



## DISABILITIES LAW PROGRAM

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### MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory Initiatives

Date: September 10, 2013

I am providing my analysis of eight (8) regulatory initiatives. Given time constraints, my commentary should be considered preliminary and non-exhaustive. I understand the September 12 Committee meeting has been cancelled given the relatively low number of items for review.

#### 1. DPH Final Communicable & Other Disease Conditions Reg., [17 DE Reg. 320 (9/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in June, 2013. The June 24 SCPD memo is attached for facilitated reference. The Division of Public Health has now adopted a final regulation incorporating several revisions prompted by the Councils' commentary.

First, the Councils recommended revision of the "definitions" section to conform to the Delaware Administrative Code Style Manual. DPH agreed and revised multiple references.

Second, the Councils suggested revision of the definition of "CDC" to correct grammar. The Division concurred and revised the definition.

Third, the Councils identified some grammatical concerns in the definition of "freestanding surgical center" and substitution of "or" for "and/or". The Division corrected the sentence.

Fourth, the Councils recommended substitution of "other facility" for "other facilities". The Division adopted the suggested change.

Fifth, the Councils suggested revisions to the definition of "psychiatric facility". The Division effected the revisions.

Sixth, the Councils recommended substitution of “or the AHRQ” for “and/or the AHRQ, to name a few” in multiple sections. DPH agreed and adopted the recommended term.

Seventh, the Councils noted that §7.6.14 ostensibly purported, by State regulation, to supersede contrary federal law. The Division responded that the federal law allows the State to be more stringent than federal law. No change was made.

Since the regulation is final, and the Division adopted revisions based on 6 of the 7 Council suggestions, I recommend no further action.

## 2. DFS Final Criminal History Record Check Regulation [17 DE Reg. 332 (9/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2013. A copy of the May 30 SCPD memo is attached for facilitated reference. At the invitation of the Division, Kyle and I participated in a conference call with DFS and its DAG on June 20 during which we discussed each recommendation. The Division then forwarded a proposed revised draft to the Councils. This prompted my supplemental critique. See attached June 24, 2013 memo from Brian Hartman to Elizabeth Timm. The Division is now publishing a final regulation.

### May 30 Recommendations

1. The Councils suggested substituting “Basis” for “Base” in the title. No change was made.
2. The Councils identified some “internal notes” which appeared on §3.0. The extraneous references were deleted.
3. The Councils recommended deletion of two references in §3.0. The Division deleted the references.
- 4, 5 and 6. The Councils identified inconsistencies in references to “direct access”. The references were amended to achieve consistency.
7. The Councils identified inconsistencies in the scope of individuals subject to the background check process. The Division amended §4.1.4 to conform to a revised definition of “child care person”.
8. The Councils noted that consideration of arrest records was inconsistent with recent EEOC guidance. The Division substituted “criminal conviction(s)” for “offenses” in several sections.
9. The Councils suggested insertion of a comma after “employer” in §10.1.1. The Division agreed to insert the comma during the teleconference but ostensibly forgot to effect this minor revision in the final regulation.

10. The Councils suggested editing §10.2 to conform to EEOC guidance. The Division agreed and substituted “convictions/substantiations” for “offenses”.

11. The Councils suggested substitution of “employer” for “them” in §10.1.2. The Division adopted the change.

12. The Councils noted the omission of punctuation in multiple sections. The Division inserted punctuation in some of the identified sections.

#### June 24 Recommendations

1. I recommended revision of references to “and/or” and deletion of references to “adolescents” in §3.0, definition of “child care person”. No change was made.

2. I identified duplicate references in §3.0, definition of “direct access”. The Division corrected the oversight.

3. I recommended revision of the definition of “volunteer” since it contained regulatory standards. No change was made.

4. I recommended deletion of an inconsistent reference on “direct access” in §4.1.1. No change was made.

5. I recommended revision of references to “Foster/Adoptive Parents” in §4.3. No change was made.

6. I noted that §6.1 was “overbroad” since it literally barred child care persons convicted of any “offenses against children” from employment in a child care setting forever with no consideration of the factors in §7.1. No change was made.

7. I noted that §7.1 still lacked punctuation. No change was made.

Since the regulation is final, and the Division considered most suggestions, I recommend no further action. Parenthetically, I suspect that the Division may have overlooked the June 24 communication.

#### 3. DFS Final Child/Health Care Setting Child Abuse Registry Reg. [17 DE Reg. 339 (9/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2013. A copy of the May 30 SCPD memo is attached for facilitated reference. At the invitation of the Division, Kyle and I participated in a conference call with DFS and its DAG on June 20 during which we discussed each recommendation. The Division then forwarded a proposed revised draft to the Councils. This prompted my supplemental critique. See attached June 24, 2013 memo from Brian Hartman to Elizabeth Timm. The Division is now publishing a final regulation.

### May 30 Recommendations

1. The Councils noted that the title to the regulation was “underinclusive” since it did not address public school personnel. The Division expanded the title to include “public school persons”.
2. The Councils suggested substituting “Basis” for “Base” in the title. No change was made.
3. The Councils identified inconsistencies and concerns in references to “direct access”. The references were amended to achieve consistency and delete an exemption for persons who would not be alone with children.
4. The Councils identified a grammatical error in §7.1. DFS corrected the error.
5. The Councils noted that the enabling legislation authorizes other entities, including nonpublic schools, to voluntarily utilize the background check process. The proposed regulation omitted any reference to such participation. In the final regulation, DFS added a new §8.1 to address such voluntary participation.

### June 24 Recommendations

1. I identified an inconsistency in references to “direct access” in definitions of “child care person”, “health care person”, “person seeking employment with a public school”, and “volunteer”. The definition of “health care person” was not amended to include a reference to “direct access”.
2. I recommended an amendment to §5.1 since it is otherwise “overbroad”. No change was made.

Since the regulation is final, I recommend no further action. Parenthetically, I suspect that the Division may have overlooked the June 24 communication.

#### 4. DSS Prop. Child Care Subsidy Program “Relative” Definition Reg. [17 DE Reg 289 (9/1/13)]

The Division of Social Services proposes to adopt a revised definition of “relative” for purposes of its Child Care Subsidy Program. The rationale is as follows:

The current definition is vague and leads eligibility determination workers to the Delaware Temporary Assistance for Needy Families (TANF) policy definitions. The proposed rule change is intended to ensure that eligible relatives provide authorized child care services.

At 289.

The revision is as follows:

Relative Grandparents, great-grandparents, aunts, uncles, ~~brothers, sisters, adult brother or sister, cousins, and any other relative as defined in TANF policy; including steprelatives,~~ as they are related to the child.

At 292.

I have the following observations.

First, the new reference to “step-relatives” could be interpreted in different ways:

- A. All step-relatives (even step-cousins and step-parents) qualify as a “relative”; or
- B. Only step-grandparents, great-grandparents, aunts, uncles and siblings qualify.

This is confusing.

Second, the definition omits persons related by adoption. Compare 45 C.F.R. §98.2(definition of “eligible child care provider), which reads, in pertinent part, as follows:

(2) A child care provider who is 18 years of age or older who provides child care services only to eligible children who are, by marriage, blood relationship, or court decree, the grandchild, great grandchild, sibling (if such provider lives in separate residence), niece, or nephew of such provider, and complies with any applicable requirements that govern child care provided by the relative involved;...

See also analogous references to “natural, legal, adoptive, step” relatives in 16 DE Admin Code §11003.9.3 and definition of parent in §11002.9 covering “natural, adoptive, and step” relatives.

Third, based on the above excerpt from 45 C.F.R. §98.2 (definition of “eligible child care provider”), I surmise that a “relative” must be an adult. The definition in the proposed regulation only requires a sibling to be an adult. An aunt or uncle could be under 18 years of age in the State regulation.

Based on the above observations, DSS could consider the following alternative:

Relative An adult who is by marriage, blood relationship, or court decree, the grandparent, great grandparent, sibling, aunt or uncle of the child receiving care.

Fourth, the Division may wish to consider amending its definition of “parent” and adding a definition of “in loco parentis” in a future proposed regulation. Consider the following:

The federal definition of “parent” (45 C.F.R. §98.2) includes a “legal guardian” and “other person standing in loco parentis”:

Parent means a parent by blood, marriage, or adoption and also means a legal guardian, or other person standing in loco parentis.

In contrast, the DSS definition of “parent” in §11002.9 omits guardians and other persons standing in loco parentis:

Parent            The child’s natural mother, natural legal father, adoptive mother or father, or step-parent.

Moreover, another federal regulation requires the State to specifically adopt a definition of “in loco parentis”. See 45 C.F.R. §98.16(f)(9).

I recommend sharing the above observations with the Division.

5. DMMA Medicaid Provider Screening Regulation [17 DE Reg. 282 (9/1/13)]

The Division of Medicaid and Medical Assistance is proposing to adopt regulations implementing §§6401 and 6501 of the Affordable Care Act.

In a nutshell, CMS adopted regulations in 2011 which: 1) require states to adopt certain screening and enrollment standards for Medicaid providers; 2) collect an enrollment fee for institutional providers; 3) authorize a temporary Medicaid provider enrollment moratorium when directed by CMS; 4) terminate provider participation in Medicaid and CHIP if another state has terminated the provider’s participation on or after January 1, 2011; and 5) adopt provider screening standards at enrollment, reenrollment and revalidation.

Given time constraints, I have not conducted an exhaustive comparison of the proposed regulation to extensive federal statutory, regulatory, and subregulatory ACA standards. However, I did identify two (2) areas of concern.

First, §§1.39.2.4 and 1.39.2.5 authorize providers terminated from program participation to invoke full appeal rights compiled in the General Policy Provider Manual. In contrast, the attached CMS Bulletin (CPI-B 11-05) contains the following limitation on provider appeal rights:

...When subsequent States terminate based on that initial termination, the scope of their appeals should only review whether the provider was, in fact, terminated by the initiating program. The subsequent appeals process should not review the underlying reasons for the initiating termination. The appeal process in subsequent States does not provide a new forum in which to litigate the basis of termination by another State Medicaid program, Medicare, or CHIP.

DMMA may wish to incorporate this limitation into §1.39.2.5.

Second, §1.39.2.4 recites that DMMA will check federal databases monthly and “will terminate providers and disclosed entities or individuals who do not meet ACA screening guidelines.” This is a “no-exceptions” standard. In contrast, the attached CMS Bulletin (CPI-B 11-05) clarifies that termination is not the invariable result of identification of termination of a provider by another state:

Q. Are there any exceptions to the requirement to terminate a provider that was terminated by Medicare or another State Medicaid program or CHIP?

A. Yes. The statute provides for the same limitations on termination that apply to exclusion under §§1128(c)(3)(B) and 1128(d)(3)(B) of the Social Security Act. Thus, a State may request a waiver of the requirement to terminate a particular provider’s participation. State agencies may submit such waiver requests to their respective CMS Regional Offices.

DMMA may wish to consider the following amendment to the last sentence in §1.39.2.4:

DMAP will terminate providers and disclosed entities or individuals who do not meet ACA screening guidelines unless DMAP, in its sole discretion, solicits and secures a waiver from CMS.

I recommend sharing the above observations with DMMA.

6. DMMA Prop. Medicaid Drug Reimbursement & Drug Rebate Reg. [17 DE Reg. 285 (9/1/13)]

The Division of Medicaid and Medical Assistance proposes to amend the Medicaid State Plan.

As background, federal law currently requires drug manufacturers to provide rebates to State Medicaid program. Two changes occurred in 2010: 1) the minimum rebate amount was increased but states were required to submit 100% of the additional funds to the federal government; and 2) the rebate program was extended to cover Medicaid recipients enrolled in Medicaid managed care. At 286.

Delaware DMMA participates in a multi-state purchasing pool known as “TOP\$” which is administered by Provider Synergies, LLC. At 286. Several discrete changes to this rebate system (compiled on p. 286) are being adopted. For example, to deter delays in paying rebates, an interest penalty of 10% is now authorized. The participation agreement among manufacturers, participating states, and Provider Synergies, LLC will also automatically renew on an annual basis.

Overall, DMMA predicts “minimal fiscal impact” based on the proposed amendment to the Medicaid Plan. At 287.

The bulk of the regulation consists of a 17-page set of revised text covering the technical implementation of the rebate program. The text is ostensibly based on a standard CMS template.

I did not identify any concerns and I recommend endorsement.

#### 7. DPH Proposed Trauma System Regulation [17 DE Reg. 288 (9/1/13)]

The Division of Public Health proposes to adopt many discrete amendments to its 16-page set of regulations covering Delaware's trauma system.

Some of the key features are as follows: 1) general alignment with American College of Surgeons' trauma standards (§5.1); 2) authorization to exceed the American College of Surgeons' standards (§5.1.1); 3) incorporation of DPH prehospital trauma triage guidance in lieu of listing specific guidance in the regulation (§6.1); 4) authorization of some discretion (given time and distance considerations) to transfer patients with significant head trauma or spinal cord injury to a Level 1 or Level 2 Trauma Center without an available neurosurgeon (§6.2); 5) adoption of more liberal standards for referral to burn centers (§6.4); and 6) adoption of new criteria, effective January 1, 2014, for patient inclusion in the hospital trauma registry (§7.7).

Overall, the standards are comprehensive and logically arranged. I identified only three (3) concerns.

First, §5.2.2.4 recites as follows:

##### Desirable

5.2.2.4. Emergency Medicine department physicians, orthopedic surgeons, and neurosurgeons taking trauma call must be Board certified or eligible.

(NOTE: Non-boarded physicians in these specialty areas who have active privileges at a designated Trauma System facility at the time of promulgation of these revisions will be grandfathered)

Assuming "promulgation of these revisions" refers to an earlier version of the regulation, it would be clearer to simply insert a date. Individuals reading the regulation will otherwise have to guess at the effective date of the provision. Moreover, it is conceptually "odd" to have a "desirable", non-essential "grandfather" provision. In effect, covered facilities are encouraged, but not required, to employ only a Board Certified or eligible physician unless the physician is grandfathered.

Second, §5.2.4 consists of an outline/list of "essential" participating hospital criteria. It would benefit from an introductory narrative. For example, the introduction could simply recite as follows: "Trauma System Participating Hospitals must have the following in place:".



Third, in §7.7.1.1, the former standards contemplated patient inclusion in the hospital Trauma Registry based on “admission”. The new standards literally only authorize inclusion of patients in the Registry based on a “transfer”. It may be preferable to include patients in the Registry who are directly admitted to a trauma center without being “transferred” from another facility.

I recommend sharing the above observations with the Division.

8. DOE Proposed Charter School Regulation [17 DE Reg. 275 (9/1/13)]

The Department of Education proposes to adopt some discrete amendments to its charter school standards.

I have the following observations.

First, in §2.0, there is a definition of “audit” which recites that it is “(a)n informal financial, programmatic, or compliance audit of a charter school. The term is then used in §7.0 to refer to “a required audit of the business and financial transactions, records, and accounts of the school” pursuant to Title 14 Del.C. §513(a). Although not earmarked for revision, the DOE may wish to delete the term “informal” in the definition in the current regulation or prospective proposed regulation. I am unfamiliar with the term “informal” audit when required by statute. The use of the term allows a charter school to argue that errors, misleading information, and omissions in the published audit are not important since the audit, after all, is simply “informal”.

Second, in §2.0, the definition of “Department’s Annual Charter Report” omits any reference to recommended changes in education laws. S.B. No. 147, which the Governor signed on July 18, 2013, amended Title 14 Del.C. §514 to require the DOE report to include “the Secretary of Education’s analysis of, recommendations relating to, and proposed changes relating to Delaware education laws, in light of the content of annual reports submitted pursuant to Section 513 of Title 14;...”

Third, §3.6 recites that “(n)o application for a new Charter School will be accepted by the Department in any year in which the Department with the approval of the State Board has decided not to accept applications”. Although not earmarked for revision, the Department may wish to consider whether this statement conforms to the current Code. H.B. No. 165, signed by the Governor on June 26, 2013, revised Title 14 Del.C. §511(h) through the following “strike-out”:

~~The Department of Education with the consent of the State Board of Education may also decide that it will not accept any new charter school applications under this chapter provided that it does so annually upon affirmative vote of its board at a public meeting on or before October 1.~~

Fourth, in §7.0, there is a plural pronoun (“their”) with a singular antecedent (“School”). I recommend substituting “its” for “their”.

I recommend sharing the above observations with the DOE and SBE.

#### Attachments

8g:legis/913bils  
F:pub/bjh/legis/2013/913bils



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MEMORANDUM

DATE: June 24, 2013

TO: Ms. Deborah Harvey  
Division of Public Health

FROM: Daniese McMullin-Powell, <sup>DM-P/20</sup> Chairperson  
State Council for Persons with Disabilities

RE: 16 DE Reg. 1255 [DPH Proposed Communicable and Other Disease Conditions Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Public Health's (DPH's) proposal to adopt a regulation to address changes prompted by Legislation (H.B. 403) which 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 proposed regulation was published as 16 DE Reg. 1255 in the June 1, 2013 issue of the Register of Regulations. SCPD has 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.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

cc: Dr. Karyl Rattay  
Mr. Brian Hartman, Esq.  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

16reg1255 dph-communicable disease 6-24-13



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MEMORANDUM

DATE: May 30, 2013

TO: Ms. Elizabeth Timm, DFS  
Office of Child Care Licensing

FROM: Daniese McMullin-Powell, Chairperson *DM-P/ps*  
State Council for Persons with Disabilities

RE: 16 DE Reg. 1152 [DFS Proposed Criminal History Record Check Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Division of Family Services' (DFS) Office of Child Care Licensing (OCCL) proposal to amend its regulations covering criminal background checks for individuals involved in residential child care. The proposed regulation was published as 16 DE Reg. 1152 in the May 1, 2013 issue of the Register of Regulations. SCPD has the following observations.

First, in §1.0, SCPD recommends substituting "Basis" for "Base" in the title.

Second, in §3.0, definition of "Child Care Person", DFS ostensibly forgot to delete some internal notes. The following reference appears twice in the regulation: "(Since definitions are not numbered we would have to use the definition title)".

Third, in §3.0, delete "(see 'Direct Access' below)" and "See definitions 'Foster Parents' and 'Volunteer' below.)".

Fourth, there is an inconsistency between §3.0, definition of "direct access", and §4.1.4.1. The former standard defines "direct access" as excluding contexts in which "another child care person" is present while the latter standard "muddies the waters" by characterizing "direct access" as opportunity for contact outside the "presence of other employees or adults". The latter reference would include persons who have not undergone the screening for a "child care person". The latter reference would also include contact by "phone" or other media. SCPD recommends the following amendment to §4.1: "The opportunity to have direct access to ~~or contact with a child without the presence of other employees or adults.~~" The definition of "direct access" renders the "strike-out" language surplusage.

Fifth, in §3.0, the definition of “direct access” excludes individuals who are proximate to a child if another child care person is present. This should be reconsidered.

A. The statutory definition of “child care personnel” (Title 31 Del.C. §309), which includes a reference to “regular direct access”, is not limited to persons who would be “alone” with a child. If DFS defines “direct access” to only cover personnel who would be regularly “alone” with children, employers may justifiably exclude many child care workers from the background check process.

B. There are situations in which perpetrators act as a team to abuse/neglect children. Just because someone is not alone with a child does not mean that the child is not at risk.

Sixth, in §4.1.4, insert “persons” prior to “employed” and merge the text of §4.1.1 into the main section. Consistent with the “Fourth” observation above, this results in the following:

4.1.4. persons employed or volunteering at an agency that contracts with the Department who are in a position which involves the opportunity to have direct access to a child.

Seventh, there is some “tension” between applying the background check process only to a “child care person” meeting “direct access” criteria and the categorical mandate in §4.2.1 requiring background checks by position regardless of direct contact. For example, if a groundskeeper, administrative secretary, or administrative bookkeeper is expected to have no “regular direct contact” with children, they would not be a “child care person” subject to a background check. However, §4.2.1 would manifestly require them to submit to a background check. At a minimum, DFS should consider limiting §4.2.1 to persons expected to have “regular direct access” to children.

Eighth, §7.0 is “overbroad”. For example, §7.1.1.1 contemplates consideration of arrest records without conviction. This is inconsistent with recent EEOC guidance. See attachments. Consistent with the EEOC Q&A document, Par. 7, the Enforcement Guidance preempts inconsistent state laws and regulations. In the analogous context of adult criminal background checks, the DLTCRP recently adopted the following regulatory standard deferring to the EEOC guidance:

8.3. DHSS adopts the guidance from the Equal Opportunity Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 915.002, issued 4/25/2012.

16 DE Admin Code 3105, §8.3.

Ninth, in §10.1.1, insert a comma after the word “employer”.

Tenth, §10.2 would violate the EEOC guidance if “history of prohibited offenses” includes arrests without conviction. The immediately preceding §10.1.2 refers to “arrests” which implies

that "offenses" may include arrests.

Eleventh, §10.1.2 includes a plural pronoun ("them") with a singular antecedent ("employer"). Substitute "the employer" for "them".

Twelfth, some sections omit punctuation. This should be corrected. See, e.g., §§8.2, 7.1.1, 4.2.1, and 6.1. The latter section has a period after §6.1.10 and no punctuation after §6.1.11.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

cc: Ms. Vicky Kelly  
Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

16reg1152 occl background 5-24-13

# Criminal background check policy updated

## EEOC issues new hiring guidelines for employers

By SAM HANANEL  
Associated Press

WASHINGTON — Is an arrest in a barroom brawl 20 years ago a job disqualifier?

Not necessarily, the government said Wednesday in new guidelines on how employers can avoid running afoul of laws prohibiting job discrimination.

The Equal Employment Opportunity Commission's updated policy on criminal background checks is part of an effort to rein in practices that can limit job opportunities for minorities who have higher arrest and conviction rates than whites.

"You thought prison was hard, try finding a decent job when you get out," EEOC member Chai Feldblum said.

She cited Justice Department statistics showing that 1 in 3 black men and 1 in 6 Hispanic men will be incarcerated during their lifetime. That compares with 1 in 17 white men who will serve time.

"The ability of African-Americans and Hispanics to gain employment after prison is one of the paramount civil justice issues of our time," said Stuart Ishimaru, one of three Democrats on the five-member commission.

About 73 percent of employers conduct criminal background checks on all job candidates, according to a 2010 survey by the Society for Human Resource Management. Another 19 percent of employers do so only for selected job candidates.

That data often can be

inaccurate or incomplete, according to a report this month from the National Consumer Law Center.

EEOC commissioners said the growing practice has grave implications for blacks and Hispanics, who are disproportionately represented in the criminal justice system and face high rates of unemployment.

But some employers say the new policy — approved in a 4-1 vote — could make it more cumbersome and expensive to conduct background checks. Companies see the checks as a way to keep workers and customers safe, weed out unsavory workers and prevent negligent hiring claims.

The new standards urge employers to give applicants a chance to explain a past criminal misconduct before they are rejected outright. An applicant might say the report is inaccurate or point out that the conviction was expunged. It may be completely unrelated to the job, or a former convict may show he's been fully rehabilitated.

The EEOC also recommends that employers stop asking about past convictions on job applications. And it says an arrest without a conviction is not generally an acceptable reason to deny employment.

The guidelines are the first attempt since 1990 to update the commission's policy on criminal background checks.

While the guidance does not have the force of regulations — and may conflict with state requirements for some job applicants — it sets a higher bar in explaining how businesses can avoid violating the law.

"It's going to be much more burdensome," said Pamela Devata, a Chicago employment lawyer who has represented companies trying to comply with EEOC's requirements.





U.S. Equal Employment Opportunity Commission

## Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. The Guidance consolidates and supersedes the Commission's 1987 and 1990 policy statements on this issue as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter. It is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

### **1. How is Title VII relevant to the use of criminal history information?**

There are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin ("disparate treatment discrimination").

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

### **2. Does Title VII prohibit employers from obtaining criminal background reports about job applicants or employees?**

No. Title VII does not regulate the acquisition of criminal history information. However, another federal law, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA), does establish several procedures for employers to follow when they obtain criminal history information from third-party consumer reporting agencies. In addition, some state laws provide protections to individuals related to criminal history inquiries by employers.

### **3. Is it a new idea to apply Title VII to the use of criminal history information?**

No. The Commission has investigated and decided Title VII charges from individuals challenging the discriminatory use of criminal history information since at least 1969,<sup>1</sup> and several federal courts have analyzed Title VII as applied to criminal record exclusions over the past thirty years. Moreover, the EEOC issued three policy statements on this issue in 1987 and 1990, and also referenced it in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the Commission's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII analysis to the use of criminal history information in employment decisions is well-established.

### **4. Why did the EEOC decide to update its policy statements on this issue?**

In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority*<sup>2</sup> decision that the Commission should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions.

### **5. Did the Commission receive input from its stakeholders on this topic?**

Yes. The Commission held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project.

**6. Is the Commission changing its fundamental positions on Title VII and criminal record exclusions with this Enforcement Guidance?**

No. The Commission will continue its longstanding policy approach in this area:

- The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records. However, an employer may act based on evidence of conduct that disqualifies an individual for a particular position.
- Convictions are considered reliable evidence that the underlying criminal conduct occurred, as noted in the Commission's 1987 policy statement on Conviction Records.
- National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
- A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.

**7. How does the Enforcement Guidance differ from the EEOC's earlier policy statements?**

The Enforcement Guidance provides more in-depth analysis compared to the 1987 and 1990 policy documents in several respects.

- The Enforcement Guidance discusses disparate treatment analysis in more detail, and gives examples of situations where applicants with the same qualifications and criminal records are treated differently because of their race or national origin in violation of Title VII.
- The Enforcement Guidance explains the legal origin of disparate impact analysis, starting with the 1971 Supreme Court decision in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), continuing to subsequent Supreme Court decisions, the Civil Rights Act of 1991 (codifying disparate impact), and the Eighth and Third Circuit Court of Appeals' decisions applying disparate impact analysis to criminal record exclusions.
- The Enforcement Guidance explains how the EEOC analyzes the "job related and consistent with business necessity" standard for criminal record exclusions, and provides hypothetical examples interpreting the standard.
  - There are two circumstances in which the Commission believes employers may consistently meet the "job related and consistent with business necessity" defense:
    - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
    - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.)
- The Enforcement Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim.
- The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.

<sup>1</sup> See, e.g., EEOC Decision No. 70-43 (1969) (concluding that an employee's discharge due to the falsification of his arrest record in his employment application did not violate Title VII); EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on "serious crimes"); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978)

(concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

<sup>2</sup> 479 F.3d 232 (3d Cir. 2007).

## Baker gets rid of felon job box

Written by Andrew Staub The News Journal  
Dec. 10

delawareonline.com

People with felony convictions no longer have to reveal their criminal background when applying for a non-uniform job with the city of Wilmington.

At the request of City Council, Mayor James M. Baker on Monday signed an executive order that removes a question about criminal convictions from city job applications unrelated to public safety.

The decree does not apply to the private sector.

"Many people who have had problems in the past need work and are ready to work and put their problem periods behind them," Baker said.

Such measures are known popularly throughout the country as "ban the box," a reference to the square employers require applicants to check denoting a conviction record. Wilmington's application also asked the applicant to indicate the type, date and location of the offense.

"By taking this action, we can restore hope, save money and give someone a fair chance and the opportunity to present themselves as an individual and not immediately be frowned upon because of past behavior," said Councilman Justin Wright, who pushed the idea that won unanimous support in the council.

Public-safety jobs in the police and fire departments are excluded from the order because of "obvious reasons," the city said.

The city will conduct criminal background checks only on applicants who have received a conditional job offer for a non-uniformed position, Baker said.

Previously, the city conducted checks on potential employees before an offer was made, said Samuel D. Pratcher Jr., the director of human resources.

Wright said he hopes other municipalities and businesses follow suit, and would like to see the ban expanded to include vendors doing business with Wilmington.

As of November, 43 cities and counties across the country had "banned the box," and statewide measures have been instituted in Hawaii, California, Minnesota, Colorado, New Mexico, Massachusetts and Connecticut, according to the National Law Employment Project.

In April, the federal Equal Employment Opportunity Commission updated its guidelines urging employers to eliminate "policies or practices that exclude people from employment based on any criminal record."

Baltimore removed the question regarding criminal history in 2007, while identifying "positions of trust" that require background checks. Last year, Philadelphia banned the box for public and private jobs.

Though support has been strong in Wilmington, such measures have been criticized elsewhere.

Earlier this year in Minnesota, business owners opposed expanding a statewide ban-the-box provision for public employers to the private sector.

The EEOC already protects against automatic denials of employment, said Ben Gerber, manager of energy and labor management policy for the Minnesota Chamber of Commerce.

"Primarily, we feel this is already being addressed, and it's kind of unnecessary legislation," Gerber said.

Different measures from state to state also can create an administrative burden for national employers, Gerber said. Employers, not the state, should decide whether they want to ask about a person's criminal history, he said.

The National Law Employment Project estimates 1 in 4 adults in the United States has a criminal record that would appear in a background check.

There are 5,770 people incarcerated in Delaware's four prison facilities and another 1,068 in community corrections centers, said John Painter, spokesman for the state Department of Correction.

Delaware processes about 23,000 intakes and 23,000 releases a year, Painter said. About 1,300 of released prisoners annually have served a sentence of a year or more, he said.

Locally, Wright said, he often hears stories of people who need jobs, but worry about a checkered past.

Councilwoman Hanifa Shabazz tied unemployment to crime, saying some people enter survival mode after a criminal record precludes them from a chance at being hired.

"That makes it very difficult for someone to continue to do the straight and narrow," she said.

The ban-the-box measures can streamline municipalities' background check procedures, while giving people with past convictions another chance at gainful employment, said Michelle Rodriguez, a staff attorney with the National Law Employment Project.

"So many times, that's all people want," she said. "They just want the opportunity to prove themselves."

Contact Andrew Staub at 324-2837, on Twitter @AndrewStaubTNJ or at [astaub@delawareonline.com](mailto:astaub@delawareonline.com).

8-4-13 NT

» DELAWARE

**Background checks could expand for department**

State officials are proposing to expand criminal background checks for people working for or with the Department of Services for Children, Youth and Their Families.

The changes would require background checks on all departmental employees and volunteers. Current regulations only give the cabinet secretary discretion to require background checks for employees working in certain divisions of the department.

Officials want to require criminal background checks for step-parent adoptions. They also are proposing to expand background checks for residential child care facilities to include administrative staff.

Officials are accepting public comment on the proposed changes through the end of the month.

» FORT DELAWARE

MEMO

To: Elizabeth Timm  
From: Brian Hartman  
Re: Draft Revisions to Part 301 Regulations  
Date: June 24, 2013

I am summarizing my observations on the revised draft of the Part 301 regulations forwarded today. Given time constraints, my observations should not be considered exhaustive.

1. In Section 3.0, definition of "child care person", I recommend deletion of "and/or adolescents under the age of 18 years" in the first sentence and ""and/or adolescents" in the second sentence. Consider the following:

A. Section 6.6.1 of the Delaware Manual for Drafting Regulations indicates that "and/or" should never be used.

B. Other sections within this part only refer to children, not adolescents. See, e.g., §2.1; §3.0, definition of "volunteer"; §6.1, and §6.2.1.

C. Section 1.0 indicates that the regulations implement Title 31 Del.C. §309. That section incorporates a definition of "child" in Title 31 Del.C. §301(2). That definition defines a "child" as "a person who has not yet attained the child's eighteenth birthday".

If you like, you could insert a definition of "child" in §3.0.

2. In §3.0, definition of "Direct Access", there are duplicate references ("to").

3. Section 3.1.1 of the Delaware Manual for Drafting Regulations discourages insertion of regulatory information in a definition. In §3.0, definition of "Volunteer", regulatory standards are included. You may wish to consider an amendment.

4. Section 4.1.1 still contains a reference to "without the presence of other employees or adults". I recommend deleting §4.1.1 since the concept of "direct access" is incorporated into the definition of "child care person in §3.0.

5. Section 4.3 refers to "Foster/Adoptive Parents as defined in 3.0". I recommend simply referring to "Foster Parents" since: a) Section 3.0 does not define "Adoptive Parents"; b) the definition of "Foster Parents" includes "adoptive parents"; c) other sections solely refer to foster parents (e.g. §§5.2, 5.6, 5.8, 6.1, 7.1.1.1); and d) "as defined in 3.0" is arguably superfluous.

6. Section 6.1 is ostensibly "overbroad". It would bar child care persons convicted of any "offenses against children" from employment in child care settings forever with no consideration of the factors in §7.1 (e.g. length of time; age when convicted; severity of crime; record since

conviction). There is no definition of “offenses against children”. Query whether this would include a conviction of reckless driving resulting in injury to a child; truancy under Title 14 Del.C. §2729; or minor crimes such as offensive touching. See, e.g., attached article describing Supreme Court’s characterization of “offensive touching”. See also S.B. No. 164, enacted August 18, 2009, authorizing licensing boards to waive convictions substantially related to professions and deterring categorical, indefinite bars to professional employment.

7. There is a general lack of punctuation in §7.1.

Attachment

cc: Kyle Hodges  
Wendy Strauss  
Janice Tigani

8g:legis/62413comPart301



STATE OF DELAWARE  
STATE COUNCIL FOR PERSONS WITH DISABILITIES  
MARGARET M. O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 1  
DOVER, DE 19901

VOICE: (302) 739-3620  
TTY/TDD: (302) 739-3699  
FAX: (302) 739-6704

MEMORANDUM

DATE: May 30, 2013

TO: Ms. Elizabeth Timm, DFS  
Office of Child Care Licensing

FROM: Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: 16 DE Reg. 1159 [DFS Proposed Child/Health Care Setting Child Abuse Registry Regulations]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Services for Children, Youth and Their Families/Division of Family Services (DFS)/Office of Child Care Licensing's (OCCL's) proposal to amend its regulations covering criminal background checks for individuals involved in child care, health care, and educational settings. The proposed regulation was published as 16 DE Reg. 1159 in the May 1, 2013 issue of the Register of Regulations. SCPD has the following observations

First, the title to the regulation is "underinclusive". It only refers to "child care and health care persons". In contrast, the regulation also covers public school employees and volunteers. See §3.0, definitions of "conditional public school person", "person seeking employment", "person seeking employment with a public school", and "public school"; and §4.1.1. The title should be expanded to highlight its coverage of educational personnel.

Second, in §1.0, SCPD recommends substituting "Basis" for "Base" in the title.

Third, in §3.0, the definition of "child care person", and §4.1.1 only apply the registry check process to persons who would be "alone" with children or persons in care. This should be reconsidered.

A. In Title 11 Del.C. §8563(a), the statutory definitions of "direct access", "person seeking employment", and "person seeking employment with a public school" are not limited to persons who would be "alone" with a child or person receiving care. Indeed, the statute [Title 11 Del.C. §8563(a)(4)] literally requires registry checks of anyone applying for work in a child care or



health care setting regardless of access to children or persons receiving care. The only reference to “direct access” is in the context of public school personnel. Compare Title 11 Del.C. §8563(a)(5). If DFS defines “direct access” to only cover personnel who would be regularly “alone” with children or persons receiving care, employers may justifiably exclude many child and health care workers from the background check process. Moreover, although the statute [Title 11 Del.C. §8563(a)(4)] requires all applicants for a license to operate a child care facility to undergo a background check, the regulations would exempt such applicants if they are “off-site” owners without individual access to children.

B. There are situations in which perpetrators act as a team to abuse/neglect vulnerable persons. Just because someone is not alone with a child or person receiving care, does not mean that the child or person receiving care is not at risk.

Fourth, in §7.1, there is a plural pronoun (“they”) with a singular antecedent (“person”). Consider the following revision - “When...perpetrator, they the person will be allowed...”

Fifth, the enabling statute [Title 11 Del.C. §8563(h)] authorizes other entities, including nonpublic schools, to voluntarily submit to the background check process. The regulation is completely silent in this context. This could result in confusion among employers and DFS staff when implementing the statutory authorization.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulations.

cc: Ms. Vicky Kelly  
Brian Hartman, Esq.  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

P&I/16reg1159 dscyf-dfs child abuse registry 5-30-13

MEMO

To: Elizabeth Timm

From: Brian Hartman

Re: Draft Revisions to Part 302 Regulations

Date: June 24, 2013

I am summarizing my observations on the revised draft of the Part 302 regulations forwarded today. Given time constraints, my observations should not be considered exhaustive.

1. In §3.0, the definitions of “child care person”, “health care person”, “person seeking employment with a public school”, and “volunteer” are inconsistent in covering only persons with “direct access to persons receiving care”. Two of the definitions require “direct access” and two do not. A reference to “direct access” should be added to the definition of “child care person” and “health care person”.

2. In §5.1, I recommend inserting “covered by §4.0” between “person” and “without”. Otherwise, no employer could hire an applicant or approve a volunteer with no direct access to persons receiving care without initiating a background check.

cc: Kyle Hodges  
Wendy Strauss  
Janice Tigani

8g:legis/62413compart302

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## **CPI – CMCS INFORMATIONAL BULLETIN**

**DATE:** May 31, 2011

**CPI-B 11-05**

**FROM:** Peter Budetti  
Director  
Center for Program Integrity (CPI)

Cindy Mann  
Director  
Center for Medicaid, CHIP and Survey & Certification (CMCS)

**SUBJECT:** **Affordable Care Act Program Integrity Provisions - Guidance to States --  
Section 6501 - Termination of Provider Participation under Medicaid if  
Terminated under Medicare or other State Plan**

This Informational Bulletin is part of a series of bulletins intended to provide guidance regarding implementation of certain provisions of the Patient Protection and Affordable Care Act, Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, together called the “Affordable Care Act.” Specifically, this bulletin provides guidance on the following program integrity provision in the Affordable Care Act that was included in the final rule CMS-6028-FC, published in the Federal Register on February 2, 2011:

- Section 6501 regarding termination of participation in Medicaid and the Children’s Health Insurance Program (CHIP) upon termination from Medicare or another State’s Medicaid program or CHIP.

### **Termination of Provider Participation Under Medicaid and CHIP**

***Section 6501 of the Affordable Care Act, Termination of Provider Participation Under Medicaid if Terminated Under Medicare or Other State Plan*** amends section 1902(a)(39) of the Social Security Act and requires States to terminate the participation of any individual or entity if such individual or entity is terminated under Medicare or any other Medicaid State plan.<sup>1</sup> On February 2, 2011, the Centers for Medicare & Medicaid Services (CMS) published the final rule implementing this provision, applicable to terminations occurring on or after the statutory effective date of January 1, 2011. See <http://edocket.access.gpo.gov/2011/pdf/2011-1686.pdf>.

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<sup>1</sup> Although Section 6501 of the Affordable Care Act does not specifically include terminations from CHIP, CMS has required CHIP, through Federal regulations, to take similar action regarding termination of a provider that is also terminated or had its billing privileges terminated under Medicare or any Medicaid State plan.

## **Termination**

“Termination” occurs when the Medicare program, a State Medicaid program, or CHIP has taken an action to revoke a provider's billing privileges, a provider has exhausted all applicable appeal rights or the timeline for appeal has expired, and there is no expectation on the part of a provider or supplier or the Medicare program, State Medicaid program, or CHIP that the revocation is temporary. The requirement for termination based upon a termination in another program applies in cases where providers, suppliers, or eligible professionals were terminated or had their billing privileges revoked for cause which may include reasons based on fraud, integrity, or quality.

## **Reporting of Terminations**

As discussed above, States are required to terminate the participation of any individual or entity if such individual or entity is terminated under Medicare, or any other State's Medicaid program, or CHIP on or after January 1, 2011. In order to help States identify those providers whose billing privileges have been revoked by Medicare or who have been terminated by other State Medicaid programs or CHIP, CMS has established a secure web-based portal that allows States to share information regarding terminated providers. Using this web-based portal, a State is able to download information regarding terminated providers in other States and Medicare and to upload information regarding its own terminations. States are not required to report information on those providers who were terminated prior to January 1, 2011. The web-based portal, however, is designed to accept information regarding terminations that have occurred as early as January 1, 2010. Access to the information-sharing portal is limited to users approved by CMS. CMS has already provided guidance and training regarding the web-based portal to States.

To assist States, we are in the process of developing a Medicaid State plan preprint that may be used when submitting a State plan amendment (SPA) to implement this and other program integrity provisions and anticipate distributing the preprint to States in the near future.

The provisions of section 1902(a)(39), as amended by Section 6501 of the Affordable Care Act, are effective January 1, 2011.

## **Questions and Answers**

Attached to this Informational Bulletin is operational guidance in the form of “Frequently Asked Questions” regarding Section 6501 of the Affordable Care Act.

Thank you for your continued commitment to combating fraud, waste and abuse in the Medicaid program and CHIP. We look forward to our continuing work together as we implement this important legislation. Questions regarding this information can be directed to Angela Brice-Smith at 410-786-4340 or via email at [Angela.Brice-Smith@cms.hhs.gov](mailto:Angela.Brice-Smith@cms.hhs.gov).

Enclosure

**Frequently Asked Questions**  
**Section 6501 of the Affordable Care Act**  
**May 2011**

Section 6501 of the Affordable Care Act requires each State Medicaid program to terminate any provider who has been terminated under Medicare or by another State Medicaid program. On February 2, 2011, CMS issued final Federal regulations implementing this provision, including defining “termination” and extending the requirements of this provision to include providers participating in the Children’s Health Insurance Program (CHIP) as well. *See* <http://edocket.access.gpo.gov/2011/pdf/2011-1686.pdf> . CMS has defined “termination” as occurring when a State Medicaid program, CHIP, or the Medicare program has taken action to revoke a Medicaid or CHIP provider’s or Medicare provider or supplier’s billing privileges *and* the provider, supplier or eligible professional has exhausted all applicable appeal rights or the timeline for appeal has expired. The requirement to terminate only applies in cases where providers, suppliers or eligible professionals have been terminated or had their billing privileges revoked “for cause.” CMS will facilitate the sharing of information to States through a secure web-based portal about terminated Medicaid and CHIP providers as well as Medicare providers who have had their billing privileges revoked. The information contained in the portal about Medicaid and CHIP providers who were terminated for cause will be provided by the States reporting such information. Information reported by States will not be independently verified by CMS.

**Q. What does “for cause” mean for Medicaid or CHIP providers?**

- A.** For cause may include, but is not limited to, termination for reasons based upon fraud, integrity, or quality. For cause does not include cases where a State terminates a Medicaid or CHIP provider as a result of a failure to submit claims due to inactivity.

In addition, for cause does not include any voluntary action taken by the provider to end its participation in the program, except where that “voluntary” action is taken to avoid sanction. For example, if a provider submits a request to the State to “voluntarily” terminate its provider agreement in an effort to avoid sanctions due to non-compliance, then this does not qualify as voluntary action.

**Q. How will States know of terminations by other State Medicaid programs?**

- A.** CMS has established a secure web-based portal to facilitate the sharing of information by States regarding terminated Medicaid and CHIP providers. Using this web-based portal, States are able to upload their own information as well as view information regarding terminated providers that is reported by Medicare and other States and use this information to help protect their respective programs from potential fraud, waste, and abuse. CMS has already provided guidance and training regarding the web-based portal to States. Access to the information-sharing portal is limited to users approved by CMS.

**Frequently Asked Questions**  
**Section 6501 of the Affordable Care Act**  
**May 2011**

- Q. Do the terms “termination” and “exclusion” mean the same thing?**
- A.** No. For purposes of section 6501, a “termination” occurs when the State terminates the participation of a Medicaid or CHIP provider from the program or the Medicare program has revoked a Medicare provider or supplier’s billing privileges, and the provider has exhausted its appeal rights or the timeline for appeal has expired. Generally, “exclusion” from participation in a federal health care program, including Medicare, Medicaid, and CHIP is a penalty imposed on providers and suppliers by the Department’s Office of Inspector General (HHS-OIG). Individuals and entities may be excluded from participating in federal health care programs for misconduct ranging from fraud convictions to patient abuse to defaulting on health education loans. We recognize, however, that certain States give the same meaning to the terms “exclusion” and “termination” and these actions; therefore, ultimately result in the provider’s involuntary departure from the Medicaid program or CHIP.
- Q. Are States expected to report information on providers who are excluded by HHS-OIG from participation in the Medicaid and/or CHIP program?**
- A.** States should report information on providers they have terminated from participation in their respective Medicaid programs and CHIP regardless of any action taken against such providers by any other entity including exclusion by HHS-OIG.
- Q. When will States be expected to start reporting terminations?**
- A.** States are expected to report those providers who were terminated on or after January 1, 2011. In addition, reporting of terminations must not occur until after the timeline for appeal has expired or the provider has exhausted all applicable appeal rights. States are not required to report those providers who were terminated prior to January 1, 2011.
- Q. What are the timeframes for States reporting provider terminations?**
- A.** There is no specified timeframe for reporting terminations. However, at a minimum, States should report terminations on a monthly basis in order to assist other States with protecting themselves from providers who pose an increased risk to government health care programs.
- Q. If a State notifies the HHS-OIG under 42 C.F.R. § 1002.3(b)(3) of actions the State takes to limit a provider’s participation in the program, must the State also report terminations to the portal under section 6501?**
- A.** Yes. A State should still report terminations under section 6501.

**Frequently Asked Questions**  
**Section 6501 of the Affordable Care Act**  
**May 2011**

- Q. What is the duration of State provider terminations and denials of enrollment in other State Medicaid programs or CHIP as a result of a termination?**
- A. The duration of a termination should be consistent with the terminating State's law. For example, State A terminates a provider and the length of termination is 3 years. A termination action is triggered in State B with regard to that same provider as a result of the State A termination action. State B's length of termination is 1 year. The provider is not allowed to re-enroll in State B's Medicaid program for a 1-year period as opposed to State A's 3-year bar to re-enrollment. Similarly, the State should follow its own State law with regard to the length of the denial of enrollment period for providers who are seeking to enroll in a State Medicaid program or CHIP that were previously terminated by other State programs or had their billing privileges revoked under Medicare.
- Q. What is the scope of appeals by terminating programs?**
- A. The scope of appeals for the original terminating program, *i.e.*, Medicare, Medicaid, or CHIP, should include a full appeal on the merits with regard to the basis of the termination. When subsequent States terminate based upon that initial termination, the scope of their appeals should only review whether the provider was, in fact, terminated by the initiating program. The subsequent appeals process should not review the underlying reasons for the initiating termination. The appeal process in subsequent States does not provide a new forum in which to litigate the basis of termination by another State Medicaid program, Medicare or CHIP.
- Q. Will managed care organizations be able to access provider termination information?**
- A. CMS will not provide managed care entities with direct access to the web-based portal reflecting provider termination information.
- Q. When is a Medicaid or CHIP termination triggered under section 6501?**
- A. A Medicaid or CHIP termination is triggered when a provider is terminated by Medicare or terminated by Medicaid or CHIP for cause and the provider has either exhausted all applicable appeal rights or the timeline for appeal has expired.
- Q. What if existing State law is inconsistent with the requirements of section 6501?**
- A. A State may delay implementation of the requirements of section 6501 if the Secretary determines that State legislation is required. Accordingly, CMS will work with those States that require statutory, regulatory, or administrative changes. If this applies to your State, send an email to [providerterms@cms.hhs.gov](mailto:providerterms@cms.hhs.gov) with the word "Termination" in the subject line.

**Frequently Asked Questions**  
**Section 6501 of the Affordable Care Act**  
**May 2011**

- Q. Are there any exceptions to the requirement to terminate a provider that was terminated by Medicare or another State Medicaid program or CHIP?**
- A.** Yes. The statute provides for the same limitations on termination that apply to exclusion under §§ 1128(c)(3)(B) and 1128(d)(3)(B) of the Social Security Act. Thus, a State may request a waiver of the requirement to terminate a particular provider's participation. State agencies may submit such waiver requests to their respective CMS Regional Offices.
- Q. When is the web-based portal going to be available for use by the States?**
- A.** The web-based portal is currently available for use by States. Several State users have already been trained on how to use the portal. For additional information regarding access to the web-based portal please provide your name, email address, agency, and telephone number via email to [providerterms@cms.hhs.gov](mailto:providerterms@cms.hhs.gov).