



DISABILITIES LAW PROGRAM

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MEMORANDUM

To: SCPD Policy & Law Committee
From: Brian J. Hartman
Re: Legislative & Regulatory Initiatives
Date: May 6, 2014

I am providing my analysis of nineteen (19) legislative and regulatory initiatives in anticipation of the May 8 meeting. Given time constraints, the commentary should be considered preliminary and non-exhaustive.

1. DMMA Final Preventive Services Regulation [17 DE Reg. 1067 (5/1/14)]

The SCPD and GACEC endorsed the proposed version of this regulation in March, 2014. A copy of the March 28 SCPD memo is attached for facilitated reference. In a nutshell, DMMA proposed adoption of a Medicaid Plan amendment to qualify for an additional 1% federal Medicaid match for certain preventive services.

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

2. DMMA Final Adult Grp. Medicaid Claiming Methodology Reg. [17 DE Reg. 1077 (5/1/14)]

The SCPD and GACEC endorsed the proposed version of this regulation in March, 2014. A copy of the March 28 SCPD memo is attached for facilitated reference. In a nutshell, DMMA proposed adoption of a Medicaid Plan amendment to conform to CMS guidance and qualify for an enhanced Medicaid match for covered individuals.

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

3. DMMA Final Medicaid Prescription Drug Reimbursement Reg. [17 DE Reg. 1080 (5/1/14)]

The SCPD and GACEC commented on the proposed version of this regulation in March, 2014. A copy of the March 27 GACEC letter is attached for facilitated reference. In a nutshell, DMMA proposed adoption of a new approach to reimbursing pharmacies for filling prescriptions of Medicaid beneficiaries. The Councils observed that pharmacies had balked at low reimbursement rates in the past and the Councils lacked sufficient information to assess the reasonableness of the new reimbursement standards.

DMMA has now adopted a final regulation which conforms to the proposed version. DMMA responded to the Councils' concerns as follows:

DMMA believes that using the CMS-supported National Average Drug Acquisition Cost (NADAC) as the best available source for accurate information regarding the ingredient cost assures that pharmacies will receive proper compensation for drugs provided to Delaware Medicaid beneficiaries and that access to pharmacy services will not be compromised. Similarly, the new dispensing fee of ten dollars (\$10.00) updates the current fee of three dollars and sixty-five cents (\$3.65) which has been in place for at least twenty-five (25) years, and reflects the actual costs to dispense individual drugs as confirmed in various recent state surveys. DMMA has been in contact with its participating pharmacy providers via facsimile transaction, electronic listservs, and through pharmacy association conference calls to share the new reimbursement methodology and to respond to all related questions. As a result, DMMA does believe access to pharmacy services will continue as usual.

At 1083.

Since the regulation is final, and DMMA addressed the Councils' observations, I recommend no further action.

4. DelDOT Final External Equal Opportunity Complaint Reg. [17 DE Reg. 1101 (5/1/14)]

The SCPD and GACEC commented on the proposed version of this regulation in February. A copy of the SCPD's February 28 memo is attached for facilitated reference. The Councils noted that the proposed standards generally conformed to Federal Highway Administration guidance. However, the Councils shared nine (9) observations on discrete aspects of the proposed standards. DelDOT has now adopted a final regulation which does not specifically address the observations but incorporates approximately five (5) amendments prompted by the commentary.

I am reproducing the SCPD comments followed by the result in italics based on the revised regulatory text:

First, in §2.1.1.2, substitute "individual with a disability" for "handicapped person" and substitute "her or his disability" for "his handicap". See attached updated version of federal law. See also Title 29 Del.C. §608.

Result: DelDOT adopted a variation of the recommended language.

Second, the word “Handicap” also appears in §2.1.2.9. However, the federal regulation ostensibly still uses the term so its use may be apt.

Result: No change was made.

Third, in §2.1.3, use of the word “refine” is somewhat odd. Consider the following substitute: “Orders further define, interpret, and implement Civil Rights...”.

Result: No change was made.

Fourth, §2.1.3 contains references to 2 of the 3 executive orders contained in the OCR Procedures Manual at p. 4. The reference to Executive Order 12250 is omitted. DelDOT may wish to review whether this omission is inadvertent or the Executive Order is no longer in force.

Result: DelDOT added a reference to the third executive order.

Fifth, in §3.0, definition of “Discrimination”, DelDOT should consider substituting “means” for “involves”. See Register of Regulations Style Manual, §3.1.2, available at <http://regulations.delaware.gov/>. Moreover, the last 3 lines purport to be a sentence. However, the language lacks a predicate (verb).

Result: DelDOT substituted “means” for “involves” but did not correct the 3-line “non-sentence”.

Sixth, in §3.0, definition of “Investigative Report”, the second sentence is not a definition but a substantive standard. The Register recommends that such regulatory standards not be included in definitions. See Register of Regulations Style Manual, §3.1.1.

Result: No change was made.

Seventh, in §4.4.3.7, substitute “its” for “their” since the pronoun refers to a singular “agency”.

Result: The change was made.

Eighth, §5.9.3.8 does not appear in the list of bases justifying dismissal in the OCR Procedures Manual (p. 9). DelDOT may wish to reassess whether this subsection conforms to federal guidance.

Result: No change was made.

Ninth, §§5.11.2.2 and 5.11.2.3 contain three (3) references to “State”. This may be “underinclusive”. A complaint could be filed against a local government entity or a private entity such as a contractor.

Result: DelDOT revised several references.

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

5. DMMA Final Pathways to Employment Medicaid Plan Amendment [17 DE Reg. 1070 (5/1/14)]

The SCPD and GACEC submitted an initial set of comments on the proposed version of this regulation in January. A supplemental set of comments was submitted in March. The Division of Medicaid & Medical Assistance is now adopting a final regulation. It addressed each of the Councils’ comments in both the regulation and the attached 8-page April 22 memo. The memo covers sixteen (16) March comments and eight (8) January comments with specific responses to each comment.

Since it would be duplicative to reiterate the comments and responses in this memo, I am simply attaching the April 22 document. The only regulatory edits prompted by the commentary are as follows:

#8: DMMA agreed to add an explicit reference to coverage of individuals with brain injury.

#10: DMMA agreed to authorize exceptions to the 6-month cap on job placement support services “based on strong justification and explicit Departmental approval”.

#14: DMMA agreed to correct references to “Department of Vocational Rehabilitation”.

#15: The scope of relatives authorized to provide personal care is expanded beyond spouses as follows: “We will add that a non-legally responsible relative (e.g. parent of an adult child, adult sibling, aunt, uncle, cousin) may render Personal Care services pursuant to the same circumstances when individuals are exercising employer authority.”

Since the Division obviously carefully considered Council comments and provided detailed responses, I recommend a “thank you” communication.

6. DSS Prop. Child Care Subsidy Child Care Eligibility Regulation [17 DE Reg. 1038 (5/1/14)]

The Division of Social Services proposes to adopt some discrete changes to the eligibility standards for persons seeking subsidized child care assistance funded by the federal Child Care Development Fund. The only substantive changes are benign, i.e., expanding eligibility to cover parents/caretakers who need services based on the following: 1) enrolled and attending middle school or high school; or 2) enrolled and participating in a General Education Diploma (GED) program.

Since the initiative expand eligibility to individuals participating in the above educational programs, I recommend endorsement subject to consideration of amendments.

First, the entire regulation would benefit from addition of punctuation.

Second, the reference to GED program merits revision. Consistent with the attached 17 DE Reg. 724 (January 1, 2014), the Delaware Department of Education has recently expanded the scope of tests equivalent to the traditional GED. The DOE now uses the term “secondary credential assessment”. Therefore, DSS may wish to adopt the following reference in Section 1.A.9: “Enrolled and participating in a General Education Diploma (GED) program or similar secondary credential assessment approved by the Delaware Department of Education.”

I recommend sharing the above observations with the Division.

7. DPH Prop. Skilled Home Health Agency Director Qualifications Reg [17 DE Reg. 1037 (5/1/14)]

The Division of Public Health proposes to amend a single standard within the regulations covering skilled home health agencies. The current regulation requires a director of a skilled home health agency to “have a Baccalaureate Degree in health or a related field”. The Division proposes to require more robust credentials. A director would be required to meet the following standards:

- (1) Have a Baccalaureate Degree with five years healthcare experience and at least one year supervisory experience (full-time or equivalent in home health care); or
- (2) Be a registered nurse with five years health care experience and at least one year of supervisory experience (full-time or equivalent) in home health care.

Since the current standard is rather minimal, I recommend endorsement. However, I recommend that the Division clarify whether existing directors are “grandfathered” or if the regulation will be applied to disqualify existing directors who do not meet the new standards.

8. DPH Proposed Cancer Registry Regulation [17 DE Reg. 1035 (5/1/14)]

The Division of Public Health maintains a cancer registry as required by Delaware’s Cancer Control Act codified at Title 16 Del.C. §§3201-3209. The Division proposes to amend its implementing regulations to convert health care provider reporting from a “paper” system to an “electronic” system. I recommend endorsement of the concept of switching to an electronic reporting system subject to consideration of some amendments.

First, in §4.0, I recommend deletion of the third sentence. It is redundant to reiterate the definition of a “non-hospital reporter” which is already defined in §2.0.

Second, in §4.0, sixth sentence, I recommend substituting “it is” for “they are” since the antecedent noun (provider) is singular.

Third, in §4.0, the eighth “sentence” reads as follows: “All data required by the reporting requirements of the National Cancer Data Base established by the American College of Surgeons.” This is not a sentence since it lacks a predicate.

Fourth, in §4.0, ninth sentence, I believe “request” should be “include”.

Fifth, §§4.0 and 5.0 condense the scope of information related to patient residence and employment. This may not comport with the enabling legislation. Consider the following.

A. Title 16 Del.C. §3204(2) requires reporting of the patient’s “primary residential address”. The regulation omits any reference to collection of such information.

B. Section §3204(2) requires reporting of “the location and nature of the patient’s primary past employment.” The regulation deletes the requirement of reporting the “name and address of employer” and merely contemplates identification of type of occupation. This is not consistent with the enabling law.

I recommend sharing the above observations with the Division.

9. DOE Proposed Educational Technology Standards Regulation [17 DE Reg. 1032 (5/1/14)]

The Department of Education proposes to adopt a set of national technology standards for all Delaware educators. The National Educational Technology Standards (NETS) are incorporated by reference into the regulation.

I have several observations.

First, although §1.2 reflects the DOE’s intent that the standards apply to “all Delaware educators”, the balance of the regulation only covers administrators (§2.0) and teachers §3.0). This is odd and incongruous. School library media specialists regulated by 14 DE Reg. 1580 are omitted. Paraprofessionals regulated by 14 DE Reg. 1517 are omitted. School psychologists regulated by 14 DE Reg. 1583 are omitted.

Second, §1.3 recites that “(a) summary of the standards is set forth within”. This is “odd” wording. Consider substituting “within this regulation”.

Third, §2.1 is not a sentence. It lacks a predicate. The Delaware Administrative Code Style Manual, §6.2.3, requires parallel form within regulations. Sections 2.2 - 2.6 have headings followed by sentences.

Fourth, §§2.2.1.1, 2.2.1.2, and 2.1.1.3 lack a subject. Consider adding “Educational Administrators fulfill the following functions:” in §2.2.1 after the word and punctuation “organization.” Punctuation should also be added to §§2.2.1.1, 2.2.1.2, and 2.1.1.3.

Fifth, the heading to §2.0 refers to “leaders” while the text of the section refers to “school administrators” and “leaders”. For consistency, the heading to §2.0 could be amended to read “...Leaders and Educational Administrators”. Since “educational administrators” is not a term used in other DOE regulations, it would also benefit from a definition. Finally, the Delaware Administrative Code Style Manual, §6.2.2, encourages use of consistent references. Therefore, the term “school administrators” in §2.1 could be revised to read “educational administrators” for consistency with §§2.2, 2.3, 2.4, 2.5, and 2.6.

Sixth, §3.1 recites that “(a)ll teachers should meet the following standards and performance indicators.” Logically, the standards and performance measures should be subparts of §3.1, i.e. §§3.1.1, 3.1.2, 3.1.3, and 3.1.4. Instead, they are numbered 3.2 - 3.6.

Seventh, §3.3 refers to “Experiences and Assessments-Teachers”. This is not a term used in other DOE regulations. It would benefit from a definition.

I recommend sharing the above observations with the Professional Standards Board, DOE, and SBE.

10. DOE Prop. Specialist Appraisal Process Regulation [17 DE Reg. 1018 (51/14)]

The SCPD and GACEC have commented on prior versions of this regulation. The most recent commentary was submitted in June, 2013. The Department of Education is now proposing to adopt several discrete amendments to the current standards. Most of the changes appear straightforward.

I have only two (2) observations on the revisions.

First, in §2.0, definition of “Student Achievement”, the term ‘Students scores’ is not grammatically correct. Substitute “Students’ scores” or, for consistency with Pars. (b) and (c), “Student scores”.

Second, in their commentary on the June, 2013 regulation, the Councils expressed concern with an authorization for districts and charter schools to waive/disregard some appraisal components. Proposed §5.1 expands this approach by authorizing districts and charter schools to apply for approval of an alternate Professional Responsibilities Component. I recommend objection to this approach which undermines uniformity in the specialist appraisal process and vitiates valid comparisons of data across districts and schools. Section 11.0 contemplates presentation of statewide data on the specialist appraisal process to the SBE annually. Moreover, the DOE publishes results of the assessment system now whose usefulness would be undermined by use of disparate standards across districts and schools. Cf. pp. 21-22 of DOE report covering DCAS II teacher results [Educator Effectiveness in Delaware: Recruitment to Retention (February, 2014)] published at http://www.doe.k12.de.us/tleu_files/From_Recruitment_to_Retention_Data_2-28-14.pdf.

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

11. DOE Prop. Teacher Appraisal Process Regulation [17 DE Reg. 1014 (5/1/14)]

The SCPD and GACEC have commented on prior versions of this regulation. The most recent commentary was submitted in June, 2013. The Department of Education is now proposing to adopt several discrete amendments to the current standards. Most of the changes appear straightforward.

I have only two (2) observations on the revisions.

First, in §2.0, definition of “Student Achievement”, the term ‘Students scores’ is not grammatically correct. Substitute “Students’ scores” or, for consistency with Pars. (b) and (c), “Student scores”.

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

12. DOE Proposed Administrator Appraisal Process Regulation [17 DE Reg. 1021 (5/1/14)]

The Department of Education proposes to adopt several revisions to its standards for appraisal of administrators.

I have the following observations.

First, in §2.0, the definition of “credentialed evaluator” requires a district superintendent to be evaluated by members of the local board of education. I recommend modifying the definition to read “...A superintendent or charter school principal shall be evaluated by member(s) of the Board...” The definition of Board includes a charter school board of directors. In other regulations, the DOE refers to the chief executive officer of a charter school as the principal. See, e.g., 14 DE Reg. 211.

Second, in §6.2.2, I recommend modifying the reference to read “...and a Satisfactory or Exceeds rating in the Student Improvement Component.” Otherwise, an administrator with an Effective or Highly Effective rating in 3 of the first 4 appraisal components and an Exceeds rating in the Student Improvement Component would not be covered.

Third, in its criteria for “Needs Improvement” and “Ineffective”, the DOE is ostensibly heavily “weighting” the Student Improvement Component. For example, an administrator who scores Highly Effective in the first four appraisal components while achieving an Unsatisfactory rating in the Student Achievement Component is given the lowest label, “Ineffective”. Conversely, an administrator who has 1 Effective and 3 Ineffective ratings on the first four appraisal components while achieving a Satisfactory rating in the Student Achievement Component is euphemistically labeled “Needs Improvement”. Reasonable persons may differ on the merits of this approach.

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

13. DOE Proposed Initial License Regulation [17 DE Reg. 1031 (5/1/14)]

The Department of Education proposes to adopt a new version of its standards covering educator preparation programs and initial licensure. The primary impetus behind the revisions is to conform to S.B. No. 51 enacted in 2013 and to align to changes in the national teacher accrediting agency. A non-exhaustive list of changes is compiled in the Synopsis of Subject Matter of the Regulation. Parenthetically, a University of Delaware professor authored the attached April 27, 2014 News Journal article which questions some of the statutory and regulatory standards. The professor is dubious that a “raising the bar” approach for prospective teachers will result in improved teaching. Overall, the new standards are quite rigorous and impose far-reaching obligations on education preparation providers.

I have the following observations.

First, in §1.1, I recommend modifying the reference to “14 Del.C. §§122(b)(22) and 1280(a)” since both statutes impose a licensing and DOE approval requirement.

Second, the regulation contains multiple references to the DPAS-II. See, e.g., §2.0, definition of “High Quality Cooperating Teacher”; and §6.1.4.3. In other regulations published this month, the DOE notes that it may approve a different appraisal system. See 17 DE Reg. 1018, §1.0 (May 1, 2014); and 17 DE Reg. 1014, §1.0. The DOE may wish to consider adding a definition of DPAS-II which encompasses any DOE-approved replacement of the assessment system.

Third, in §2.0, definition of “High Quality Clinical Supervisor”, there’s a plural pronoun (they) with a singular antecedent (supervisor). Consider substituting “...field in which supervision is provided...”.

Fourth, in §2.0, the definition of “High Quality Clinical Supervisor” would allow a supervisor to qualify under this standard even if rated “Ineffective” on all five DPAS-II components if the supervisor achieved a satisfactory rating on some other evaluation system. The latter evaluation system could be a brief, in-house assessment. The DOE may wish to reconsider whether this option should be less “open-ended”.

Fifth, Title 14 Del.C. §1280(b)(2) authorizes entry of students into an educator preparation program based on “achieving a minimum score on a standardized test normed to the general college-bound population, such as Praxis, SAT, or ACT, as approved by the Department.” In contrast, §3.1.1 merely refers to “achieving a score deemed to be College Ready on a test of general knowledge normed to the college-bound population.” Although there is a definition of “College Ready”, the Legislature expected the DOE to identify and approve qualifying tests, not simply say any test of general knowledge nationally normed for college-bound students is acceptable. There may be many tests of general knowledge with norms for incoming college students which are not comparable to the Praxis, SAT, or ACT. In deference to the statute, the DOE may wish to define qualifying tests as the Praxis, SAT, and ACT and other tests approved by the Administrator.

Sixth, in §3.2.1.1.2, there is a lack of consistent form. See Register of Regulations Style Manual, §6.2.3. Consider substituting “A recipient of” for “Receives”.

Seventh, in §3.2.1.2, consider substituting “with a summative effective or highly effective rating under 14 DE Admin Code 108” for “deemed effective or highly effective under 14 DE Admin Code 108”. Otherwise, administrators could posit that they qualify based on ratings on individual appraisal components.

Eighth, in §3.4.1.1.1, consider inserting “Professional” before “Standards Board”.

Ninth, in §§7.3.1 and 7.3.2, I recommend substituting “may” for “shall”. If a Unit or Program fails to meet only a technical or minor standard, the DOE literally has no discretion but to revoke approval. This is a rather “brittle” approach which unnecessarily limits DOE discretion.

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

14. DFS Prop. Residential Child Facility & Day Treatment Prog. Reg. [17 DE Reg. 1043 (5/1/14)]

The Councils submitted extensive comments on earlier versions of this regulation in 2013. The Division of Family Services Office of Child Care Licensing is now publishing another set of revised regulations. The existing regulations are deleted in their entirety in favor of a new set of standards.

I have the following observations.

1. In §1.3, definition of “residential child care facility”, psychiatric hospitals and foster homes are excluded from coverage. However, the status of a pediatric skilled nursing facility is unclear. Exceptional Care for Children in Newark is an example. DHSS ostensibly licenses such facilities pursuant to Title 16 Del.C. §§1119B and 1119C. However, such facilities may also meet the DFS definition of “residential child care facility”. DFS may wish to clarify coverage or non-coverage of pediatric nursing facilities.

2. In §1.4, definition of “Administrative Hearing”, the reference to “...place the facility on the enforcement actions of Warning...” is awkward language. DFS may wish to revise the reference.

3. Section 17.3 contemplates HRC review of “restrictive procedures” and “proper treatment”. It is unclear if DFS envisions HRCs reviewing psychotropic medications. Section 1.4, definition of “restrictive procedure”, only covers drugs which qualify as a “chemical restraint”. The definition of “chemical restraint” excludes “the planned and routine application of a prescribed psychotropic drug”. Therefore, if a child were prescribed heavy daily doses of multiple psychotropic drugs, the HRC may arguably lack jurisdiction to review. By analogy the DDDS HRCs review regularly prescribed psychotropic drugs administered in covered facilities, including co-DHSS/DFS regulated AdvoServ. DFS may wish to consider whether HRC review of psychotropic drugs excluded from the definition of “chemical restraint” merit HRC review.

4. In §1.4, definition of “Consultant”, there is a plural pronoun (their) with a singular antecedent (practitioner). Consider substituting “the practitioner’s” for “their”.

5. In §1.4, definitions of “Exclusion” and “Locked Isolation”, it is somewhat anomalous to categorically bar use of unlocked exclusion for kids under age 6 but have no equivalent limit for locked isolation. DFS may wish to consider adding a similar age standard in the definition of “locked isolation”.

6. In §1.4, the definitions of “exclusion” and “time-out technique” are not well differentiated. Placing a child in an unlocked classroom or office would fit both definitions. Section 3.12.9.3.2 reinforces the overlap by stating that “time-out” may not occur in closet, bathroom, unfinished basement or attic. The implication is that placement in other rooms is an acceptable use of “time-out”. If a provider were considering placement of a child under age 6 in an unlocked room, that would be barred under the “exclusion” definition (and §17.1.2) but allowed per §3.12.9.3.3 if characterized as “time-out”.

7. A related anomaly to that described in the preceding paragraph is that an exclusion requires “continuous” monitoring (§1.4, definition of “exclusion”; §17.5.1.1) while time-out only requires a visual check every 30 minutes (§3.12.9.3.2). If a provider wishes to avoid the continuous monitoring requirement, the provider would simply characterize placing a child in an unlocked room as “time-out”. Moreover, the implication of 30-minute checks is that “time-out” periods are extended. Clinically, a time-out should permit some time to reflect and regain self-control. A time-out should not last for hours. Cf. §3.12.9.3.3, time-out for children under 6 should not exceed 1 minute for each year of age.

8. Section 17.5.1.1 raises a similar concern. Within each two (2) hours of a restrictive procedure, a child is given an opportunity for 10 minutes of release. Based on the definition of “restrictive procedure”, this suggests that extended periods of mechanical restraint, locked isolation, and exclusion are acceptable norms. This section could also be interpreted to authorize a facility to limit access to a toilet to once every two hours. The structure of the DFS regulations appear to allow sequential use of restrictive procedures resulting in extended isolation. For example, §17.5.1.1, in combination with §17.7.1.3, authorize a 2 hour locked isolation followed by a 10 minute break, another 2 hour locked isolation followed by a 10 minute break, and then a third 2 hour locked isolation. Similarly, per §§17.5.1.1 and 17.6.1 and 17.6.2, “exclusions” can be “stacked” resulting in removal of a child to an unlocked room for an hour, followed by a 10 minute break, which can be repeated for an aggregate of six (6) hours. Similarly, per §§17.5.1.1 and 17.9.1.4, “mechanical restraints” can be “stacked” resulting in 2 hours of mechanical restraint, followed by a 10 minute break, followed by another 2 hours of mechanical restraint. Temporal limits on “consecutive minutes” of a restrictive procedure (e.g. §17.7.5 and 17.9.1.4) are easily circumvented by allowing short breaks to toilet or stretch. DFS may wish to consult DPBHS to assess whether the above regulations conform to contemporary clinical standards in the field. The Terry Center has converted its former seclusion room to a children’s store.

9. There is some “tension” between §3.12.10.1.3 and 17.5.1.1. The former section contemplates the release of a child from a restraint after no more than 15 minutes while the latter would authorize restraint for at least 2 hours.

10. In §3.5.5, DFS requires a “direct care worker” (who only needs a high school diploma) to be at least 21 years of age. Some states have promoted college students working as support staff in group homes and similar facilities since they generally represent a demographic group with some intellectual wherewithal. Students seeking degrees in social work, psychology, etc. may be very interested in working in an RTC or specialized child care setting for experience. However, since §3.5.5 requires a direct care worker to be 21, many college students would be categorically barred from such employment. DFS could consider either: a) reducing the age to 18; or 2) adopting a standard of at least 21 or, if the applicant is a college student, 18. DFS could also consider only allowing employment of 18-20 year old college students with a minimum number of credits in a social services field (e.g. social work; psychology).

11. In §3.12.5.5, DFS may wish to add a reference to referrals to the Pathways to Employment program for qualifying adolescents. See 17 DE Reg. 1070 (May 1, 2014).

12. There are several authorizations to use restraint to prevent destruction of property. See, e.g. §1.4, definition of “non-violent physical intervention strategies”; and §3.12.10.1.2. When the Legislature adopted S.B. No. 100 in 2013, it did not authorize use of restraints in public school educational settings based on property destruction. See 14 Del.C. §4112F(b)(2). If a child is tearing paper, throwing a pencil or eraser, or ripping buttons off his/her clothes, the DFS regulation authorizes use of physical and possibly mechanical restraint. DFS may wish to at least consider a more “restrained” authorization. For example, if the property destruction implicates a threat of bodily harm (e.g. throwing a desk or punching a wall), restraint may be justified. The DFS regulation is simply too “loose” in authorizing restraint based on any, even minor, property destruction.

13. Section 4.7.1 can be interpreted in two ways: a) facilities must be free of lead paint hazards if they accept kids under 6 who either have an intellectual disability or severe emotional disturbance; or b) facilities must be free of lead paint hazards if they accept kids under age 6 OR with intellectual disabilities of any age OR with severe emotional disturbance of any age. I suspect DFS intends the latter. Moreover, the term “severely emotionally disturbed” violates Title 29 Del.C. §608 and should be modified.

14. In §7.0, DFS should consider adding a provision to address electronic cigarettes. See attached statement of the American Lung Association and articles describing H.B. No. 241 and H.B. No. 309.

15. Section 3.12.10.1.4 requires persons implementing physical intervention strategies to be “specifically trained in its use...and have current certification, if applicable.” This is a rather ambiguous standard. When is a certification applicable? Does some in-house training suffice?

I recommend sharing the above observations with the Division.

15. H.B. No. 293 (Supplemental Nutrition Assistance Program)

This legislation was introduced on April 9, 2014. On April 29, it remained in the House Health & Human Development Committee.

Consistent with the attached articles, approximately 17% of Delawareans (152,000) participate in the Supplemental Nutrition Assistance Program (SNAP). Benefits are paid entirely from federal funds but the State shares administrative costs. SNAP recipients cannot use the assistance to purchase beer, wine, liquor, cigarettes, tobacco, nonfood items, vitamins, medicine, hot food, and any food that will be eaten in a store.

H.B. No. 293 would amend State law by adding the following limit on purchases: “Benefits provided pursuant to this Chapter shall only be used for foods, food products, and beverages that have beneficial nutritional value.” The Department of Health & Social Services would be directed to issue implementing regulations to “identify specific foods, food products, and beverages, or general categories of foods, food products, and beverages ...that have beneficial nutritional value.” DHSS would also be required to apply for a waiver from the U.S. Department of Agriculture (USDA) to permit implementation of the law.

As reflected in the attached articles, the USDA has never granted a SNAP waiver limiting benefits to perceived healthy foods. The legislation is opposed by DHSS and the Delaware Food Bank. The Food Bank CEO offered the following observation:

The biggest barrier between low-income Delawareans and a healthy diet is not a lack of will or self-control, but a lack of affordability and accessibility. ... Fresh, healthy food is just more expensive than the alternatives and in some neighborhoods it’s not even stocked in some stores.

Since the benefits average \$1.40 per person per meal, recipients are hard-pressed to budget for acquisition of basic food products. The attached Delaware News Journal editorial questioned the wisdom underlying the bill and suggested adoption of positive incentives for electing healthier foods:

Limiting shopping choices to 'nutritional foods' is wrong-minded and meddlesome at the 'Big Brother' level. Rewards in the form of a little extra subsidy for better health choices will do a lot more to change food stamp recipients' poor eating habits.

Finally, a one-size-fits-all list of "healthy" foods may be an illusory goal. Some would posit that "red meat" is unhealthy, that canned soup with typically high sodium content is unhealthy, and that non-organic produce is unhealthy. Individuals may be on special diets which may not match a regulatory list of "approved" foods.

Based on the above considerations, I recommend opposition.

16. H.B. No. 298 (Distracted Driving Civil Penalty)

This legislation was introduced on April 10, 2014. On April 29, it remained in the House Public Safety & Homeland Security Committee.

As background, statistics on the dangers of use of handheld devices while driving are compelling. On April 10, 2014, the House passed H.R. No. 28 recognizing April as "Distracted Driving Awareness and Enforcement Month". The preamble to the legislation includes the following observations: 1) drivers using cell phones are 4 times more likely to be in a crash and miss seeing up to 50% of the roadway environment; 2) cell phone use is a factor in nearly 1 in 4 crashes; 3) sending or receiving a text takes a driver's eyes off the road for an average of 4.6 seconds, the equivalent of driving the length of a football field when traveling at 55 mph; and 4) the percentage of drivers visibly manipulating hand-held devices is increasing.

The Delaware Code currently authorizes civil penalties for drivers using handheld phones and devices. A first offense results in a \$50 civil penalty. A subsequent offense results in a \$100-\$200 civil penalty. Consistent with the attached articles, police issued 19,610 citations for violations of the law in 2013. The State Office of Highway Safety reported there were 149 cellphone related crashes in Delaware in 2013. It is inferable that some of these crashes resulted in injuries resulting in disability.

H.B. No. 298 would effect one change in the existing law, i.e., it would raise the civil penalty for a first offense from \$50 to \$75. According to the attached April 13 News Journal article, Delaware's penalties are lower than those in 34 of the 40 other states with laws banning texting or using handheld phones while driving.

I recommend endorsement. Since the percentage of drivers using handheld devices continues to increase despite current laws, enhancing penalties may have a deterrent effect. Frankly, a \$50 civil penalty is so modest that many drivers will not be concerned with the consequences of violating the law. A higher penalty could be supported given the risk of accidents and resulting injuries attributable to distracted driving.

17. H.B. No. 309 (Clean Indoor Air Act & Electronic Cigarettes)

This legislation was introduced on April 29, 2014. As of May 5, it awaited action by the House Health & Human Development Committee.

Consistent with the attached November 27, 2012 News Journal article, Delaware became the second state to ban smoking in indoor workplaces and public places when it enacted its Clean Indoor Air Act in 2002. Since then, at least 27 states and the District of Columbia have enacted clean indoor air laws covering bars and restaurants.

H.B. No. 309 is intended to update the Clean Indoor Air Act to specifically cover “electronic cigarettes”. For background, see the attached May 1, 2014 News Journal article. It notes that 3 other states ban indoor e-cigarette usage and 9 other states ban use in certain buildings and other venues such as public transportation. The attached American Lung Association Statement on E-Cigarettes observes that e-cigarette vapors include carcinogens. The attached Consumer Reports article describes both pros and cons to usage.

I recommend endorsement subject with two suggestions.

First, consistent with the attached February 27, 2014 industry article, many states are proposing taxes on e-cigarettes. Delaware could consider a similar initiative.

Second, lines 19-20 of the legislation contain an exemption for “any product that has been approved by the United States Food and Drug Administration for tobacco cessation or other medical purpose.” The problem with this exemption is that even a very limited FDA approval of e-cigarettes would result in a wholesale exemption from the State law. For example, the FDA could potentially approve e-cigarettes as transitional smoking cessation devices for chronic smokers. Some states do not include an FDA reference in their legislation. See, e.g., the attached enacted N.J. legislation. Other states include an FDA exemption. See, e.g., the attached enacted Kentucky legislation. The sponsors may wish to consider whether the sentence should be deleted.

18. H.B. No. 241 (Electronic Cigarettes & Minors)

This legislation was introduced on January 29, 2014. It passed the House unanimously on April 10. On May 5, it awaited action by the Senate Health & Social Services Committee.

Background is provided in the preamble to the legislation and the attached excerpt from the April 25 issue of the House Minority Caucus Newsletter. Use of electronic cigarettes among middle and high school students is increasing at an alarming rate. For example, the percentage of such students using e-cigarettes doubled between 2011 and 2012. The e-cigarettes contain nicotine which is highly addictive. In September, 2013, forty-one (41) Attorneys General asked the FDA to regulate e-cigarettes. In April, 2014, the FDA decided to regulate e-cigarettes but the process to adopt federal regulations could be extended. See attached Associated Press article. In the meantime, at least twenty-seven (27) states have banned sales of e-cigarettes to minors.

The legislation would ban sales and distribution of e-cigarettes to minors. It would also ban minors from purchasing or attempting to purchase e-cigarettes. Minors who violate the law could be fined \$50 and ordered to perform 25 hours of community service for a first offense.

I recommend endorsement. My only concern is that the bill (lines 55-59) uses the term “tobacco substitute” to cover e-cigarettes. The definition excludes devices approved by the FDA for tobacco cessation or other medical purposes. As a result, even very limited FDA approval of the devices as a transitional smoking cessation product would effectively render the Delaware law meaningless. Vendors could sell and minors could buy e-cigarettes since they would not meet the definition of a “tobacco substitute”. Some states have adopted definitions of “e-cigarettes” without the FDA reference. See, e.g., the attached enacted N.J. legislation. Other states include an FDA exemption. See, e.g., the attached recently enacted Kentucky legislation. The sponsors may wish to consider whether the FDA exemption could be deleted or modified.

19. H.B. No. 302 (State Board of Elections)

This bill was introduced on April 10, 2014. On May 5, it remained in the House Administration Committee.

Given statistics confirming disproportionately low voting rates by persons with disabilities, the State Council for Persons with Disabilities has historically promoted adoption of laws and policies to encourage voting and remove voting barriers. For example, Title 15 Del.C. §4512(b) authorizes the Council to report polling place accessibility issues to county departments of election to prompt review by the Architectural Accessibility Board. The Council is therefore interested in this reform legislation.

The legislation implements some of the recommendations contained in the March 31, 2014 Election Law Taskforce Report issued in conformity with SCR No. 20. It seeks to improve the elections process in several ways.

First, it consolidates county boards of election into a single State Board of Elections. The State Board would be comprised of ten (10) members appointed by the Governor selected from a list of nominees from the state chair of the respective political parties. Members would also be subject to Senate approval. The State Election Commissioner would be an ex officio eleventh (11th) member who would only vote in the event of a tie (lines 22-32, 233).

Second, county departments of election would continue to operate but subject to the single State Board of Elections. A director and deputy director of each county office would be appointed by the State Board of Elections subject to a protocol to ensure the director and deputy director are members of different political parties (lines 153-159).

Third, subject to the availability of funds, an Elections Counsel would be appointed by the State Election Commissioner with a variety of duties (assistance with preparation of manuals; investigation of violations of election laws; preparation of advisory opinions)(lines 196-224). If the Elections Counsel believes a violation may have occurred, a referral to the State Attorney General or United States Attorney is authorized if at least five (5) members of the State Board of Elections agree that reasonable grounds exist to believe a violation may have occurred (lines 203-207).

Fourth, the State Board of Elections would hear appeals when individuals are fined for failing to timely file campaign finance reports or include "paid by me" statements in campaign ads (lines 263-281).

Fifth, no member of the State Board of Elections or employee of the state or county departments of election may engage in political activities. Violations would result in a fine and loss of position or employment (lines 189-193).

In a small state like Delaware, it makes sense to have a single statewide Board of Elections to coordinate and implement election laws. The State Department of Elections has been very proactive in developing manuals and publications addressing voting rights of individuals with disabilities. The legislation includes many safeguards to ensure the non-partisan operation of the State and county departments. I recommend endorsement.

Attachments

8g:leg/514bils
F:pub/bjh/leg/2014/514bils



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
MARGARET M. O'NEILL BUILDING
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TTY/TDD: (302) 739-3699
FAX: (302) 739-6704

MEMORANDUM

DATE: March 28, 2014

TO: Ms. Sharon L. Summers, DMMA
Planning & Policy Development Unit

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

RE: 17 DE Reg. 885 [DMMA Proposed Preventive Services Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) proposal to adopt a State Plan amendment regarding the provision of preventative services described in the Affordable Care Act. The proposal is published as 17 DE Reg. 885 in the March 1, 2014 issue of the Register of Regulations.

As background, Section 4106 of the Affordable Care Act authorizes states to adopt a Medicaid State Plan amendment in the context of preventive services. In a nutshell, a State can secure an additional 1% federal Medicaid match for specified preventive services if it agrees to cover the following: preventive services assigned a grade of A or B by the U.S. Preventive Services Task Force (USPSTF) and approved vaccines and their administration recommended by the Advisory Committee on Immunization Practices (ACIP). CMS guidance was provided in a State Medicaid Director Letter, SMD#13-002 (February 1, 2013) and Q&A document.

Delaware DMMA proposes to adopt a State Plan amendment to qualify for the additional match effective April 1, 2014. The actual amendment is brief and appears to conform to the CMS guidance.

SCPD endorses the proposed regulation since it will result in confirmation of Delaware Medicaid coverage of specified preventive services and increase federal funding.

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

cc: Mr. Stephen Groff
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

MEMORANDUM

DATE: March 28, 2014

TO: Ms. Sharon L. Summers, DMMA
Planning & Policy Development Unit

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

RE: 17 DE Reg. 887 [DMMA Proposed Adult Group Medicaid Claiming Methodology Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA) proposal to adopt an amendment to the Medicaid State Plan regarding the Federal Medical Assistance Percentage (FMAP) effective January 1, 2014. The proposed regulation is published as 17 DE Reg. 887 in the March 1, 2014 issue of the Register of Regulations.

As background, the Affordable Care Act (ACA) contemplates State Medicaid programs covering individuals with countable income up to 133 percent of the poverty level. Delaware Medicaid already covered this population and Delaware therefore qualifies as an "expansion state". In order to qualify for an enhanced federal Medicaid match for covering this group of individuals, the State must adopt a Medicaid Plan amendment based on a CMS template. The federal Medicaid match for expansion states is described at the top of p. 889. DMMA envisions the receipt of the following federal funds based on the initiative: \$78,254,636 in FFY 14 and \$137,495,659 in FFY15.

SCPD endorses the proposed regulation since the Plan amendment is designed to achieve conformity with CMS guidance under the ACA.

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

cc: Mr. Stephen Groff
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

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

March 27, 2014

Sharon L. Summers
Planning & Policy Development Unit
Division of Medicaid and Medical Assistance
1901 North DuPont Highway
P. O. Box 906
New Castle, DE 19720-0906

**RE: DMMA Proposed Medicaid Prescription Drug Reimbursement Regulation [17 DE Reg. 893
(March 1, 2014)]**

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 a Plan amendment incorporating the National Average Drug Acquisition Cost (NADAC) pricing benchmarks. As background, DMMA notes that federal law requires Medicaid agencies to reimburse pharmacies for outpatient drugs based on two components: 1) drug ingredient/acquisition cost; and 2) dispensing cost. The first component has historically been based on an "Average Wholesale Price" (AWP) benchmark. However, the federal Office of Inspector General determined that the AWP was flawed and resulted in excess payments to pharmacies. CMS has now contracted with Myers and Stauffer LC, a national certified public accounting firm to develop a new "National Average Drug Acquisition Cost" (NADAC) pricing benchmark. Any state wishing to adopt the NADAC must submit a Medicaid State Plan amendment to CMS which has led to this DMMA proposed amendment.

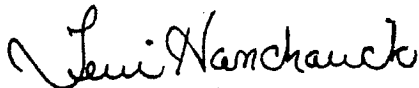
DMMA is also increasing its reimbursement for dispensing cost from \$3.65 to \$10.00 per prescription. DMMA projects the following savings to State General Funds based on the new reimbursement standards: \$604,000 (October 1, 2014- September 30, 2015); \$1,340,000 (October 1, 2015 - September 30, 2016). Since the payment for dispensing a prescription is almost tripling (increasing from \$3.65 to \$10.00), these cost savings could only occur if the NADAC benchmark is much lower than the AWP benchmark.

The GACEC would like to note that in the past, Delaware pharmacies have balked at the low Medicaid reimbursement rates and threatened to not fill prescriptions funded by Medicaid. The Council lacks sufficient information to assess whether the new pharmacy reimbursement standards are adequate and

notes that the effective date of the Plan amendment is April 1, 2014. At 895. Therefore, DMMA envisions adopting the new methodology without allowing sufficient time to consider public comments which may be submitted up until March 31. As noted earlier, pharmacies have balked at low drug reimbursement rates in the past. Council is unable to adopt a position on the proposed regulation given the lack of information on whether the rates fairly compensate pharmacies and the short timeframe for research and comments.

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

Sincerely,

A handwritten signature in cursive script that reads "Terri Hancharick".

Terri A. Hancharick

TAH:kpc



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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MEMORANDUM

DATE: February 28, 2014

TO: John R. McNeal
ADA Title II/Section 504 and Title VI Coordinator

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

RE: 17 DE Reg. 833 [DelDOT Prop. External Equal Opportunity Complaint Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Transportation's proposal to amend its external equal employment opportunity complaint procedures published as 17 DE Reg. 833 in the February 1, 2014 issue of the Register of Regulations. SCPD commented on an earlier version of this proposed regulation in September 2012. In general, the new standards conform to the Federal Highway Administration Office for Civil Rights guidance entitled "Procedures Manual for Processing External Complaints of Discrimination" [hereinafter "OCR Procedures Manual"] relied upon by the Council in its 2012 commentary. SCPD has the following observations and recommendations.

First, in §2.1.1.2, substitute "individual with a disability" for "handicapped person" and substitute "her or his disability" for "his handicap". See attached updated version of federal law. See also Title 29 Del.C. §608.

Second, the word "Handicap" also appears in §2.1.2.9. However, the federal regulation ostensibly still uses the term so its use may be apt.

Third, in §2.1.3, use of the word "refine" is somewhat odd. Consider the following substitute: ..Orders further define, interpret, and implement Civil Rights...".

Fourth, §2.1.3 contains references to 2 of the 3 executive orders contained in the OCR Procedures Manual at p. 4. The reference to Executive Order 12250 is omitted. DelDOT may wish to review

whether this omission is inadvertent or the Executive Order is no longer in force.

Fifth, in §3.0, definition of “Discrimination”, DeIDOT should consider substituting “means” for “involves”. See Register of Regulations Style Manual, §3.1.2, available at <http://regulations.delaware.gov/>. Moreover, the last 3 lines purport to be a sentence. However, the language lacks a predicate (verb).

Sixth, in §3.0, definition of “Investigative report”, the second sentence is not a definition but a substantive standard. The Register recommends that such regulatory standards not be included in definitions. See Register of Regulations Style Manual, §3.1.1.

Seventh, in §4.4.3.7, substitute “its” for “their” since the pronoun refers to a singular “agency”.

Eighth, §5.9.3.8 does not appear in the list of bases justifying dismissal in the OCR Procedures Manual (p. 9). DeIDOT may wish to reassess whether this subsection conforms to federal guidance.

Ninth, §§5.11.2.2 and 5.11.2.3 contain three (3) references to “State”. This may be “underinclusive”. A complaint could be filed against a local government entity or a private entity such as a contractor.

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

cc: Ms. Marti Dobson
Mr. Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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U.S. Code 29 U.S. Code § 794

29 U.S. CODE § 794 - NONDISCRIMINATION UNDER FEDERAL GRANTS AND PROGRAMS

US Code Books Updates Authorities (17)

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705 of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7001 of title 20), system of vocational education, or other school system;

(3)

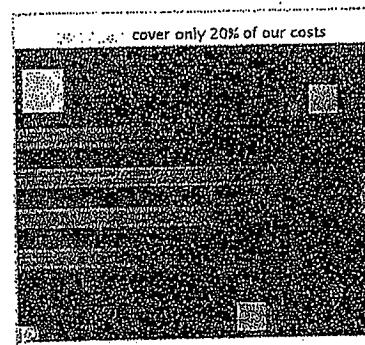
(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

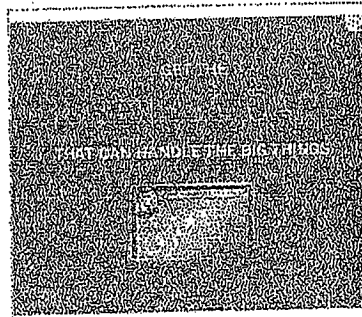
(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);



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FIND A LAWYER

APR 24 2014



**DELAWARE HEALTH
AND SOCIAL SERVICES**
DIVISION OF MEDICAID AND
MEDICAL ASSISTANCE

DATE: April 22, 2014

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

FROM: Sharon L. Summers, DMMA *Summers*
Planning & Policy Development Unit

RE: 17 DE Reg. 930 [DMMA Proposed Pathways to Employment Medicaid State Plan Amendment Regulation] – March 1, 2014

Thank you for your recent memorandum regarding the Division of Medicaid and Medical Assistance (DMMA) notice soliciting comments on its proposal to adopt a Medicaid State Plan amendment to establish a "Pathways to Employment" program. The proposed regulation was published as 17 DE Reg. 930 in the March 1, 2014 issue of the Delaware Register of Regulations. DMMA has considered your comments and responds as follows.

You write,

SCPD commented on this initiative originally published in the January 2014 Register of Regulations. A copy of the January 30, 2014 memo is attached for facilitated reference. However, since a concept paper and draft Plan amendment were not included in a DMMA link until January 17th, DMMA is extending the opportunity to comment until March 31, 2014. Since the only document which the Councils lacked when compiling the previous analysis of the regulation in January was the 55-page Plan amendment, Council is providing a supplemental analysis focusing on that document.

Agency Response: With regard to your specific comments, responses are provided below. Your comments provided on March 12, 2014 are included verbatim first, followed by comments (paraphrased) from Mr. Kyle Hodges from January 30, 2014 that were not otherwise addressed.

March 12, 2014 Comments

1. P. 1. The Council questions why individuals with visual impairments are eligible for only 5 services while individuals with all other qualifying impairments are eligible for 9 services. Individuals with visual impairments would be categorically barred from receiving the following Pathways services available to individuals with other qualifying impairments: 1) Career Exploration and Assessment; 2) Small Group supported Employment; 3) Individual supported Employment; and 4) Personal Care. The Council recommends uniformity in the services menu.

Agency Response: Career Exploration and Assessment, Small Group supported Employment, Individual supported Employment, and Personal Care are services that Delaware anticipates will be utilized by individuals who have not had or are not eligible for vocational rehabilitation and/or who require ongoing support due to the nature of their disability. For individuals with visual impairments, Career Exploration and Assessment is widely available through the Division for the Visually Impaired's (DVI) vocational rehabilitation program. Small Group supported Employment, Individual supported Employment, and Personal Care are ongoing supports for individuals who require longer-term support services for successful employment. Based on historical data and information, Delaware does not expect that individuals with a sole diagnosis of visual impairment will present a need for such supports. In the event that such a need is present, Delaware expects that the individual would likely be eligible in one of the remaining, broad-based target groups and therefore would have access to the needed service.

2. P. 4. The Division envisions the establishment of "a consumer council within the organization to monitor issues of choice." The Council did not identify any other references to the council. It could be useful to include the council in the quality improvement section (pp. 40 et seq) and otherwise clarify the structure and role of the council.

Agency Response: DVI is exploring how the engagement of an existing council in this critical role of monitoring will ensure that individuals receiving services through Pathways are assured independence in both their choice of service providers and services.

3. P. 4. In its January commentary, the Council recommended an explicit recital that the fair hearing process applies to disputes. This is clarified at p. 4 (Par. 5) and p. 13.

Agency Response: Delaware affirms that all applicable Medicaid due process requirements apply for the Pathways program.

4. P. 4. On p. 4, Par. 7, as well as on p. 8, the Division of Medicaid & Medical Assistance (DMMA) represents that the program will not cover services otherwise available to an individual under the Individuals with Disabilities Education Act (IDEA). There is some "tension" between such an approach and Federal law, which generally bars Medicaid programs from refusing to cover services available to a student under the IDEA. See attached materials. The NHLP memo (pp 2 and 3) offers the following guidance:

Some related services can be paid for by Medicaid. In fact, the Medicaid statute specifically forbids the Federal government from refusing to pay for Medicaid services that are provided to a child with a disability as part of the child's IEP. 42 USC §1396b(c). In addition, 34 CFR §300.501 provides that "Part B of the [IDEA] may not be construed to permit a state to reduce medical or other assistance available to children with disabilities or to alter the eligibility of a child with a disability, under title V (Maternal and Child Health) or title XIX (Medicaid) of the Social Security Act, to receive services that are also part of FAPE."

For example, if a student could receive habilitation services through the special education system, DMMA could not deny Medicaid funded habilitation simply because it is available through the student's special education program. Between Medicaid and the IDEA, Medicaid is generally the payer of first resort.

Agency Response: Delaware intends to operate the Pathways program in full compliance with all applicable Federal statutes. We would note, however, that not all Medicaid services are treated similarly with regard to IDEA. In fact, regulations at 42 CFR 441.720 specifically note that in applying the requirements of section 1915(f)(1)(F) of the Act, the State must:

... (7) Include in the assessment, for individuals receiving habilitation services, documentation that no Medicaid services are provided which would otherwise be available to the individual, specifically including, but not limited to services available to the individual through a program funded under section 110 of the Rehabilitation Act of 1973, or the IDEA.

(8) Include in the assessment and subsequent service plan, for individuals receiving Secretary approved services under the authority of §440.182 of this chapter, documentation that no State Plan home and community based services (HCBS) are provided which would otherwise be available to the individual through other Medicaid services or other Federally funded programs.

With these provisions in mind, however, DHSS is committed to working with our partners at the Department of Education and the Division of Vocational Rehabilitation to ensure that individuals receive the services they need to be successful in employment.

5. P. 5. DMMA identifies an income cap, but does not address whether any resource cap applies. Consistent with the Council's January commentary, "First" paragraph, it would be preferable to clarify that there is no resource cap.

Agency Response: Delaware appreciates this comment. While the SPA does not directly address the issue of a resource cap, by checking Box #1 on page 5 of the application, Delaware is indicating that in order to be eligible for the Pathways benefit, a person must be eligible for Medicaid based on the eligibility criteria for one of the categorical groups. The Delaware Medicaid State Plan does not indicate a resource test for any of the categorical groups.

6. P. 7. The standard defining the credentials of persons conducting reevaluations is rather meager: For all target groups, reevaluations are conducted by individuals holding an associate's degree or higher in a behavioral, social sciences, or a related field or experience in health or human services support which includes interviewing individuals and assessing personal, health, employment, social, or financial needs in accordance with program requirements.

This standard is reiterated on pp. 11, 12, and 15. An Employment Navigator preparing a plan of care does not even need a high school diploma. A telephone receptionist for a non-profit or public agency will generally meet the standard of "experience in health or human services support which includes interviewing individuals and assessing needs in accordance with program requirements." Moreover, an individual with only geriatric experience would qualify under the above standard despite no familiarity with services for teens and young adults. This represents a major weakness in the proposal, especially for low-incidence populations (e.g., – [traumatic brain injury] TBI) who have very specialized needs.

Agency Response: These functions will be conducted by Delaware state staff, and the qualifications articulated there are reflective of state classifications. Delaware is committed to ensure that the individuals performing these tasks are of the highest caliber and are prepared to effectively carry out these responsibilities and support individuals in gaining and maintaining employment. These individuals will be individually trained, initially and ongoing, on the specific requirements of the program, the use of established tools for determining whether individuals continue to meet targeting and needs based criteria, and who will receive tailored disability-specific training.

We draw your attention to the provider qualifications for Employment Navigators as contained on p. 15 that stipulate that Employment Navigators must:

- “Complete Department required training, including training on the participant’s service plan and the participant’s unique and/or disability specific needs, which may include, but is not limited to, communication, mobility, and behavioral needs.” and
 - “Comport with other requirements as determined by the Department.”
7. P. 7. There are no timelines for screening and processing of applications. Timelines would be useful.

Agency Response: Delaware is committed to getting people into service at the earliest possible date, and will ensure that all timelines comport with reasonable promptness requirements. Once timeframes have been established, this will become part of the routine performance monitoring.

8. P. 10. The table on p. 10 does not match the DDDS eligibility standards. See attached 16 DE Admin Code Part 2100. Under DDDS standards, some conditions require low I.Q. scores while others (e.g., autism) do not. The table would literally permit Pathways eligibility of individuals with brain injury without low I.Q. scores. SCPD would strongly favor this approach. However, as we stressed in the January 30 memo, the absence of an explicit reference to brain injury under the “physical disabilities” is very troublesome. This concern could be addressed by amending the reference to Group B on p. 10 as follows: “Individuals age 14 to 25 with a physical disability (including brain injury); whose physical condition is anticipated to last 12 months or more.”

Agency Response: Delaware will add parenthetical as suggested. The chart on p. 10 is intentionally structured. All clients eligible for Pathways services served by DDDS must have a functional limitation in addition to the diagnostic criteria indicated on page 10 of the application. CMS describes eligibility for HCBS services by defining both target criteria (age, diagnosis or condition) and “needs based” or functional criteria. Target criteria (page 10) and the functional criteria (page 8) are separated into two separate sections in the SPA application. The current DDDS eligibility criteria includes both target and needs based criteria.

9. P. 14. In its January 30 commentary, Tenth Paragraph, the Council supported inclusion of references to “self-employment.” The Plan amendment includes such references at pp. 14, 16, and 18.

Agency Response: Yes. The Pathways program will provide support to individuals in gaining competitive or self-employment.

10. P. 19. For individuals receiving Individual supported Employment services, job placement support appears to be capped at 6 months in a benefit year. The same cap is applied to persons receiving Group supported Employment services (p. 22). No rationale is provided. DMMA may wish to reconsider the merits of such a cap.

Agency Response: This limitation is proposed to ensure that providers supporting individuals, even those with complex needs, are incented toward successful employment outcomes and not toward perpetual job search activities, an issue that other states have encountered. We will add in the SPA, however, that exceptions to this limitation may be considered, requiring strong justification and explicit Department approval.

11. Individuals receiving Group supported Employment are subject to a presumptive (but not absolute) cap of 12 continuous months. There is no comparable cap for Individual supported Employment (p. 19). This may be a deterrent to successful outcomes for persons with the most severe disabilities who may need more time to prove successful.

Agency Response: You correctly note that the 12 continuous months limitation is not absolute. Delaware believes that all individuals with the proper support can successfully engage in individualized employment, and have designed the benefit package of Pathways to continue offering such opportunities to individuals.

12. P. 26. The standards for financial coaches appear to be very generic, that is, persons with some financial planning experience may serve as financial coaches despite little experience with disability based planning. The Council suspects that few financial planners are familiar with Miller Trusts, the Delaware CarePlan Trust, the Social Security PASS program, housing assistance programs, and the Social Security Administration's Ticket to Work Program. Perhaps this level of sophistication with disability-related financial planning is achieved through the training identified on p. 27. If that training does not address programs such as the Delaware CarePlan Trust, PASS program, and Ticket to Work, this section should be revised to require background at least equivalent to DVR's benefits planners.

Agency Response: The Financial Coaching service, modeled after the successful Stand by Me program in Delaware, is aimed at helping individuals identify and achieve financial goals, and to provide key, basic financial education. This service is intended to complement and refer individuals to, rather than duplicate the functions of, the Benefit Counseling service, which requires specific Social Security Administration's certification and knowledge of programs you indicate.

13. P. 29. DMMA recites that the non-medical transportation service "does not provide for mileage reimbursement for a person to drive himself to work." This is objectionable and unrealistic. The transportation broker should be allowed to pay the participant to drive himself/herself to an employment or training site. This is the approach adopted by DVR. See Delaware DVR Casework manual Section 9.3. As a practical matter, if someone lives in Sussex County, use of a personal vehicle may be the only realistic and affordable option. There is negligible taxi service and no accessible taxi service. Paratransit is limited and often results in lengthy delays in reaching destinations. Finally, it is possible that the assistive technology benefit could be used to retrofit a vehicle (e.g., with hand controls). It makes no sense to facilitate a participant's driving capacity and then categorically exclude mileage reimbursement as an option.

Agency Response: During the initial period of implementation, we will monitor this service carefully to ascertain the demand for this mode of transportation. As with other Medicaid benefits, we can adjust the parameters for allowable reimbursement within Federal guidelines as deemed appropriate.

14. P. 34. There are several references to the “Department of Vocational Rehabilitation” rather than the Division of Vocational Rehabilitation.

Agency Response: Thank you for pointing this out. We will make all necessary corrections.

15. P. 35. It is somewhat “odd” to solely authorize spouses (among all relatives) to provide personal care services. Many individuals between 14 and 25 will not be married. It would be preferable to authorize siblings and other relatives to provide personal care service. See attached September 29, 2008 CMS Press Release and DSAAPD PAS Services Specifications, Section 6.2.2.2.

Agency Response: We will add that a non-legally responsible relative (e.g. parent of an adult child, adult sibling, aunt, uncle, cousin) may render Personal Care services pursuant to the same circumstances when individuals are exercising employer authority. We will monitor the demand for the provision of services by relatives and/or other legally responsible relatives to determine whether further adjustment is needed.

16. P. 40 et seq. The number and disposition of fair hearing requests could be incorporated into the quality improvement standards. The emphasis on “safety,” “abuse/neglect,” and “incidents of emergency restrictive intervention strategies” (pp. 46 to 48) are not intuitively core benchmarks of successful employment outcomes and should be reconsidered.

Agency Response: We will review the performance measures that are to be reported to CMS in light of your comments. However, we expect that CMS will require Delaware to meet minimum thresholds around health and welfare. We also note that Delaware will institute a method of continuous quality improvement, so we will continually evaluate elements that will inform our oversight processes.

January 30, 2014 Comments

Agency Note: In addition to our responses above to your comments submitted on March 12, 2014, DMMA offers these additional responses to your organization’s previously submitted comments (paraphrased below) on January 30, 2014 that have not been addressed above.

1. DMMA should address the interplay between Medicaid beneficiaries who enroll in both the Ticket to Work program and the Pathways program.

Agency Response: As noted in number 4 above, 1915(i) regulations require that other Federal programs be leveraged before HCBS services, but we expect that Pathways services can be well coordinated with any such services available to the individual through other funding sources to ensure that the individual obtains support key to successful employment outcomes.

2. DMMA could consider adding legal advocacy to the menu of services in the Pathways program.

Agency Response: DMMA will monitor the implementation of Pathways to determine whether different services would be warranted to achieve the goals of the program.

3. There will obviously be overlap between participants in the Pathways program and the Diamond State Health Plan Plus (DSHP+) program. DMMA should adopt disincentives and deterrents to such practices that the managed care organizations (MCOs) may employ to deflect costs to Pathways.

Agency Response: DMMA is developing strategies to ensure that the MCOs are covering all services that they are contractually obligated to provide, with close coordination with Pathways Employment Navigators to ensure that Pathways services are only provided over and above that which the MCO must provide.

4. Pathways may present a Catch 22 to participants in light of the income limitation.

Agency Response: The 150% Federal Poverty Level (FPL) income limitation is a statutory requirement of 1915(i). That said, Delaware expects that individuals will be able to utilize financial coaching and benefits counseling to help devise individualized strategies to achieve financial independence.

5. 14 to 17 year olds with covered disabilities may be financially ineligible due to parental income. DMMA may wish to consider an exception to parental deeming for the Pathways program.

Agency Response: Individuals eligible for Medicaid under the TEFRA authority in the State Plan (called the Delaware Children's Community Alternative Disability Program or CCADP) already have their parents' income disregarded in the financial eligibility determination. The Pathways program will serve individuals, including these children, who are otherwise Medicaid eligible, and meet the statutory requirements. Per the regulations at 42 CFR 440.182(b), HCBS can be made available to individuals who are eligible under the SPA and have income, calculated using the otherwise applicable rules, including any less restrictive income disregards used by the State for that group under section 1902(r)(2) of the Act, that does not exceed 150% of the FPL.

6. The Council recommends consideration of draft legislation to authorize a tax credit for hiring Pathways participants.

Agency Response: Thank you for your recommendation. The Department is not currently contemplating any legislation related to the implementation of this program.

7. The Council has requested membership on the cross-division workgroup.

Agency Response: The workgroup referenced refers to the Department workgroup that is charged with operating and overseeing Pathways as a Medicaid program with functions delegated to divisions who will be instrumental in implementation and ongoing operations. As needed, the Department will reach out to other departments and stakeholders, and, as such, will certainly engage the Council as the program progresses.

8. The Council recommends inclusion of services specific to individuals with brain injury.

Daniese McMullin-Powell
State Council for Persons with Disabilities
April 22, 2014 – Page 8

Agency Response: The service package is designed to meet the support needs of persons with disabilities seeking employment. DMMA will monitor the implementation of Pathways to determine whether different services would be warranted to achieve the goals of the program.

DMMA is pleased to provide the opportunity to receive public comments and greatly appreciate the thoughtful input given.

Cc: Stephen M. Groff, Director, DMMA

FINAL REGULATIONS

IV. ORDER

It is hereby ordered that the proposed amendments to the Department's regulations are adopted; the text of the final regulation shall be in the form attached hereto as Exhibit A; and the effective date of this Order shall be ten (10) days from date this Order is published in the *Delaware Register of Regulations*.

***Please note that no changes were made to the regulation as originally proposed and published in the August 2013 issue of the *Register* at page 146 (17 DE Reg. 146). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

601 Delaware Pesticide Rules and Regulations

DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))
14 DE Admin. Code 910

REGULATORY IMPLEMENTING ORDER

910 Delaware Requirements for Issuance of the GED® Test Credential

I. Summary of the Evidence and Information Submitted

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 910 Delaware Requirements for Issuance of the GED® Test Credential. The regulation name has been changed to 14 DE Admin. Code 910 Delaware Requirements for Issuance of the Secondary Credential. This regulation is being reviewed in order to provide greater access to a secondary credential assessment in Delaware.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on **November 2, 2013**, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities. The title of the regulation was changed in the proposed published version to expand the regulation beyond the GED® credential. The Department has reviewed the various Delaware Code sections related to the various references to "GED," "General Equivalency Diploma" or other language that infers a different secondary credential other than a high school diploma, and plans to address as appropriate.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 DE Admin. Code 910 Delaware Requirements for Issuance of the GED® Test Credential to 14 DE Admin. Code 910 Delaware Requirements for Issuance of the Secondary Credential in order to provide greater access to a secondary credential assessment in Delaware.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 DE Admin. Code 910 Delaware Requirements for Issuance of the GED® Test Credential. Therefore, pursuant to 14 Del.C. §122, 14 DE Admin. Code Delaware Requirements for Issuance of the Secondary Credential attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 Del.C. §122(e), 14 DE Admin. Code 910 Delaware Requirements for Issuance of the Secondary Credential hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 **DE Admin. Code** Delaware Requirements for Issuance of the Secondary Credential amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** Delaware Requirements for Issuance of the Secondary Credential in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on **December 19, 2013**. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

IT IS SO ORDERED the 19th day of December 2013.

Department of Education
Mark T. Murphy, Secretary of Education

Approved this 19th day of December 2013

State Board of Education

Teri Quinn Gray, Ph.D., President

Jorge L. Melendez, Vice President

G. Patrick Heffernan

Barbara B. Rutt

Gregory B. Coverdale, Jr.

Terry M. Whittaker, Ed.D.

Randall L. Hughes II

910 Delaware Requirements for issuance of the ~~GED[®]-Test~~ Secondary Credential

The ~~A Delaware GED[®]-test-credential secondary credential~~ is given to persons who satisfactorily pass the ~~GED[®]-Test~~ a recognized secondary credential assessment approved by the Delaware Department of Education.

1.0 Eligibility to take the ~~GED[®]-test~~ a secondary credential assessment

1.1 For persons 18 years of age or older, an applicant shall:

1.1.2 Be a resident of Delaware or, if a resident of another state, be currently employed in Delaware and have been so employed for a minimum of six months prior to taking the test; and

1.1.2 Certify under his or her signature on the ~~GED[®] secondary credential assessment~~ application form that he or she is not enrolled in a public or non public school program; ~~and.~~

~~4.1.3 Provide a verified copy of the Official GED Practice Test[®] indicating the applicant has passed the Official GED Practice Test[™] with a score of 2450 or better and not less than 470 on each of the 5 sub-test areas.~~

1.2 For a person 16 or 17 years of age an applicant shall:

1.2.1 Seek a waiver of the 18 years of age requirement by completing a written application to the Delaware Department of Education that includes showing good cause for taking the test early and designating where the test will be taken; and

1.2.2 Be a resident of the State of Delaware; and

1.2.3 Verify that they are at least 16 years of age at the time of the application for the waiver of the age requirement using a birth certificate, ~~drivers~~ driver's license, a State of Delaware Identification Card or other comparable and reliable documentation of age; and

1.2.4 Provide verification of withdrawal from the applicant's public or non public school program; and

1.2.5 Provide a transcript from the applicant's public or non public school program; ~~and.~~

FINAL REGULATIONS

4.2.6 ~~Provide a verified copy of the Official GED Practice Test™ indicating the applicant has passed the Official GED Practice Test™ with a score of 2450 or better and not less than 470 on each of the 5 sub-test areas.~~

2.0 ~~Scores Required for the Delaware GED® test a Delaware secondary Credential~~

~~An individual shall have a standard score of not less than 410 on each of the five tests with an average standard score of not less than 450 for all five tests and a total standard score of not less than 2250 in order to be issued a GED® test credential attain the minimum passing standard as approved by the Delaware Department of Education.~~

3.0 Retesting Assessment Approval Process

Forty five days shall lapse prior to retesting and instruction is recommended before retesting.

3.1 The assessment provider must complete a DOE approved application. The application must include at minimum the following:

3.1.1 provider's qualification and experience;

3.1.2 assessment content and form;

3.1.3 validation and norming processes;

3.1.4 assessment delivery;

3.1.5 technology processes;

3.1.6 security provisions;

3.1.7 accommodations processes;

3.1.8 assessment scoring and reporting processes;

3.1.9 assessment data access requirements;

3.1.10 practice test and supplementary instructional materials;

3.1.11 staff training;

3.1.12 alignment with college and career readiness standards and Delaware accountability system; and

3.1.13 cost and timeframe for implementation.

4.0 Currently Recognized Assessments and Publication

4.1 The GED® Test has been previously approved and is a Department of Education recognized secondary credential assessment.

4.2 DOE will publish annually a list of approved assessments.

PROFESSIONAL STANDARDS BOARD

Statutory Authority: 14 Delaware Code, Section 122(d) (14 Del.C. §122(d))

14 DE Admin. Code 1503

REGULATORY IMPLEMENTING ORDER

1503 Educator Mentoring

I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The Professional Standards Board, acting in cooperation and collaboration with the Department of Education, seeks the consent of the State Board of Education to amend regulation 14 DE Admin. Code 1503 Educator Mentoring. The regulation applies to the comprehensive induction program, including mentoring and professional development required of educators, pursuant to 14 Del.C. §1210. It is necessary to amend this regulation in order

RAISE THE BAR

(CAREFULLY)

IN TEACHER EDUCATION

Calls for higher admission standards not
the answer in shaping better educators

FRANK B. MURRAY

Calls to "raise the bar" for admission to Delaware's teacher education programs, like those that will take effect this July from Delaware's Senate Bill 51, are based on a reasonable assumption that the bar and the quality it represents are related so that raising one would lead to increases in the other. When that relationship is weak (the typical case) or non-linear, it is likely, however, that raising the bar will have no effect on quality and may in fact lower it.

The field of education has not in fact established many causal links between standards and the educational outcomes allegedly influenced by them. We know very little about what must come before what in intellectual and academic development, for example. While there are studies showing links between some sensori-motor skills and beginning reading, reading can also be acquired without those skills in place.

Typically educational prerequisites and selection criteria are promoted on their making a kind of sense, like knowing the names of letters before one can learn to read; but knowing letter names is not in fact related to beginning reading as one can read without knowing the names of the letters. Diagramming sentences would also seem to be sensibly useful for developing writing, but it has no independent link to composition and writing either, if only because any number of competent writers have never diagrammed a sentence. Knowing algebra might seem like a prerequisite for knowing geometry, or chemistry for physics, but each can be understood without the study of the other. Historically, educators argued that the study of Latin was a pre-requisite foundation for learning other languages or the study of Aristotelian logic was indispensable for critical thinking only to have it turn out that each has no particular benefit for language or critical thinking performance.

In teacher education, there is a per-

Teachers: Higher quality evaluation of teaching a better target

Continued from Page A21

factly reasonable presumption that academic achievement, represented by high grades in subject matter, license and admission test scores should be associated with teaching skill. The Teacher Education Accreditation Council (TEAC) has found throughout the history of its accrediting over 200 programs nationally since 1997 that ratings of teacher candidates' performances in the classroom tends to have a zero or even a slightly negative correlation with several common academic measures — college grades, scores on state licensure tests, and scores on college admission tests.

The consequences of raising the GPA standard when the relationship between grades and teaching performance is curvilinear is that there are also increases in the percentages of admitted candidates who turn out to be weaker in their teaching performance than had the program not raised its GPA bar past the point of curvature. While raising the bar inevitably gives the program fewer candidates, it also gives it proportionately more candidates who prove to be weaker teachers and the program loses proportionately more who would have been as good as those who graduate. Thus, the popular call to raise the bar for the standards for those entitled to enter teacher education programs must be considered carefully and only after a systematic investigation into the precise relationship between the standard and the quality it is thought to represent.

Typically one finds that none of the grades or standardized admission test measures has a meaningful or significant relationship with the clinical assessments of actual teaching. While grades and standardized test scores are positively and significantly related to each other, they often are not related to the assessment of the candidate's teaching performance.

There are a number of possible explanations for this consistently weak relationship between measures of academic accomplishment and ratings of teaching

accomplishment. There could be two separate and distinct "factors" — the ability to get high grades and scores and the ability to relate effectively to young people and teach them successfully. If that were the case, it is no surprise that the academic and clinical measures are not related. The lack of relationship could be due to limited variation that stems from documented grade and rating inflation. This explanation is weakened by the fact that there are statistically significant correlations among the inflated clinical measures themselves and among the inflated academic measures themselves, but just not between them. Perhaps candidates with the relatively lower academic measures can't perform well in the classroom because they lack the subject matter knowledge and allied pedagogical knowledge to do the job well, and perhaps the extremely able scholars have difficulty coping with and motivating struggling learners. These downturns at either end of the range of performance might also account for the zero correlations. It might also be that teachers need only a modest level of academic attainments to succeed in the classroom. After that level or tipping point is reached, additional academic attainments make no appreciable difference.

It is also possible that the lack of relationship is simply due to poorly crafted assessments in which none of the program's academic measures assess any teaching performance and none of the clinical assessments deal with the academic content of the program. We do in fact occasionally find significant positive relationships in the few instances when the pedagogical and content courses also have clinical components and when the clinical courses have academic content in the subject matter and pedagogy.

The "raising-the-bar" for grades, license scores, admission scores are advocated by policy-makers, like those who sponsored and voted for Bill 51, because they think that doing so will eventually improve teaching. This "raising-the-bar" approach for the prospective teacher, however, has another serious

weakness. It overestimates the influence internal personal characteristics (like ability, disposition, knowledge, motivation, personality, etc.,) have in accounting for and explaining teaching behavior and it underestimates the influence of external situational factors and actions. This bias leads education reformers to focus on the characteristics and traits of the teacher and not directly on the features of teaching acts themselves, the very things the reformers seek to influence. The shift in focus from the teacher to teaching entails the study of, and the subsequent improving of, the routines, artifacts, lessons and methods of teaching a particular subject.

To have standards for teaching, and not just for the teacher, requires a determination of whether the pupils learned anything more or better as a result of the changes the reformers put in place. One prerequisite for these raising-the-bar reforms, would be to raise a different bar, not for the standards about teacher traits per se, but for the quality of the evidence we accept as evidence for the standard that teaching was effective. This is this bar that tells us that the evidence we have accepted (or rejected) allows us to accurately distinguish truly low quality from truly high quality teaching.

This is the bar or standard we have for the authenticity, accuracy, reliability and validity of the evidence used by teacher education programs to support their confident claim that their graduates can teach effectively. This bar for the standard of teaching sets the criterion by which we know that the teacher's students have learned what was expected of them in the lesson.

This is the signature criterion of a quality preparation program and for that reason should be the signature and only standard for the state's standards for teacher education programs.

Frank B. Murray is H. Rodney Sharp Professor, School of Education, University of Delaware.



Search



American Lung Association Statement on E-Cigarettes

The American Lung Association is very concerned about the potential safety and health consequences of electronic cigarettes, as well as claims that they can be used to help smokers quit. There is no government oversight of these products and absent Food and Drug Administration (FDA) oversight, there is no way for the public health, medical community or consumers to know what chemicals are contained in e-cigarettes or what the short and long term health implications might be. That's why the American Lung Association has called on the Obama Administration to halt its delay and for the FDA to propose meaningful regulation of these products to protect to the public health.

The FDA has not approved e-cigarettes as a safe or effective method to help smokers quit. When smokers are ready to quit, they should call 1-800-QUIT NOW or talk with their doctors about using one of the seven FDA-approved medications proven to be safe and effective in helping smokers quit.

A study has estimated that there are 250 different e-cigarette brands for sale in the U.S. today. There is likely to be wide variation in the chemicals that each contain, but in initial lab tests conducted by the FDA in 2009, detectable levels of toxic cancer-causing chemicals were found, including an ingredient used in anti-freeze, in two leading brands of e-cigarettes and 18 various cartridges. That is why it is so urgent for FDA to begin its regulatory oversight of e-cigarettes, which would include ingredient disclosure by e-cigarette manufacturers to FDA.


Also unknown is what the potential harm may be to people exposed to secondhand emissions from e-cigarettes. Two initial studies have found formaldehyde, benzene and tobacco-specific nitrosamines (a carcinogen) coming from those secondhand emissions. While there is a great deal more to learn about these products, it is clear that there is much to be concerned about, especially in the absence of FDA oversight.

American Lung Association

55 W. Wacker Drive, Suite 1150, Chicago, IL 60601

T: 1-800-LUNGUSA | F: 202-452-1805 | [Contact Us](#)



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Bill would ban e-cigarette use indoors

By Jon Offredo
The News Journal

Electronic cigarettes would be prohibited from being smoked in most indoor public places in Delaware under legislation filed Tuesday.

The legislation adds the trendy devices that emit mist of nicotine and chemical vapors to Delaware's 2002 Clean Indoor Air Act, which bans smoking in restaurants, bars, and other indoor public places.

The bill's sponsor, Rep. Debra Heffernan, D-Brandywine Hundred South, said she thought of the idea after she encountered someone using an e-cigarette while she and her family were out to dinner.

"I thought since Delaware was one of the first states to enact the indoor air ban, here we have smoking being normalized again in restaurants and indoor places and I needed to do a bill to ensure that would stop," she said.

Three other states, including New Jersey and North Dakota, ban smoking e-cigarettes indoors and nine others have prohibited their use in buildings like schools, universities or corrections facilities, or on public transportation, according to the National Conference of State Legislatures.

Bethany Beach approved a measure last week adding e-cigarettes to its smoking ban for public beaches, parks and the boardwalk.

Heffernan, a toxicologist, said she thought emissions are bad, but there hasn't been enough scientific studies to determine the actual harm.

"They're not regulated. They're not well-studied.



Yenisey Dieppa tries different flavors as she purchases an electronic cigarette at the Vapor Shank store in Miami in February. GETTY IMAGES

Why take a chance with problems for people inhaling second-hand emissions," she said.

The legislation is supported by the state Division of Public Health and has been endorsed by the Delaware Restaurant Association.

Many eating establishments are confused about the handling e-cigarette use in their establishments, wrote Carrie Leishman, president and CEO of the restaurant association in a letter to lawmakers.

"Potential conflicts can arise between the smoking consumer, nearby customers and staff without clear

"They're not regulated. They're not well-studied. Why take a chance with problems for people inhaling second hand emissions."

REP. DEBRA HEFFERNAN

rules set forth under the current law," she said in the letter.

The U.S. Food and Drug administration does not regulate the devices, but are in the process of reviewing potential limitations on the sale. The Centers for Disease Control and Prevention reported that the percentage of high school and middle school students using e-cigarettes doubled between 2011 and 2012. The National Tobacco Survey shows Delaware's high school students reporting using e-cigarettes jumped from 4.7 percent in 2011 to 10 percent in 2012.

E-cigarettes have exploded in popularity over recent years, especially among those under 18.

House lawmakers recently passed legislation prohibiting the sale of e-cigarettes to minors. The bill is now expected to be heard in the Senate.

Contact Jon Offredo at (302) 678-4271 or at joffredo@delawareonline.com or on Twitter @jonoffredo.

EXCERPT:

4-25-14

DEL HOUSE OF
REPRESENTATIVES
REPUBLICAN
CAUCUS
E-NEWS LETTER



One popular e-cigarette starter kit.

NEWS:

Bill to Ban Sale of e-cigarettes to Minors Will Move Ahead Despite Federal Action

A Delaware bill seeking to ban the sale of e-cigarettes to minors will move forward, despite action announced by the U.S. Food and Drug Administration (FDA) yesterday that seeks the same goal.

An e-cigarette is a battery-powered device that converts liquid nicotine into a vapor that can be inhaled. Because the devices do not create second-hand smoke and do not contain some of the harmful chemicals associated with smoking tobacco, they are sometimes marketed as a healthier alternative to smoking.

The FDA proposed rule would extend the agency's tobacco authority over products including e-cigarettes, cigars, pipe tobacco, nicotine gels, and waterpipes.



State Rep.
Deborah Hudson

Under federal law, this merchandise meets the statutory definition of "tobacco product."

Among other things, the rule change would prohibit the sale and distribution of e-cigarettes to minors.

State Rep. Deborah Hudson, R-Fairthorne, said the FDA proposal will do nothing to alter plans to pass a bipartisan bill she is sponsoring with the same objective. House Bill 241 -- also sponsored by State Sen. Patricia Blevins, D-

Elsmere -- cleared the House April 10th on a unanimous vote.

The bill has not yet been assigned to a Senate committee.

"I support the FDA's decision, but I still want our bill to become law," Rep. Hudson said. "It could take many months, or longer, for the FDA to finalize and promulgate their regulations. At least 27 other states have already banned the sale of e-cigarettes to minors and I do not see any reason for us to wait for the federal government."

Rep. Hudson added that enacting the bill will clarify that state officials have the authority and jurisdiction to enforce the prohibition.

The FDA action was not unexpected. The agency has expressed concerns about the possible health implications of e-cigarette use for many years. Agency officials say consumers currently have no way of knowing whether e-cigarettes are safe for their intended use; how much nicotine or other potentially harmful chemicals are being inhaled by users; and if there are any benefits associated with using the products.

Last September, 41 attorneys general -- including Delaware's Beau Biden -- urged the FDA to test and regulate e-cigarettes.

Trepidation regarding e-cigarettes has grown with their usage and amid increasing evidence they are being aggressively marketed to minors and young adults.

The Centers for Disease Control and Prevention reported that the percentage of U.S. high school and middle school students using e-cigarettes doubled between 2011 and 2012. The National Youth Tobacco Survey revealed that approximately 1.8 million young people tried e-cigarettes in 2012.

Some companies sell the vapor device with flavors of liquid nicotine in the cartridge including cotton candy, bubble gum and Fruit Loops.

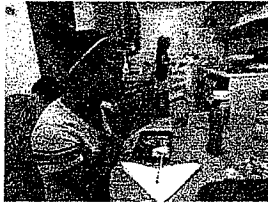
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Delaware State House of Representatives | Minority Caucus | Legislative Hall - H-23 | P.O. Box 1401 | Dover | DE | 19901

Food stamp use increasing in Delaware

William H. McMichael, Jon Offredo and James Fisher, The News Journal 12:53 a.m. EST March 9, 2014



(Photo: JENNIFER CORBETT/THE NEWS JOURNAL)

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(<https://twitter.com/intent/tweet?url=http://delonline.us/1iouzLS&text=Food%20stamp%2>)

TWEET

Each Delaware community experienced different problems.

In New Castle County, it was the loss of good-paying jobs. In Smyrna, thousands of newcomers seeking an affordable life stumbled into economic troubles. In Rehoboth Beach, younger workers and seniors struggled to make ends meet.

In each, increasingly, many Delawareans needed help with food.

The number of state residents receiving food stamps has nearly tripled over the past 10 years, far outpacing the relatively small increase of 14 percent in population.

For Joyce Robertson, 68, of Wilmington, it began in 2004, when she was forced to become legal guardian to her two granddaughters. "I've been on food stamps ever since," she said.

"When I go to the grocery store, if I get a family pack of chicken wings, it's \$12-and-something out of the \$99," she said. "So I split it and try to make two meals. Whatever they got on sale, I try to get it. And the rest, I go to a dollar store and get dollar hot dogs, and stuff like that."

Robertson says she can't afford to buy the juice and vegetables she knows her granddaughters need for a well-rounded diet. There's a food pantry at the nearby St. Patrick's Center, which provides emergency food for those in need. But demand is high and the pickings, she said, are sometimes slim.



Joyce Robertson of Wilmington shops for food at the Fresh Grocer in the Adams Four Shopping Center. "Whatever they got on sale, I try to get it," Robertson said. (Photo: JENNIFER CORBETT/THE NEWS JOURNAL)

"You got to get there, like, 6 o'clock in the morning, to sign up, because there's a great big line," she said. "And if you don't get there that early ... there may be nothing left. There might be one orange, or one apple."

The News Journal obtained data from the Department of Health and Social Services showing the number of food stamp recipients in each ZIP code around the state for 2003 and 2013. The data show where food stamp use has increased the most, but every county experienced an increase of at least 97 percent.

In New Castle County's 19713 ZIP code south of Newark, the population fell 2.7 percent, yet the number of food stamp recipients increased 299 percent. In Kent's 19977 in Smyrna, the population grew by an astounding 70 percent, while the food stamp population increased 250 percent. In the Rehoboth Beach area of Sussex, where population grew nearly 23 percent, the number of food stamp users skyrocketed 325 percent.

STORY: [One NCCo community looks to recover \(/story/news/local/2014/03/08/food-stamps-new-castle-county-as-big-employers-depart-one-community-looks-to-recover/6218579/\)](#)

STORY: [Rising need 'a big deal' in Smyrna \(/story/news/local/2014/03/08/food-stamps-in-delaware-rising-need-a-big-deal-in-smyma/6218761/\)](#)

STORY: [Coastal Sussex changes hit some hard \(/story/news/local/2014/03/08/food-stamps-in-delaware-coastal-sussex-changes-hit-some-hard/6218769/\)](#)

Overall, the state's food stamp rolls grew faster in the past decade, by 196 percent, than the national average of 124 percent. And it far surpassed increases in neighboring Pennsylvania and New Jersey, both of which dwarfed Delaware's rate of population growth.

Simply put, more than 152,000 Delawareans – 17 percent of the population – count on government help to eat. That's up from about 51,000 a decade ago. And the people who oversee food stamps in the state expect demand to remain high despite a healthier U.S. economy.

MAP: [Food stamp enrollment \(/story/news/local/2014/03/08/map-food-stamp-enrollment/6174565/\)](#)

"As the economy improves, our rate of growth has definitely tapered," said Elaine Archangelo, director of the Delaware Division of Social Services. "But I'm not expecting the caseload to decline in this slow-growth economy."

Economic woes

The food-stamp program is funded by the U.S. Department of Agriculture, and Congress appropriates money for it in the farm bill. Only the federal government pays for the direct aid, with states picking up about half of the administrative costs.

Currently, this year's food stamp benefits average out to pay \$1.40 per person per meal, according to the Center on Budget and Policy Priorities. It's not a lot, said Lawana Pipkin of Wilmington, a mother of seven children ages 18 to 2, with another on the way.



Wilmington resident Lawana Pipkin, a mother of seven children ages 18 to 2, had no milk for breakfast on a recent morning, and couldn't afford to buy more. (Photo: ROBERT CRAIG/THE NEWS JOURNAL)

"It can become, like, stressful, very depressing," said Pipkin, who one morning last week had no milk for her children's breakfast and was unable to afford more. She was about a week shy of receiving her March food stamps.

Delaware, along with most states, actively encourages those eligible to sign up for food stamps, a benefit provided based on income. And as many states have done, Delaware expanded eligibility in recent years, automatically making households eligible for food benefits if they qualify for welfare.

<http://www.delawareonline.com/story/news/local/2014/03/08/food-stamp-use-increasing-in-delaware/62...> 4/29/2014

"My opinion is, it's definitely primarily because of the economy," Archangelo said. "Food stamps are a little bit of a precursor of the economy tanking. We started to see the use of food stamps inch up before 2008. The low-income people that we serve tend to lose their jobs first."

The loss of quality jobs, particularly in New Castle County, has contributed to the rise, said Patricia Beebe, CEO of the Food Bank of Delaware, which provides donated food to 477 pantries and programs around the state.

"It's not just the loss of good-paying jobs. It's also what workers are getting paid," she said.



The huge increase in demand for food stamps is highly concerning, said Patricia Beebe, CEO of the Food Bank of Delaware. (3/9/14)

The top industry for employment growth in the state is fast food, said David Grimaldi, New Castle County's chief administrative officer.

"Fast food don't buy houses," said Tom Gordon, New Castle County executive.

' (</story/news/local/2014/03/08/map-food-stamp-enrollment/6174565/>)Filling the gap'

Throughout Delaware, working families aren't earning enough to pay for a basic need – food. Of the 26,700 Delaware families receiving food stamps, half of them had one family member with a job in the last 12 months, and nearly a third had two workers in the household, according to the most recent data available from the U.S. Department of Agriculture.

Most people using the benefit also are caring for children, with 59 percent of food stamp households reporting at least one child younger than 18. The median income of a Delaware household relying on food assistance last year was \$23,104.

STORY: [Shopping trips involve careful planning \(/story/news/local/2014/03/08/food-stamps-in-delaware-shopping-trips-involve-careful-planning/6218567/\)](/story/news/local/2014/03/08/food-stamps-in-delaware-shopping-trips-involve-careful-planning/6218567/)

About 77 percent of eligible Delawareans actually receive the benefits, according to Matt Talley, food stamp outreach coordinator for the Food Bank of Delaware. The 23 percent who do not receive the benefit – "the most vulnerable people," he called them – often have not even applied.

These, he said, include seniors, many of whom have no access to transportation; Latino and Hispanic households who face additional language barriers; and the working poor – those with an income, but one that isn't enough.

Beebe, who describes her organization as being counted upon to "swoop in and try to put a finger in the dike," said the Food Bank is not catching up to demand.

"There is no way that we can continue to fill the gap," Beebe said.

President Barack Obama's economic stimulus bill in 2009 had increased food stamp benefits around the country for several years. But an effort in Congress to extend that last year couldn't overcome opposition from Republicans who said the benefits were ineffective and the system vulnerable to fraud.

"As long as we continue to follow that pattern," said Dan Reyes, who coordinates the Food Bank's Coalition to End Hunger, "we're just going to keep chipping away at a program that's designed to stimulate the economy while need increases."

<http://www.delawareonline.com/story/news/local/2014/03/08/food-stamp-use-increasing-in-delaware/62...> 4/29/2014

COLUMN: [Food stamps keep millions from going hungry \(/story/opinion/columnists/2014/03/07/food-stamps-keep-millions-from-going-hungry-/6187543/\)](#)

COLUMN: [Playing politics with food stamps \(/story/opinion/columnists/rhonda-graham/2014/03/08/playing-politics-with-food-stamps/6205363/\)](#)

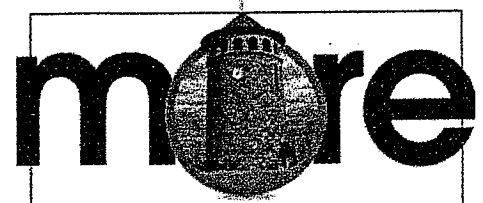
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April 29, 2014, 9:02 a.m.

Food stamp bill has nutrition provision

GOP-sponsored proposal not backed by Food Bank, others

By James Fisher
The News Journal

A GOP-sponsored bill would limit food stamp spending in Delaware only to foods that have "proven beneficial nutritional value," a change its sponsors say would bring the federally funded program in line with other state efforts to promote healthy eating habits.

But the bill doesn't have any support from the main state agencies and non-profits that guide Delawareans through the process of applying for and using food stamp funds.

The proposed rule "feels like low-income discrimination, to some degree," Department of Health and Social Services Secretary Rita Landgraf said this month, at a panel discussion on hunger arranged by the Delaware Food Bank. Landgraf's department provides eligible Delawareans with funds for food from the Supplemental Nutrition Assistance Program, or SNAP.

The legislation has three Republican primary sponsors: Rep. Daniel Short, R-Seaford; Rep. Timothy D. Dukes, R-Laurel; and Sen. Greg Lavelle, R-Sharples.

The bill would task Landgraf's department with crafting a list of healthy foods, and require that SNAP funds "shall only be used" to buy foods on that list.

The department's list, the bill says, should start with the foods approved by the Women, Infants and Children nutrition program and expand on it "with a focus on improving selection and affordability."

The bill's supporters say it would put SNAP in the service of making Delawareans healthier, in the same vein as initiatives to build walking-biking trails and a declaration that March is National Nutrition Month.

"Making healthy choices is not inherently more expensive than making unhealthy selections," Dukes said in a statement announcing the bill. "I just believe it is ludicrous to have a government nutrition program that subsidizes poor nutritional habits."

Officials at the Delaware Food Bank, which supplies millions of pounds of food each year to churches and civic groups and also encourages eligible peo-



The bill would task Health and Social Services Secretary Rita Landgraf's department with crafting a list of healthy foods, and require that SNAP funds "shall only be used" to buy foods on that list. JENNIFER CORBETT/THE NEWS JOURNAL



Rep. Daniel Short

Sen. Greg Lavelle

Rep. Timothy Dukes

"I just believe it is ludicrous to have a government nutrition program that subsidizes poor nutritional habits."

REP. TIMOTHY DUKES, R-LAUREL

ple to sign up for SNAP, aren't getting behind the bill.

"The biggest barrier between low-income Delawareans and a healthy diet is not a lack of will or self-control, but a lack of affordability and accessibility," Food Bank CEO Patricia Beebe and coordinator Dan Reyes said in an op-ed about the bill. "SNAP allotments are inadequate to afford a sufficiently healthy diet."

Fresh, healthy food is just more expensive than the alternatives, they said, and in some neighborhoods it's not even stocked in stores.

Reyes, in an interview, said the pro-

posal would add to the social stigma people feel when they buy food with a SNAP card. "You're in line with a bunch of other people at your store, and your items are getting picked apart," Reyes said. "People on SNAP filling up their carts with soda, that's just not a reality."

The bill hasn't budged in the legislature since it was introduced on April 9 and assigned to the House Health & Human Development Committee. It would also require a never-before-granted legal waiver from the U.S. Department of Agriculture, which funds SNAP, to be implemented.

Dukes said he was surprised the Food Bank opposed his bill. "We really ought to take the 'N' out of SNAP if it's not going to be nutritional," he said in an interview.

"I think it all comes down to education, honestly."

Delaware hasn't often been out ahead of other states in placing more restrictions on the use of public assistance than the federal government requires. At least 10 states have passed laws requiring drug testing for some welfare recipients, according to the National Conference of State Legislatures, but Delaware isn't one of them. A recently enacted Florida law requiring tests for every single welfare recipient was halted by a federal judge, who ruled it amounted to an unconstitutional search.

Contact James Fisher at 983-6772, on Twitter @JamesFisherTNI or jfisher@delawareonline.com

Try incentivizing food stamp changes

Our View 7:22 p.m. EDT April 22, 2014



(Photo: Getty Images)

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Although maybe unintended, an air of meanness typically hovers over calls to reform the Supplemental Nutritional Assistance Program, better known as food stamps. As a result, Republican lawmakers' pitch for the "Delaware Nutritional Improvement Act," to get food stamp recipients to choose more healthy food items, will more than likely translate negatively.

First of all, this is a federal government-run program that has a long history of mismanagement when it comes to client abuse of the benefits. This reality summons up memories of President Ronald Reagan's talk of "welfare queens" and lazy single mothers with multiple children in fatherless homes or neighborhood shysters who barter food stamps for cash.

Second, the program is extraordinarily costly, so much so just within the last year Congress has favored trading off funding cuts in the millions to the monthly allotment for food stamp recipient's groceries in favor of funding higher federal subsidies to aid rural farmers.

But thirdly and more important, food stamps are a necessary bridge for millions of Americans who are out of work or face extreme income deficits, despite having a job.

Remove the assistance entirely or keep whacking away at the benefit in the name of balancing the budget, then be prepared for the results in terms of higher health costs and likely crimes committed – not in the name of typical urban malfesance – but at the urging of grumbling empty stomachs. Those are the realities when a \$4.50-a-day food budget is the norm.

Isn't there a better way to address both problems of an overblown food stamp budget and the low-income assistance it provides?

Yes, backers of the Delaware Nutritional Improvement Act are correct about the benefit of more healthy food choices for welfare recipients. However, the message sent is not one of concern for food stamp recipients' diet necessarily, but meddling in the grocery carts of adults, many of whom are embarrassed to pull out those government slips to hand to the cashier. They are well aware of the scowls of those in line, who are able to pay with credit cards or cash.

Rather than punishing food stamp users for failure to stock their carts with more fruits and vegetables, than soda and potato chips, Delaware Republicans would be wise to remember the advice that Russian leader Nikita Khrushchev's handed out after he made name for his liberal government policies: "Call it what you will, incentives are what get people to work harder."

So why use the club of the law to penalize recipients' food choices? Limiting shopping choices to "nutritional foods" is wrong-minded and meddlesome at the "Big Brother" level. Rewards in the form of a little extra subsidy for better health choices will do a lot more to change food stamp recipients' poor eating habits.

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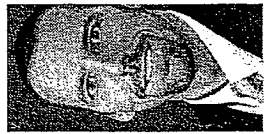
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One trick improves your driving in seconds

EYES ON THE ROAD JIM LARDEAR



Prepare to be shocked and amazed. Use this one trick to improve your driving in seconds: Turn off your cellphone and put it out of reach before starting to drive.

Seems simple. Still, during 2013, more than 19,600 drivers in Delaware were issued citations under Delaware's hand-held cellphone and text messaging ban. And that's on top of the 16,100 cited in 2012.

However, there are far worse risks than just a ticket.

The National Highway Traffic Safety Administration estimates that 3,328 people were killed and an estimated 421,000 were injured in distraction-related crashes in 2012.

These numbers are roughly 10 percent of all fatal and 17 percent of all injury crashes, and they likely are under-reported because of the difficulty in determining the role distraction plays in crashes.

Last year in Delaware, police reported 149 crashes related to distracted driving.

Distracted driving is a danger that motorists easily recognize on Delaware's roadways.

According to a AAA study, nearly 89 percent of respondents believed that a driver talking on a cellphone represents a somewhat or serious threat to their personal safety.

That proportion increases to 95 percent with regard to drivers text messaging or emailing behind the wheel, and drivers checking or updating social media.

Here's another weird fact: Motorists recognize that risk in other drivers — but not in themselves.

AAA found a distressing “do as I say, not as I do” attitude among drivers.

While 31 percent of drivers believe they are not distracted while talking on their cellphone and driving, 82 percent believe that others are distracted while doing the exact same thing.

Although obvious to see, the concern and danger is not just with drivers holding a cellphone.

Hands-free and voice-activated technology that allows drivers to text and talk while driving is still dangerous because, cognitively, the brain is distracted.

A research study the AAA Foundation for Traffic Safety released last summer debunked that common myth by proving that hands-free cellphone use is not risk-free.

Mental distractions exist even when drivers keep their hands on the wheel.

The AAA Foundation study measured brainwaves, eye movement and more, showing hands-free technology increased mental workload and cognitive distractions that can lead to a type of tunnel vision or inattentive blindness where motorists don't see potential hazards right in front of them.

There is no time like the present to begin limiting potentially dangerous mental distractions behind the wheel, as April has been designated Distracted Driving Awareness Month in Delaware.

Delaware is one of 43 states with text messaging bans for drivers of all ages, one of 12 states prohibiting drivers of all ages from using hand-held

cellphones while driving, and one of 37 states that ban cellphone use by novice drivers.

If a police officer observes a motorist using a hand-held device while driving, they can pull them over and give them a \$106 fine for the first offense.

Multiple offenses could result in fines up to \$300.

To prevent distracted driving, motorists are urged to:

- » Turn off electronic devices and put them out of reach before starting to drive.

- » Be good role models for young drivers, and talk with your teens about responsible driving.

- » Speak up when you are a passenger and your driver uses an electronic device while driving. Offer to make the call for the driver, so his or her full attention stays on the driving task.

- » Always wear your seatbelt. Seatbelts are the best defense against other unsafe drivers.

Jim Lardear is director of public and government affairs for AAA Mid-Atlantic.

Lawmakers seek to increase some car texting fines

By Jon Offredo
The News Journal

A group of state lawmakers want to boost the fine for texting and using cellphones while driving by \$25.

The legislation, introduced Thursday, raises the fine for first-time violators caught texting or using their hand-held device from \$50 to \$75.

"Talking while you are driving is not the issue, it is holding the phone while you're driving, or texting while you are driving. That is the issue," said Rep. Joe Miro, R-Pike Creek Valley.

"Cellphones have a place in our society. We're not trying to undermine that," he said on a phone interview Friday. Miro, the bill's sponsor, noted that he pulled over into a parking lot to speak since his hands-free device was not working.

State law bans texting while driving, and motorists are required to use hands-free technology when using cellphones in their vehicles. Officers who spot drivers using a hand-held device while driving will stop and cite them.

The bipartisan backed bill, which is

"Talking while you are driving is not the issue, it is holding the phone while you're driving, or texting while you are driving."

REP. JOE MIRO

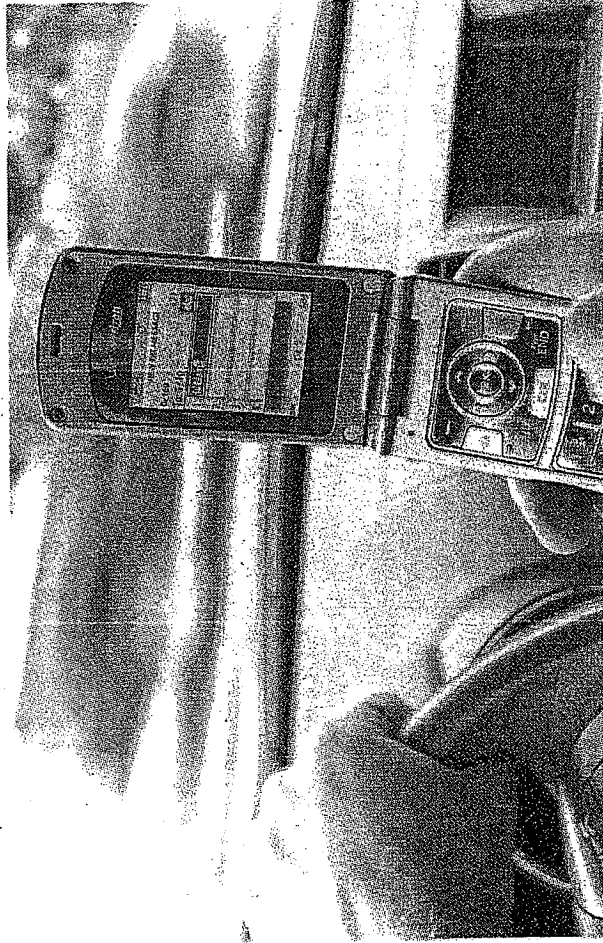
since 2011.

Last year, there were 149 cellphone-related crashes in Delaware, according to an official with the state Office of Highway Safety.

Nationally, the U.S. Department of Transportation launched its first campaign and law enforcement crackdown to combat distracted driving. The campaign, which started last week, runs through April 15.

Police across the state were out in full force Friday as part of that campaign to ticket motorists using their cellphones while driving.

Contact Jon Offredo at (302) 678-4271 or at joffredo@delawareonline.com or on Twitter @[jonoffredo](https://twitter.com/jonoffredo)



A bill introduced in the General Assembly on Thursday raises the fine for first-time violators caught texting or using their hand-held device from \$50 to \$75. AP

or using hand-held cellphones, while pending action in the House Public Safety Committee, would not impact penalties for repeat offenders, who face fines between \$100 and \$200. But Delaware's current fines are lower than 34 of the 40 other states with laws banning texting,

The state's texting and cell phone law first went into effect at the start of 2011. Police officers issued 19,610 citations for the offense last year, and about 35,000

Ten years later, smoking ban pays for state

Today Delaware celebrates the 10th anniversary of the implementation of the Clean Indoor Air Act. In 2002, when Gov. Ruth Ann

DELAWARE VOICE

RITA LANDGRAF AND DEBORAH BROWN were became the second state, after California, to pass a law against smoking in indoor workplaces and public places.

Since then, 27 states and the District of Columbia have enacted clean indoor air laws covering bars and restaurants.

SB 99, sponsored by Sen. David McEride and Sen. Patricia Blevins with Rep. Deborah Hudson and several co-sponsors, banned indoor smoking at health care facilities, public and non-public schools, restaurants, bars, libraries, museums, theaters, auditoriums, casinos, 75 percent of hotel rooms and other public places such as restrooms, hallways and lobbies. Ten years later,

the law remains untouched, respected by health-conscious Delawareans and visitors. Earlier this year, Gov. Jack Markell said all state agency campuses would be smoke-free.

The Clean Indoor Air Act was truly a landmark law, part of a model comprehensive approach to tobacco prevention and control — something Delaware Health and Social Services calls a population-based approach. Another population-based approach was the Delaware General Assembly approving cigarette excise tax increases in 2003, 2007 and 2009, bringing the total tax to \$1.60 per pack.

Tobacco use is the leading cause of preventable death in Delaware and the United States. An estimated 443,000 adults nationwide die from smoking-related illnesses each year, according to the 2010 U.S. Surgeon General's report. Every year, smoking costs the United States an estimated \$96 billion in direct medical ex-

penses and \$97 billion in lost productivity, reports the Centers for Disease Control and Prevention.

People who use tobacco or are exposed to it are at high risk for developing several types of cancers, cardiovascular disease and respiratory illnesses. Babies whose mothers were around secondhand smoke during pregnancy are more likely to have lower birth weights, and children who breathe secondhand smoke are more likely to have lung problems, ear infections and severe asthma.

In 2002, the Kick Butts Generation, Delaware's largest anti-tobacco youth movement played a significant part in supporting the Clean Indoor Air Act. Today, the movement is still dedicated to preventing all Delaware youth from using tobacco, especially smokeless tobacco product such as snuff, snus and chew.

By discouraging the social acceptance of tobacco, the Clean Indoor Air Act helped

reduce smoking levels among Delaware's youth fall to all-time lows.

According to the Department of Education's Youth Risk Behavior Survey, among Delaware high school students who smoked 20 or more days in the past month, the smoking rate decreased by 57 percent to 7.6 percent in 2011. Among students who smoked one or more days in the past month, the smoking rate decreased by 43 percent to 18.3 percent in 2011. Cigarette smoking among Delaware adults also has declined to 21.7 percent in 2011, according to the Division of Public Health's Behavioral Risk Factor Survey.

There is still work to be done. In our personal lives, we should create smoke-free zones, such as eliminating smoking at home, in the car or in front of minors. Our business sector can continue carding youths who are purchasing tobacco.

We should encourage tobacco users younger than 18 to

contact the American Lung Association for the Not on Tobacco Use program, and for Delaware tobacco users 18 years and older to call the Delaware Quitline at (866) 409-1858.

DHSS, the American Lung Association and our many partners, the American Cancer Society, the American Heart Association and the IMPACT Coalition, work with dedication and resolve to prevent the diseases and health problems caused by tobacco. Since 2001, DPH has directed more than \$2 million in mini-grants to 70 organizations to implement tobacco prevention activities and programs.

We continue to prevent and control tobacco sales and use while helping tobacco users connect to beneficial cessation services.

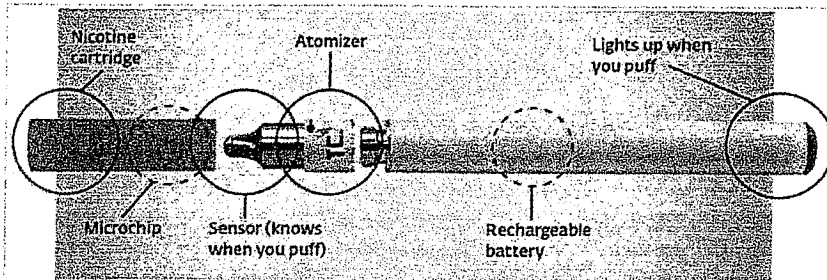
Rita Landgraf is secretary of Delaware's Department of Health and Social Services. Deborah Brown is president and CEO of the American Lung Association of the Mid-Atlantic.

ConsumerReports.org

Do e-cigarettes help smokers quit?

These battery-powered electronic cigarettes deliver vaporized nicotine without tobacco, tar, or other chemicals

Consumer Reports magazine: May 2012



More than 45 million Americans smoke cigarettes, the leading preventable cause of death in the U.S. Unfortunately, some stop-smoking methods, including nicotine gum and patches, are less effective than previously thought, according to a recent study in the journal *Tobacco Control*.

Enter battery-powered electronic cigarettes, which deliver vaporized nicotine without tobacco, tar, or other chemicals in regular cigarettes. (But nicotine itself has health risks of its own and is extremely addictive.) Their battery heats a cartridge of liquid nicotine solution, creating an aerosolized mist that the user puffs, or "vapes."

Though e-cigarettes emit no smoke, they deliver an experience like smoking, including the way they're held and the LED tip. Last year, 2.5 million Americans tried one. The cost: up to \$100 for a starter kit, which often includes the e-cig unit, two rechargeable lithium batteries, and five flavor cartridges. (Each cartridge equals roughly one pack of cigarettes.)

Fans and foes

Proponents of e-cigarettes say they're more healthful than the conventional type and that they might help smokers quit tobacco. Some research backs that up. In a study published last year in the *International Journal of Clinical Practice*, researchers interviewed more than 100 e-cigarette users and found that most were former smokers who had used the devices to help them quit. They'd tried to stop smoking previously an average of nine times, and two-thirds had tried a cessation drug approved by the Food and Drug Administration. A recent review of the available (albeit meager) scientific evidence on e-cigarettes in the *Journal of Public Health Policy* concluded that "electronic cigarettes show tremendous promise in the fight against tobacco-related morbidity and mortality."

Critics say that too little is known about the safety of e-cigarettes, which are unregulated. Some experts also worry that their availability online—where a user need only click a box saying he or she is 18—could entice children and teens to try them. So could some of the flavors, such as piña colada and vanilla.

In 2010, the FDA tried to block the sale of some e-cigarette brands, arguing that they're marketed as smoking-cessation devices, which the agency regulates. A court disagreed. Now, some states (including Mississippi, New Jersey, and Utah) and cities have proposed or enacted bans on the sale or use of e-cigarettes.

Bottom line. Talk to your doctor before trying to quit smoking with e-cigarettes. Because they're not regulated, safety is a question and you use them at your own risk.

What users have reported to the FDA

News reports that an electronic cigarette exploded in a Florida man's mouth in February spurred us to file a Freedom of Information Act request with the FDA to see what, if any, adverse-event reports it has received on e-cigarettes since they came on the U.S. market in 2006. The agency responded in early March with 39 reports logged through its [adverse-event monitoring system](#). Of them, 31 dealt with negative health effects; eight were complaints about customer service or positive comments about e-cigarettes.

Among the most common complaints were headache, dizziness, nausea, sleepiness, and coughing or other respiratory symptoms. There was only one report of an e-cigarette exploding and causing burns.

Adverse-event reports don't establish causality, nor can they show whether a person was using a product as directed. On the other hand, the FDA estimates that it receives only 1 to 10 percent of all adverse events experienced by the public on products it regulates. Other people using e-cigarettes might have had symptoms but not reported them.

Either way, the reports underscore the need for the FDA to find a way to regulate e-cigarettes, which occupy a sort of regulatory no-man's land between smoking-cessation devices and tobacco products. The agency told us that it plans to develop regulations for e-cigarettes, but no proposed rules have yet been issued.

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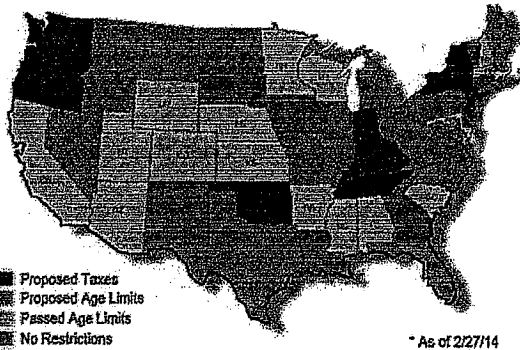
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UPDATE: Electronic Cigarette Legislation by State

by Cig Buyer.com | February 27th, 2014

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For the past year the media and lawmakers have been having a field day with their attack on electronic cigarettes. From e-cigarette safety, to the impact on kids... there's a lot of concern about e-cigs whether it's warranted or not. It seems like every other week there's another city voting on public bans and new statewide proposals are constantly being discussed. To be honest, we've been having a hard time keeping up with all the legal and regulatory action! To get everyone up to speed, here's an update on e-cigarette legislation by state.



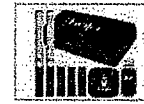
* As of 2/27/14

Proposed E-Cigarette Taxes

It's a frustrating proposition for vapers, but many lawmakers are trying to lump e-cigarettes in with traditional tobacco products, or they're creating a completely separate subclass of products that can be taxed independently. Here is a list of states trying to impose new e-cigarette taxes:

- **Indiana:** House Bill 1174 would include electronic cigarettes under the definition of tobacco products and apply the state's 24% tax on tobacco to e-cigs.
- **Kentucky:** Governor Steve Beshear is proposing to tax e-cigarettes at a 20% OTP rate, and several bills are proposing similar rates. House Bill 220 redefines alternative tobacco products to be other tobacco products and imposes a 15% tax on these products. House Bill 319 defines electronic cigarettes as a tobacco product and imposes a 15% OTP tax.
- **New Jersey:** Governor Chris Christie proposed a new budget this week that would tax e-cigs at the same rate as traditional cigarettes. Currently, the cigarette tax in NJ is \$2.70 per pack.
- **New York:** Senate Bill 6255 would exempt e-cigarettes from state taxation. However, Assembly Bill No. 8594 would impose the state's 75% OTP tax rate on e-cigarettes.
- **Oklahoma:** House Bill 2989 imposes a 30% tax rate on e-cigarettes. Senate Bill 1892 would tax tobacco-derived products at a rate of \$.10 per tobacco-derived product unit and the tax shall not exceed one-tenth the rate of the cigarette tax.
- **Oregon:** House Bill 4129 would tax electronic cigarettes at 81.25%.
- **Rhode Island:** Governor Lincoln Chaffee introduced a budget that includes e-cigs within the state's current definition of "tobacco products" which means they would be subject to Rhode Island's 80% tax on tobacco. House Bill 7133 incorporates the Governor's proposed tax on e-cigarettes.

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The New York Mail



- **Tennessee:** Big win if it passes! House Bill 1461 defines vapor products and clarifies that policies applicable to tobacco are not applicable to these devices.
- **Washington:** Senate Bill 6569 would tax e-cigs like tobacco products at a 95% OTP rate.

Bills Banning E-Cig Sales to Minors

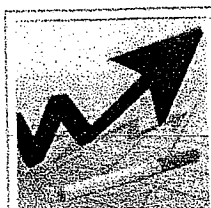
Now here are some regulations we can stand behind! It's safe to say that everyone in the vaping community supports banning electronic cigarette sales to minors. Here is a list of states with proposed (and approved) regulations regarding the sale of e-cigarettes to minors:

- **APPROVED:** These states have already approved banning sales to minors – AL, AK, AR, AZ, CA, CO, IL, IN, KS, MA, MD, MN, MS, NE, NH, NJ, NY, SC, TN, UT, WA, WI, WY
- **Connecticut:** Senate Bill 24 would prohibit the sale of e-cigarettes to minors.
- **Delaware:** House Bill 241 defines tobacco substitute to include electronic cigarettes and prohibits the sale of electronic cigarettes to minors.
- **Georgia:** House Bill 251 defines alternative nicotine products and prohibits the sale of nicotine products, including e-cigarettes, to minors. Senate Bill 347 prohibits the sale of e-cigs to minors.
- **Iowa:** House Bill 2109 and Senate Bill 566 define alternative nicotine and vapor products and prohibit the sale of these products to anyone under 18 years old.
- **Kentucky:** House Bill 299 defines vapor products and prohibits their sale to anyone under 18.
- **Louisiana:** Senate Bill 12 adds "alternative nicotine product" to present law which would prohibit the sale of e-cigarettes to individuals under the age of 18.
- **New Mexico:** House Bill 15 would prohibit the sale of electronic cigarettes to minors.
- **New York:** Prohibits the sale of e-cigarettes to anyone under 18.
- **Oklahoma:** Senate Bill 1835, House Bill 2904 and House Bill 3451 would prohibit the sale of electronic cigarettes and other vapor products to minors.
- **South Dakota:** Senate Bill 181 would prohibit the sale of tobacco, alternative nicotine products and vapor devices to anyone under the age of 18.
- **Vermont:** Very scary! House Bill 632 would ban the sale or possession of electronic cigarettes by anyone of any age – including adults!
- **Virginia:** Senate Bill 96 includes vapor and alternative nicotine products in the definition of tobacco, prohibits the possession by and outlaws the sale to minors.
- **West Virginia:** House Bill 4237 would prohibit the sale of e-cigs to minors.

As vapers, we should stand behind any proposals that limit sales to minors, but most of us can agree that treating them like tobacco products is just plain ridiculous! They contain NO TOBACCO and none of the harmful chemicals found in cigarettes. Almost all of the studies, thus far, have suggested that there's very little risk to electronic cigarette users – and no risk to bystanders. To stay up-to-date with the latest legal and regulatory news, or to **TAKE ACTION**, visit CASAA.org.

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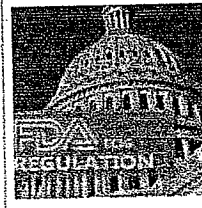
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ADOPTED NOVEMBER 23, 2009

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**Assemblywomen Greenstein, Evans, Senators Gordon, Vitale, Codey,
Sarlo and Whelan**

SYNOPSIS

Prohibits use of electronic smoking devices in indoor public places and sale to minors.

CURRENT VERSION OF TEXT

Substitute as adopted by the Assembly Health and Senior Services Committee.

1 AN ACT concerning electronic smoking devices and amending
2 P.L.2005, c.383, P.L.2000, c.87, and P.L.1999, c.90.

3
4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6
7 1. Section 2 of P.L.2005, c.383 (C.26:3D-56) is amended to
8 read as follows:

9 2. The Legislature finds and declares that: **[tobacco]**

10 a. Tobacco is the leading cause of preventable disease and
11 death in the State and the nation**[, and tobacco]**;

12 b. Tobacco smoke constitutes a substantial health hazard to the
13 nonsmoking majority of the public; **[the]**

14 c. Electronic smoking devices have not been approved as to
15 safety and efficacy by the federal Food and Drug Administration,
16 and their use may pose a health risk to persons exposed to their
17 smoke or vapor because of a known irritant contained therein and
18 other substances that may, upon evaluation by that agency, be
19 identified as potentially toxic to those inhaling the smoke or vapor;

20 d. The separation of smoking and nonsmoking areas in indoor
21 public places and workplaces does not eliminate the hazard to
22 nonsmokers if these areas share a common ventilation system; and
23 **[, therefore]**

24 e. Therefore, subject to certain specified exceptions, it is
25 clearly in the public interest to prohibit the smoking of tobacco
26 products and the use of electronic smoking devices in all enclosed
27 indoor places of public access and workplaces.

28 (cf: P.L.2005, c.383, s.2)

29
30 2. Section 3 of P.L.2005, c.383 (C.26:3D-57) is amended to
31 read as follows:

32 3. As used in this act:

33 "Bar" means a business establishment or any portion of a
34 nonprofit entity, which is devoted to the selling and serving of
35 alcoholic beverages for consumption by the public, guests, patrons
36 or members on the premises and in which the serving of food, if
37 served at all, is only incidental to the sale or consumption of such
38 beverages.

39 "Cigar bar" means any bar, or area within a bar, designated
40 specifically for the smoking of tobacco products, purchased on the
41 premises or elsewhere; except that a cigar bar that is in an area
42 within a bar shall be an area enclosed by solid walls or windows, a
43 ceiling and a solid door and equipped with a ventilation system
44 which is separately exhausted from the nonsmoking areas of the bar

1 so that air from the smoking area is not recirculated to the
2 nonsmoking areas and smoke is not backstreamed into the
3 nonsmoking areas.

4 "Cigar lounge" means any establishment, or area within an
5 establishment, designated specifically for the smoking of tobacco
6 products, purchased on the premises or elsewhere; except that a
7 cigar lounge that is in an area within an establishment shall be an
8 area enclosed by solid walls or windows, a ceiling and a solid door
9 and equipped with a ventilation system which is separately
10 exhausted from the nonsmoking areas of the establishment so that
11 air from the smoking area is not recirculated to the nonsmoking
12 areas and smoke is not backstreamed into the nonsmoking areas.

13 "Electronic smoking device" means an electronic device that can
14 be used to deliver nicotine or other substances to the person
15 inhaling from the device, including, but not limited to, an electronic
16 cigarette, cigar, cigarillo, or pipe.

17 "Indoor public place" means a structurally enclosed place of
18 business, commerce or other service-related activity, whether
19 publicly or privately owned or operated on a for-profit or nonprofit
20 basis, which is generally accessible to the public, including, but not
21 limited to: a commercial or other office building; office or building
22 owned, leased or rented by the State or by a county or municipal
23 government; public and nonpublic elementary or secondary school
24 building; board of education building; theater or concert hall; public
25 library; museum or art gallery; bar; restaurant or other
26 establishment where the principal business is the sale of food for
27 consumption on the premises, including the bar area of the
28 establishment; garage or parking facility; any public conveyance
29 operated on land or water, or in the air, and passenger waiting
30 rooms and platform areas in any stations or terminals thereof; health
31 care facility licensed pursuant to P.L.1971, c.136 (C.26:2H-1 et
32 seq.); patient waiting room of the office of a health care provider
33 licensed pursuant to Title 45 of the Revised Statutes; child care
34 center licensed pursuant to P.L.1983, c.492 (C.30:5B-1 et seq.);
35 race track facility; facility used for the holding of sporting events;
36 ambulatory recreational facility; shopping mall or retail store; hotel,
37 motel or other lodging establishment; apartment building lobby or
38 other public area in an otherwise private building; or a passenger
39 elevator in a building other than a single-family dwelling.

40 "Person having control of an indoor public place or workplace"
41 means the owner or operator of a commercial or other office
42 building or other indoor public place from whom a workplace or
43 space within the building or indoor public place is leased.

44 "Smoking" means the burning of, inhaling from, exhaling the
45 smoke from, or the possession of a lighted cigar, cigarette, pipe or

1 matter that can be smoked, or the inhaling or exhaling of smoke or
2 vapor from an electronic smoking device.

3 "Tobacco retail establishment" means an establishment in which
4 at least 51% of retail business is the sale of tobacco products and
5 accessories, and in which the sale of other products is merely
6 incidental.

7 "Workplace" means a structurally enclosed location or portion
8 thereof at which a person performs any type of service or labor.

9 (cf: P.L.2005, c.383, s.3)

10

11 3. Section 1 of P.L.2000, c.87 (C.2A:170-51.4) is amended to
12 read as follows:

13 1. a. No person, either directly or indirectly by an agent or
14 employee, or by a vending machine owned by the person or located
15 in the person's establishment, shall sell, offer for sale, distribute for
16 commercial purpose at no cost or minimal cost or with coupons or
17 rebate offers, give or furnish, to a person under 19 years of age~~[,]~~:

18 (1) any cigarettes made of tobacco or of any other matter or
19 substance which can be smoked, or any cigarette paper or tobacco
20 in any form, including smokeless tobacco; or

21 (2) any electronic smoking device that can be used to deliver
22 nicotine or other substances to the person inhaling from the device,
23 including, but not limited to, an electronic cigarette, cigar, cigarillo,
24 or pipe, or any cartridge or other component of the device or related
25 product.

26 b. The establishment of all of the following shall constitute a
27 defense to any prosecution brought pursuant to subsection a. of this
28 section:

29 (1) that the purchaser of the tobacco product or electronic
30 smoking device or the recipient of the promotional sample falsely
31 represented, by producing either a driver's license or non-driver
32 identification card issued by the New Jersey Motor Vehicle
33 Commission, a similar card issued pursuant to the laws of another
34 state or the federal government of Canada, or a photographic
35 identification card issued by a county clerk, that the purchaser or
36 recipient was of legal age to make the purchase or receive the
37 sample;

38 (2) that the appearance of the purchaser of the tobacco product
39 or electronic smoking device or the recipient of the promotional
40 sample was such that an ordinary prudent person would believe the
41 purchaser or recipient to be of legal age to make the purchase or
42 receive the sample; and

43 (3) that the sale or distribution of the tobacco product or
44 electronic smoking device was made in good faith, relying upon the
45 production of the identification set forth in paragraph (1) of this

1 reasonable belief that the purchaser or recipient was of legal age to
2 make the purchase or receive the sample.

3 c. A person who violates the provisions of subsection a. of this
4 section, including an employee of a retail dealer licensee under
5 P.L.1948, c.65 (C.54:40A-1 et seq.) who actually sells or otherwise
6 provides a tobacco product to a person under 19 years of age, shall
7 be liable to a civil penalty of not less than \$250 for the first
8 violation, not less than \$500 for the second violation, and \$1,000
9 for the third and each subsequent violation. The civil penalty shall
10 be collected pursuant to the "Penalty Enforcement Law of 1999,"
11 P.L.1999, c.274 (C.2A:58-10 et seq.), in a summary proceeding
12 before the municipal court having jurisdiction. An official
13 authorized by statute or ordinance to enforce the State or local
14 health codes or a law enforcement officer having enforcement
15 authority in that municipality may issue a summons for a violation
16 of the provisions of subsection a. of this section, and may serve and
17 execute all process with respect to the enforcement of this section
18 consistent with the Rules of Court. A penalty recovered under the
19 provisions of this subsection shall be recovered by and in the name
20 of the State by the local health agency. The penalty shall be paid
21 into the treasury of the municipality in which the violation occurred
22 for the general uses of the municipality.

23 d. In addition to the provisions of subsection c. of this section,
24 upon the recommendation of the municipality, following a hearing
25 by the municipality, the Division of Taxation in the Department of
26 the Treasury may suspend or, after a second or subsequent violation
27 of the provisions of subsection a. of this section, revoke the license
28 issued under section 202 of P.L.1948, c. 65 (C.54:40A-4) of a retail
29 dealer. The licensee shall be subject to administrative charges,
30 based on a schedule issued by the Director of the Division of
31 Taxation, which may provide for a monetary penalty in lieu of a
32 suspension.

33 e. A penalty imposed pursuant to this section shall be in
34 addition to any penalty that may be imposed pursuant to section 3
35 of P.L.1999, c. 90 (C.2C:33-13.1).
36 (cf: P.L.2005, c.384, s.1)

37
38 4. Section 3 of P.L.1999, c.90 (C.2C:33-13.1) is amended to
39 read as follows:

40 3. a. A person who sells or gives to a person under 19 years of
41 age any cigarettes made of tobacco or of any other matter or
42 substance which can be smoked, or any cigarette paper or tobacco
43 in any form, including smokeless tobacco, or any electronic
44 smoking device that can be used to deliver nicotine or other
45 substances to the person inhaling from the device, including, but not

1 including an employee of a retail dealer licensee under P.L.1948,
2 c.65 (C.54:40A-1 et seq.) who actually sells or otherwise provides a
3 tobacco product or electronic smoking device to a person under 19
4 years of age, shall be punished by a fine as provided for a petty
5 disorderly persons offense. A person who has been previously
6 punished under this section and who commits another offense under
7 it may be punishable by a fine of twice that provided for a petty
8 disorderly persons offense.

9 b. The establishment of all of the following shall constitute a
10 defense to any prosecution brought pursuant to subsection a. of this
11 section:

12 (1) that the purchaser or recipient of the tobacco product or
13 electronic smoking device falsely represented, by producing either a
14 driver's license or non-driver identification card issued by the New
15 Jersey Motor Vehicle Commission, a similar card issued pursuant to
16 the laws of another state or the federal government of Canada, or a
17 photographic identification card issued by a county clerk, that the
18 purchaser or recipient was of legal age to purchase or receive the
19 tobacco product or electronic smoking device;

20 (2) that the appearance of the purchaser or recipient of the
21 tobacco product or electronic smoking device was such that an
22 ordinary prudent person would believe the purchaser or recipient to
23 be of legal age to purchase or receive the tobacco product or
24 electronic smoking device; and

25 (3) that the sale or distribution of the tobacco product or
26 electronic smoking device was made in good faith, relying upon the
27 production of the identification set forth in paragraph (1) of this
28 subsection, the appearance of the purchaser or recipient, and in the
29 reasonable belief that the purchaser or recipient was of legal age to
30 purchase or receive the tobacco product or electronic smoking
31 device.

32 c. A penalty imposed pursuant to this section shall be in
33 addition to any penalty that may be imposed pursuant to section 1
34 of P.L.2000, c.87 (C.2A:170-51.4).

35 (cf. P.L.2005, c.384, s.5)

36
37 5. Sections 1 and 2 of this act shall take effect on the 180th day
38 after enactment, but the Commissioner of Health and Senior
39 Services may take such anticipatory administrative action in
40 advance thereof as shall be necessary for the implementation of
41 those sections. Sections 3 and 4 of this act shall take effect on the
42 60th day after enactment.

[lanereport.com](http://www.lanereport.com)<http://www.lanereport.com/31010/2014/04/bill-banning-sale-of-e-cigarettes-to-kids-signed-into-law/>

Bill banning sale of e-cigarettes to kids signed into law

April 15, 2014

Prohibits sales of all types of e-cigarettes to minors, regardless of whether devices use nicotine

Prohibits sales of all types of e-cigarettes to minors, regardless of whether devices use nicotine

FRANKFORT, Ky. (April 15, 2014) – Calling the measure a big win for efforts to reduce tobacco use in the state and particularly among young people, Gov. Steve Beshear on Monday signed Senate Bill 109 into law, banning the sale of all types of e-cigarettes to minors.

The governor specifically urged legislators to pass this bill during his State of the Commonwealth in January, and identified this effort as a key part of his legislative agenda.

"We have the highest rates of youth smoking in the country," Beshear said. "And we know that if we can keep our children from trying cigarettes – including e-cigarettes – before the age of 18, they are significantly less likely to become smokers later in life. I commend the General Assembly for passing this important bill."

SB109 prohibits the sales of all types of e-cigarettes to minors, regardless of whether the devices use nicotine. Food and Drug Administration testing has found that a number of e-cigarettes sold as "nicotine-free" actually contained the drug, and the largely unregulated nature of e-cigarette products at present creates enforcement issues around youth access for state agencies, retailers, school districts and parents.

The effects of SB109 are especially important now. Between 2011 and 2012, the percentage of all youth in grades 6 to 12 who had tried e-cigarettes doubled, with e-cigarettes being increasingly marketed to minors. The vast majority of youth who have used e-cigarettes have also smoked conventional cigarettes.

"Prohibiting the sale of e-cigarettes to minors is an important step in the right direction for an issue that deserves quick attention," said Rep. Joni Jenkins, D-Shively. "Nicotine products of any kind should remain off-limits to Kentucky's most precious resource – our children. I am thankful for the bipartisan conversation about e-cigarette regulations, and look forward to continue monitoring this issue."

The goal to reduce Kentucky's smoking rate by 10 percent over the next five years is one goal of Beshear's recently created initiative, kyhealthnow, which aims to reduce Kentucky's dismal health rankings and habits through goals and strategies related to seven areas that include obesity, cancer and health insurance.

The initiative's oversight team consists of cabinet secretaries and key state agency officials, and is chaired by Lt. Gov. Jerry Abramson.

"Kentucky has a special incentive to enforce strong restrictions on minor access to tobacco products, given our high rates of smoking both among teens and adults," said Lt. Gov. Abramson. "We hope this bill will prevent our young Kentuckians from trying e-cigarettes and from moving on to traditional cigarettes as a result. One of the kyhealthnow initiative's key priorities is to change the state's culture so that smoking of any kind among young people is not tolerated."



AN ACT relating to the sale of tobacco related products to minors and declaring an emergency.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔ Section 1. KRS 438.305 is amended to read as follows:

As used in KRS 438.305 to 438.340, unless the context requires otherwise:

(1) (a) "Alternative nicotine product" means a noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means.

(b) "Alternative nicotine product" does not include any product regulated as a drug or device by the United States Food and Drug Administration under Chapter V of the Food, Drug, and Cosmetic Act;

(2) "Manufacturer" means any person who manufactures or produces tobacco products within or without this Commonwealth;

~~(3)~~(2) "Nonresident wholesaler" means any person who purchases cigarettes or other tobacco products directly from the manufacturer and maintains a permanent location or locations outside this state at which Kentucky cigarette tax evidence is attached or from which Kentucky cigarette tax is reported and paid;

~~(4)~~(3) "Proof of age" means a driver's license or other documentary or written evidence that the individual is eighteen (18) years of age or older;

~~(5)~~(4) "Resident wholesaler" means any person who purchases at least seventy-five percent (75%) of all cigarettes or other tobacco products purchased by that person directly from the cigarette manufacturer on which the cigarette tax provided for in KRS 138.130 to 138.205 is unpaid, and who maintains an established place of business in this state at which the person attaches cigarette tax evidence or receives untaxed cigarettes;

~~(6)~~(5) "Sample" means a tobacco product, alternative nicotine product, or vapor product distributed to members of the general public at no cost;

~~(7)(6)~~ "Subjobber" means any person who purchases tobacco products, on which the Kentucky cigarette tax has been paid, from a wholesaler licensed pursuant to KRS 138.195, and makes them available to a retail establishment for resale;~~[-]~~

(8) (a) "Tobacco product" means any cigarette, cigar, snuff, smokeless tobacco product, smoking tobacco, chewing tobacco, and any kind or form of tobacco prepared in a manner suitable for chewing or smoking, or both, or any kind or form of tobacco that is suitable to be placed in a person's mouth.

(b) "Tobacco product" does not include any alternative nicotine product, vapor product, or product regulated as a drug or device by the United States Food and Drug Administration under Chapter V of the Food, Drug, and Cosmetic Act; and

(9) (a) "Vapor product" means any noncombustible product that employs a heating element, battery, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size and including the component parts and accessories thereto, that can be used to deliver vaporized nicotine or other substances to users inhaling from the device. "Vapor product" includes but is not limited to any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and every variation thereof, regardless of whether marketed as such, and any vapor cartridge or other container of a liquid solution or other material that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar product or device.

(b) "Vapor product" does not include any product regulated as a drug or device by the United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act.

➔Section 2. KRS 438.310 is amended to read as follows:

- (1) No person shall sell or cause to be sold any tobacco product, alternative nicotine product, or vapor product at retail to any person under the age of eighteen (18), or solicit any person under the age of eighteen (18) to purchase any tobacco product, alternative nicotine product, or vapor product at retail.
- (2) Any person who sells tobacco products, alternative nicotine products, or vapor products at retail shall cause to be posted in a conspicuous place in his establishment a notice stating that it is illegal to sell tobacco products, alternative nicotine products, or vapor products to persons under age eighteen (18).
- (3) Any person selling tobacco products, alternative nicotine products, or vapor products shall require proof of age from a prospective buyer or recipient if the person has reason to believe that the prospective buyer or recipient is under the age of eighteen (18).
- (4) A person who violates subsection (1) or (2) of this section shall be subject to a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for a first violation and a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) for any subsequent violation. The fine shall be administered by the Department of Alcoholic Beverage Control using a civil enforcement procedure.

➔Section 3. KRS 438.311 is amended to read as follows:

- (1) Except for the provisions of KRS 438.330, it shall be unlawful for a person who has not attained the age of eighteen (18) years to purchase or accept receipt of or to attempt to purchase or accept receipt of a tobacco product, alternative nicotine product, or vapor product, or to present or offer to any person any purported proof of age which is false, fraudulent, or not actually his or her own, for the purpose of purchasing or receiving any tobacco product, alternative nicotine product, or vapor product. It shall not be unlawful for such a person to accept receipt of a tobacco

product, alternative nicotine product, or vapor product from a family member, except if the child has been committed to the custody of the state under KRS Chapters 600 to 645, or from an employer when required in the performance of the person's duties.

- (2) Violation of this section shall be punishable by a fine of fifty dollars (\$50) and twenty (20) hours of community service work for a first offense within a one (1) year period, and a fine of two hundred dollars (\$200) and forty (40) hours of community service work for a second or subsequent offense within a one (1) year period.
- (3) This offense shall be deemed a status offense and shall be under the jurisdiction of the juvenile session of the District Court.
- (4) All peace officers with general law enforcement authority and employees of the Department of Alcoholic Beverage Control may issue a uniform citation, but not make an arrest or take a child into custody, for a violation of this section. If a child fails to appear in court in response to a uniform citation issued pursuant to the section, the court may compel the attendance of the defendant in the manner specified by law.

➔Section 4. KRS 438.313 is amended to read as follows:

- (1) No wholesaler, retailer, or manufacturer of cigarettes, ~~or~~ tobacco products, alternative nicotine products, or vapor products may distribute cigarettes, ~~or~~ tobacco products, alternative nicotine products, or vapor products, including samples thereof, free of charge or otherwise, to any person under the age of eighteen (18).
- (2) Any person who distributes cigarettes, ~~or~~ tobacco products, alternative nicotine products, or vapor products, including samples thereof, free of charge or otherwise shall require proof of age from a prospective buyer or recipient if the person has reason to believe that the prospective purchaser or recipient is under the age of

eighteen (18).

- (3) Any person who violates the provisions of this section shall be fined not less than one thousand dollars (\$1,000) nor more than two thousand five hundred dollars (\$2,500) for each offense. The fine shall be administered by the Department of Alcoholic Beverage Control using a civil enforcement procedure for persons eighteen (18) years of age or older. For persons under the age of eighteen (18) years, the offense shall be deemed a status offense and shall be under the jurisdiction of the juvenile session of the District Court.
- (4) All peace officers with general law enforcement authority and employees of the Department of Alcoholic Beverage Control may issue a uniform citation, but may not make an arrest, or take a child into custody, for a violation of this section. If a child fails to appear in court in response to a uniform citation issued pursuant to this section, the court may compel the attendance of the defendant in the manner specified by law.

➔ Section 5. KRS 438.315 is amended to read as follows:

- (1) The sale of tobacco products, alternative nicotine products, or vapor products dispensed through a vending machine is prohibited to any person under the age of eighteen (18) years.
- (2) The purchase of tobacco products, alternative nicotine products, or vapor products dispensed through a vending machine is prohibited to any person under the age of eighteen (18) years.
- (3) Except for vending machines located in factories or vending machines located in bars or taverns to which minors are not permitted access, ~~beginning one (1) year after July 15, 1994,~~ any vending machine from which tobacco products, alternative nicotine products, or vapor products are dispensed shall be located in the line of sight of the cashier for the retail establishment.
- (4) Any owner of a retail establishment violating this section shall be subject to a fine

of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each violation. The fine shall be administered by the Department of Alcoholic Beverage Control using a civil enforcement procedure for persons eighteen (18) years of age or older. For persons under the age of eighteen (18) years, the offense shall be deemed a status offense and shall be under the jurisdiction of the juvenile session of the District Court.

- (5) All peace officers with general law enforcement authority and employees of the Department of Alcoholic Beverage Control may issue a uniform citation, but may not make an arrest, or take a child into custody, for a violation of this section. If a child fails to appear in court in response to a uniform citation issued pursuant to this section, the court may compel the attendance of the defendant in the manner specified by law.

➔Section 6. KRS 438.325 is amended to read as follows:

- (1) Each owner of a retail establishment selling or distributing tobacco products, alternative nicotine products, or vapor products shall notify each individual employed in the retail establishment as a retail sales clerk that the sale of tobacco products, alternative nicotine products, or vapor products to any person under the age of eighteen (18) years and the purchase of tobacco products, alternative nicotine products, or vapor products by any person under the age of eighteen (18) years ~~is~~~~are~~ prohibited.
- (2) Each owner of a retail establishment selling or distributing tobacco products, alternative nicotine products, or vapor products shall notify each individual employed in the retail establishment as a retail sales clerk that proof of age is required from a prospective buyer or recipient if the person has reason to believe that the prospective purchaser or recipient is under the age of eighteen (18).
- (3) The notice to employees that is required in subsection (1) of this section shall be provided before the person commences work as a retail sales clerk, or, in the case of

a person employed as a retail sales clerk on the effective date of this Act [July 15, 1994], within thirty (30) days of that date. The employee shall signify receipt of the notice required by this section by signing a form that states as follows:

"I understand that under the law of the Commonwealth of Kentucky it is illegal to sell or distribute tobacco products, alternative nicotine products, or vapor products to persons under the age of eighteen (18) years and that it is illegal for persons under the age of eighteen (18) years to purchase tobacco products, alternative nicotine products, or vapor products."

- (4) The owner of the retail establishment shall maintain the signed notice that is required pursuant to subsection (3) of this section in a place and in a manner so as to be easily accessible to any employee of the Department of Alcoholic Beverage Control or the Department of Agriculture conducting an inspection of the retail establishment for the purpose of monitoring compliance in limiting the sale or distribution of tobacco products, alternative nicotine products, or vapor products to persons under the age of eighteen (18) as provided in KRS 438.305 to 438.340.
- (5) Any owner of the retail establishment violating subsections (1) to (4) of this section shall be subject to a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each violation. The fine shall be administered by the Department of Alcoholic Beverage Control in a civil enforcement procedure.

➔Section 7. KRS 438.330 is amended to read as follows:

- (1) The Department of Alcoholic Beverage Control and the Department of Agriculture shall carry out annually-conducted random, unannounced inspections of retail establishments where tobacco products, alternative nicotine products, or vapor products are sold or distributed for the purpose of enforcing the provisions of KRS 438.305 to 438.340. The inspections shall be conducted to the extent necessary to assure that the Commonwealth remains in compliance with Public Law 102-321 and applicable federal regulations. The Department of Alcoholic Beverage Control

and the Department of Agriculture shall also ensure that targeted inspections are conducted at those retail establishments where, and at those times when, persons under the age of eighteen (18) years are most likely to purchase tobacco products, alternative nicotine products, or vapor products. Persons under the age of eighteen (18) years may be used to test compliance with the provisions of KRS 438.305 to 438.340 only if the testing is conducted under the direct supervision of the Department of Alcoholic Beverage Control, sheriff, or chief of police, or their employees, and written parental consent has been obtained. The Department of Alcoholic Beverage Control shall prepare annually, for submission by the Governor to the Secretary of the United States Department of Health and Human Services, the report required by Section 1926 of Subpart 1 of Part B of Title XIX of the Federal Public Health Service Act.

- (2) The Department of Alcoholic Beverage Control shall develop and implement the survey sampling methodologies to carry out the inspections as described in this section.

➔Section 8. KRS 438.335 is amended to read as follows:

The Department of Agriculture shall carry out the provisions of KRS 438.305 to 438.340 as they relate to educating the public and sellers of tobacco products, alternative nicotine products, or vapor products about provisions and penalties of KRS 438.305 to 438.340. The Department of Agriculture shall be entitled to the revenue produced by one-twentieth of one cent (\$0.0005) of the three-cent (\$0.03) per pack revenue collected by the Department of Revenue from the state excise tax on the sale of cigarettes as imposed by KRS 138.140 and to keep fifty percent (50%) of any fines collected under KRS 438.305 to 438.340 to offset the costs of these education efforts.

➔Section 9. KRS 438.350 is amended to read as follows:

- (1) No person under the age of eighteen (18) shall possess or use tobacco products, alternative nicotine products, or vapor products.

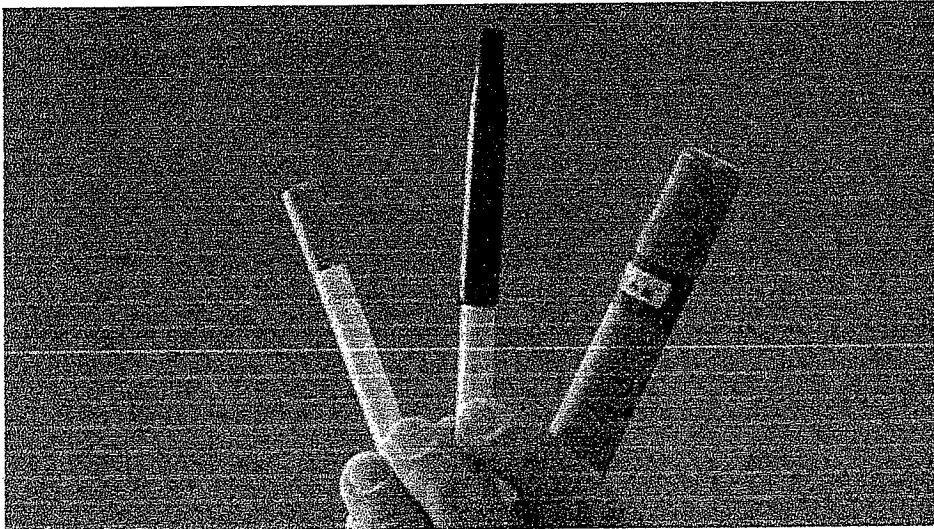
- (2) Any tobacco product, alternative nicotine product, or vapor product found in the possession of a person under the age of eighteen (18) and in plain view of the law enforcement officer shall be confiscated by the law enforcement officer making the charge.
- (3) This section shall not apply to persons exempted as provided by KRS 438.311 and 438.330.
- (4) The terms "alternative nicotine product," "tobacco product," and "vapor product," shall have the same meaning as in Section 1 of this Act.

→Section 10. Whereas it is incumbent upon the Commonwealth of Kentucky to protect the health, safety, and welfare of the young people living within its borders, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

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FDA proposes ban on e-cigarette sales to minors



Associated Press

Posted on April 24, 2014 at 9:06 AM

Updated Thursday, Apr 24 at 12:28 PM

WASHINGTON (AP) -- The U.S. government wants to ban sales of electronic cigarettes to minors and require approval for new products and health warning labels under regulations being proposed by the federal Food and Drug Administration.

While the proposal being issued Thursday won't immediately mean changes for the popular devices, the move is aimed at eventually taming the fast-growing e-cigarette industry.

The industry started on the Internet and at shopping-mall kiosks and has rocketed from thousands of users in 2006 to several million worldwide who can choose from more than 200 brands. Sales are estimated to have reached nearly \$2 billion in 2013. Tobacco company executives have noted that they are eating into traditional cigarette sales, and their companies have jumped into the business.

The agency said the proposal sets a foundation for regulating the products but the rules don't immediately ban the wide array of flavors of e-cigarettes, curb marketing on places like TV or set product standards.

Any further rules "will have to be grounded in our growing body of knowledge and understanding about the use of e-cigarettes and their potential health risks or public health benefits," Commissioner Dr. Margaret Hamburg said.

Once finalized, the agency could propose more restrictions on e-cigarettes. Officials didn't provide a timetable for that action.

Members of Congress and public health groups have raised concerns over e-cigarettes and questioned their marketing tactics.

"When finalized (the proposal) would result in significant public health benefits, including through reducing sales to youth, helping to correct consumer misperceptions, preventing misleading health claims and preventing new products from entering the market without scientific review by FDA," said Mitch Zeller, the director of the FDA's Center for Tobacco Products.

The FDA said the public, members of the industry and others will have 75 days to comment on the proposal. The agency will evaluate those comments before issuing a final rule but there's no timetable for when that will happen. The regulations will be a step in a long process that many believe will ultimately end up being challenged in court.

E-cigarettes are plastic or metal tubes, usually the size of a cigarette, that heat a liquid nicotine solution instead of burning tobacco. That creates vapor that users inhale.

Smokers like e-cigarettes because the nicotine-infused vapor looks like smoke but doesn't contain the thousands of chemicals, tar or odor of regular cigarettes. Some smokers use e-cigarettes as a way to quit smoking tobacco or to cut down. However, there's not much scientific evidence showing e-cigarettes help smokers quit or smoke less, and it's unclear how safe they are.

Some believe lightly regulating electronic cigarettes might actually be better for public health overall, if smokers switch and e-cigarettes really are safer. Others are raising alarms about the hazards of the products and a litany of questions about whether e-cigarettes will keep smokers addicted or encourage others to start using e-cigarettes, and even eventually tobacco products.

"Right now for something like e-cigarettes, there are far more questions than answers," Zeller said, adding that the agency is conducting research to better understand the safety of the devices and who is using them.

In addition to prohibiting sales to minors and requiring health labels that warn users that nicotine is an addictive chemical, e-cigarette makers also would be required to register their products with the agency and disclose ingredients. They also would not be allowed to claim their products are safer than other tobacco products.

They also couldn't use words such as "light" or "mild" to describe their products, give out free samples or sell their products in vending machines unless they are in a place open only to adults, such as a bar.

Companies also will be required to submit applications for premarket review within two years. As long as an e-cigarette maker has submitted the application, the FDA said it will allow the products to stay on the market while they are being reviewed. That would mean companies would have to submit an application for all e-cigarettes now being sold.

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