requires DSCY&F written consent to placement of children with non-relatives, the legislation would only require DSCY&F assessment (lines 10-12 and 40-44). Exceptions are identified, including placements involving licensed child placement agencies (lines 45-70).

Second, current law generally requires the Family Court to obtain a DSCY&F evaluation and report prior to granting custody of a child to a non-relative (lines 18-21). The legislation deletes this requirement (lines 18-21) and merely cross references a statute which requires assessment unless one of multiple exceptions applies. This change is problematic since it may bar the Family Court from exercising any discretion to direct a DSCY&F evaluation if an exception is literally met. For example, if the Court is considering placement of a child with a distant relative (cousin; great uncle) and there is little or no positive or negative information about the relative, the Court could not obtain a DSCY&F assessment since, by operation of law (lines 21 and 54-55), the assessment is exempt. It would be preferable to clarify that the Family Court may exercise judicial discretion to direct a DSCY&F assessment even if facially exempt under Section 351 of Title 31. To remedy this concern, consider substituting the following for the proposed §1009(b)(3) [lines 18-21]:

(b)(3) Grant custody of a child to any person or agency where satisfactory arrangements can be made but, in the event the child is placed in a home ~~other than the home of a relative~~, of an "adult individual" who fails to meet the definition of relative in §901 of this Title, the Court shall require order an evaluation written assessment and report from the Department of Services for Children Youth and Their Families or its licensed agency if required by Section 351 of Title 31, or, notwithstanding Section 351 of Title 31, in the sound discretion of the Court.

The synopsis recites that the sponsors intend to make it “clear that the Family Court has the final authority to determine whether or not the placement is appropriate”. The Court’s exercise of this authority should be “informed”. If the Court has reservations about a distant relative, it should have some discretion to direct an assessment even if technically exempt under Section 351 of Title 31.

I recommend sharing the above observations with policymakers.

15. S.B. No. 100 (Seclusion & Restraint)

This legislation was introduced on June 4, 2013. It was released from the Senate Education Committee on June 5. It is on the Senate agenda to be considered on June 11.

As background, several reports have been published in recent years underscoring the problematic use of seclusion and restraint in public schools and the lack of reliable data on use.

- GAO, “Seclusion and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers”, GAO 09-719T (May 19, 2009), available at <http://www.gao.gov/products/GAO-09-719T>.
- Congressional Resource Services, “The Use of Seclusion and Restraint in Public Schools: The Legal Issues” (April 14, 2009), available at http://www.spannj.org/information/CRS_Report_on_Legal_Issues_in_Seclusion_&_Restraints.pdf.
- NDRN, “School Is Not Supposed to Hurt” (March, 2012), available at http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf.

In 2012, the U.S. Department of Education Office for Civil Rights issued the results of national data on seclusion and restraint covering 72,000 public schools. The results are summarized in the attached article. The findings were alarming:

- “Of all 38, 792 students physically restrained by school staff members, nearly 70% were students with disabilities.”
- “Of students with disabilities who were mechanically restrained, which includes being handcuffed, tied down, strapped to a chair, or held with equipment for that purpose, a disproportionate share, 44%, were African-American.”
- “Of the 111,417 instances of seclusion in the survey, 61.7% were of students with disabilities, compared with 38.3% for other students.”

Highly publicized instances of restraint have occurred in Delaware, resulting in prosecution. See attached February 8, 2012 and February 12, 2012 News Journal articles.

In May, 2012, the U.S. Department of Education issued a 41-page set of authoritative guidance on the use of seclusion and restraint in public schools. U.S. Dept. Of Education, "Restraint and Seclusion: Resource Document" (May 15, 2012), available at <http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>. The document included the attached set of 15 principles (pp. 11-13). The principles discourage use of seclusion and restraint on students with and without disabilities. States are encouraged to adopt policies and procedures which may exceed the principles in the guidance. Id.

Federal legislation has been introduced on multiple occasions to adopt uniform national standards applicable to public schools. The latest version of the "Keeping All Students Safe Act" was introduced in the House in April, 2013. It incorporates many of the concepts outlined in the U.S. DOE's guidance. There has been little progress on the federal legislation. Most legislation has occurred at the state level. The most recent compilation, published in May, 2013, concluded as follows: "19 states have laws providing meaningful protections against restraint and seclusion for all children; 32 for children with disabilities". Jessica Butler, "How Safe Is the Schoolhouse? - An Analysis of State Seclusion and Restraint Laws and Policies (May 2, 2013), available on www.specialedconnection.com.

S.B. No. 100 embodies the research and deliberations of an interagency committee convened by the Governor's Advisory Council for Exceptional Citizens (GACEC) which reviewed best practices and legislation in other states. S.B. No. 100 has been refined through several sequential drafts to ensure the support of key stakeholders (Delaware Department of Education; DSEA; AdvoServ). Apart from the support of these stakeholders, the legislation has been endorsed by the following organizations:

- Developmental Disabilities Council
- State Council for Persons with Disabilities
- Governor's Advisory Council for Exceptional Citizens
- Autism Delaware
- Disabilities Law Program, Community Legal Aid Society, Inc.

If enacted, the legislation would have the following effects:

- 1) chemical restraint would be banned;
- 2) seclusion and mechanical restraint would be disallowed subject to a DOE waiver;
- 3) physical restraint would be restricted to emergency situations and subject to safeguards;
- 4) a uniform data collection system would be created and results compiled in annual report;
- 5) DOE regulations would be adopted to implement the law; and
- 4) parents would receive notice of each use of physical restraint and any waiver-authorized seclusion and mechanical restraint.

I recommend that the Councils share the above or comparable summary with policymakers and expand the list of endorsing agencies if the above summary is adopted.

16. SCR No. 20 (Election Law Task Force)

This legislation was introduced on May 15, 2013 and passed the Senate the same day with strong support (20 yes; 0 no; 1 not voting). As of June 8, it awaits action by the House.

The preamble to the bill notes that the Elections Code contains 32 chapters and has been amended many times over the years without a comprehensive review. The resolution would establish a small, 7-member Election Law Task Force” to “comprehensively review, study, and make findings and recommendations regarding Title 15 Elections” (lines 7-8). A report would be issued by March 30, 2014.

The Councils have been active in recent years in addressing various aspects of the voting process, including accessibility of polling sites, absentee ballot procedures, and scope of assistance in the voting booth. The Task Force offers the opportunity for a comprehensive review of many aspects of the voting process and merits endorsement.

Attachments

8g:legis/613bils
F:pub/bjh/leg/2013p&l/613bils

**GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS**

GEORGE V. MASSEY STATION
516 WEST LOOCKERMAN STREET
DOVER, DELAWARE 19904
TELEPHONE: (302) 739-4553
FAX: (302) 739-6126

April 25, 2013

Sharon L. Summers
Policy, Program and Development Unit
Division of Social Services
1901 North DuPont Highway
P. O. Box 906
New Castle, DE 19720-0906

RE: DMMA Proposed Medicaid Prescription Drug Regulation [16 DE Reg. 1028 (April 1, 2013)]

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Medicaid and Medical Assistance (DMMA) proposal to adopt some discrete amendments to its drug coverage standards.

First, for dual eligible (Medicare/Medicaid) individuals, Medicaid coverage for benzodiazepines ends and Medicaid coverage for barbiturates ends unless prescribed for a condition other than epilepsy, cancer, or a chronic mental health disorder. This change is required by federal law. Effective January 1, 2013, Medicare D will cover benzodiazepines and barbiturates prescribed to treat epilepsy, cancer, or a chronic mental health disorder. Therefore, there is no "net" loss of coverage for dual eligibles, i.e., they will be eligible for these drugs under the Medicare-D program rather than Medicaid.

Second, the Division is changing quantity limits on opioid analgesics. At 1033. The current limit is "200 doses per 30 days" which is roughly equivalent to 2,400 doses per year. The new limit will be "720 immediate release doses per 365 days". Lowering the quantity limit from 2,400 to 720 doses annually represents a 70% reduction. The Division indicates that the "720 immediate release doses per 365 days" reflects current practice. At 1030.

Overall, the Medicaid Plan changes are expected to result in \$101,000.00 in savings. At 1030.

The GACEC endorses the change in coverage for dual eligible in reference to benzodiazepines and barbitrates since the change is required by federal law; however, we would like to request clarification of the following: 1) the rationale for reducing the limits on opioid analgesics by 70% and 2) the availability of an "override" based on compelling circumstances.

Please feel free to contact me or Wendy Strauss should you have any questions or concerns.

Sincerely,

Dafne A. Carnright/KPC

Dafne A. Carnright
Vice Chairperson

DAC:kpc

**GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS**

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April 25, 2013

Sharon L. Summers
Division of Social Services
1901 North DuPont Highway
P. O. Box 906
New Castle, DE 19720-0906

RE: DSS Proposed Child Care Subsidy Definitions Regulation [16 DE Reg. 1043 (April 1, 2013)]

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Social Services (DSS) proposal to amend a single definition in its Child Care Subsidy Program regulation. The rationale for the change includes the desire to conform to Office of Child Care Licensing (OCCL) standards.

Council would like to share two observations.

First, DSS recites as follows in the Summary of Proposed Changes:

- 1) This regulatory action changes the number of children in "Child Care Centers" from 12 or more to 13 or more; ...

However, the actual text of the proposed revision is omitted from both the "paper" and electronic version of the regulation. The current regulatory definition of "Child Care Centers" from 16 DE Admin Code 11000, §11002.9 is attached for facilitated reference. This is the section DSS intended to amend by substituting "13" for "12".

Second, DSS is amending the definition of "large family child care home" to cover non-residential centers and change the qualifications from caring for 6-12 children to 7-12 children:

~~A private residence other than the child's residence, where licensed care is provided for more than six but less than twelve children who are not related to the caregiver. A private residence other than the child's residence or a non-residential site where licensed care is provided for seven to twelve children who are not related to the caregiver....~~

At 1044. Unfortunately, this definition is at odds with the attached OCCL definition published at 9 DE Reg. 104, §3.0. The OCCL definition, in pertinent part, reads as follows:

The person or entity has in custody or control seven (7) to a maximum of twelve (12) children preschool age or older who live at and/or are present at the Large Family Child Care Home. In addition to the children preschool-age or younger, this person or entity may also have custody or control of one (1) to a maximum of two (2) school-age children who do not live at the Large Family Child Care Home but are present only for before and after school, and/or during school holidays, and/or during the summer....¹

The DSS definition is not co-terminous with the OCCL definition since: 1) it omits the OCCL age criteria; and 2) it would not permit the presence of 1-2 school-age children in addition to the complement of 7-12 children.

Given these observations, DSS may wish to consider republication of a corrected proposed regulation.

Thank you in advance for your time and consideration of our observations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,

Dafne A. Carnright/KPC

Dafne A. Carnright
Vice Chairperson

DAC:kpc

Enclosures

¹Council suspects the OCCL regulation contains an erroneous reference, i.e., the word "older" should be "younger".

11002.9 Definitions and Explanation of Terms

The following words and terms, when used in the context of these policies will, unless clearly indicated otherwise, have the following meanings.

Authorization	Form 618d or 626 is the parents/caretakers authority to receive subsidized child care services and is the provider's authority to provide subsidized child care services to eligible parents/caretakers. The authorization informs providers how much care a parent is authorized to receive, what DSS will pay the provider, and what parents/caretakers must pay as part of their fee.
Caregiver/Provider	The person(s), other than the parent/caretaker, whom DSS approves to provide child care services or the approved place where care is provided.
Caretaker	The adult responsible for the primary support and guardianship of the child. As used here, this adult is someone other than the child's parent who acts in place of the parent. If a caretaker is unrelated to the child and has not been awarded custody by Family Court or guardianship, the caretaker is referred to the Division of Family Services to make a determination to either approve the non-relative placement or remove the child.
CCDBG	<p>Child Care and Development Block Grant. 45 CFR Parts 98 and 99 created by the Omnibus Budget Reconciliation Act of 1990 to provide federal funds without state match to:</p> <ol style="list-style-type: none"> 1. Provide child care to low income families 2. Enhance the quality and increase the supply of child care 3. Provide parents the ability to choose their provider 4. Increase the availability of early childhood programs and before and after school services. Under the Division's DCIS II Child Care Sub system, CCDBG is part of Categories 31 and 41
CFR	Code of Federal Regulations. These are the rules the Federal Government writes to implement federal legislation. Once written and approved, they have the force of law.
CCMIS	Child Care Management Information System, the name used to describe the Division's payment system for child care.
Child	A person under the age of 13, or children 13 through 18 years of age if they are physically or mentally incapable of caring for themselves or are in need of protective services.
Child Care Category	<p>The DCIS II Child Care Sub system code for the child care funding source. Case Managers choose category codes based on the parents/caretaker's technical eligibility for service. The codes are:</p> <p>11 - Participants receiving TANF and not working, but participating in TANF E&T</p>

12 - Participants receiving TANF and working

21 - Participants receiving Food Stamps Benefits who are mandatory or voluntary participants in E&T and not receiving TANF

31 - SSBG, CCDBG, and State funds: Income eligible participants. Participants who receive FS and are not E&T mandatory or voluntary

41 - A participant who is a qualified alien or U.S. citizen is coded as a category 41 when his or her eligibility allows a non U.S. citizen or non-qualified alien to receive child care services. (Example: One child is a citizen and one is not. The citizen child is a 41.)

51 - A participant is coded category 51 when s/he is not a U.S. citizen or legal alien but receives Child Care services due to a family member in category 41

* Child Care Centers

A place where licensed or license-exempt child care is provided on a regular basis for periods of less than 24 hours a day to 12 or more children, who are unattended by a parent or guardian.

104 Large Family Child Care Homes

INTRODUCTION

1.0 Legal Base

The legal base for these licensing Rules is in the Delaware Code, Title 31, Welfare, In General, Chapter 3, Child Welfare, Subchapter III, The Delaware Child Care Act, Subsections 341 – 345 and Title 29, State Government, Part VIII, Departments of Government, Chapter 90, Department of Services For Children, Youth And Their Families, Subsection 9003 (7).

2.0 Purpose

The overall purpose of these Rules is the protection and promotion of the health, safety, well-being, and positive development of children who receive licensed child care services in Large Family Child Care Homes.

PART I. GENERAL PROVISIONS

3.0 Definition of Regulated Service

* Large Family Child Care is a licensed child care service provided for part of a twenty-four (24) hour day, offered by any person or entity including but not limited to an owner, association, agency or organization that advertises or holds himself, herself or itself out as conducting such a service. This person or entity has in custody or control seven (7) to a maximum of twelve (12) children preschool-age or older who live at and/or are present at the Large Family Child Care Home. In addition to the children preschool-age or younger, this person or entity may also have custody or control of one (1) to a maximum of two (2) school-age children who do not live at the Large Family Child Care Home but are present only for before and after school, and/or during school holidays, and/or during the summer. All of these children are provided care, education, protection, supervision or guidance in a private home or non-residential setting. This does not include a child care service provided exclusively to relatives as defined by these Rules.

5-18-13

Toughened teacher prep standards win final OK

By Nichole Dobo and Jonathan Starkey

The News Journal

Delaware lawmakers gave final approval Thursday to a measure that aims to strengthen teacher preparation standards at the state's colleges and universities, a proposal that was central to Gov. Jack Markell's legislative agenda.

The changes, proposed in Markell's State of the State address in January, passed 37-2 in the House.

It passed the Senate earlier this month and now heads to Markell's desk for his signature.

"We want to attract the best candidates into the teaching profession because our state's success in the future is dependent on how well we educate our children today," Markell said in a statement after the House action.

The measure sets a minimum grade-point average for students who wish to study education at a

See TEACHERS, Page B2

DELAWARE

delawareonline.com

Teachers: New test, more time in classroom among changes

Continued from Page B1

Delaware college or university, though it does provide several ways to get around that requirement.

A rigorous test will screen those who are certified to teach in public schools, which the governor has likened to the bar exam taken by aspiring lawyers.

There will be other changes in the college experience, including boosting the level of time spent in a functioning classroom



Rep. Darryl Scott

with children. And colleges and universities will face new scrutiny with public reports on how well their graduates fare based on ratings from the state's educator evaluation system.

Rep. Darryl Scott, a Dover Democrat and sponsor of the bill, said

"we are raising the bar" for the teaching profession in Delaware.

The measure does provide some flexibility to the 3.0 GPA requirement for students who enroll in Delaware teacher colleges. The requirement can be waived for up to 10 percent of students who enroll. Students also can demonstrate academic qualifications by taking a state-approved test or by ranking in the top half of their graduating class.

The GPA requirement applies to the most recent two years of coursework, whether in high school or in college before entering a teaching program.

The new regulations would not apply to colleges outside of Delaware, and those graduates remain eligible to work in the state if they pass certification exams. However, the largest supplier of teachers in Delaware are in-state colleges and universities, federal and state reports show.

The University of Delaware, Delaware State University, Wilmington University and Wesley Col-

lege offer a bachelor's degree in education.

Amendments failed Thursday to nix the GPA requirement and data reporting elements of the bill. Rep. John Kowalko, a Newark Democrat, said the bill represented the "height of legislative intrusion where we don't belong. It prematurely eliminates students from entering into their chosen career path by legislating away their choices and options," Kowalko said.

Rep. Paul Baumbach, also a Newark Democrat, said the bill placed undue burden on the state Department of Education by requiring the agency to oversee data on grads.

In other legislative business Thursday, the House unanimously approved legislation that allows Alabama-based HealthSouth Corp. to build a rehabilitation hospital in Middletown, despite a lawsuit challenging its approval.

The legislation, which now goes to the Senate, exempts freestanding rehabilitation hospitals from

YOUR OPINION



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How do you feel about Delaware toughening standards for teachers?

YESTERDAY'S POLL RESULTS, B1

having to seek certification before the Delaware Health Resources Board. Markell has backed the legislation as a way to allow HealthSouth to move forward on its 34-bed facility, which is planned for Del. 299 just west of Del. 1.

Broadmeadow Investment LLC, which operates a rehabilitation hospital in Middletown that would compete with HealthSouth's facility, has sued the board for approving the application.

Contact Jonathan Starkey at 983-6756, on Twitter @jwstarkey or at jstarkey@delawareonline.com.

Contact Nichole Dobo at 324-2281 or ndobo@delawareonline.com. On Twitter @NicholeDobo.



For education, encouraging only the best

EDITOR'S NOTE: This is an edited version of a speech Marvin Schoenhals gave to the Delaware State Chamber of Commerce on Monday night.

What are the similarities between the changes we made at WSFS over a 15 year period and what we need to do in education? Actually, I think it is pretty simple, WSFS changed its culture. Now we need to help public education do the same thing.

A vibrant state economy depends on a vibrant banking community. But that dependence is dwarfed by the influence our education system has on the long-term growth of our state, our quality of life, and the dignity of our communities.

If our education system is not serving all of our children, all of the time, who will be our colleagues of tomorrow? Who will be our employees? Who will be the next business leaders? Who will support the economy on which we all depend? They cannot all come from private schools. Most have to come from our public schools.

For most in this room, the education system worked fine and has continued to do so for your children and grandchildren. That is not the case for many in our society. As a

result of that discrepancy, we are often complacent about the hard work required to make our schools effective for all children.

Many say if the kids would just work harder and their parents make them do their homework things would be fine. Others say that because many of these kids live in poverty and in broken down family and community systems, it is impossible to provide an adequate education for them. In other words, they cannot learn.

Let me confess that until about 10 years ago, I was one of those people that thought that providing a quality education to everyone was impossible. I believed that the odds some people faced were just too overwhelming to be overcome by our education system.

I also believed that if we consolidated school districts and could get rid of the teachers' union, we could reform our schools.

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Turns out I was wrong on every one of those beliefs.

There are schools right here in our state that are overcoming the incredible challenges of educating children who come from lower socioeconomic backgrounds. These schools that are beating the odds are traditional public and charter schools in urban and rural areas up and down the state.

For example, schools in Indian River have received national recognition over several years for strong performance in high-poverty schools. As Education Secretary Lillian Lowery noted, Indian River is noteworthy because their achievement is consistent.

We have islands of excellence and we must appreciate them, but with rare exceptions those islands are separated by murky oceans where the educational outcomes are at best uncertain.

Let me give you a few facts on the murky oceans:

» Two thirds of the children showing up for kindergarten in Delaware cannot perform at the appropriate level for a 5-year-old. These students rarely catch up; they become the 3rd-graders who are behind; who drop out when they get to high school.

» Under-performing schools are not constrained to just areas of urban poverty. The screen shows 12 schools that produce over 60 percent of the dropouts in the

state. Note their dispersion across the entire state. This is not a New Castle or Wilmington problem; it exists in all three counties.

» Nationally, only 43 percent of students meet what SAT defines as college ready. In Delaware only 29 percent meet that bar.

» Every single school day, eight children in Delaware drop out of school.

» America used to be first in college attainment, now we're 10th. Over the last 30 years US students have slid from first to 17th on international achievement tests in reading; and to an unbelievable level of 31st in math. Delaware's children perform at the US average, so this chart describes how our kids perform against international competition.

So why has America stagnated while many other countries have made significant improvement?

We have notable broad successes, like

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winning Race to the Top; expanding state funding for and winning the federal grant for improvement in early childhood education; and a history that enabled these successes to take place. We have islands of excellence.

These efforts will make some difference, but they will not do enough to change the fundamental culture of education fast enough for the next generation, let alone the current one.

So here are the actions we have to take at the public policy level that will enable the education culture to change much faster than it is.

First, we must have an effective way to evaluate how schools and districts are performing independent of political posturing.

With a report card for each school and district, the legislature would be able to hold each district accountable for the performance of their schools. This would move the districts from the current culture that focuses on complying with the rules to a culture where they are clearly judged on the performance of their schools.

Second, establish standards of performance for our students that are equal to the best international standards.

Third, we must better recognize and reward high-performing districts and schools whether they are traditional public schools or charter schools.

Fourth, with an adequate way to evaluate the performance of schools and districts as I outlined, we must develop better ways to assist those districts that are not succeeding. But if a district just cannot demonstrate meaningful progress however, there must be a provision for the state to force changes, without withholding funding.

Fifth, the legislature must create a system of financing schools that is much more flexible than the current system.

Finally, teaching is a true profession, much like doctors, lawyers and engineers. These are professions where people are expected to achieve specific outcomes: cure the patient, win the trial, build the bridge or educate the child, but the practitioner must achieve success in ever changing circumstances and conditions. Yet the teacher's union, DSEA, insists on personnel practices that are more appropriate for a factory floor than in a profession like teaching. It is a philosophy where seniority drives assignments, transfers and layoffs; and where salaries

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are based upon years of service and educational level, not on achievements in the classroom. I ask DSEA to continue be a forward thinking union by working with the legislature to change this law.

One size or system of pay does not fit all. Let the districts and the local union determine what would work best for them. With a system that is more reflective of the profession that teaching is, we can then work to get teacher pay to a level worthy of the task teachers perform educating the next generation.

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STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

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October 19, 2011

Susan Haberstroh, Education Associate
Department of Education
401 Federal Street, Suite 2A
Dover, DE 19901

RE: DOE Proposed Teacher Appraisal Regulation [15 DE Reg. 409 (10/1/11)]

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education regulations revising the appraisal of teachers. The GACEC would like to share the following observations.

First, the term "Highly Effective" in §6.2.1 should be in bold print to match the references to "Effective", "Needs Improvement", and "Ineffective". Alternatively, the bold print should be eliminated for the terms "Effective", "Needs Improvement", and "Ineffective" for consistency.

Second, the regulation is inconsistent in characterizing a "passing" score/rating in the student improvement component. Section 6.2.1 identifies an "Exceeds" rating as the official acceptable benchmark in contrast to inconsistent references to a "Satisfactory" rating in §§3.2 and 6.2.2.1 and "Unsatisfactory" rating in §§6.2.3.2, 6.2.4.2, 7.2.1, 7.2.2, 7.2.3, and 8.2.1. Section 2.0 includes a definition of "Satisfactory Component Rating" but no definition of an "Exceeds" rating. Council suspects the isolated reference to an "Exceeds" rating is an oversight and the word "Satisfactory" should be substituted.

Third, DOE has established five appraisal components in §5.0: 1) planning and preparation; 2) classroom environment; 3) instruction; 4) professional responsibilities; and 5) student improvement. The last component, student improvement, is new. Teachers are rated in these five contexts resulting in an overall classification of highly effective, effective, needs improvement, and ineffective. See §6.0. The classification system could be characterized as "overly generous" or "misleading" in some contexts. For example, a teacher scoring a satisfactory rating in only three of the five components inclusive of student improvement (60%) is characterized as "effective". Reasonable persons might view such a characterization as a

distortion of the plain meaning of "effective". Likewise, a teacher scoring a satisfactory rating in only one of the five components inclusive of student improvement (20%) is euphemistically characterized as "needs improvement". DOE may wish to revisit the qualifications for "effective" and "needs improvement" to more closely align to the plain meaning of the terms.

Fourth, the current DOE regulation contains a chart defining the criteria for a finding of a "pattern of ineffective teaching" (§7.1). This pre-existing chart is "diluted" by a new §7.2 which directs a "disregard" of an unsatisfactory student improvement rating for the 2011-12 school year. The DOE ostensibly balanced competing considerations, i.e. fairness to teachers since "student improvement" was not included in the current regulation versus fairness to students who deserve effective teachers. The attached October 10, 2011 News Journal article provides further background in this context. It indicates that the DOE and teachers union arrived at an agreement to disregard negative student performance scores for the 2011-12 school year. Similarly, §8.2 categorically bars development of a teacher improvement plan for a teacher with an overall "needs improvement" rating if solely based on an unsatisfactory "student improvement" score. However, positive student performance results can be counted to enhance prospects for teachers qualifying for rewards such as retention bonuses. Rather than totally ignoring an unsatisfactory student performance rating, the DOE could at least encourage public schools to affirmatively offer additional training or mentoring to such teachers.

Thank you for your time and consideration of our observations. Please feel free to contact me or Wendy Strauss should you have questions or concerns.

Sincerely,



Terri A. Hancharick
Chairperson

TAH:kpc

CC: The Honorable Lillian Lowery, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Charles Michels, Professional Standards Board
Mary Ann Mieczkowski, DOE
John Hindman, Esq., DOE
Terry Hickey, Esq., DOE
Paula Fontello, Esq., DOE

Enclosure

EDUCATION

4-12-1305

Just who gets how much at Christina issue's core

By Matthew Albright
The News Journal

The \$2.3 million conflict between the Christina school board and the state over teacher bonuses boils down to a few simple issues: how should districts determine who the best teachers are, how many should be rewarded and how much of a bonus should each receive?

As part of a Race to the Top program aimed at attracting and retaining high-performing

teachers in struggling schools, Gov. Jack Markell and the state Department of Education want school districts to give \$20,000 bonuses over two years to teachers rated "highly effective," a label only a small number of teachers earn.

Of the 11 schools that participated in the bonus program last year, only 125 teachers were eligible for the bonuses, according to Department of Education

See CHRISTINA, Page A2

Christina: District concerned about bonus fairness

Continued from Page A1

figures. So far, about 28 have been selected to receive the money.

The Christina school board instead wants to

budgeted about \$260,000 for the bonus program, suggesting the district expect about 260 teachers would be rewarded. A pilot program for the evaluation system last year suggested that less than 1 percent of teachers in Christina would not reach that "effective" label.

State officials say that alternative is simply unacceptable.

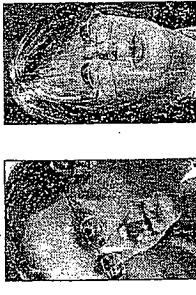
"The Talent Cooperative proposed by the Department of Education was developed based on national and local research," said Catherine Rossi, Markell's spokeswoman. "Christina has not developed any alternative program to retain the best teachers, and instead simply wants to use these

funds to give across-the-board smaller raises."

Secretary of Education Mark Murphy said Christina's bonuses were too broad to meet the goals laid out in the Race to the Top plan.

"What we're talking about doing is attracting the best teachers we have to the schools that need them most and keeping them there," said Murphy. "The need for this is big. In fact, Christina has the biggest problem in the state in this area. And yet no alternative they've proposed does anything to fix it."

Christina leaders say they are concerned that doing out only a few big bonuses could leave de-serving teachers in the



Secretary of Education Mark Murphy

for the state's bonuses because their students don't take tests, which are part of the teacher-evaluation process. He said the district's approach would be a "rising tide raises all boats mentality."

"Our teachers are more interested in a supportive and collaborative work environment and being recognized for the job they're doing," Young said. "There are many teachers in our district who are doing amazing work at low-performing schools, but might not have that 'highly effective rating.'"

Christina Superintendent Freeman Williams sent a letter to district employees on Wednesday criticizing remarks state officials have made saying district leadership has been doing a disservice to their students by refusing to accept the state's system.

"We have not 'forfeited' the Race to the Top money; it has been withheld from us by our own state Department of Education because we could not come to agreement on implementing one initiative out of more than 100 separate initiatives included in our Race to the Top plan," Williams wrote. "We stand with the membership of [The Christina Education Association] on this issue, and we will continue to do so."

That argument resonates with the district's teachers union, which has supported the board's decision to fight the state's system.

"The Christina Education Association, the school board and the district are on the same page on this," said Frederick Jenner, president of the Delaware State Education Association.

In the union's February newsletter, Jenner supported a bonus plan similar to Christina's.

"We recommended that the program be designed to make school-wide awards that promote collegiality and cooperation in a noncompetitive environment," Jenner said.

Young said some teachers wouldn't be eligible

Matthew Albright can be reached at 324-2428, or at malbright@delawareonline.com.

give \$1,000 bonuses to most of its teachers. To earn the district's smaller bonus, a teacher would need to earn only an "effective" rating.

The Christina board

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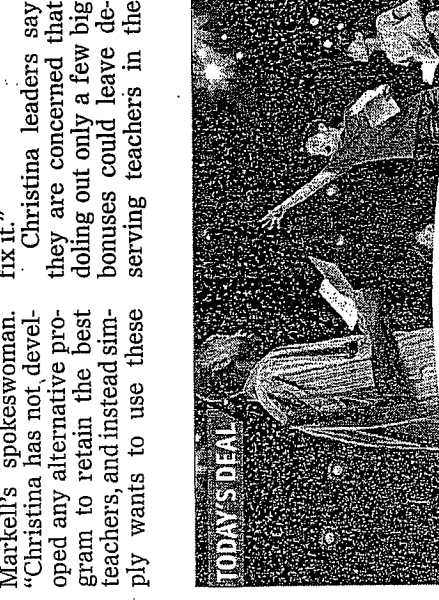
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EDUCATION

Christina pulls out of fight with state

Hearing over \$2.3M federal aid squashed

By Matthew Albright
The News Journal

Christina School District has withdrawn its request for a hearing in its feud with the state over \$2.3 million in federal Race to the Top money, which means the district will likely lose those funds.

The money has been tied up for months in a battle between the district and the state Department of Education over a plan to attract top-flight teachers to low-performing schools.

The state wanted Christina to give \$20,000 over two years to only the most elite teachers, while administrators proposed giving much smaller bonuses to more teachers or boosting technology in struggling schools.

Christina officials had signed up for an impartial hearing. But the district announced Thursday afternoon that it was withdrawing its request, arguing it didn't make sense to spend money on legal costs.

"We do not feel it would be fiscally responsible to commit additional public tax dollars or staff resources to pursue this process any further and respectfully withdraw our request," wrote Superintendent Freeman Williams in a letter to Secretary of Education Mark Murphy.

A DOE spokeswoman said the agency received the letter, but would not comment because it had not been reviewed.

The department outlined the rules for a potential hearing last week.

Christina would have presented its case on Wednesday to Dover-based attorney John C. Andrade and would have to prove that the state violated the law in revoking the money.

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See RETREAT, Page B2

Retreat: Writing was on the wall, board member says

Continued from Page B1

Andrade would then make a recommendation to Murphy, the final arbitrator on whether the money would be reinstated.

Christina board member John Young said that made it unlikely the hearing would change the situation.

"The rulings of this hearing would have only been advisory anyway," Young said. "And [Murphy] has done a pretty good job of telegraphing his intention to withhold the funds."

Several school board members have criticized the state for yanking all \$2.3 million left in the district's Race to the Top plan when only part of it is in dispute. The state has countered that the teacher incentives are a major component that could hurt the rest of the plan if excluded.

District staff said that money was set to expire at the end of the year any-

Several school board members have criticized the state for yanking all \$2.3 million left in the district's Race to the Top plan when only part of it is in dispute.

way, so they were simply making their transition plan take effect a year earlier. They also contend the \$2.3 million isn't a catastrophic loss in a budget of more than \$200 million.

But state education leaders have said Christina's low-performing schools struggle to keep good teachers, and argue the money would have been beneficial.

Matthew Albright can be reached at 324-2428 or at malbright@delawareonline.com.

**GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS**

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October 19, 2011

Susan Haberstroh, Education Associate
Department of Education
401 Federal Street, Suite 2A
Dover, DE 19901

RE: DOE Proposed Specialist Appraisal Regulation [15 DE Reg. 417 (10/1/11)]

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education's revision of its regulation covering the appraisal of specialists. The GACEC would like to share the following observations.

First, the regulation is inconsistent in characterizing a "passing" score/rating in the student improvement component. Section 6.2.1 identifies an "Exceeds" rating as the official acceptable benchmark in contrast to inconsistent references to a "Satisfactory" rating in §§3.2 and 6.2.2.1 and "Unsatisfactory" rating in §§6.2.3.2, 6.2.4.2, 7.2.1, 7.2.2, 7.2.3, and 8.2.1. Section 2.0 includes a definition of "Satisfactory Component Rating" but no definition of an "Exceeds" rating. The GACEC suspects the isolated reference to an "Exceeds" rating is an oversight and the word "Satisfactory" should be substituted.

Second, the Council recommends that DOE consider deletion of the many references to "client" in §5.0. The word "student" is used throughout the regulation and the reference to "client" is ostensibly irrelevant. Specialists will not be serving clients apart from students.

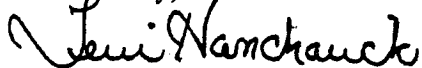
Third, DOE establishes five appraisal components in §5.0: 1) planning and preparation; 2) professional practice and delivery of services; 3) professional collaboration and consultation; 4) professional responsibilities; and 5) student improvement. Unlike the teacher appraisal regulation, these five components are included in the current regulation last revised in May of 2010. Specialists are rated in these five contexts resulting in an overall classification of highly effective, effective, needs improvement, and ineffective. See §6.0. The classification system could be characterized as "overly generous" or "misleading" in some contexts. For example, a specialist scoring a satisfactory rating in only three of five components inclusive of student

improvement (60%) is characterized as "effective". Reasonable persons might view such a characterization as a distortion of the plain meaning of "effective". Likewise, a specialist scoring a satisfactory rating in only one of five components inclusive of student improvement (20%) is euphemistically characterized as "needs improvement". DOE may wish to revisit the qualifications for "effective" and "needs improvement" to more closely align to the plain meaning of the terms.

Fourth, the current DOE regulation contains a chart defining the criteria for a finding of a "pattern of ineffective practice" (§7.1). This pre-existing chart is "diluted" by a new §7.2 which directs a "disregard" of an unsatisfactory student improvement rating for the 2011-12 school year. The rationale for "disregard" is not provided. Since the student improvement standard has been included in the regulation since at least May of 2010, specialists have been on notice that student improvement would be part of their evaluation. Similarly, §8.2 categorically bars development of an improvement plan for a specialist with an overall "needs improvement" rating if solely based on an unsatisfactory "student improvement" score. The Council recommends deletion of §§7.2 and 8.2. Alternatively, rather than totally ignoring an unsatisfactory student performance rating, the DOE could at least encourage public schools to affirmatively offer additional training or mentoring to such specialists.

Thank you for your time and consideration of our observations and recommendations. Please feel free to contact me or Wendy Strauss should you have any questions or concerns.

Sincerely,



Terri A. Hancharick
Chairperson

TAH:kpc

CC: The Honorable Lillian Lowery, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Charles Michels, Professional Standards Board
Mary Ann Mieczkowski, DOE
John Hindman, Esq., DOE
Terry Hickey, Esq., DOE
Paula Fontello, Esq., DOE

Policy Research Brief

RESEARCH AND
TRAINING CENTER
ON COMMUNITY LIVING
UNIVERSITY OF MINNESOTA

The Inclusion of Disability as Grounds for Termination of Parental Rights in State Codes

This Policy Research Brief examines state policies regarding termination of parental rights, focusing on the extent to which states use disability status as grounds for termination. It was written by Elizabeth Lightfoot, Ph.D., School of Social Work, University of Minnesota, Minneapolis; and Traci LaLiberte, Ph.D., Research and Training Center on Community Living, Institute on Community Integration, University of Minnesota, Minneapolis. Dr. Lightfoot may be reached at (612) 624-1220 or elightfo@umn.edu. Dr. LaLiberte may be reached at (612) 625-9700 or lali0017@umn.edu. The analyses in this Brief were supported in part by Grant #926-552 from the Minnesota Agricultural Experiment Station (MAES), University of Minnesota.

■ Introduction

The number of families headed by a parent with a disability has increased substantially during the past century, particularly those headed by parents with intellectual and/or developmental disabilities. Likewise, parents with disabilities are increasingly involved in the child welfare system, though the overall prevalence of such involvement is unknown due to inadequate record-keeping and the paucity of research. For example, we do know from the 1994-1995 National Health Interview Survey - Disability Supplement (NHIS-D) that only 51% of parents with intellectual and/or developmental disabilities were currently living with their children, but we don't know the ages of the children living with and apart from those parents (Larson, Lakin, Anderson, & Kwak, 2001). Others have estimated that 40-60% of parents with developmental disabilities have had their children removed from their care at some point in time, and reunification rates are unknown (Kennedy, Garbus & Davis, 1999).

The child welfare system is often ill-equipped to provide

services to parents with disabilities and their families, and often places the focus on a parent's disability rather than on assessment of a parent's ability to keep his or her child safe. This problematic interface between the child welfare system and parents with disabilities has been documented for more than two decades, however efforts to address this interface have been negligible (Booth & Booth, 1993; McConnell & Llewellyn, 1998, 2002; Tymchuk, 1999, 2001; Tymchuk, Llewellyn, & Feldman, 1999). This focus on a parent's disability by the child welfare system extends to the family courtroom, particularly in regard to termination of parental rights (TPR).

State courts have become increasingly involved in terminating parental rights due to child maltreatment in the 25 years since the passage of the federal Adoption Assistance and Child Welfare Act of 1980 (Hardin, 1992, 1996), which set out requirements for states regarding child welfare, including both family preservation and permanency planning. The Adoption and Safe Families Act of 1997 (ASFA), designed in part to shorten the stay of abused or neglected children in foster care, has mandated that state courts become even more involved in TPR. There are many specific requirements regarding TPR that states must comply with in order to receive federal funding, including initiating proceedings to sever parental rights when a child has been in foster care for 15 of the most recent 22 months, when a child is an

A summary of research on policy issues affecting persons with developmental disabilities. Published by the Research and Training Center on Community Living, Institute on Community Integration (UCEDD), College of Education and Human Development, University of Minnesota.

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abandoned infant, and when a parent has committed murder, manslaughter, or felonious assault to their child or another child. Most states have incorporated these new ASFA TPR requirements into their state statutes (Duquette & Hardin, 1999).

In addition to the ASFA-related TPR grounds, most states have additional grounds for TPR, some which date back many decades. States vary in their non-ASFA related grounds, with some having extensive and explicit lists of grounds for termination and others having very limited and/or very broad grounds for termination. Examples of other common grounds include chronic substance abuse, failure to maintain contact with a child or failure to maintain support of a child (Duquette & Hardin, 1999):

More than two-thirds of the states also include parental disability as part of their state grounds for TPR. Although recent research has found that parents with developmental disabilities or mental illness are not more likely to maltreat their children than parents without disabilities (Glaun & Brown, 1999; Oyserman, Mowbray, Meares, & Firminger, 2000), recent studies have found very high rates of TPR of parents with disabilities in the United States (Accardo & Whitman, 1989) and abroad (Llewellyn, McConnell, & Ferronato, 2003; Mirfin-Veitch, Bray, Williams, Clarkson, & Belton, 1999).

This brief will examine how states are including disability in their TPR statutes, present recent trends related to TPR statutes and parental disability, and suggest a direction for states to consider regarding the inclusion of disability in state codes for TPR.

■ Method

This study used legal document analysis, consisting of a comprehensive Boolean search of the state codes of the 50 states and District of Columbia relating to TPR, examining the most recent state codes available on Lexis-Nexis in August 2005. TPR and related statutes were searched for contemporary and historical disability-related terms and their common cognates, such as "disability," "mental," "handicap," "disorder," and "incapacity." Further, definitions for child welfare terms such as "unfit parent" and "best interest of the child" were explored to see if these were statutorily defined elsewhere as including parental disability. Two researchers independently conducted the searches, and the searches were reconciled. A code list was then developed to measure for preciseness, scope, use of language, and references to accessibility or fairness, and the statutes were reanalyzed and groupings developed.

While the language used in this brief reflects contemporary United States usage of disability-related terms, the vast majority of the state codes relating to TPR use extremely outdated terminology when discussing a parent's disability. Many codes use language from the 1940s and 1950s, such as

"mental deficiency." This archaic language does not easily translate to contemporary legal, medical or social definitions of disability. Further, many people consider the type of language contained in the state statutes to be offensive, and certainly not people-first language. In addition, the state codes tend to use imprecise definitions of disability, and emphasize parental conditions rather than parental behaviors.

■ Findings

Parental Disability in State TPR Statutes

While many state courts have ruled that a parental disability *alone* is not justification for TPR (among them are Arizona,¹² Colorado,¹³ Louisiana,¹⁴ and Nebraska¹⁵) the majority of states include parental disability in their codes as grounds for TPR if a disability impacts a parent's ability to care for his or her child, or at least as a condition to take into consideration when determining whether a person is unfit to parent. As of August 2005, 37 states included disability-related grounds for TPR, while 14 states did not include disability as grounds for termination.

Arizona is an example of a state that includes specific grounds relating to disability in determining TPR. Arizona's state code indicates that "evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court shall also consider the best interests of the child."¹ The code then lists 11 separate grounds, including many of the ASFA-required grounds, such as abandonment of a child or serious physical or emotional abuse by the parent. The third ground listed is a criteria specifically related to disability. It reads:

That the parent is unable to discharge the parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.²

Thus, in Arizona, parental rights can be terminated if the state proves that certain permanent or long-term disabilities will cause a parent to be unable to take care of his or her children appropriately. However, in Arizona and many other states, the state courts have ruled that disability alone is not justification for termination of parental rights.³ Nonetheless, disability is included in the state statute as a specific condition, when many other conditions are not listed.

Montana is an example of a state that includes disability as a condition to consider when terminating parental rights. Montana's state code includes several criteria for termination for the parent-child legal relationship, including all of the grounds required by ASFA, such as abandonment or the

parent's conviction of a felony. Termination can also be ordered if a child is determined to be a youth in need of care and his or her parents have not complied with or been successful with a treatment plan and "the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time."⁴ In determining whether the conduct or condition is unlikely to change within a reasonable time, courts are to consider factors such as history of violent behavior, excessive use of intoxicating liquor or a dangerous drug, or long-term imprisonment. In addition, courts are to consider:

...emotional illness, mental illness, or mental deficiency of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time.⁵

Further, the Montana state code says that a treatment plan is not required if "two medical doctors or clinical psychologists submit testimony that the parent cannot assume the role of a parent within a reasonable time."⁶ Thus, if two outside professionals testify that a parent is unable to assume the role of parent, the Montana child welfare system is not required to attempt to provide any services to this parent, such as pursuing accommodations that may support parenting efforts, providing specialized parenting classes, or finding alternative arrangements, such as family foster care or intensive parenting supports.

Types of disability

All of the states that include disability in their grounds for termination specify types of disabilities for courts to consider. Currently, 36 states have specific grounds for mental illness, 32 have specific grounds for intellectual or developmental disability, 18 have grounds for emotional disability, and 8 have grounds for physical disability (see Table 1). Two states, Missouri and Tennessee, also use the generic term "mental condition," which can imply both a mental illness or an intellectual or developmental disability. North Carolina is the only state that also specifies "organic brain syndrome" as a specific disability to consider when terminating parental rights. The most common combination of disability types is "emotional illness, mental illness and mental deficiency," with this combination of disability types used almost verbatim by 11 states. The following is a summary of the usages of the various terms across states:

- **Mental Illness.** Mental illness is the most commonly included disability in TPR grounds or considerations for termination. Most states refer to mental illness as "mental illness" or "mentally ill," though it is also called "mental disorder," "mental health," "mental status," "psychological incapacity," or "psychopathology." Many states either have no definition of mental illness or a very broad definition. For example, Colorado's code allows for TPR if

there exists clear and convincing evidence of "emotional illness, mental illness or mental deficiency of the parent of such duration or nature as to render the parent unlikely within a reasonable time to care for the ongoing physical, mental, and emotional needs and conditions of the child."⁷ There is no definition of mental illness provided in the particular section of the code, nor is there direction as to an appropriate definition that may be present in other parts of the code.

Other states have mental illness more explicitly defined, usually using a general state definition of the term. For example, Maryland's TPR code reads as follows: "...the natural parent has a disability that renders the natural parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for long periods of time."⁸ Disability is defined for the TPR code as meaning either a "mental disorder" or "mental retardation," as defined in the state code. "Mental disorder," as defined generally in the Maryland state code, "includes a mental illness that so substantially impairs the mental or emotional functioning of an individual as to make care or treatment necessary or advisable for the welfare of the individual or for the safety of the person or property of another."⁹

Several states have narrower definitions of how mental illness can be used for TPR, usually including severity and/or chronicity. For example, Iowa's state code specifies that parental rights may be terminated if a parent has a chronic mental illness, has been repeatedly institutionalized, and presents a danger to him- or herself or others.¹⁰ Similarly, Wisconsin limits the use of mental illness as grounds for termination solely for individuals who are currently hospitalized and have been hospitalized for two of the previous five years.¹¹

- **Intellectual or Developmental Disability.** Thirty-two state codes include a reference to a disability that in modern terminology would consist of an intellectual or developmental disability. However, the term "intellectual disability" is never used, and "developmental disability" is only used by three states. The most commonly used description of intellectual or developmental disabilities in state statutes is "mental deficiency" used by 21 states. The term "mental deficiency" was common usage in the United States from the 1940s through the 1960s, with the main professional association called the American Association on Mental Deficiency through the 1970s. However, this term fell out of favor and by the 1970s was replaced by the term "mental retardation." Now both terms are considered pejorative, with many advocates and researchers recently adopting the term "intellectual disability" as a more respectful term. However, the term "mental retardation" still is commonly used in diagnostics. The term "developmental disability" is a broader term than "mental retardation" that includes other types

of disabilities that occur during the developmental period, such as cerebral palsy that may not involve an intellectual disability. This term was first defined federally in 1970 (The Developmental Disabilities Services and Facilities Construction Amendments of 1970), and has since been amended to focus on functional limitations caused by life-long impairments that first occur prior to age 22.

Most of the state codes that include provisions for TPR in conjunction with an individual's intellectual or developmental disability do not include a definition in their state codes. For example, most of the states that include the term "mental deficiency" do not include a state definition of mental deficiency anywhere in their state code. As there is no modern definition of this term, courts will have to rely on precedent that may be well out of date.

Interestingly, the states that use the more modern terms "developmental disabilities" or "mental retardation" in their TPR statutes tend to have much more precise definitions of the disability. All three of the states using "developmental disabilities" rely on a state definition of developmental disabilities, which generally mirrors the federal definition. Likewise, most of the eight states that use the term "mental retardation" or "mentally retarded" have a precise definition of mental retardation that is similar to standard diagnostic usage.

- **Emotional Disability.** Eighteen states include a reference to emotional disability, with thirteen referring to it as "emotional illness," two as "emotional health," and one each as "emotional disability," "emotional disturbance," and "emotional status." "Emotional illness" is not defined in any of the state codes, except to say that it must not be transitory. In fact, in Colorado, Nevada, North Dakota, and Virginia the only place the term "emotional illness" is used in the entire state code is in the TPR statute. Like the term "mental deficiency," the term "emotional illness" again does not have any agreed-upon current definition by medical, psychological or advocacy groups. It reflects language originating from the Psychoanalytic period of the 1950s when it was believed that children could not have many forms of mental illness because they had yet to become fully developed (E. Taylor, personal communication, May 17, 2005). While the current view is that an emotional illness is caused by the environment, whereas mental illness is caused by the brain, there are not current agreed-upon definitions of what an emotional illness or emotional disability is.
- **Physical Disability.** Only eight states include physical disability in their grounds for TPR. Like mental illness and emotional illness, physical disability is usually not defined, except by duration and/or severity. States refer to physical disability as "physical disability," "physical incapacity," "physical health," "physical disorder" or "physical illness." None of the states using physical

disability as grounds for termination of parental rights also include anything about mitigating a disability with the use of appropriate accommodations anywhere in the child protection code, nor have a precise definition for a physical disability.

Focus on conditions rather than behaviors

A major concern about the inclusion of disability in the grounds for termination is that it can shift the focus from a parent's behavior to a parent's condition. Almost all of the non-disability related grounds for TPR are based on parents' past or current behaviors, such as neglect, abuse or abandonment. While no states have criteria indicating that having a disability by itself is grounds for termination, it also is one of the only grounds for termination that is based on a contributing factor to a parent's behavior, rather than the parent's behavior itself. By contrast, of the many states that include failure to financially support a child as a reason for termination, none list the causes of lack of financial support in their statutes, such as chronic unemployment, having too many children to support adequately or lack of a high school diploma.

States Without Disability Grounds for TPR

Currently, there are 14 states that do not refer to a parent's disability in their state TPR statutes. All of these states include language in their codes allowing states to terminate parental rights based on abusive or neglectful behavior of a parent. For example, Maine's state code says:

The court finds, based on clear and convincing evidence, that: a) Termination is in the best interest of the child; and b) Either: i) The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs; ii) The parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs...¹⁶

The provisions in Maine's TPR statute allow the courts to terminate based on a parent's specific behaviors relating to taking care of his or her child. The courts in Maine have found that it is indeed proper to terminate a parent's rights under this statute if a mental illness affects how the parent cares for his or her child.¹⁷ However, with disability not included in the state statute, the focus necessarily has to be more on the individual's behavior rather than the individual's condition.

In the past several years, both Rhode Island and Idaho have consciously eliminated disability language from their state codes (see Figure 1 for a description of the Idaho process). The rationale in both states was that the disability language was unnecessary, and could result in unequal

treatment in the state courts for people with disabilities. In Idaho, they not only eliminated the disability language, but also inserted protections for people with disabilities, and inserted a provision that parents with disabilities have the option to show how their use of adaptive equipment can aid in their parenting.

Americans with Disabilities Act and TPR

All states are covered by Title II of the Americans with Disabilities Act (ADA), and thus are barred from discriminating against people with disabilities in the provision of services. Many believe that the provision of child protection services is a public service that is covered under this federal legislation. Two states, Arkansas and Idaho, have made this connection explicit, including a reference in their codes' TPR sections that the department of human services cannot terminate parental rights if they have not provided reasonable accommodations in accordance with the ADA to parents with disabilities.

However, many state appellate courts have ruled that the ADA is not an appropriate defense in regard to TPR for people with disabilities on a number of grounds. Among them is the assertion that the ADA does not apply to TPR proceedings since TPR is based on the child's welfare, not the parent's; and that the ADA does not apply because TPR is not a public service, program or activity described under the ADA.¹⁸ Currently, only the Texas appellate court has ruled that the ADA may be used in a TPR hearing, but in the particular case being reviewed it was not appropriate.¹⁹

Trends

Currently, there are conflicting trends in states regarding the inclusion of disability in the TPR statutes. Despite some states' actions towards eliminating disability language from state parental rights termination codes, there has been recent activity at both federal and state levels to further include disability language. In 1997, a Clinton administration taskforce, *Adoption 2002: The President's Initiative on Adoption and Foster Care*, released its *Guidelines for Public Policy and State Legislation Governing Permanence for Children* (Duquette & Hardin, 1999). These guidelines were being developed concurrent with the adoption of the ASFA legislation, and thus include many recommendations to states related to the new emphasis on permanency for children. However, the guidelines also include a recommendation that "parental incapacity" be included in state codes. The guideline reads: "We recommend that State law authorize termination of parental rights based on parental incapacity that makes the parent unable to care for the child who is the subject of the termination proceeding..." (Duquette & Hardin, 1999, p. 72). It goes on to say that "many [state codes] do not make it clear that, in some cases, sufficient evidence of parental incapacity is enough to establish grounds for termination" (p. 72). While the

majority of the other recommendations in the document focus on behaviors, this recommendation was squarely based on a condition. Further, the guidelines suggest that an individual with a disability be evaluated for future capacity, and termination be made if it is anticipated that an individual with a disability would be unable to care for a child in the future:

In evaluating the parent's disabilities, it is important to consider not only the parent's capacity to meet the child's immediate needs, but also the parent's capacity to care for the child as the child grows up. For example, a particular developmentally disabled parent may be capable of caring for an infant but not able to supervise or meet the needs of an older child. (p. 72)

Despite these guidelines, no states have actually adopted new disability language related to TPR or strengthened existing language according to the guidelines. Only South Dakota has attempted to include new disability language in the past seven years, though the 1999 bill introduced in South Dakota's state legislature did not prevail and was not supported by many of those in the State administration. However, there is a chance that some other states may attempt to comply with the federal guidelines and include disability language.

■ Discussion and Conclusion

Parents with disabilities are at a high risk of discrimination in TPR proceedings if courts remove children on the basis of parental disability, rather than on the basis of specific parental behavior. From this overview, it appears that many states include disability inappropriately in their TPR statutes, including using inappropriate, outdated terminology to refer to a person's disability; using imprecise definitions of disability; and often focusing on disability rather than behavior. While no state focuses solely on disability as a cause for TPR, there is a danger that courts will rely on disability. Of the states that do not include disability-related language in their TPR statutes, they all have general provisions that would allow TPR of parents with disabilities, though such a TPR would focus on the individual's behavior rather than disability status.

As advocates in some states are pushing for the removal of outdated disability language in other sections of their state codes, it is likely that states may be addressing the disability language in their TPR codes as well. It is an appropriate time for states to thoughtfully reconsider whether the inclusion of disability in their state codes for TPR is necessary, or discriminatory.

Figure 1: Idaho Process for Removal of Disability Language from State TPR Codes

During public forums and focus groups held in 1999 to gather input for the Idaho State Independent Living Council's (SILC) three-year plan, parents with disabilities raised concerns about losing custody of their children based on parental disability. The Idaho SILC developed a committee to examine the issue; it was called FAMILY (Fathers and Mothers Independently Living with their Youth) and consisted of people with disabilities, advocates, legislators, and members of disability organizations. The committee determined that legislative reform was necessary to meet their goal of creating "a process that was consistent and guaranteed that no parent would lose custody of his/her children solely due to the fact that they had a disability (Idaho SILC, 2005)." FAMILY intended to eliminate inappropriate disability language in Idaho statutes, include protections against disability discrimination, and create a fair and consistent parental evaluation system that allowed parents with disabilities to show how adaptive equipment and support services helped them parent their children.

While FAMILY was ultimately successful in changing legislation, their advocacy efforts took four years. In partnership with supportive legislators, bills were first introduced in the Idaho legislature in 2000 and 2001. However, despite numerous testimonials by parents with disabilities who had lost parental rights based upon their disability, and overwhelming support in the Senate, the House blocked legislative reform both years. In 2002, the Chair of the House Health and Welfare Committee happened to see *I am Sam*, a movie about a father with a developmental disability who lost custody of his daughter through a child protection action. Impressed with the movie, the Chair took the entire House Health and Welfare Committee along with Kelly Buckland, the director of the Idaho SILC, to see the film. The portrayal of the father's abilities to parent his daughter and his struggle within the system were eye-opening to committee members.

FAMILY introduced legislation again in 2002, this time focusing on divorce, adoption, guardianship, and termination of parental

rights, with a strong emphasis on provisions that allow parents to present evidence detailing how adaptive equipment and support services enable them to parent effectively. This bill passed the House and Senate, and became law. In 2003, FAMILY introduced legislation regarding child protection, with a special emphasis on creating an evaluation system that is consistent and fair for parents, and requiring that child protection investigators be knowledgeable about disability accommodations. This legislation also passed, and FAMILY was thus successful in accomplishing their goals, and Idaho became the first state in the nation to include disability protections in their termination of parental rights statutes.

FAMILY was successful as a result of its impressive collaboration, education, and lobbying. Under the leadership of Kelly Buckland, the SILC collaborated with families, advocates, and disability organizations to identify their goals and strategize solutions. FAMILY eventually included members of over 40 local, state, and national agencies, as well as individual advocates. Education was a key to this successful legislative reform. FAMILY committee members educated legislators about parenting with disabilities, informing legislators about how parents with disabilities can meet their parental responsibilities in a variety of ways, including the use of adaptive equipment. This education included individual meetings with legislators, as well as through other means, such as a popular movie. And, FAMILY members were successful lobbyists. They built on existing relationships with legislators and built new relationships. They tried different strategies for introducing legislation, and compromised when necessary. But ultimately, FAMILY was relentless in advocating for the basic rights of parents with disabilities to be treated fairly in regard to issues related to child rearing, and did not stop lobbying until they reached their goal.

For more information about the SILC's FAMILY Committee and its legislative efforts, see www.2.state.id.us/silc/legislupdate.htm.

Table 1. State Codes' Inclusion of Disability Language for Termination of Parental Rights

State	Disability as TPR grounds	ID/DD*	Mental Illness	Emotional Disability	Physical Disability	Other	Language
AL	Yes	X	X	X			Emotional illness Mental illness Mental deficiency
AK	Yes	X	X	X			Mental illness Serious emotional disturbance Mental deficiency
AZ	Yes	X	X				Mental illness Mental deficiency
AR	Yes	X	X	X			Mental illness Emotional illness Mental deficiencies
CA	Yes	X	X				Developmentally disabled Mentally ill Mentally disabled Mental incapacity Mental disorder
CO	Yes	X	X	X			Emotional illness Mental illness Mental deficiency
CT	No						
DE	Yes	X	X				Mental illness Psychopathology Mental retardation Mental deficiency
DC	Yes		X	X	X		Physical, mental and emotional health
FL	No						
GA	Yes		X	X	X		Medically verifiable deficiency of the parent's physical, mental, or emotional health
HI	Yes	X	X				Mentally ill Mentally retarded
ID	No						

*Intellectual or Developmental Disability

Table 1, continued. State Codes' Inclusion of Disability Language for Termination of Parental Rights

State	Disability as TPR grounds	ID/DD*	Mental Illness	Emotional Disability	Physical Disability	Other	Language
IL	Yes	X	X	X			Mental impairment Mental illness Mental retardation Developmental disability
IN	No						
IA	Yes		X				Chronic mental illness and has been repeatedly institutionalized
KS	Yes	X	X	X	X		Emotional illness Mental illness Mental deficiency Physical disability
KY	Yes	X	X				Mental illness Mental retardation
LA	No						
ME	No						
MD	Yes	X	X				Mental disorder Mental retardation
MA	Yes	X	X				Mental deficiency Mental illness
MI	No						
MN	No						
MS	Yes	X			X		Severe mental deficiencies Extreme physical incapacitation
MO	Yes					X	Mental condition (undefined)
MT	Yes	X	X	X			Emotional illness Mental illness Mental deficiency
NE	Yes	X	X				Mental illness Mental deficiency
NV	Yes	X	X	X			Emotional illness Mental illness Mental deficiency

*Intellectual or Developmental Disability

Table 1, continued. State Codes' Inclusion of Disability Language for Termination of Parental Rights

State	Disability as TPR grounds	ID/DD*	Mental Illness	Emotional Disability	Physical Disability	Other	Language
NH	Yes	X	X				Mental deficiency Mental illness
NJ	No						
NM	Yes	X	X		X	X	Physical disorder or incapacity Mental disorder or incapacity Hospitalization
NY	Yes	X	X				Mental illness Mental retardation
NC	Yes	X	X			X	Mental retardation Mental illness Organic brain syndrome
ND	Yes	X	X	X	X		Physical illness or disability Mental illness or disability Emotional illness or disability Other illness or disability
OH	Yes	X	X	X	X		Chronic mental illness Chronic emotional illness Mental retardation Physical disability
OK	Yes	X	X				Mental illness Mental deficiency
OR	Yes	X	X	X			Emotional illness Mental illness Mental Deficiency
PA	No						
RI	No						
SC	Yes	X	X		X		Mental deficiency Mental illness Extreme physical incapacity
SD	No						
TN	Yes		X	X			Mental condition Mental and emotional status
TX	Yes	X	X	X			Mental or emotional illness Mental deficiency

* Intellectual or Developmental Disability

Table 1, continued. State Codes' Inclusion of Disability Language for Termination of Parental Rights

State	Disability as TPR grounds	ID/DD*	Mental illness	Emotional Disability	Physical Disability	Other	Language
UT	Yes	X	X	X			Emotional illness Mental illness Mental deficiency
VT	No						
VA	Yes	X	X	X			Mental or emotional illness Mental deficiency
WA	Yes	X	X				Psychological incapacity Mental deficiency
WV	Yes	X	X	X			Emotional illness Mental illness Mental deficiency
WI	Yes	X	X			X	Presently, and for at least two of the previous five years, has been an inpatient at a hospital, licensed treatment facility or state treatment facility due to mental illness or developmental disability
WY	No						

* Intellectual or Developmental Disability

Totals: Yes = 37, No = 14

■ Notes

- ¹ A.R.S. § 8-533(B)
- ² A.R.S. § 8-533(B)(3)
- ³ Courts in Arizona re Maricopa County Juvenile Action No. JS-5209, 143 Ariz. 178, 692 P.ds 1027 (Ct. App. 1984)
- ⁴ 41-3-609(1)(f)(ii)
- ⁵ MCA § 41-3-609(2)(a)
- ⁶ 41-3-609(4)(b)
- ⁷ C.R.S. 19-3-604(1)(b)(I) (2004)
- ⁸ Md. FAMILY LAW Code Ann. § 5-313 (2004)
- ⁹ Md. FAMILY LAW Code Ann. § 10-101
- ¹⁰ Iowa Code § 232.116 (2004)
- ¹¹ Wis. Stat. § 48.415 (2004)
- ¹² In re Maricopa County Juvenile Action No. JS-5209, 143 Ariz. 178, 692 P.ds 1027 (Ct. App. 1984)
- ¹³ People in Interest of C.B., 740 P.2d 11 (Colo. 1987)
- ¹⁴ State ex re. C.R., La. App. 00-1916, 778 So. 2d 84, 2000 La. App. LEXIS 3600 ((La. App. 1 Cir. Dec. 22, 2000)
- ¹⁵ In re. State v. Holley, 209 Neb. 437, 308 N.W. 2d 341 (1981)
- ¹⁶ 22 M.R.S. § 4055
- ¹⁷ In re David G., 659 A.2d 859, 1995 Me. LEXIS 130 (Me. 1995)
- ¹⁸ *J.T. v. Arkansas Dept. of Human Services*, 947 S.W.2d 761 (Ark. 1997); *In re Antony B.*, 735 A.2d 893 (Conn. App. 1999); *In re Doe* (Haw. 2002), 60 P.3d 285, 291 *Stone v. Daviess County Division of Children & Family Services*, 656 N.E.2d 824 (Ind. App. 1995); *State ex rel. B.K.F.*, 704 So.2d 314 (La. App. 1997); *In re Terry*, 610 N.W.2d 563 (Mich. App. 2000); *In re A.P.*, 728 A.2d 375 (Pa. Super. 1999); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997); *In re Torrance*, 522 N.W.2d 243 (Wis. App. 1994)
- ¹⁹ *In re C.M.* (Tex. App. 1999), 996 S.W.2d 269, 270

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Address Service Requested

Policy Research Brief October 2006 • Vol. 17, No. 2

Policy Research Brief is published by the Research and Training Center on Community Living, Institute on Community Integration (UCEDD), College of Education and Human Development, University of Minnesota. This publication is supported, in part, by Cooperative Agreement #H133B031116 from the National Institute on Disability and Rehabilitation Research (NIDRR), U.S. Department of Education.

Managing Editor is Sheryl A. Larson. The opinions expressed are those of the authors and do not necessarily reflect the position of the Center or its funding sources.

Policy Research Brief is available online at <http://ici.umn.edu/products/newsletters.html#policy>. Additional copies are also available for purchase at:

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147TH GENERAL ASSEMBLY

FISCAL NOTE

BILL: HOUSE BILL NO. 163
SPONSOR: Representative Bennett
DESCRIPTION: AN ACT TO AMEND TITLES 10 AND 29 OF THE DELAWARE CODE RELATING TO YOUTH AGING OUT OF FOSTER CARE.

ASSUMPTIONS:

1. This Act is effective July 1, 2013.
2. This Act requires the Department of Services for Children, Youth and Their Families to create and maintain a developmentally appropriate, comprehensive program that fully integrates independent living services from ages 14 to 21 and which will assist youth with their successful transition into adulthood.
3. This Act establishes direct youth stipends that are subject to an appropriation and shall not exceed \$515,000 annually. The Fiscal Year 2014 Budget Act, as written by the Joint Finance Committee, includes an appropriation of \$515,000 for direct youth stipends as defined by this Act.

Cost:

Fiscal Year 2014: \$515,000 for direct youth stipends (included in the FY 2014 Budget)
Fiscal Year 2015: \$515,000 for direct youth stipends
Fiscal Year 2016: \$515,000 for direct youth stipends

Office of Controller General
June 05, 2013
KARN:KARN
4531470003

(Amounts are shown in whole dollars)

UNDERSTANDING IMPLEMENTATION OF THE MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT OF 2008

May 9, 2012

The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) generally requires employment-based group health plans and health insurance issuers that provide group health coverage for mental health/substance use disorders to maintain parity between such benefits and their medical/surgical benefits. Specifically, MHPAEA and its implementing regulations generally:

- Provide that financial requirements (such as copays and deductibles), and quantitative treatment limitations (such as visit limits), applicable to mental health or substance use disorder benefits can generally be no more restrictive than the requirements or limitations applied to medical/surgical benefits.
- Include requirements to provide for parity for nonquantitative treatment limitations (such as medical management standards).
- Expand the parity requirements of an earlier law, the Mental Health Parity Act of 1996, such that **plans and issuers may not impose a lifetime or annual dollar limit on mental health or substance use disorder benefits that is lower than the lifetime or annual dollar limit imposed on medical/surgical benefits.**

The Departments of Labor, the Treasury, and Health and Human Services (HHS) (collectively, the Departments), administer MHPAEA together with the States. This document provides basic information about the Departments' MHPAEA implementation efforts.

More detailed information on MHPAEA's requirements is available at <http://www.dol.gov/ebsa/mentalhealthparity/>.

COMMON MHPAEA IMPLEMENTATION QUESTIONS

Q1: Who oversees MHPAEA implementation?

The Departments, as well as the States, all have important roles with respect to MHPAEA implementation to ensure that there are coordinated interpretive guidance and enforcement efforts.

The Departments share responsibility for interpretations under MHPAEA, including regulations and other guidance, which is generally developed and issued jointly to ensure consistency.¹

¹ See 64 FR 70164 (December 15, 1999) for a Memorandum of Understanding between the Departments regarding provisions of shared jurisdiction, which includes MHPAEA.

The Departments of Labor and the Treasury generally enforce these requirements for private, employment-based group health plans. States have primary enforcement responsibility with respect to health insurance issuers. If a State does not act in the areas of its responsibility, HHS may make a finding that the State has failed “to substantially enforce” the law and enforce directly. HHS also has direct enforcement authority over non-Federal governmental plans (those sponsored by State and local government employers).

Employees with questions about MHPAEA, including complaints about compliance by their employment based group health plans, can contact any of the Departments. The Departments will work together and, to the extent an issuer is involved, will work with the States, as appropriate, to ensure MHPAEA violations are corrected.

Q2: Have the Departments issued regulations implementing MHPAEA?

Yes. The Departments jointly issued interim final regulations on February 2, 2010.² These rules generally became applicable for plan years beginning on or after July 1, 2010.

Q3: What does it mean to issue an interim final regulation?

The Departments’ interim final MHPAEA regulations apply to group health plans and health insurance issuers for plan years beginning on or after July 1, 2010. The regulations are “interim” in the sense that public comments were invited, which is used to inform the Departments’ work. Comments received on the MHPAEA regulations have informed the issuance of guidance, including frequently asked questions (FAQs) addressing common questions regarding MHPAEA.³ Plans and issuers are required to comply with interim final regulations.

Q4: It is permissible for a health plan to define mental health coverage as consisting solely of inpatient care benefits?

No. The Departments regulations set forth six classifications of benefits: 1) inpatient, in-network; 2) inpatient, out-of-network; 3) outpatient, in-network; 4) outpatient, out-of-network; 5) emergency care; and 6) prescription drugs.⁴ If a plan covers mental health or substance use disorder benefits in one of the six classifications, the plan must provide coverage in all of the classifications in which medical/surgical benefits are available. Therefore, a plan that provides medical/surgical benefits on an outpatient basis may not limit mental health or substance use disorder benefits to inpatient care only.

² 75 FR 5410 (February 2, 2010).

³ FAQs regarding MHPAEA were issued on June 30, 2010 (<http://www.dol.gov/ebsa/faqs/faq-mhpaea.html>), December 22, 2010 (<http://www.dol.gov/ebsa/faqs/faq-aca5.html>), and November 17, 2011 (<http://www.dol.gov/ebsa/faqs/faq-aca7.html>).

⁴ In June 2011, the Departments released an FAQ that established an enforcement safe harbor for a plan or issuer that divides its benefits furnished on an outpatient basis into two sub-classifications for purposes of applying the financial requirement and treatment limitation rules under MHPAEA: (1) office visits, and (2) all other outpatient items and services. See <http://www.dol.gov/ebsa/faqs/faq-mhpaea.html>.

Q5: Does my health plan violate MHPAEA because it uses a separate managed behavioral health organization to provide utilization review and other services with respect to mental health and/or substance abuse benefits (sometimes called a carve-out arrangement)?

No, MHPAEA does not require that insurance arrangements be organized in any particular way. Instead, MHPAEA requires that mental health and substance use disorder benefits be covered and managed in a manner that is no more stringent than medical/surgical benefits. Managed behavioral health organizations may have specialized expertise in the treatment of mental health and substance use disorders and in organizing networks of specialty providers.

To comply with MHPAEA, group health plans, their health insurance issuers, and other service providers should work together to ensure that standards for financial requirements, treatment limitations and non-quantitative treatment limitations are being met. In particular, standards used in applying nonquantitative treatment limitations to mental health or substance use disorder benefits must be comparable to, and applied no more stringently than the standards used in applying the limitations with respect to medical/surgical benefits, except to the extent that recognized clinically-appropriate standards of care permit a difference.

Q6: MHPAEA and its implementing regulations impose mathematical tests for determining whether a financial requirement or quantitative treatment limitation (such as a copay or visit limit) on mental health/substance use disorder benefits is permitted. Are nonquantitative treatment limitations, or NQTLs, (such as medical management standards) analyzed the same way?

No. While the Departments' regulations set forth mathematical rules for analyzing plan limitations that are expressed numerically, nonquantitative limitations are analyzed differently.

With respect to nonquantitative treatment limitations, the Departments' regulations provide that under the terms of the plan as written and in practice, any processes, strategies, evidentiary standards, or other factors used by a plan or issuer in applying an NQTL to mental health or substance use disorder benefits must be comparable to, and applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation to medical/surgical benefits, unless recognized clinically appropriate standards of care may permit a difference.

For more information and guidance regarding NQTLs, see the interim final regulations, as well as the FAQs available at: <http://www.dol.gov/ebsa/pdf/faq-aca7.pdf>.

Q7: How does MHPAEA interact with State mandates?

States generally may impose stricter requirements on health insurance issuers. For example, while MHPAEA does not require that plans provide benefits for any particular mental health condition or substance use disorder, a State law may mandate that an issuer offer coverage for a particular condition. To the extent a State law mandates that an issuer provide some coverage for any mental health condition or substance use disorder, benefits for that condition must be in parity with medical/surgical benefits under MHPAEA.

If health coverage is offered through an HMO or an insurance policy, check with your State insurance department for more information on that State's insurance laws.

Q 8: Are there plans that are exempt from MHPAEA?

Yes. While MHPAEA applies to most employment-based health coverage, there are a few important exceptions. Specifically, MHPAEA does not apply to small employers who have fewer than 51 employees.⁵ There is also an increased cost exemption available to plans whose costs increase by more than a specified amount and who follow guidance issued by the Departments.⁶ Additionally, plans for State and local government employees that are self-insured may opt-out of MHPAEA's requirements if certain administrative steps are taken (such as sending notice to enrollees).⁷ Finally, MHPAEA does not apply to retiree-only plans.⁸

Q9: What do I do if I think my plan is violating MHPAEA?

If you have concerns about your plan's compliance with MHPAEA, you can contact the Federal government or your State Department of Insurance. You may contact the Department of Labor at 1-866-444-3272 or on the web at:

<http://www.dol.gov/ebsa/contactEBSA/consumerassistance.html>. You may also contact the Department of HHS at 1-877-267-2323 ext 61565 or at phig@cms.hhs.gov or your State Department of Insurance at [http://www.dol.gov/cgi-bin/leave-dol.asp?exiturl=http://www.naic.org/&exitTitle=State%27s Health Insurance Laws](http://www.dol.gov/cgi-bin/leave-dol.asp?exiturl=http://www.naic.org/&exitTitle=State%27s%20Health%20Insurance%20Laws).

Regardless of which agency or State you contact, the Federal Departments and the States work together to ensure MHPAEA violations are corrected.

Q10: What are the Departments doing to promote compliance?

The Departments are working with plans, issuers, and their service providers to help them understand and come into compliance with MHPAEA and to ensure that participants and beneficiaries receive the benefits they are entitled to under the law. The Departments also coordinate with State regulators to ensure compliance and issue guidance to address frequently asked questions from stakeholders. Compliance assistance is a high priority for the Departments and our approach to implementation is marked by an emphasis on assisting plans and issuers that are working diligently and in good faith to comply with the requirements of the law. The Departments receive complaints from participants, beneficiaries, providers, and other stakeholders and work with these individuals and the regulated community to correct violations.

⁵ For more information on the small employer exception, see Q8 of the FAQs available at <http://www.dol.gov/ebsa/faqs/faq-aca5.html>.

⁶ For more information on MHPAEA's increased cost exemption, see Q11 of the FAQs available at <http://www.dol.gov/ebsa/faqs/faq-aca5.html>.

⁷ If you are an employee of a State or local government and would like to know if your employment-based plan has opted out, contact HHS at 877-267-2323, ext. 61565 or at phig@cms.hhs.gov.

⁸ See 75 FR 34538 at 34539 (June 17, 2010) for more information on special rules for retiree-only plans.

The Departments also engage in extensive outreach and compliance assistance activities throughout the year on MHPAEA. For a copy of MHPAEA outreach publications, and to get information on upcoming events, see <http://www.dol.gov/ebsa/mentalhealthparity/>.



Mental Health Parity and Addiction Equity Act

How does the new mental health parity law affect my insurance coverage?

In 2008, Congress passed the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act taking a great step forward in the decade-plus fight to end insurance discrimination against those seeking treatment for mental health and substance use disorders. This law requires health insurance to cover both mental and physical health equally. Under this law, insurance companies can no longer arbitrarily limit the number of hospital days or outpatient treatment sessions, or assign higher co-payments or deductibles for those in need of psychological services.

The 2008 act closes several of the loopholes left by the 1996 Mental Health Parity Act and extends equal coverage to all aspects of health insurance plans, including day and visit limits, dollar limits, coinsurance, co-payments, deductibles and out-of-pocket maximums. It preserves existing state parity and consumer protection laws while extending protection of mental health services to 82 million Americans not protected by state laws. The bill also ensures mental health coverage for both in network and out-of-network services.

Research shows that physical health is directly connected to mental health and millions of Americans know that suffering from a mental health disorder can be as frightening and debilitating as any major physical health disorder. Passage of this law will lead the health care system in the United States to start treating the whole person, both mind and body.

Frequently asked questions

The frequently asked questions, or FAQs listed below contain questions and answers relating directly to the new mental health parity law.

What is mental health and substance use parity?

Parity means equal coverage for mental health and physical health conditions covered under health plans. The 2008 Mental Health Parity and Addiction Equity Act provides the following:

Equal benefits: Means that benefits coverage for mental health and substance use treatments must be at least equal to that coverage provided for physical health services.

Equal limits: All of the financial requirements and treatment limitations applied to mental health and substance use benefits may be no more restrictive than for physical health benefits.

Equal cost-sharing: The new law prohibits the use of higher patient cost-sharing (deductibles, co-payments, maximum-out-of-pocket costs) for mental health and substance use benefits than for physical benefits. For example, your co-payment for psychotherapy will be the same amount as your co-pay for an office visit with your family physician.

What does the Mental Health Parity and Addiction Equity Act do?

Applies to groups of more than 50 employees: The act, effective January 1, 2010, ends inequities in health insurance benefits between mental health/substance use disorders and medical/surgical benefits for group health plans with more than 50 employees.

Creates equity: Applies to all financial requirements in health insurance plans, including:

- lifetime and annual dollar limits,
- deductibles, copayments, coinsurance,
- out-of-pocket expenses, and
- to all treatment limitations including frequency of treatment, number of visits, days of coverage and other similar limits.

Insurance plans will no longer be able to apply a different deductible for mental health services than they do for physical health services, or more restrictive limits to the number of treatment sessions or days of hospital stays.

When does the new law take effect?

The Mental Health Parity and Addiction Equity Act will apply to most health plans beginning January 1, 2010. The current 1996 parity law will remain in effect through December 31, 2009.

Will my health plan have to comply with the new law?

The act applies to all group health plans with more than 50 employees, whether they are self-funded (regulated under ERISA) or fully insured (regulated under state law), that provide mental health or substance use benefits. Those health plans with 50 or fewer employees will remain subject to current state mental health parity requirements. The new law does not apply to the individual insurance market.

What diagnoses are included under parity?

The parity act covers all diagnoses for mental disorders. It goes beyond the 1996 act and some state parity and mandated benefit laws by also requiring parity for substance use disorders. There are no exclusions. In effect, whatever a plan covers must be at parity with (equal to) what is covered for physical health problems. As in the current system, a health plan may deny coverage based on medical necessity or under the terms of its coverage contract with an employer.

Can benefits for a particular diagnosis be excluded from coverage under the new parity law?

Yes, employers are not prohibited from dropping coverage for a diagnosis. The act broadly defines mental health and substance use disorder benefits to mean benefits with respect to services for mental health conditions and substance use disorders, as defined under the terms of the plan and in accordance with applicable federal and state law.

Does the new act have any impact on benefits management and medical necessity criteria?

A health plan may manage the benefits under the terms and conditions of the plan. The act requires insurance plans to make medical necessity criteria available to current or potential participants, beneficiaries or providers upon request. A health plan must also make reasons for payment denials available to participants or beneficiaries on request or as otherwise required.

Does the new parity law apply to out-of-network services?

Yes. Under the new law, if a health plan provides both out-of-network physical and mental health/substance use disorder benefits, these services must be provided at parity.

If a plan currently provides only out-of-network physical health benefits, this new law will require it to add out-of-network mental health and substance use disorder benefits, at parity.

Can health plans drop mental health and substance use benefits completely?

Yes. The act does not require health plans to provide mental health and substance use benefits, but if the plan does provide such coverage, it must be at parity with physical health coverage.

Elimination of these benefits would likely be very expensive to health plans. A Kaiser Family Foundation Annual Survey of Benefits showed that 97 percent of plans already provide mental health and substance use benefits. It is now well accepted these benefits are an integral part of treating most health conditions. Effective treatment of most illnesses like diabetes, asthma and congestive heart conditions requires a full recognition and treatment of comorbid mental health and substance use disorders.

My state already has a parity law. How will this new federal law impact state law?

State laws only apply to fully insured groups. They do not apply to "self-insured" ERISA groups. Forty three states have enacted parity laws. While some of these laws provide for strong parity protections, many are not as comprehensive as the new federal law. For those states with strong existing parity laws, the Mental Health Parity and Addiction Equity Act is protective of state law. If a provision in a state parity law provides for less protection than the federal law, it is the federal law that prevails. Conversely, if the state law provides for more protection than the federal law, state law prevails.

Does the new law apply to Medicare and Medicaid patients?

The act does not apply to Medicare patients. In July 2008, Congress provided for Medicare coinsurance parity for Medicare patients by 2014 when it enacted "phase-in parity" under the Medicare Improvements for Patients and Providers Act (MIPPA). The 2008 act, however, does apply to Medicaid managed care health plans.

Are you an employer looking for information about Mental Health Parity? See the Employer's Guide (<http://www.phwa.org/resources/goodcompany/newsletter/article/112>) .

August 2009

Find this article at:

<http://www.apa.org/helpcenter/parity-law.aspx#>

Wearable computer could be banned behind wheel soon

ABOUT THIS COLUMN

The blog Dialogue Delaware is updated by reporters and editors at The News Journal. We welcome comment and debate from all corners and print the best of the blog here. Click on delawareonline.com/dialoguedelaware/ and join us at Delaware's digital water cooler.

Before it even hits store shelves, Google's wearable computer might become illegal to use while driving on Delaware roadways, if a proposal in the state House wins support.

"To me, it's an even bigger distraction than other technologies out there that we already prohibit while driving," said bill sponsor Rep. **Joe Miro**, R-Pike Creek.

"If this becomes a popular communications device, it may create a distraction that could put you or I at risk."

HB 155, introduced Thursday, would add "wearable computer with a head-mounted display" to the list of electronic devices that motorists may not operate legally while behind the wheel in Delaware.

State law bans texting and the use of handheld cellphones while driving. That leaves a loophole

for "hands-free" gadgets such as Google Glass, which is worn like glasses and allows users to access the Internet and shoot photos and short videos. The devices won't go on sale until next year.

"While this technology is nowhere near widespread yet, just look to the trajectory of the smartphone," said **Jim Lardlear** of Mid-Atlantic AAA. "Earlier this month, Google's project team indicated that Glass will be compatible with prescription lenses."

Google Glass is worn as a pair of lens-less frames with a teeny-tiny computer attached to the right earpiece. That could complicate enforcement of the bill under consideration by Delaware lawmakers.

Police say the hands-free exception to state law

See DIALOGUE, Page B3

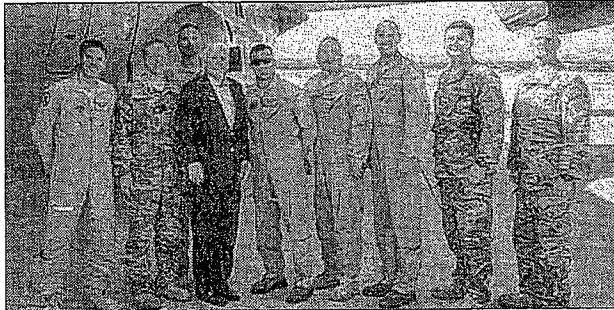
Dialogue: Guard members assist McCain

Continued from Page B1

already makes it difficult to judge whether a motorist is illegally texting or merely dialing, which is permissible. At a distance, could officers decipher Google Glass from regular glasses?

"I don't want to speculate on enforcement until we see how the bill is ultimately written or how the code is changed," said Sgt. **Paul Shavack**, spokesman for the Delaware State Police. "But anything that doesn't allow the driver to give full attention to the roadway is a distraction, from our perspective."

Some developers testing the device claim Glass is safer to use in traffic than looking away from the road to operate a



U.S. Sen. John McCain, R-Ariz., (fourth from left) is shown with U.S. Air Force airmen just before taking off from Turkey on May 27. His crew was drawn mostly from the Delaware Air National Guard. REUTERS

smartphone. Glass users can send texts and emails, surf the web and make calls all via voice prompts and dictation.

Miro acknowledged the potential challenges for enforcement but said the bill has value nonetheless.

"The objective is in part to raise the level of awareness," he said.

In Dover, HB 155 was assigned to the Commit-

tee Public Safety & Homeland Security, where it could get a hearing as early as Wednesday, Miro said.

Flying John McCain

Sen. **John McCain** was flown to his surprise May 27 meeting with Syrian rebels by a deployed crew drawn mostly from the Delaware Air National Guard, according to an

Air Guard spokesman who viewed a McCain staffer's photo published on Twitter and picked up by Reuters.

McCain, R-Ariz., a former Republican presidential candidate and one of the loudest voices calling for military aid to the Syrian opposition, met with some of the rebels during a visit to the war-torn country, Reuters quoted his spokesman as saying. He is the highest-ranking U.S. official to visit Syria since the two-year uprising began.

Politico reported Thursday that McCain met with the rebels inside Syria, but does not say whether the Air Force C-130 that carried him from Turkey entered Syrian airspace. McCain told CNN Wednesday night the visit was "moving."

"Their message was, to be frank with you: They

do not understand," McCain said. "They do not understand why we won't help them."

U.S. aid to date is what is called "non-lethal" — that is, non-military-specific. The U.S. is providing nearly \$510 million in humanitarian assistance; the first such shipment, according to Air Mobility Command, was delivered April 30 by a Dover Air Force Base C-17. The U.S. also has committed, according to the State Department, to providing \$250 million in transition support to the Syrian Coalition and the opposition's Supreme Military Council. Transition assistance equals money for local opposition councils and civil society groups to "provide essential services to their communities and extend the rule of law and enhance stability inside liberated areas of Syria."

Google Glass

From Wikipedia, the free encyclopedia

Google Glass (styled "GLASS") is a wearable computer with a head-mounted display (HMD) that is being developed by Google in the **Project Glass** research and development project,^[10] with the mission of producing a mass-market ubiquitous computer.^[1] Google Glass displays information in a smartphone-like hands-free format,^[11] that can interact with the Internet via natural language voice commands.^{[12][13]} While the frames do not currently have lenses fitted to them, Google is considering partnerships with sunglass retailers such as Ray-Ban or Warby Parker, and may also open retail stores to allow customers to try on the device.^[1] The Explorer Edition cannot be used by people who wear prescription glasses, but Google has confirmed that Glass will eventually work with frames and lenses that match the wearer's prescription; the glasses will be modular and therefore possibly attachable to normal prescription glasses.^[14]

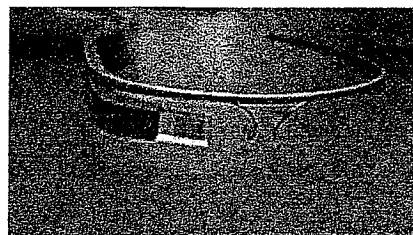
Glass is being developed by Google x,^[15] which has worked on other futuristic technologies such as driverless cars. The project was announced on Google+ by Project Glass lead Babak Parviz, an electrical engineer who has also worked on putting displays into contact lenses; Steve Lee, a product manager and "geolocation specialist"; and Sebastian Thrun, who developed Udacity as well as worked on the self-driving car project.^[16] Google has patented the design of Project Glass.^{[17][18]} Thad Starner, an augmented reality expert, is a technical lead/manager on the project.^[19]

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Google Glass

GLASS



Google Glass Explorer Edition

Also known as Project Glass

Developer Google

Manufacturer Foxconn USA

Type Augmented reality (AR), head-mounted display (HMD), Wearable technology, Wearable computer

Release date **Developers (US):** February 2013^[1]
Consumers: Q4 2013^{[2][3][4]}

Introductory price Developer version: \$1,500 USD^[5]

Operating system Android^[6] (4.0.4^[7])

Power Rechargeable battery

CPU OMAP 4430 SoC, dual-core

Storage capacity 16 GB Flash total (12 GB of usable memory)^[8]

Memory 1GB RAM (682MB available to developers)

Display Prism projector, 640×360 pixels (equivalent of a 25 in. screen from 8 ft. away^[8])

Sound Bone conduction transducer^[8]

Input Voice command through microphone, accelerometer, gyroscope, magnetometer, ambient light sensor, proximity sensor, orientation sensor, rotation vector

- 4.3 Terms of service
- 4.4 Pre-release bans
- 5 See also
- 6 References
- 7 External links

Development

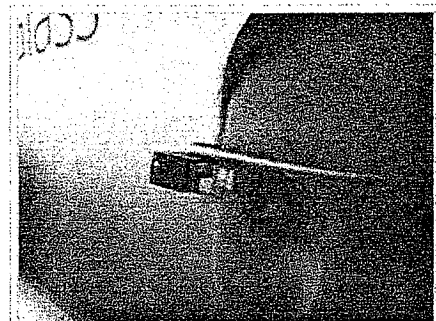
Although head-worn displays for augmented reality are not a new idea, the project has drawn media attention^[20] primarily due to its backing by Google, as well as the prototype design, which is smaller and slimmer than previous designs for head-mounted displays.^[21] The first Glass demo resembles a pair of normal eyeglasses where the lens is replaced by a head-up display.^[22] Around August 2011, a Glass prototype weighed 8 pounds; the device is now lighter than the average pair of sunglasses.^[1] In the future, new designs may allow integration of the display into people's normal eyewear.^{[13][23]}

According to several Google employees, the Glass was initially projected to be available to the public for "around the cost of current smartphones" by the end of 2012,^[24] but other reports stated that the Glass was not expected to be available for purchase by then.^{[25][26][27]}

The Explorer Edition is available to testers and Google I/O developers in the United States for \$1,500, to be delivered in early 2013,^[5] while a consumer version will be available by the end of 2013 for "significantly less" than the Explorer Edition. However, in an interview with BBC Radio 4's *The World at One*, Eric Schmidt said that Google Glass is "probably a year-ish away."^{[28][29][3][4]}

The product began testing in April 2012.^[30] Sergey Brin wore a prototype of the Glass to an April 5, 2012 Foundation Fighting Blindness event in San Francisco.^{[31][32]} In May 2012, Glass was demonstrated in the first test video shot with the eyewear, demonstrating the 720p HD first-person video recording capabilities of the device.^[33] Sergey Brin demonstrated the Glass on *The Gavin Newsom Show* where California Lieutenant Governor Gavin Newsom also wore the Glass.^[34] On June 27, 2012, he also demonstrated the Glass at Google I/O where skydivers, abseilers, and mountain bikers wore the Glass and live streamed their point of view to a Google+ Hangout, which was also shown live at the Google I/O presentation.^[35] In February 2013, Google released a demo video showcasing the voice-augmented display of the Glass filming various experiences in first-person.^{[36][37]}

	sensor, linear acceleration sensor, gravity sensor
Controller input	Touchpad, MyGlass phone app
Camera	Photos - 5 MP, videos - 720p ^[8]
Connectivity	Wi-Fi 802.11b/g, Bluetooth ^[8] , micro USB
Backward compatibility	Any Bluetooth-capable phone; MyGlass companion app requires Android 4.0.3 (Ice Cream Sandwich) or higher ^[8]
Website	google.com/glass (http://www.google.com/glass/start/)



A Glass prototype seen at Google I/O in June 2012



Google Glass (2013) with Mann's Digital Eye Glass^[9] (1980) on exhibit at the "History of AR Vision" exhibit at Augmented World Expo, 2013. Both are shown recording video, with each glass lit up accordingly.

Google is currently working on models that can be used with prescription lenses. In a Google+ post, Google stated that it will not be ready for the Explorer Edition of Glass; however, consumers can expect it later in 2013.^[14]

Glass Explorer program

An early adopter program named the Glass Explorer program is available for developers and consumers to test Google Glass and gauge how people will want to use Glass. Entry into the Explorer program was made available to the general public on February 20, 2013, and ended on February 27, 2013. The program stated that it was looking for "bold, creative individuals" who wanted to test the device. Those who wanted to apply were required to post a message on Google+ or Twitter consisting of 50 words or less, featuring the hashtag #ifihadglass. Those who were selected were required to attend a Google Glass event in either New York, San Francisco, or Los Angeles to pick up the developer version for \$1,500 USD.^[1] The Explorer Edition receives data through Wi-Fi, or it can tether via Bluetooth to an Android device or iPhone and use its 3G or 4G data; the Glass also has a GPS chip. The Explorer Edition is available in Charcoal, Tangerine, Shale, Cotton, and Sky colors.^[38] Users issue voice commands by first saying "ok glass", then the command, or they can scroll through the options using a finger along the side of the device. The Explorer Edition has an interchangeable sunglasses accessory which twists on or off. Monthly updates to the Glass are planned after the program starts.^[2] On April 16, 2013, Google announced that the initial Glass Explorer Edition units had completed production and would begin shipping.^[39] On the same day, Google also released a web-based setup page for Glass,^[40] as well as the MyGlass companion app.^[41] Developers were also given first access to the Mirror API for Glass.^[42]

Hardware

Camera

Google Glass has the ability to take photos and record 720p HD video. While video is recording, a recording light is displayed above the eye, which is unnoticeable to the wearer.^[43]

Touchpad

The side of Google Glass is a touchpad, allowing users to control the device by swiping through a timeline-like interface displayed on the screen.^[44]

Technical specifications

For the developer Explorer units:

- Android 4.0.4 and higher^[6]
- No official information about display resolution, 640×360 suggested, as it is recommended for app developers^{[45][46][47]}
- 5-megapixel camera, capable of 720p video recording^[8]
- Wi-Fi 802.11b/g^[8]
- Bluetooth^[8]
- 16GB storage (12 GB available)^[8]
- Texas Instruments OMAP 4430 SoC 1.2Ghz Dual(ARMv7)
- 682MB RAM "proc" (<https://plus.google.com/108304992255149838420/posts/GwvagwVN6Hz>).



A man controls Google Glass using the touchpad built into the side of the device

- 3 axis gyroscope^[48]
- 3 axis accelerometer^[48]
- 3 axis magnetometer (compass)^[48]
- Ambient light sensing and proximity sensor^[48]
- Bone conduction transducer^[8]

Software

Applications (Glassware)

Google Glass applications (Glassware) are free applications built by third-party developers. Glass also uses many existing Google applications, such as Google Now, Google Maps, Google+, and Gmail.

Third-party applications announced at South by Southwest (SXSW) include Evernote, Skitch, *The New York Times*, and Path.^[49]

On April 15, 2013, Google released the Mirror API, allowing developers to start making apps for Glass.^{[50][51]} In the terms of service, it is stated that developers may not put ads in their apps or charge fees;^[52] a Google representative told *The Verge* that this might change in the future.^[53]

Many developers and companies have built applications for Glass, including news apps, facial recognition, photo manipulation, and sharing to social networks, such as Facebook and Twitter.^{[54][55]}

On 16th May 2013, Google announced the release of seven new apps, including reminders from Evernote, fashion news from *Elle*, and news alerts from CNN.^[56]

Voice actions

Other than the touchpad, Google Glass can be controlled using "voice actions". To activate Glass, wearers tilt their heads upward or say "O.K., Glass." Once Glass is activated, wearers can say an action, such as "Take a picture", "Record a video", "Hangout with [person/Google+ circle]", "Google 'What year was Wikipedia founded?'", "Give me directions to the Eiffel Tower", and "Send a message to John".^[57] Many of these commands can be seen in a product video released in February 2013.^[37]

Reception

There have been parodies and criticisms aimed at the general notion of augmented reality glasses, ranging from the potential for Google to insert advertising (its main source of revenue) to more dystopian outcomes.^[citation needed] However, Google has stated it has no plans to insert advertising.^{[58][59]}

In November 2012, Glass received recognition by *Time Magazine* as one of the "Best Inventions of the Year 2012", alongside inventions such as the Curiosity Rover.^[60]

After a visit to the University of Cambridge by Google's chairman Eric Schmidt in February 2013, Wolfson College professor^[61] John Naughton praised the Glass and compared it with the achievements of hardware and networking pioneer Douglas Engelbart. Naughton wrote that Engelbart believed that machines "should do what machines do best, thereby freeing up humans to do what *they* do best".^[62]

Privacy concerns

The eyewear's functionality and minimalist appearance have been compared to Steve Mann's EyeTap,^[63] also known as "Glass" or "Digital Eye Glass", although Google Glass is a "Generation-1 Glass" compared to EyeTap, which is a "Generation-4 Glass".^[64] According to Mann, both devices affect both privacy and secrecy by introducing a two-sided surveillance and sousveillance.^[65]

Concerns have been raised by various sources regarding the intrusion of privacy, and the etiquette and ethics of using the device in public and recording people without their permission.^{[66][67][68]} There is controversy that Google Glass would violate privacy rights due to security problems and others.^{[69][70][71]} Privacy advocates are concerned that people wearing such eyewear may be able to identify strangers in public using facial recognition, or surreptitiously record and broadcast private conversations.^[1] Some companies in the U.S. have posted anti-Google Glass signs in their establishments.^{[72][73]}

Other concerns have been raised regarding legality of the Glass in a number of countries, particularly in Russia, Ukraine, and other post-USSR countries. In February 2013, a Google+ user noticed legal issues with Glass and posted in the Glass Explorers community about the issues, stating that the device may be illegal to use according to the current legislation in Russia and Ukraine, which prohibits use of spy gadgets that can record video, audio or take photographs in an inconspicuous manner.^[74]

Safety concerns

Concerns have also been raised in regards to operating motor vehicles while wearing the device. West Virginia state representative Gary G. Howell has introduced an amendment to the state's law against texting while driving that would include bans against "using a wearable computer with head mounted display." In an interview, Howell stated, "The primary thing is a safety concern, it (the glass headset) could project text or video into your field of vision. I think there's a lot of potential for distraction."^[75]

Terms of service

Under the Google Glass terms of service for the Glass Explorer pre-public release program, it specifically states, "*you may not resell, loan, transfer, or give your device to any other person. If you resell, loan, transfer, or give your device to any other person without Google's authorization, Google reserves the right to deactivate the device, and neither you nor the unauthorized person using the device will be entitled to any refund, product support, or product warranty.*" Wired commented on this policy of a company claiming ownership of its product after it had been sold, saying: "*Welcome to the New World, one in which companies are retaining control of their products even after consumers purchase them.*"^[76]

Pre-release bans

Due to the potential privacy violating capabilities of Google Glass, several facilities have already banned the use of Google Glass before its release to the general public. Others, such as Las Vegas casino Caesars Palace, banned Google Glass, citing their desire to comply with Nevada state law and common gaming regulations which ban the use of recording devices near gambling areas.^[77] Additionally, there is a petition on the White House website calling on President Obama to issue a nationwide ban on Google Glass until clear limits on privacy can be established on the technology.^[78]

See also

- Virtual retinal display – display technology that projects images directly onto the retina
- EyeTap – eye-mounted camera and heads up display (HUD)
- Golden-i – head-mounted computer
- Laster Technologies – manufactures augmented reality (AR) devices
- Looxcie – ear-mounted streaming video camera
- Oculus Rift – wide field of view virtual reality (VR) goggles with low latency head tracking
- Recon Instruments – manufactures HUDs
- SixthSense – wearable AR device
- Vuzix – manufactures display devices and AR head-mounted devices
- Google Goggles – query-by-image search engine
- Sousveillance

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External links

- Official website (<http://www.google.com/glass/start/>)
- Google Glass (<https://plus.google.com/+projectglass/posts>) on Google+

Retrieved from "http://en.wikipedia.org/w/index.php?title=Google_Glass&oldid=558748531"

Categories: Google | Augmented reality | Display technology | Eyewear | Wearable computers

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H. B. 3057

(By Delegates Howell, Hamrick, Rowan, A. Evans,
E. Nelson, Ashley, McCuskey, Hamilton, Westfall,
Azinger and Hunt)

[Introduced March 22, 2013; referred to the

Committee on Roads and Transportation then the Judiciary.]

A BILL to amend and reenact §17C-14-15 of the Code of West Virginia, 1931, as amended, relating to traffic safety; specifically, establishing the offense of operating a motor vehicle using a wearable computer with a head-mounted display.

Be it enacted by the Legislature of West Virginia:

That §17C-14-15 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 14. MISCELLANEOUS RULES.

§17C-14-15. Prohibited use of an electronic communications device driving without handheld hands-free features; definitions; exceptions; penalties.

(a) Except as provided in subsection (c) of this section, a person may not drive or operate a motor vehicle on a public street or highway while:

- (1) Texting; ~~or~~

(2) Using a cell phone or other electronic communications device, unless the use is accomplished by hands-free equipment; or

(3) Using a wearable computer with head mounted display.

(b) For purposes of this section, the following terms ~~shall~~ mean:

(1) "Cell phone" ~~shall mean~~ means a cellular, analog, wireless or digital telephone.

(2) "Driving" or "operating a motor vehicle" means operating a motor vehicle with the motor running including while temporarily stationary because of traffic, a traffic control device or other momentary delays. ~~but does~~ These do not include operating a motor vehicle after the driver has moved the vehicle to the side of or off a highway and halted in a location where the vehicle can safely remain stationary.

(3) "Electronic communication device" means a cell telephone, personal digital assistant, electronic device with mobile data access, laptop computer, pager, broadband personal communication device, 2-way messaging device, electronic game or portable computing device. For the purposes of this section, an "electronic communication device" does not include:

(A) Voice radios, mobile radios, land mobile radios, commercial mobile radios or two way radios with the capability to transmit and

receive voice transmissions utilizing a push-to-talk or press-to-transmit function; or

(B) Other voice radios used by a law-enforcement officer, an emergency services provider, an employee or agent of public safety organizations, first responders, Amateur Radio Operators (HAM) licensed by the Federal Communications Commission and school bus operators.

(4) "Engaging in a call" means when a person talks into or listens on an electronic communication device but ~~shall~~ does not include when a person dials or enters a phone number on a pushpad or screen to initiate the call.

(5) "Hands-free electronic communication device" means an electronic communication device that has an internal feature or function or that is equipped with an attachment or addition, whether or not permanently part of such electronic communication device, by which a user engages in a call without the use of either hand or both hands.

(6) "Hands-free equipment" means the internal feature or function of a hands-free electronic communication device or the attachment or addition to a hands-free electronic communication device by which a user may engage in a call or text without the use of either hand or both hands.

(7) "Texting" means manually entering alphanumeric text into or reading text from an electronic communication device and includes, but is not limited to, short message service, e-mailing, instant messaging, a command or request to access a World Wide Web page or engaging in any other form of electronic text retrieval or entry for present or future communication. For purposes of this section, "texting" does not include the following actions:

(A) Reading, selecting or entering a telephone number, an extension number or voicemail retrieval codes and commands into an electronic device by ~~the~~ pressing the device in order to initiate or receive a phone call or using voice commands to initiate or receive a telephone call;

(B) Inputting, selecting or reading information on a global positioning system or navigation system; or

(C) Using a device capable of performing multiple functions including fleet management systems, dispatching devices, smart phones, citizens band radios or music players for a purpose that is not otherwise prohibited in this section.

(8) "Using a cell phone or other electronic communication device" means holding in a person's hand or hands an electronic communication device while:

(A) Viewing or transmitting images or data;

(B) Playing games;

(C) Composing, sending, reading, viewing, accessing, browsing, transmitting, saving or retrieving e-mail, text messages or other electronic data; or

(D) Engaging in a call.

(9) "Wearable computer with a head mounted display" means a computing device which is worn on the head and projects visual information into the field of vision of the wearer.

(c) Subsection (a) of this section ~~shall~~ does not apply to:

(1) A law-enforcement officer, a firefighter, an emergency medical technician, a paramedic or the operator of an authorized emergency vehicle in the performance of their official duties;

(2) A person using an electronic communication device to report to appropriate authorities a fire, a traffic accident, a serious road hazard or a medical or hazardous materials emergencies; or

(3) The activation or deactivation of hands-free equipment or a function of hands-free equipment.

(d) This section does not supersede the provisions of section three-a, article two, chapter seventeen-b of this code or ~~any~~ more restrictive provisions for drivers of commercial motor vehicles prescribed by the provisions of chapter seventeen-e of this code or federal law or rule.

(e) ~~Any~~ A person who violates the provisions of subsection (a) of this section is guilty of a traffic offense and, upon conviction thereof, shall for a first offense be fined \$100; for a second offense be fined \$200; and for a third or subsequent offense be fined \$300. No court costs or other fees shall be assessed for a violation of subsection (a) of this section.

(f) Notwithstanding any other provision of this code to the contrary, points may not be entered on ~~any~~ a driver's record maintained by the Division of Motor Vehicles as a result of a violation of this section except for the third and subsequent convictions of the offense for which three points shall be entered on ~~any~~ a driver's record maintained by the Division of Motor Vehicles.

(g) Driving or operating a motor vehicle on a public street or highway while texting shall be enforced as a primary offense as of July 1, 2012. Driving or operating a motor vehicle on a public street or highway while using a cell phone or other electronic communication device without hands-free equipment shall be enforced as a secondary offense as of July 1, 2012, and as a primary offense as of July 1, 2013 for purposes of citation. Using a wearable computer with a head mounted display shall be enforced as a primary offense as of July 1, 2013.

(h) Within ninety days of the effective date of this section, the Department of Transportation shall cause to be erected signs upon any highway entering the State of West Virginia on which a welcome to West Virginia sign is posted, and any other highway where the Division of Highways deems appropriate, posted at a distance of not more than one mile from each border crossing, each sign to bear an inscription clearly communicating to motorists entering the state that texting or the use of a wireless communication device without hands-free equipment is illegal within this state.

(i) Nothing contained in this section ~~shall be construed to authorize~~ authorizes seizure of a cell phone or electronic device by ~~any~~ a law-enforcement agency.

NOTE: The purpose of this bill is to provide that using a wearable computer with a head-mounted display violates the provisions of this section.

Strike-throughs indicate language that would be stricken from the present law and underscoring indicates new language that would be added.

THE Source for Recent Developments in School Law

YOU ARE READING

Federal data shows disproportionate use of seclusion and restraint

The U.S. Department of Education (ED) has collected data showing that, nationwide, school employees use isolation (seclusion) and restraint techniques disproportionately on disabled students, especially disabled African-American disabled students, says *Education Week*. ED surveyed more than 72,000 public schools, asking how many students were isolated or restrained for the purpose of keeping them from harming themselves, classmates, or school employees. Although seclusion and restraint are primarily associated with special education, the data show those technique are used on all students.

Among the report's findings:

Of students with disabilities who were mechanically restrained, which includes being handcuffed, tied down, strapped to a chair, or held with equipment for that purpose, a disproportionate share, 44%, were African-American. Only 21% the overall population of students with disabilities are African-Americans.

Of all 38,792 students physically restrained by school staff members, nearly 70% were students with disabilities.

Of 131,990 instances of physical restraint tallied by the data collection, 78.6% involved students with disabilities, compared with 21% for other students. Yet just 12% of the 42 million students in the data set have disabilities.

Schools were far more likely to isolate students with disabilities. Of the 111,417 instances of seclusion in the survey, 61.7% were of students with disabilities, compared with 38.3% for other students.

Russlynn H. Ali, ED's assistant secretary for civil rights, found the disparity shocking. Ali's office, the Office for Civil Rights (OCR), requires a sample of districts across the country to answer questions about subjects including course enrollment and participation on athletic teams and in college-entrance exams, all broken down by race, gender, and whether students have a disability every two years. The data OCR gathered for the 2009-10 school year encompassed more districts than ever, nearly half of all districts, a large enough swath to include 85% of the nation's public school students. OCR asked schools to report restraint and seclusion data, in part because of public input and

concerns about the practices raised in 2009, when the National Disability Rights Network (NDRN) issued "School Is Not Supposed to Hurt."

According to Ron Hager, a senior staff lawyer for NDRN, the numbers should dispel any idea that the use of restraint and seclusion is isolated. NDRN published its second update to "School Is Not Supposed to Hurt" on the same day the federal restraint and seclusion data were released.

The group's first report led to congressional hearings, a request from ED Secretary Arne Duncan that states develop or revise policies governing their use, and a Government Accountability Office (GAO) report. Bills that would regulate and limit restraint and seclusion have been introduced in Congress, but they have stalled. In the meantime, states have passed a patchwork of laws regulating those practices on their own.

However, some organizations argue against federal regulation of such methods. The American Association of School Administrators (AASA) has issued its own report, "Keeping Schools Safe: How Seclusion and Restraint Protects Students and School Personnel." The report relates incidents in which restraining students was delayed and the result was injuries to teachers and administrators severe enough to prompt visits to the emergency room.

The report also cites parents who attest that, without the use of restraints and seclusion, their children would have been institutionalized. "This is not something schools use to punish children," said Sasha Pudelski, AASA's government-affairs manager. "It's something the school used when behavior-management techniques fail and the situation becomes untenable."

AASA does not support any federal legislation on the issue, but Pudelski admitted that sometimes the practices are misused. "The unfortunate reality is, there are individuals in school systems that make a variety of mistakes—sometimes intentionally—that hurt children," she said. "We would never support those actors."

The proposed legislation provides for training, which may be lacking in some cases where students or staff were injured, said Lindsay E. Jones, the senior director of policy and advocacy services for the Council for Exceptional Children. A common thread in those scenarios, Jones said, is that the class is large, the teachers and other staff members are inexperienced, or the educators involved are general education teachers who haven't had any training about restraint and seclusion.

Source: *Education Week*, 3/13/12, By Nirvi Shah

[Editor's Note: The 2009 data is available at OCR's data collection website. The "School Is Not Supposed to Hurt" 2009 report and its 2012 update are available from the National Disability Rights Network. The GAO report is available here. AASA's report is available here.

As the Education Week article notes, some states have moved to enact rules and regulations limiting the use of seclusion and restraint. In January 2012, Legal Clips summarized an Associated Press article in the Bowling Green Daily News reporting that Kentucky education officials were limiting the use of restraint and seclusion on public school students after citing two schools for violating the rights of three disabled students who were subjected to the practices. In November 2011, Legal Clips summarized an article in the Bangor Daily News reporting that the Maine Department Education had released a draft of its new rules governing the use of restraint and seclusion on students in public schools. In July 2010, Legal Clips cited the Atlanta Journal Constitution's coverage of the Georgia State Board of Education's decision to prohibit the practice of seclusion in schools.

Even some school districts have adopted policies to restrict the use of restraint and seclusion. In April 2011, Legal Clips summarized an article in the Palm Beach Post reporting that the Palm Beach County School Board had increased limitations on the restraints that can be used on special-needs students.]

Tags: Department of Education, disability, OCR, race, restraint

COMMENTS FOR THIS ENTRY

Lisa

Duncan has deferred to the AASA so they can keep restraining kids. If Duncan wanted to show true leadership, he would make demands that states mandate to train their teachers so restraining children is not their first line of defense. As it stands now, teachers resort to

restraining and secluding children because they do not have the appropriate training to understand how to defuse incidents so they don't lead to an adult physically controlling a child to get them to comply. The answer is better training!



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NORTH LAUREL ELEMENTARY NEW DETAILS

Special ed teacher suspended

She reportedly tied hands of two students behind their backs

By **MOLLY MURRAY**
The News Journal

A longtime special education teacher at North Laurel Elementary School, who worked with children with severe special needs, faces charges of unlawful imprisonment and endangering the welfare of a child.

Laurel police say the teacher Nyazina Custis, 61, of Bivalve, Md. - used neckties to tie the hands of two students behind their backs.

Custis has been suspended from teaching by Laurel School District officials pending the

"You don't expect any of it, but we're dealing with people."

PATRICK VANDERSLICE, school board president

outcome of an in-house investigation, said Acting Superintendent Dorothy Nave.

Nave said the incident occurred Tuesday afternoon as Custis was instructing a group of elementary students with severe special needs.

Nave said Custis repeatedly tried to convince two fourth-graders to follow instructions. Two other adults were in the

classroom at the time and witnessed the incident. One of the witnesses, a paraprofessional, asked Custis to untie the students and reported the incident to their supervisor, Nave said.

Nave said district officials learned of the incident on Wednesday, called in the three employees and asked them for written accounts of what had happened.

Nave said all three accounts were the same.

She said she immediately suspended Custis, North Laurel's lone specialist for severe special needs students.

A substitute certified in special education has been brought in, Nave said.

School officials reported the incident to the state Division of Family Services.

Nave said she believes officials with the state agency contacted Laurel police, who released the information to the public Saturday.

See **ARREST**, Page B7

WINTER SPORTS

GEORGETOWN

Arrest: Teacher is released unsecured bond

Continued from Page B1

Sgt. Derrick Calloway, a spokesman for the Laurel Police Department, said Custis turned herself in to Laurel police Friday and was charged with two counts of unlawful imprisonment and two counts of

endangering the welfare of a child. She was released on unsecured bond.

Patrick Vanderslice, the school board president, said he expects the board to continue Custis' suspension until the investigation is complete.

"You don't expect any of it," he said, "but we're dealing with people."

Vanderslice said as far as he knew neither of the two children was harmed in the alleged incident.

Contact Molly Murray at 463-3334 or mmurray@delawareonline.com.

2-8-12 NJ

Trash can tiff leads to headlock, charge

By **TERRI SANGINITI**

The News Journal

A contract worker for the Colonial School District was arrested Monday for allegedly putting a 13-year-old student in a headlock over an argument about a trash can, state police said.

The incident occurred Jan. 26 at the New Castle School at 903 Delaware St. in New Castle, Sgt. Paul Shavack said.

Mark A. Murdock, 41, a New Castle resident who was employed by Positive Directions and contracted by the school district

as an educational specialist, was charged with one count of misdemeanor offensive touching and released on \$100 unsecured bail.

Police said Murdock and the 13-year-old boy got into an argument in the school's suspension room, which Murdock was monitoring.

The two argued over comments made a few days earlier and the confrontation continued about a trash can in the center of the room, Shavack said. Murdock told the student not to touch the trash can and the boy defied him by walking up to the can and

touching it, he said.

Murdock then put the boy in a headlock, but the boy was able to break away, Shavack said. The confrontation continued with Murdock again putting the boy in a headlock and escorting him back to his seat, he said.

The victim was treated by the school nurse for minor injuries to his neck and face, Shavack said.

Murdock is no longer employed at Positive Directions, according to the company's owner, Sheree Manlove.

Contact Terri Sanginiti at 324-2771 or tsanginiti@delawareonline.com.



Fifteen Principles⁷



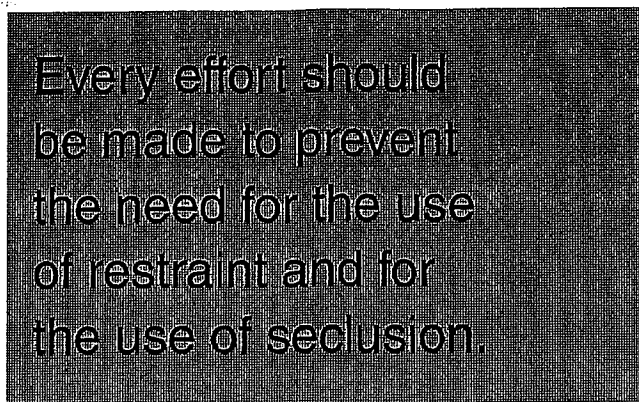
The Department, in collaboration with SAMHSA, has identified 15 principles that we believe States, local school districts, preschool, elementary, and secondary schools, parents, and other stakeholders should consider as the framework for when States, localities, and districts develop and implement policies and procedures, which should be in writing related to restraint and seclusion to ensure that any use of restraint or seclusion in schools does not occur, except when there is a threat of imminent danger of serious physical harm to the student or others, and occurs in a manner that protects the safety of all children and adults at school.



The Department recognizes that States, localities, and districts may choose to exceed the framework set by the 15 principles by providing additional protections from restraint and seclusion.

FIFTEEN PRINCIPLES

1. Every effort should be made to prevent the need for the use of restraint and for the use of seclusion.
 2. Schools should never use mechanical restraints to restrict a child's freedom of movement, and schools should never use a drug or medication to control behavior or restrict freedom of movement (except as authorized by a licensed physician or other qualified health professional).
 3. Physical restraint or seclusion should not be used except in situations where the child's behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective and should be discontinued as soon as imminent danger of serious physical harm to self or others has dissipated.
 4. Policies restricting the use of restraint and seclusion should apply to all children, not just children with disabilities.
 5. Any behavioral intervention must be consistent with the child's rights to be treated with dignity and to be free from abuse.
 6. Restraint or seclusion should never be used as punishment or discipline (e.g., placing in seclusion for out-of-seat behavior), as a means of coercion or retaliation, or as a convenience.
 7. Restraint or seclusion should never be used in a manner that restricts a child's breathing or harms the child.
 8. The use of restraint or seclusion, particularly when there is repeated use for an individual child, multiple uses within the same classroom, or multiple uses by the same individual, should trigger a review and, if appropriate, revision of strategies currently in place to address dangerous behavior;⁸ if positive behavioral strategies are not in place, staff should consider developing them.
 9. Behavioral strategies to address dangerous behavior that results in the use of restraint or seclusion should address the underlying cause or purpose of the dangerous behavior.
 10. Teachers and other personnel should be trained regularly on the appropriate use of effective alternatives to physical restraint and seclusion, such as positive behavioral interventions and supports and, only for cases involving imminent danger of serious physical harm, on the safe use of physical restraint and seclusion.
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- ⁷ This Resource Document addresses the restraint or seclusion of any student regardless of whether the student has a disability. Federal laws, including the IDEA, the Americans with Disabilities Act of 1990, as amended, and Section 504 of the Rehabilitation Act of 1973, as amended, must be followed in any instance in which a student with a disability is restrained or secluded, or where such action is contemplated. This Resource Document does not, however, address the legal requirements contained in those laws.
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- ⁸ As used in this document, the phrase "dangerous behavior" refers to behavior that poses imminent danger of serious physical harm to self or others.



11. Every instance in which restraint or seclusion is used should be carefully and continuously and visually monitored to ensure the appropriateness of its use and safety of the child, other children, teachers, and other personnel.
12. Parents should be informed of the policies on restraint and seclusion at their child's school or other educational setting, as well as applicable Federal, State, or local laws.
13. Parents should be notified as soon as possible following each instance in which restraint or seclusion is used with their child.
14. Policies regarding the use of restraint and seclusion should be reviewed regularly and updated as appropriate.
15. Policies regarding the use of restraint and seclusion should provide that each incident involving the use of restraint or seclusion should be documented in writing and provide for the collection of specific data that would enable teachers, staff, and other personnel to understand and implement the preceding principles.



Following is additional information about each of the 15 principles.

1. Every effort should be made to prevent the need for the use of restraint and for the use of seclusion.

All children should be educated in safe, respectful, and non-restrictive environments where they can receive the instruction and other supports they need to learn and achieve at high levels. Environments can be structured to greatly reduce, and in many cases eliminate, the need to use restraint or seclusion. SAMHSA notes in its *Issue Brief #1: Promoting Alternatives to the Use of Seclusion and Restraint*, that with leadership and policy and programmatic change, the use of seclusion and restraint can be prevented and in some facilities has been eliminated. One primary method is to structure the environment using a non-aversive effective behavioral system such as PBIS. Effective positive behavioral systems are comprehensive, in that they are comprised of a framework or approach for assisting school personnel in adopting and organizing evidence-based behavioral interventions into an integrated continuum that enhances academic and social behavioral outcomes for all students. The PBIS prevention-oriented framework or approach applies to all students, all staff, and all settings. When integrated with effective academic instruction, such systems can help provide the supports children need to become actively engaged in their own learning and academic success. Schools successfully implementing comprehensive behavioral systems create school-wide environments that reinforce appropriate behaviors while reducing instances of dangerous behaviors that may lead to the need to use restraint or seclusion. In