DISABILITIES LAW PROGRAM

COMMUNITY LEGAL AID SOCIETY, INC.

100 W. 10th Street, Suite 801
Wilmington, Delaware 19801
(302) 575-0660 TTY (302) 575-0696 Fax (302) 575-0840
www.declasi.org

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory & Legislative Initiatives

Date: January 9, 2016

Consistent with the requests of the SCPD and GACEC, I am providing an analysis of thirteen (13) regulatory and legislative initiatives in anticipation of the January 14 meeting. Given time constraints, the analyses should be considered preliminary and non-exhaustive.

1. DOE Final Educational Records Transfer & Maintenance Reg. [19 DE Reg. 618 (1/1/16)]

The SCPD and GACEC submitted comments on the proposed version of this regulation in November. A copy of the SCPD's November 24, 2015 letter is attached for facilitated reference.

The Councils endorsed the proposed regulation subject to a concern that a Delaware public school could send the original cumulative record to an out-of-state public school without retaining a copy. There would then be no Delaware cumulative record if a student requested documentation at a later date. In response, the Department added a definition of "public school" and cross referenced the Delaware Public Records Law [29 Del.C. Ch. 5]:

> Comments were received from [GACEC] and [SCPD] regarding: (1) concerns that there is no definition of "public school" in the regulation, which could cause a problem if a student transfers to an out of state school; (2) suggestion that Delaware public schools should keep a copy of the cumulative file sent to an out of state public school so that there is a Delaware record. The Department added the definition of public school into the regulation for clarification. The Delaware Public Records Law controls as to whether copies of records sent to out of state public schools should be kept; therefore no changes were made regarding this issue.

At 618.

The "Delaware Public Records Law" is somewhat general. It may have been more informative to provide specific direction in the regulation or a non-regulatory note to guide school conduct.

Since the regulation is final, and the DOE attempted to address the Councils' concern, I recommend no further action.

2. DOE Final Medications & Treatments Regulation [19 DE Reg. 362 (1/1/16)]

The SCPD and GACEC submitted comments on the proposed version of this regulation in October. A copy of the SCPD's November 24, 2015 letter is attached for facilitated reference.

The Councils opposed the regulation which ostensibly authorized schools to not adhere to the established regulatory protocol of assisting students with medications on field trips and other school activities. The Department of Education has now adopted a final regulation with no changes.

In reviewing the background to the regulation, the Councils observed that the DOE had not fully implemented a law authorizing contractors to assist with medications. Although counter-intuitive, the DOE correctly notes that its definition of "other school employees" includes non-employee contractors.

The DOE's rationale for authorizing an exemption from the "assistance with medication" protocol is somewhat cryptic:

> Additionally, there is nothing in this amendment to support the Councils' assertions, and the Department's amendment is not based on a limited economic or human resource; rather is a means to allow for increased access and opportunity for students to receive medications and treatments while participating in unique situations for which the general policy is not applicable.

At 622.

The GACEC may wish to solicit DOE illustrations of the alternative approaches to assistance with medications. Literally, such approaches could only be adopted based on impossibility of fulfilling the standard protocol, i.e., the "specified process is unable to be implemented".

3. DOE Final Certification Programs for Leaders in Education Reg. [19 DE Reg. 626 (1/1/16)]

The SCPD and GACEC submitted comments on the proposed version of this regulation in October. A copy of the SCPD's October 28, 2015 letter is attached for facilitated reference.

The Councils identified a single concern with the content of the regulation. The Councils observed that the roles of the Professional Standards Board and the State Board of Education had been revised such that a different agency would review an initial versus a renewal application.

The Department of Education has now adopted a final regulation with no changes. No rationale is provided for rejecting the Council's concern:

> Comments were received from the State Council for Persons with Disabilities and the Governor's Advisory Council for Exceptional Citizens. The suggestions that were made by both groups were considered by the Professional Standards Board, but no changes were made at this time.

At 626.

The approach adopted by the DOE violates the Administrative Procedures Act which requires the following:

> (b) At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include:
>
> (1) A brief summary of the evidence and information submitted;
>
> (2) A brief summary of its findings of fact with respect to the evidence and information where a rule of procedure is being adopted or amended; ...

Title 29 Del.C. §10118(b) [emphasis supplied]

The final regulation contains no summary of the information submitted and no findings.

The omission of a summary of information and findings in adopting final regulations has been a recurrent problem. See, e.g., 17 DE Reg. 835 (February 1, 2014). The Councils may wish to consider issuing a reminder to the DOE and its counsel with a copy to the Register of Regulations.

4. DOE Final School Psychologist Regulation [19 DE Reg. 624 (1/1/16)]

The SCPD and GACEC submitted comments on the proposed version of this regulation in October. A copy of the SCPD's October 28, 2015 letter (minus enclosures) is attached for facilitated reference. The Councils shared a few observations and endorsed the proposed regulation with no amendments. The Department of Education has now adopted a final regulation which conforms to the proposed version.

Since the regulation is final, and the Councils did not suggest any edits, I recommend no further action.

5. DPH Final DMOST Regulation [19 DE Reg. 637 (1/1/16)]

The SCPD and GACEC commented on the proposed version of this regulation in November. A copy of the November 24, 2015 SCPD letter is attached for facilitated reference. The Division of Public Health has now adopted a final regulation incorporating several amendments prompted by the commentary.

First, the Councils recommended an amendment to clarify that an AHCD valid in another state would qualify under the regulatory definition of AHCD. The Division agreed and adopted a conforming amendment.

Second, the Councils recommended consideration of additional safeguards for persons with communication deficits. The Division added safeguards to §7.7.2.

Third, the Councils recommended inclusion of a reference to "effective communication" based on the ADA. A conforming reference was added to §4.7.

Fourth, the Councils identified a grammatical error in the DMOST form. The error was corrected.

Fifth, the Councils identified an ambiguity in the signature line in the DMOST form. The Division edited the form.

Sixth, the Councils recommended an edit to highlight a form provision addressing the representative's authority to alter a DMOST. The Division altered the format for greater clarity.

Since the regulation is final, and the Division adopted edits consistent with each of the Councils' comments, a "thank you" communication could be considered.

6. DMMA Final Medicaid Home Health Services Reg. [19 DE Reg. 627 (1/1/16)]

The SCPD and GACEC commented on the proposed version of this regulation in October. A copy of the October 28, 2015 SCPD memorandum is attached for facilitated reference.

The Councils endorsed the proposed regulation which was being prompted by CMS and resulted in a more uniform payment rate for each type of home health service. The Councils identified one grammatical error. The Division of Medicaid & Medical Assistance has now adopted a final regulation which corrects the grammatical error.

Since the regulation is final, and the only identified error was corrected, I recommend no further action.

7. DMMA Final Deletion of Pers. Care Services from Medicaid Plan Reg [19 DE Reg. 632 (1/1/16)]

The SCPD and GACEC commented on the proposed version of this regulation in October. A copy of the October 28, 2015 SCPD memorandum is attached for facilitated reference.

The proposed regulation contemplated deletion of "personal care services (PCS)" in the Medicaid State Plan based on the rationale that "PCS will be provided under the Home Health Services benefit". At 636.

The Councils shared multiple concerns with the initiative, including the following: 1) agencies currently providing PCS will ostensibly have to apply for new licenses as "home health agencies"; and 2) the scope of PCS services is broader than home health services, does not require nurse supervision, and can be provided by individuals with fewer qualifications.

The Division of Medicaid & Medical Assistance dismissed these concerns:

> DMMA is not proposing a change in the delivery and authorization of these services to eligible individuals. These services will continue to be provided as a component of home health services for eligible individuals.

At 635. Essentially, DMMA posits that the change is not substantive, i.e., personal care services will be a form of home health services. I continue to view this characterization as overly simplistic since there is separate licensing for personal assistance vs. home health assistance and the scope of authorized work is different.

Since the regulation is final, and the Division was unpersuaded by identified concerns, no further action appears warranted.

8. H.B. No. 161 (Parent Empowerment Savings Account Act)

This legislation was introduced on June 3, 2015. H.A. No. 1 was placed with the bill on June 11. I t remained in the House Education Committee when the 2015 session ended on June 30.

As amended, the legislation would establish a system in which State educational funds could be used to cover the costs of some educational programming for students with disabilities.

I have the following substantive and technical observations.

1. The bill was intended to become effective on August 1, 2015 (line184). There are several references to "2015" and the "2015-2016 fiscal year" (lines10, 92, and 99). All of these references would benefit from updating.

2. Line 11 authorizes a parent to enroll a participating child "in a non-public school in any school district". This creates some ambiguity. Lines 25-26 define a "participating school" as a "nongovernmental primary or secondary school located in this State". To obviate any implication that the chosen school must be within the parent's school district borders, it would be preferable to simply substitute "a participating school" in line 11 for "a nonpublic school in any school district".

3. If the intent of the bill is to only cover students with disabilities, there is a "disconnect" between the definitions of "parent" and "eligible student". Line 20 limits a "parent" to a person with a certain relationship to " a child between 5 and 16 years of age". This would omit a parent of a child older than 16. It would also omit IDEA-eligible children who are either eligible on their third birthday (line 35) or at birth (lines 35-36). See, e.g., 14 Del.C. §3101. The reference to "Title 14, Chapter 31" in line 36 may also be "underinclusive" since it would omit statutory eligibility of blind infants pursuant to Title 31 Del.C. §2501.

4. It's unclear why line 27 only covers discrimination based on race, color or national origin. It would be preferable to at least explicitly mention "disability". The most prudent approach would be to incorporate the attached list of eleven covered classes based on 14 DE Admin Code 225.1.0.

5. The definition of "resident school district" (line 28) refers to the district "in which the student resides". This is inconsistent with 14 Del.C. §202(e)(1) (students are residents of district in which parent resides). The sponsors may wish to consider cross referencing §202 rather than inserting a conflicting standard in the bill.

6. If H.A. No. 1 is adopted, it creates two formatting problems as follows:

A. Since there is no subsection "(b)", there should be no subsection "(a) (line 30);

B. The reference to "any of the following" (line29) is no longer apt since there is only a single reference, not an "(a)" and "(b)".

7. The definition of an eligible student (lines 30-36) is convoluted and ostensibly "overbroad". For example, an eligible student is listed as an "exceptional child" as defined in Chapter 31 of Title 14 (line 30). That definition includes "a gifted and talented child". I suspect the sponsors do not intend to include gifted and talented children as eligible students under this bill. If the sponsors intend to cover IDEA-eligible students, it would be preferable to cross reference the definition of "child with a disability" in 14 Del.C. §3101(2).

It appears that the sponsors intend that students identified under Section 504 of the Rehabilitation Act would also be "eligible students" (lines 30-36). However, the definition is inaccurate and reflects a misunderstanding of eligibility under Section 504. For example, there are no State Department of Education regulations defining eligibility under Section 504 (line 33). The cross reference to Chapter 31 of Title 14 (line 36) is also inapposite since that chapter solely addresses IDEA-eligible children. The sponsors may wish to review the relevant Section 504 federal education regulation, 34 C.F.R. Part 104. If the sponsors wish to include students covered by Section 504, the preferable approach would be to cross reference a federal standard rather than attempting to paraphrase the standard (lines 30-36). Consider the following definition: "A student identified as a qualified person consistent with 34 C.F.R. Part 104 implementing Section 504 of the Rehabilitation Act". Alternatively, based on 34 C.F.R. 104.33, the following definition could be considered: "A student identified as a qualified person eligible for a free, appropriate, public education consistent with 34 C.F.R. Part 104 implementing Section 504 of the Rehabilitation Act."

8. Lines 46-47 contain multiple grammatical errors (e.g. plural pronoun ("their") with singular antecedent ("parent") and inconsistent references to "parent" and "parents". Consider the following alternative: "(a) Any parent of an eligible student shall qualify for the state to make a grant to the eligible student's education savings account if the parent signs an agreement promising:".

9. Lines 46-48 require a parent, as a condition of receipt of a grant, to promise that the eligible student will receive an education "in at least the subjects of reading, grammar, mathematics, social studies, and science. There are multiple concerns with this provision.

A. Lines 58- 67, 76, and 102 authorize funds to be used for "tutoring" and college expenses. It's unlikely a college student would be enrolling in courses teaching reading and grammar.

B. Students only need 3 credits in Social Studies and 3 credits in Science to earn a diploma. See 14 DE Admin Code 505.4.0 . Therefore, there may be years in which the student does not take courses in these contexts.

C. For students in a non-diploma track or with an IEP stressing functional skills, the student may not be taking courses in the listed subjects.

10. Line 52 and 74 contain a grammatical error [plural pronoun ("their") with singular antecedent ("student")] Substitute ""the student" for "they"

11. Line 70 refers to a "multidisciplinary evaluation team plan". This term is not defined and is "odd" wording.

12. Line 71 refers to "an empowerment scholarship account". This term is not defined . Based on the context, I suspect the reference should be to a "savings account".

13. In line 85, the reference to "prior" school district is problematic. A child could be identified as an "eligible student" who has never enrolled in the resident school district. Cf. 14 DE Admin Code 923.31. Consider substituting "resident school district", the term defined at line 28 and used in line 81.

14. I recommend capitalizing "fund" when referring to the "Parent Empowerment Education Savings Account Fund". This would include references in lines 88, 89, 95, 97, 99, and 100.

15. The word "department" should be capitalized in lines 89 and 93.

16. In lines 95-100, the references to "State Treasurer" should be to "Treasurer". See line 44.

17. In line 96, the reference to "Subsection 3,F of this Act" makes no sense.

18. Lines 97- 98 refer to "empowerment scholarship accounts". The term is undefined. I assume the term should be "empowerment savings accounts".

19. In line 105, the reference to "article" makes no sense. Moreover, the recital that monies received under this program "do not constitute taxable income" may not be accurate. For example, it the student is not a degree candidate, the IRS may treat such funds as taxable income. See attached article.

20. Line 128 merits review. The reference to "42 USC 1981" is limited to discrimination based on race. Words have obviously been omitted from the end of the subsection. Consistent with Par. 4 above, it would be preferable to at least explicitly mention "disability". The most prudent approach would be to incorporate the attached list of eleven covered classes based on 14 DE Admin Code 225.1.0.

21. In line 149, the word "department" should be capitalized.

22. Lines 151-160 are problematic and conflict with the non-discrimination provisions in lines 27 and 128. As a recipient of federal education funds, the State cannot contract with agencies or provide any benefit to agencies which discriminate. See 14 DE Admin Code 225.1.0 and 34 C.F.R. §104.4. Thus, if a private school only accepted students of a certain religion, that school should not be allowed to be a participating school.

23. Lines 172-173 merit reconsideration. For example, does the reference to "30 calendar days" mean from the date of Department decision?

24. The references to transportation in lines 180-183 are somewhat ambiguous. Moreover, the standard transportation subsidy for private school students is not administered by districts. See 14 DE Admin Code 1150.26.0

25. Apart from the above technical observations, whether establishing the savings account/voucher program is a "good idea" merits deliberation. The attached May 16, 2015 News Journal article and June 9, 2014 News Journal article (describing predecessor H.B. 353) describe the perceived advantages of the legislation. Other attached articles describe reservations. Voucher opponents argue that such programs divert resources from public schools and, to the extent they only cover partial tuition costs, are disproportionately beneficial to the wealthy who can afford to pay the difference between the subsidy and private school tuition costs.

The SCPD and GACEC reviewed similar legislation in 2005 (H.B. 185) and 2004 (H.B. 440). Delaware previously offered school vouchers primarily for LD students up to the 1977-78 school year. See attached Grymes v. Madden, 3 IDELR 552:183, 184 (D.Del. May 3, 1979). The partial tuition subsidy to attend a private school was approximately $1,200. It cost the State approximately $167,000 annually. See attached November 8, 1977 letter from Controller General. It ended after enactment of the federal IDEA and S.B. No. 353 on August 13, 1977.

9. S.B. No. 142 (Medicaid Coverage of Adult Dental Services)

This legislation was introduced on June 16, 2015. It was released from the Senate Health & Social Services Committee on June 24, 2015. It awaits action by the full Senate.

The legislation is similar, but not identical, to S.B. No. 56 which was introduced in 2013. That bill was released by the Senate Health & Social Services Committee but stricken on June 12, 2014. The SCPD endorsed S.B. No. 56. A copy of the Council's May 30, 2013 memo is attached for facilitated reference. S.B. No. 142 would have the same effect as S.B. No. 56. It would therefore be logical to issue a similar memo subject to the following: 1) substituting "care" for "car" on second page; 2) noting that DHSS requested 6 months funding of $2.4 million in its OMB FY17 presentation to implement S.B. No. 142 (confirmed through December 21 email from Steve Groff to Kyle); 3) updating some of the background; and 4) noting that this is enabling legislation which would only become effective upon an appropriation (lines 63-64).

The updated background could consist of the following: 1) attached July 11, 2015 USA Today/Delaware News Journal article, "Dental problems - sometimes deadly - drive more people to ER"; and 2) either link or copy of publication minus appendix, National Academy for State Health Policy, "Adult Dental Benefits in Medicaid: Recent Experiences from Seven States" (July, 2015). The latter publication highlights recent efforts in several states to provide a Medicaid adult dental benefit.

Consistent with the above observations, the May 30, 2013 SCPD memo could be "adapted" as follows:

A. In second paragraph, insert after the first sentence: "Dental disease is not benign; it can be life-threatening. See attached article, "Dental problems - sometimes deadly - drive more people to ER" (July 11, 2015).

B. Insert the following paragraph after the "In summary" paragraph":

> The bill is designed as "enabling legislation". It would only be effective upon an appropriation. In its November 19, 2015 FY17 budget presentation, DHSS recommended the inclusion of 6-month funding (approximately 2.4 million) to implement the adult dental benefit initiative. The Council supports such funding. It is consistent with a trend among the states to incrementally add an adult dental benefit to Medicaid state plans. See attached excerpt from National Academy for State Health Policy, "Adult Dental Benefits in Medicaid: Recent Experiences from Seven States" (July, 2015).

10. H.B. No. 186 (Charter School Audits)

This legislation was introduced on June 16, 2015. It passed the House (by a 23-17 vote) on June 30, 2015. It was assigned to the Senate Education Committee on July 15, 2015.

As background, financial irregularities and misuse of finances within multiple charter schools have been highly publicized in recent years. See attached articles. This has resulted in proposals to improve financial oversight of charter schools. At present, all school districts are subject to the Auditor of Accounts. In contrast, charter schools are not statutorily subject to the Auditor of Accounts. H.B. No. 186 would require charter schools to be subject to and pay the State Auditor of Accounts to conduct "postaudits" of their financial transactions.

The attached January 7, 2016 News Journal article, "Education will be prominent when Legislature returns", offers the following observations on the bill:

> Charter schools may also become an issue. Williams, for example, has proposed a bill that would have the state auditor's office select and manage the firms that audit charters, much like it does for traditional schools. Williams says that it will help prevent a repeat of a series of high-profile scandals at charter schools over the past few years in which school leaders used school money to make personal purchases. But charter advocates oppose the bill, arguing they are supposed to be free from bureaucratic rules in exchange for stiffer accountability.

The attached April 26, 2013 article describes a $350,000 State "bailout" of the Pencader Charter School to cover payroll based on "financial mistakes". The attached July 22, 2012 News Journal editorial, "Charter school needs better steering", contains the following commentary:

> Recent revelations of School Leader Ann Lewis' undocumented professional qualifications - combined with questionable salaries for minimal classroom for her husband and questionable bookkeeping that possible violates Internal Revenue Service law - call into question the school's ability to fulfill its original mission. ...For example, Bob Lewis fired this spring for calling a student a "bitch", has been rehired at a salary of $6,500 a month to teach just one class on "morals and ethics" to freshmen. But he was not listed as a teacher for the school, now he makes more than double the salary of teachers who work a full day. Through a bookkeeping trick, Lewis's husband and a few other favored employees were reclassified as outside contractors, allowing them to draw additional salary and collect pensions from earlier state teaching jobs. Thankfully, the State Board of Pension saw through the ruse...and is seeking to have the money repaid.

The attached August 20, 2011 News Journal article, "Charter school revisions signed", has the following observations on another charter school:

> The General Assembly moved quickly to pass the legislation in June, prompted by a News Journal report that revealed the founder of the all-girls Reach Academy charter school in Claymont was a convicted child abuser, had filed for bankruptcy several times, and was spending school money with a company with which he was affiliated. Financial woes at Reach Academy and Pencader Business and Finance Charter School in New Castle threatened to close both schools this summer, but a special probationary arrangement agreed to by Secretary Lillian Lowery convinced the state Board of Education to keep the schools open.

H.B. No. 186 appears to be a prudent initiative to enhance safeguards in use of State funds by charter schools. Charter schools are public schools and Auditor of Accounts involvement in audits should have a deterrent effect on misuse of funds.

11. H.B. No. 175 (Unified Sports)

This legislation was introduced on June 10, 2015. It was released from the House Education Committee on June 17, 2015. There is a modest fiscal note of $45,000 in FY16 (attached).

As background, the U.S. Department of Education released the attached guidance on participation of students with disabilities in extracurricular athletics in January, 2013. The guidance reminds public schools that students with disabilities must be given an opportunity to benefit from athletic programs equal to that of students without disabilities. At pp. 3 and 5. One option to partially fulfill the guidance is to offer "'allied' or 'unified' sports teams on which students with disabilities participate with students without disabilities.' At p. 11.

H.B. No. 175 is intended to authorize and fund a pilot "unified sports" program in FY16 in which district and charter high schools would be expected to participate. Lines 12-13 and 19 suggest that such participation would be mandatory. Special Olympics would "partner" with high schools by providing uniforms, equipment, and training (line 16 and Fiscal Note). Schools would provide coaches, other necessary staff, and transportation (lines 17-18). The pilot would only cover "track and field" athletics (line 15). A report with findings would be developed by December 1, 2016 covering participation information, costs, and recommendations (lines 23 - 37). The law would be effective upon an appropriation (lines 38-40).

Since the legislation was not enacted in 2015, it would have to be revised to modify dates and references to the 2015-16 school year (lines 12-13 and 23) if enacted in 2016. It would benefit from an amendment defining participating students. The attached federal guidance covers students identified as qualified persons with a disability under Section 504. At p. 3. Likewise, the synopsis refers to the desire to comply with Section 504 guidance. In contrast, the participating students with disabilities are limited to IDEA-eligible students, a subpart of Section-504 eligible students (line 9). See OCR Policy Letter to C. Veir, 20 IDELR 864, 867 (December 1, 1993); and OSEP & OCR Joint Policy Letter to M. Williams, 21 IDELR 73, 76 (March 14, 1994). The definition in line 9 should therefore be expanded.

It's unclear if the pilot is being implemented at some level without enactment of the bill. See attached articles describing unified sports programs in Middletown, Caesar Rodney, Concord, and William Penn high schools.

I recommend checking with the DIAA and Special Olympics to assess the status of the bill and the "unified sports" initiative. If the DIAA and Special Olympics are supporting enactment of the legislation, the Councils may wish to recommend the above amendments and share comments with policymakers.

12. H.B. No. 158 (Adult Protective Services)

This bill was introduced on June 2, 2015. It remains in the House Health & Human Development Committee.

As background, the current law requires reporting to Adult Protective Services as follows:

> (a) Any person having reasonable cause to believe that an adult person is impaired or incapacitated as defined in §3902 of this title and is in need of protective services as defined in §3904 of this title shall report such information to the Department of Health and Social Services in the manner and format published by the Department.

Title 31 Del.C. §3910(a)

Consistent with the synopsis, the main thrust of this bill is to provide penalties for failure to report. The proposed penalty is up to $10,000 for a first offense, $50,000 for a subsequent offense, and costs and attorney's fees:

> (g) Any person or entity that knows or in good faith suspects that an adult person is impaired or incapacitated as defined in §3902 of this title and in need of protective services as defined in §3904 of this title and does not report such information to the Department of Health and Social Services in the manner and format published by the Department shall be liable for a civil penalty not to exceed $10,000 for the first violation, and not to exceed $50,000 for any subsequent violation. In any action brought under paragraph (a) of this section, if the court finds a violation, the court may award costs and attorney's fees.

While well-intentioned, I have several significant reservations with this initiative.

First, the penalty for the omission of reporting is manifestly excessive. Consider the following:

A. The penalty for failing to report will generally far exceed the penalty applied to the actual convicted perpetrator of the abuse/neglect. The APS statute [31 Del.C. §3903(a)] generally treats convicted perpetrators as guilty of a class A misdemeanor:

> (a) Any person who knowingly or recklessly abuses, neglects, exploits or mistreats an adult who is impaired shall be guilty of a class A misdemeanor.

The maximum monetary fine for a class A misdemeanor is $2,300. See Title 11 Del.C. §4206(a). Thus, this bill would authorize a financial penalty($10,000) on the person omitting the report which is more than quadruple the penalty for the actual abuser. For a subsequent offense, the person omitting the report would be subject to a criminal penalty ($50,000) approximately 22 times the penalty for the actual abuser.

B. The DHSS Long-term Care Ombudsman has overlapping authority with APS to investigate abuse and neglect of individuals in long-term care facilities. See Title 16 Del.C. §1152(5). If a person affirmatively interferes with an Ombudsman investigation, the maximum penalty is $100 for a first offense and $1,000 for a subsequent offense. See Title 16 Del.C. 1155. Logically, the financial penalty for a person omitting a report should be less than the penalty for persons affirmatively interfering with an investigation.

C. There is a comparable employee duty to report abuse and neglect in long-term care facilities under Delaware's long-term care law. The penalty for omitting a report is not $10,000-$50,000 as contemplated by this bill, it's $1,000. See Title 16 Del.C. §1132 (b).

Second, the bill reinforces a conflict in the Code since an employee of a long-term care facility must report abuse/neglect pursuant to the protocol and timetable in Title 16 Del.C. §1132(a) in contrast to the "manner and format published by the Department" for APS reports [31 Del.C. §3910(a)].

Third, if the purpose of the bill is to encourage more reports, query whether the bill should include a fiscal note to process the increased volume of reports coupled with provision of victim support services.

Fourth, given the potential liability for a $10,000 - $50,000 penalty, information about how and when to report to APS should be readily available. The bill requires the report to be made "in the manner and format published by the Department". Unfortunately, the protocol for reporting to APS is ostensibly hidden. I could locate no DHSS regulation on reporting under the APS statute. Moreover, the DHSS APS website (attached) has no published procedure for reporting abuse/neglect and, for contact information, refers the public to a resource center operated by another division. In contrast, the Department of Services for Children, Youth & Their Families is required by statute to "maintain a 24-hour statewide toll-free telephone report line" [16 Del.C. §905] and its website prominently displays information about reporting procedures and contains a website link to easily report abuse/neglect. See attachment. If DHSS expects the public to report adult abuse/neglect or face $10,000-$50,000 penalties, it should mirror the approach adopted by the DSCY&F.

The Councils may wish to share the above reservations with policymakers.

13. S.B. No. 134 (Homeless Bill of Rights)

This legislation was introduced on June 11, 2015. It remains in the Senate Community/County Affairs Committee.

As background, similar legislation creating a bill of rights for homeless individuals has been passed in a few states (e.g. Rhode Island; Illinois) and municipalities. See attached November 7, 2015 Wikapedia article. In 2013, the Delaware Homeless Planning Council issued the attached report which included a recommendation to promote adoption of a homeless bill of rights in Delaware. The report (at p. 8) discusses the prevalence of persons with disabilities among the homeless population. In June, 2014, legislation (H.B. 373) was introduced to establish such a bill of rights. It was tabled in the House Housing and Community Affairs Committee.

S.B. No. 134 is identical to the House bill tabled in 2014. It is intended to prevent discrimination based on homelessness in a variety of contexts, including using public places, seeking employment, applying for housing, seeking temporary shelter, and voting. Local governments would be barred from enacting ordinances or regulations inconsistent with the listed rights (e.g. overbroad vagrancy laws). An aggrieved person could file a civil action for and obtain

I suspect the legislation will be opposed by coalitions of landlords, local governments, and law enforcement agencies. Given the high incidence of persons with disabilities in the homeless population, the Councils may wish to consider endorsement.

Attachments

8g:leg/116bils
F:pub/bjh/legis/2016p&l/116bils

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

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

November 24, 2015

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 19 DE Reg. 355 [DOE Proposed Educational Records Transfer & Maintenance Regulation]

Dear Ms. Shockley:

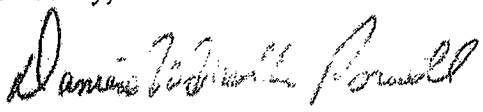
The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend its regulations covering the transfer and maintenance of student records. The proposed regulation was published as 19 DE Reg. 355 in the November 1, 2015 issue of the Register of Regulations. SCPD has the following observations.

The most significant clarification is the treatment of records when students transfer between schools. See §§3.2.1.1 and 3.2.1.2. First, if a student transfers from a public school to either a private school or DSCY&F educational program, the public school keeps the original cumulative file while sending a copy to the receiving private school or DSCY&F program. Second, if a student transfers from a public school to another public school, the original cumulative file is sent to the receiving public school. This is ostensibly a reasonable approach. The only caveat is that there could be ambiguity if a student transfers to an out-of-state "public school". There is no definition of "public school" and it might be prudent for the Delaware public school to retain at least a copy of the cumulative file sent to an out-of-state public school so there is a Delaware record. Otherwise, if the out-of-state school loses the record, and the student seeks to document his/her education in Delaware, there would be no Delaware cumulative record for reference.

SCPD is endorsing the proposed regulation subject to DOE's review of the practice for students transferring to an out-of-state public school.

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

Sincerely,



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

cc: The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Kathleen Geiszler, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Ilona Kirshon, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

19reg355 doe-educational records transfer 11-25-15

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

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

November 24, 2015

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 19 DE Reg. 362 [DOE Proposed Medications & Treatments Regulation]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend its regulation covering assistance with self-administration of medications at approved school activities. The proposed regulation was published as 19 DE Reg. 362 in the November 1, 2015 issue of the Register of Regulations. SCPD opposes the proposed regulation and has the following observations.

As background, it is settled law that public schools must provide healthcare accommodations to facilitate participation of students with disabilities on field trips and school-sponsored events. The Delaware Attorney General's Office issued the attached opinion in 1994 highlighting that obligation. In 2000, the Legislature enacted legislation (S.B. No. 382), authored by Sen. Blevins, to authorize trained educators to assist students with self-administration of medications on field trips. In 2012, the Legislature enacted legislation (S.B. No. 257) which expanded the law to permit trained coaches and persons under contract to assist with medications in approved school activities outside the traditional school day or off-campus. See attachment. The Department of Education never fully implemented S.B. No. 257, restricting assistance with medications to "employees" and excluding contractors. See attached regulation, 19 DE Reg. 362, 363, §6.1 (November 1, 2015).

The Department is now proposing a regulation to allow public schools to adopt exemptions from the above system:

> 6.2 . District and charter school boards may develop policies for unique Approved School Activities for which the specified process is unable to be implemented.

The DOE envisions such exemptions applying to "extended field trips":

This regulation is amended to clarify assistance with self-administration of medications at unique approved school activities, such as extended field trips...

This "exemption" authorization is ill-conceived, undermines the intent of the above of State legislation, and invites non-compliance with federal law. Given the reference to "extended" field trips, SCPD infers that the justification for this initiative is based on cost concerns or limited availability of trained employees. These are insufficient reasons to authorize exemptions from providing medication support to students.

A U.S. Supreme Court decision is instructive. In Cedar Rapids Community School District v. Garret, 526 U.S. 66 (1999) (copy attached), the Supreme rejected a "cost defense" to a district's obligation to provide continuous one-to-one nursing services to a ventilator dependent student paralyzed from the neck down. If a school district can be required to provide continuous 1:1 nursing care to a student, it is difficult to imagine a scenario in which a district could legally decline to provide medication support for an "extended field trip". Districts can utilize a school nurse, a trained employee, or a trained contractor to facilitate a student's participation in off-campus activities. If a district has insufficient trained personnel, it can hire a nurse to provide medication assistance in the activity.

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

Sincerely,

Daniese McMullin-Powell

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

cc: The Honorable Matthew Denn
The Honorable Patricia Blevins
The Honorable Bethany Hall-Long
The Honorable Nicole Poore
The Honorable Debra Heffernan
Sheila Welch, Down Syndrome Association of Delaware
Teresa Avery, Autism Delaware
The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Kathleen Geiszler, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Ilona Kirshon, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

19reg362 doe-medications and treatments 11-25-15

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

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

October 28, 2015

Mr. Chris Kenton, Executive Director
Professional Standards Board
Townsend Building
401 Federal Street – Suite 2
Dover, DE 19901

RE: 19 DE Reg. 243 [DOE Proposed Certification Programs for Leaders in Education Regulation]

Dear Mr. Kenton:

The State Council for Persons with Disabilities (SCPD) has reviewed the Professional Standards Board's [in collaboration with the Department of Education (DOE)] proposal to amend its certification standards for Certification Programs for Leaders in Education. The changes include the following: 1) clarifying that the standards cover assistant superintendents (§1.0); and 2) modifying the roles of the State Board of Education (SBE) and Professional Standards Board (PSB) in the process to approve initial and continuing programs. The proposed regulation was published as 19 DE Reg. 243 in the October 1, 2015 issue of the Register of Regulations. SCPD has the following concern.

The DOE Secretary makes the final decision to approve both an initial and renewal application to offer a covered program (§4.15 and §4.3.3.3). However, the supporting roles of the SBE and PSB are significantly changed. Consider the following:

A. The current regulation contemplates SBE involvement in the initial review process (current §§4.1.5 and 4.1.6) and the renewal review process (current §§4.3.4.3 and 4.3.4.4). The proposed regulation strikes the SBE's involvement in the initial application review process. The opposite is true for the renewal process, i.e., the SBE remains highly involved in review of renewal applications (new §§4.3, 4.3.3.1, and 4.3.3.2.

B. The current regulation contemplates PSB involvement in both the initial review process (§§4.1.2, 4.1.3, 4.1.4, and 4.2) and renewal review process (current §§4.3.2, 4.3.4, 4.3.4.1, 4.3.4.2, 4.3.4.3, and 4.3.4.4). The new regulation strikes the PSB's involvement in the renewal review process in its entirely.

It is anomalous to recognize that the SBE has expertise to warrant involvement in the review of renewal applications but not initial applications. It is also anomalous to recognize that the PSB has expertise to warrant involvement in the review of initial applications but not renewal applications. Finally, other sections of the regulation contemplate the involvement of both the SBE and PSB in the program monitoring process (§7.0). The following table illustrates the effect of the revisions:

	INITIAL APPLICATION REVIEW AGENCY	RENEWAL APPLICATION REVIEW AGENCY	MONITORING
Current Regulation	Professional Standards Bd State Board of Education	Professional Standards Bd State Board of Education	Professional Standards Bd State Board of Education
Proposed Regulation	Professional Standards Bd	State Board of Education	Professional Standards Board State Board of Education

Logically, it would be helpful to have the same agency or agencies involved in reviewing a renewal application since they would be familiar with the original application. For example, the PSB may have recommended "special considerations or conditions" (§4.1.4) which it could target in a review of a renewal application. Moreover, since the duration of the initial approval is variable and could be short (§4.1.4), the review of a renewal application may occur within a short time of review of an original application.

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

Sincerely,

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

cc: The Honorable Steven Godowsky, Ed.D, Secretary of Education
Ms. Tina Shockley, Department of Education
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Kathleen Geiszler, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Ilona Kirshon, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

19reg243 doe-certification programs for leaders 10-28-15

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

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

October 28, 2015

Mr. Chris Kenton, Executive Director
Professional Standards Board
Townsend Building
401 Federal Street – Suite 2
Dover, DE 19901

RE: 19 DE Reg. 241 [DOE Proposed School Psychologist Regulation]

Dear Mr. Kenton:

The State Council for Persons with Disabilities (SCPD) has reviewed the Professional Standards Board's [in collaboration with the Department of Education (DOE)] proposal to amend its standards for credentialing of school psychologists. The current standards require completion of a graduate level program of school psychology approved be either the National Association of School Psychologists (NASP) or the American Psychological Association (APA). The amendment to completion of the graduate level program is as follows: "culminating in an ~~Masters with an additional~~ Educational Specialist (Ed.S.) degree or its equivalent or a Doctoral degree in School Psychology". The proposed regulation was published as 19 DE Reg. 241in the October 1, 2015 issue of the Register of Regulations. SCPD has the following observations.

First, the rationale for the changes is somewhat uninformative, i.e., "to clear up some language under additional requirements necessary to become a School Psychologist". At 242.

Second, consistent with the attached information from NASP, it does appear that the current reference to "Masters with an additional Educational Specialist (Ed.S) degree" could be problematic. A graduate student may acquire essentially a single, combined degree. Moreover, the attached NASP materials indicate that it recognizes "equivalent" degrees/programs:

> Specialist Degree or Equivalent (e.g., Master's Degree Totaling 60 Semester Credits or More) Please note: Many programs award a master's degree after completing the 3rd year internship, while other programs award a master's degree after two years of coursework prior to internship. As long as the program is a minimum of 60 credits and requires a minimum of a 1,200 hour internship, these programs are considered "specialist equivalents".

SCPD endorses the proposed regulation since it appears to more closely align to NASP standards,

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.

Sincerely,

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

cc: The Honorable Steven Godowsky, Ed.D, Secretary of Education
Ms. Tina Shockley, Department of Education
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Kathleen Geiszler, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Ilona Kirshon, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

19reg241 doe-school psychologist 10-28-15

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

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

November 24, 2015

Mr. Jamie Mack
Division of Public Health
Jesse Cooper Building
417 Federal Street
Dover, DE 19901

RE: 19 DE Reg. 388 [DPH Proposed DMOST Regulation]

Dear Mr. Mack:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Public Health's (DPH's) proposal to repeal and replace its Delaware Medical Orders for Scope of Treatment ("DMOST") regulation. The proposed regulation was published as 19 DE Reg. 388 in the November 1, 2015 issue of the Register of Regulations.

A DMOST is a clinical process in which patients, with serious, advanced illness or frailty, or their authorized representatives if they lack decision-making capacity, discuss and have reduced to a medical order their goals of care and treatment choices. The DMOST order must be signed by the patient or representative, and a health care practitioner, in order to be valid. The DMOST is not meant to supplant advance health care directives ("AHCD"); rather it is meant to address a more immediate need for a medical order reflecting current goals and treatment choices that can be followed by emergency medical personnel and treatment providers in multiple settings. AHCDs are of limited utility in emergency situations, situations where people are transferring frequently between locations (home, nursing home, hospital) or situations where the AHCD doesn't address a specific medical decision that has to be made.

The regulations mirror the statutory language in large measure. The most important feature is the promulgation of the form and plain language statement, which are the only forms that can be used. SCPD has the following observations.

1.0 Definitions.

"Advance health care directive." The definition seeks to clarify that AHCDs that are valid where executed are to be honored in Delaware. However, the regulatory definition adds the phrase "valid under Delaware law" to the statutory definition, and the language suggests that the only out of state AHCDs that are recognized in Delaware are ones that are valid where executed and in Delaware. This requirement would prove unworkable and is inconsistent with the statutory language in 16 Del Code §2503A(a) and of 16 Del. Code §2517, which plainly states that AHCDs valid where executed are honored in Delaware, whether they strictly comport to Delaware law or not.

Section 4.0 is sort of a catch-all section for a number of important principles.

Section 4.7 addresses situations where a person has decision-making capacity but is unable to communicate by speaking or writing. In those circumstances, the person is allowed to communicate through the method by which they usually communicate, so long as the person interpreting understands that method, and this must be documented in the medical record. There is always a concern in these circumstances that the person interpreting is actually doing so and not substituting their own words or wishes. The requirement that there be a notation in the chart is something of a safeguard. However, it would be appropriate to add a requirement that there be a witness to this communication, and that a health care practitioner has noted some indicia of reliability regarding the interpreter's ability to understand what is being communicated. Additionally, this section does not and cannot eliminate the requirement under the ADA or state law that a health care facility provides effective communication for people with communication impairments. This should be stated in the regulation. It would be unfortunate for this regulation to be used to deny qualified interpreters when they are required, and sanction the use of lay interpreters or family members, which is often inappropriate.

In the DMOST form, in the first bullet point section, an "s" is needed in bullet 4 at the end of "measure." In Section E, it is unclear who is signing on the line to the immediate right. You have to check the directions to be sure. Additionally, the line regarding whether an appointed representative can alter a DMOST should be set off in some fashion, either by bolding or by line. It very much gets lost in the rest of the box, and it is a very significant designation. SCPD recommends that you consider doing a yes/no box format, or adding it to Box F.

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

Sincerely,

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

cc: Ms. Karyl Rattay, DHSS-DPH
Ms. Debbie Gottschalk, DHSS
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens
19reg388 dph DMOST 11-25-15

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

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

MEMORANDUM

DATE: October 28, 2015

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

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

RE: 19 DE Reg. 253 (DMMA Proposed Medicaid Home Health 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 (DMMAs) proposal to amend its standards for reimbursing providers for home health services. Home health services include skilled nursing services; home health aide services; therapies (OT, PT, ST); durable medical equipment; and medical supplies. The proposed regulation was published as 19 DE Reg. 253 in the October 1, 2015 issue of the Register of Regulations. CMS is prompting the initiative:

> "During review and subsequent approval on December 31, 2014 of Delaware's 1915(i) Home and Community State Plan Option Amendment (Pathways to Employment), the Centers for Medicare and Medicaid Services (CMS) performed a program analysis of corresponding coverage sections not originally submitted with this SPA. This analysis revealed that the reimbursement language for home health services fails to comply with 42 CFR 430.10 and 42 CFR 447.252 which implement in part Section 1902(a)(30)(A) of the Social Security Act, to require collectively that States comprehensively describe the methodologies that they use to reimburse service providers. The methodologies must be understandable, clear, unambiguous and auditable. This amendment proposes to revise the payment methodology language for home health services."

In general, the new methodology is a universal rate for each home health service type. All providers would receive the same rate for each procedure code and rates would be increased annually based on an inflation factor derived from a CMS source. Id. Reimbursement standards for durable medical equipment (DME) are being revised to reflect the discontinuation of the EPIC Plus pricing software.

SCPD only has the following technical observation: In the section on AAC systems, first paragraph, the word "devise" should be "device".

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

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

19reg253 dmma-medicaid home health services reimbursement 10-28-15

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

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

MEMORANDUM

DATE: October 28, 2015

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

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

RE: 19 DE Reg. 258 (DMMA Proposed Deletion of Personal Care Services from Medicaid Plan 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 (DMMAs) proposal to delete "personal care services" from the Medicaid State Plan. Instead, DMMA posits that supports currently covered as "personal care services" will be covered as "home health services". The proposed regulation was published as 19 DE Reg. 258 in the October 1, 2015 issue of the Register of Regulations.

DMMA provides the following rationale for the change:

> During review and subsequent approval on December 31, 2014 of Delaware's 1915(i) Home and Community State Plan Option Amendment (Pathways to Employment), the Centers for Medicare and Medicaid Services (CMS) performed a program analysis of corresponding coverage sections not originally submitted with this SPA. This analysis revealed an issue that requires a state plan amendment (SPA) to sunset coverage and reimbursement methodology for Personal Care Services as personal care as a service will be provided as a component of home health services.

SCPD has the following observations.

First, the change may result in a reduction in available providers for non-monetary reasons. Licensing of "personal assistance services agencies" is separate from licensing of "home health agencies". Compare Title 16 Dolce §122x and 16 DE Admin Code 4469 (personal assistance licensing) with 16 Dolce §122lo and 16 DE Admin Code 4406 (home health licensing). Agencies currently providing "personal assistance services" will

ostensibly have to apply for new licenses as "home health agencies".

Second, it would be unfortunate if the change results in a reduction in the scope of currently-covered services. Consider the following:

A. Licensed "personal assistance" agencies can perform any acts individuals could normally perform themselves but for functional limitations consistent with Title 24 Del.C. §1921(a)(15) and Title 16 Del.C. §122x.2. CMS has historically adopted the same broad approach for "personal care assistance" as including "a range of human assistance provided to persons with disabilities and chronic conditions of all ages which enables them to accomplish tasks that they could normally do for themselves if they did not have a disability." See attached CMS, State Medicaid Manual, §4480C. Licensed "home health" agencies lack that authority.

B. Services provided by licensed "personal assistance" agencies are not required to be supervised by a nurse. All services provided by licensed "home health" agencies must be supervised by a registered nurse. See Title 16 Del.C. §122oB(V)2.C.

C. The required qualifications of persons providing "home health services" are much more extensive than the qualifications of persons providing "personal assistance". Compare 16 DE Admin Code 4406.1.1, definition of "home health aide", with 16 DE Admin Code 4469.1.1, definition of "direct care worker".

Third, when SCPD initially reviewed the proposed regulation, it appeared unclear what effect the change would have on attendant services provided under the DSHP+ program. DMMA notes that "personal care services" are also known by other names "such as personal attendant services, personal assistance services, or attendant care services, etc.". At 259. The DSHP+ contracts with MCOs require coverage of "attendant care services" independent of coverage of "home health services". See attached excerpts from 2015 DMMA-MCO contract. One could infer that DMMA's elimination of "personal care services" from the Medicaid program represents either actual program elimination of "attendant services" or is a precursor to such elimination. However, SCPD communicated with the DMMA Director who stated that "(t)here is no actual or planned elimination of attendant services." See attached October 12, 2015 email communication.

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

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

19reg258 dmma-deletion of personal care services Medicaid plan 10-28-15

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INFORMATION
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Title 14 Education
200 Administration and Operations

200 Administration and Operations

Authenticated PDF Version

225 Prohibition of Discrimination

1.0 Prohibition of Discrimination

No person in the State of Delaware shall on the basis of race, color, religion, national origin, sex, sexual orientation, genetic information, marital status, disability, age or Vietnam Era veteran's status be unlawfully excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving approval or financial assistance from or through the Delaware Department of Education.

2 DE Reg. 1246 (01/01/99)

7 DE Reg. 1177 (03/01/04)

9 DE Reg. 1069 (01/01/06)

14 DE Reg. 554 (12/01/10)

Last Updated: November 07 2014 16:14:41.

FinAid!

The SmartStudent™ Guide to Financial Aid

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SEARCH

Rules for Exemptions in Taxability of Scholarships

When it comes to taxability of scholarships, it's better to find out well before your taxes are due rather than at the last minute whether or not your scholarships need to be accounted for on your tax forms.

Non-degree Candidates

If the student is not a degree candidate, the full amount of any financial aid is subject to federal income tax, even if it is spent on educational expenses.

Degree Candidates

If the student is a degree candidate, then scholarship and fellowship amounts used for tuition and REQUIRED course-related expenses (e.g., fees, books, supplies, and equipment) are exempt from federal income tax and may be excluded from gross income. Amounts used for living expenses (room and board) and other non-required expenses (computers, travel, etc.) are not exempt.

In most circumstances, federal and state educational grants are not taxable. (They are treated as scholarships, and are nontaxable to the extent that they were used for tuition and education-related expenses. Since most federal and state educational grants are restricted to being used for tuition, the usually end up being nontaxable.)

Student loans are also not taxable. If all or part of a student loan is cancelled or forgiven, the amount of debt forgiven may represent taxable income. See IRC section 108(f) for details.

Not Payment for Services

The scholarship or fellowship must NOT, however, be awarded in compensation for teaching and research services performed by the student. The portion of the award that represents payment for services is taxable. For example, a teaching assistantship or research assistantship is not necessarily exempt. If you are required to teach a class in exchange for your tuition waiver and stipend, it may be the case that the award is fully taxable. In such cases, for the tuition waiver portion of a TAship or RAship to be exempt, the rest of the stipend must represent fair compensation for the services rendered. Stipends paid for living expenses are, of course, always taxable. If the tuition waiver is exempt, then only the stipend portion of your award will be reported to you (and the IRS) as income on your W2 form.

Some universities or departments work around the "payment for services" restriction by making teaching duties part of the educational program. For example, one department provides every graduate student in the department with a full fellowship, and requires each graduate student to TA two classes before they can graduate. Since the teaching and research duties are uniform for all students and are construed as educational requirements -- more for the benefit of the student than the university -- these duties do not represent payment for services. They are graduation requirements and not conditions for receiving the grant. These duties are an essential part of the students' graduate education; TAships provide the student with teaching experience necessary for their future careers as faculty, and RAships provide the student with the opportunity to conduct doctoral research and to work on their dissertation. After all, a PhD is a research degree, so it makes sense to require research experience as part of the degree program.

[The IRS recently started challenging the validity of such arrangements. According to the May 5, 1995, issue of the Chronicle of Higher Education, the IRS has asked the University of Wisconsin at Madison for $81 million in back taxes, claiming that the work performed by research assistants is not part of their graduate education and hence subject to taxation like any other job. Note that the university was careful to distinguish between research assistantships intended to further the student's education and research assistantships aimed at assisting faculty with their own research. Federal income tax and Social Security tax was withheld from the latter but not the former. The university will be fighting the charges in US Tax Court.]

ROTC and Service Academies Exempt

ROTC scholarships and the service academies are specifically exempted from this requirement in the tax code, even though they could be considered payment for services. So the tuition, books, and the monthly stipend students receive from ROTC are exempt from tax. Pay for summer training, however, is taxable, and the student will receive a W2 for this work. (Veteran's educational benefits, however, may be taxable. Check with the VA for more information.)

Definition of Excludable

Excludable expenses are eliminated from gross income before any deductions. Thus you can exclude the exempt amounts and still take advantage of the standard deduction. Note that if you itemize your deductions, you cannot both exclude the educational expenses from gross income and deduct them -- no double dipping.

Scholarships and Fellowships Exempt from Social Security Taxes

The full amount of a scholarship or fellowship is usually exempt from FICA (social security) whether or not the student is a degree candidate.

Moving Expenses Not Deductible

Many new graduate students ask whether their moving expenses are tax deductible. Unfortunately they aren't, according to the IRS, because graduate students aren't really employees.

Reporting

Universities are not required to report scholarship or fellowship income for US students to the IRS via W2 or 1099 forms, nor do they have any responsibility for withholding estimated tax for these students. The only exception is assistantships where the compensation represents pay for services and must be reported on a W2. (According to IRS guidelines, students who receive pay for services should receive a W2 form, not a 1099 form.)

For foreign students, however, the university is required to withhold appropriate taxes. (Many universities are too conservative in the amount withheld, so foreign students should cite the terms of the appropriate tax treaty on their return to claim a refund of the excess taxes withheld.)

If you received a taxable scholarship or fellowship which was not reported to the IRS on a W2 or 1099 form, you are required to include it on line 7 and write "SCH" to the left. If you report taxable scholarship or fellowship income in this fashion, it is wise to attach an explanatory letter to your return, especially if you exclude any required educational expenses.

If your scholarship or fellowship was reported to the IRS on a W2 or 1099 and you wish to exclude additional required educational expenses (e.g., the university excluded tuition and fees but not required books), exclude the amount of the expenses from the amount reported on line 7 on Form 1040 or Form 1040A and line 1 of Form 1040EZ, and attach an explanatory letter. It is very important to attach such a letter, since the IRS computers will notice the discrepancy between the amounts reported to the IRS and the wages you listed on your return. Failing to attach such a letter will likely cause your return to be audited. (Some people recommend reporting educational expenses as a negative amount on the "Other Income" line, instead of subtracting the expenses from line 7. In either event, you should still attach an explanatory letter.)

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Education alternatives put power in hands of parents

DELAWARE VOICE

Recently there have been an increasing number of education alternatives proposed to the existing traditional system of Delaware's public schools. The nonpublic schools are an option that has been around for a long time. One of them actually predates the founding of our country.

Two other alternatives, home schooling and charters, are experiencing significant growth.

Our state legislature soon will be considering a new alternative for students with special needs, the Education Savings Account, which was initiated by Arizona in 2011.

It is a parent-empowerment piece of legislation designed to enable parents of children with special needs to customize their children's educational experience. The state portion of a child's education funding is placed in a state-controlled account which the parents can access for qualified education expenses. The district retains the local portion. Qualified expenses include such things as tuition at an approved participating school, textbooks, services from a licensed or accredited practitioner or provider, payment to a licensed or accredited tutor and, if any funds remain after high school, they could be put toward college tuition.

Another alternative is the Education Tax Credit Scholarship.

The Washington Center for Education Reform describes the concept as allowing individuals or businesses (or both) to claim a credit against their tax bill for donations made to authorized organizations that in turn use those donations to fund tuition scholarships for eligible students to attend a school of their choice. Even though this program reduces the amount of taxes collected, the net result is a savings to the state. This is because the tax revenue reduction is more than offset by the reduction in education expenditures. This is in addition to the significant benefit of shifting the power of choosing a child's education from the government to the child's parent. As of 2014, 14 states have enacted tax credit-funded scholarship programs. These programs now include approximately 190,000 students, a participation level that is surpassed only by enrollment in charter schools.

With a belief that "one size doesn't fit all" and "we can't take a cookiecutter approach to education," there is little doubt a demand exists for education alternatives. Perhaps the next education alternative on the horizon will focus on an alternative way to operate the current system.

Ronald R. Russo is senior education fellow with the Caesar Rodney Institute.

RONALD R. RUSSO

GENERAL ASSEMBLY 6-9-14 #5

Fund would give parents school cash

By Matthew Albright
The News Journal

Parents would be able to spend the money that goes to their public school as they see fit under a new bill proposed in the legislature.

While they acknowledge it is unlikely to pass this session, the Republican leaders who proposed the bill say parents deserve more control in their children's education.

Called the "Parent Empowerment Education Savings Account Act," HB 353 would allow parents to place a percentage of the per-student funding that goes to a public school into accounts with the state treasurer's office. They could then spend the money from those accounts on whatever educational purposes they choose, as long as they do not enroll their student in a

See BILL, Page A7

Bill: Sponsors predict parents would support funding plan

Continued from Page A1

public school.

"We always talk about how, in Delaware, the money follows the child. But that's only true within the government schools," said House Minority Whip Deborah Hudson, one of the bill's sponsors. "That unnecessarily limits some kids, and we want to change that."

The families could use the money for things like tuition and fees at participating schools, textbooks, tutors, online learning programs and fees for exams like Advanced Placement or college admission exams like the SAT. If a family has any money left after paying for high school, they can use the money to pay tuition and fees at eligible colleges and universities.

The bill's sponsors say it would knock down financial barriers that prevent low-income parents from picking the school they want for their kids.

"When a family is challenged economically, they can be trapped in failing schools or in a school that doesn't meet what their kid needs," said Senate Minority Whip Greg Lavelle, another sponsor. "We want to give them the option to send their children to the school that is best for them."

Gov. Jack Markell does not support the idea, believing it is a form of school vouchers, in which the state reimburses parents for private school tuition.

"[The accounts] would not help strengthen our schools across the state, and would drain funding from our system at a time when more parents than in the past are choosing Delaware's public schools as the best education option for their children," Markell spokesman Jonathon Dworkin said in a statement.

Hudson and Lavelle both recognized the odds are stacked against the bill right now. But they believe many parents would support the plan.

"This is not a bill I expect to pass this year, but it's the kind of bill the public needs to know about and think about," Hudson said. "I think parents need to know that there is a way for them to have more control over their child's education, and right now they don't have that option."

How much a family would receive depends on how much money they make.

Households with income low enough to qualify for free or reduced-price lunch would receive the same amount as a school district would get to educate their child. For last year, that means $43,568 for a family of four. Families that earn less than 1.5 times that amount would get 75 percent; families than earn between 1.5 times and twice the amount to qualify would get half, and families that earn between 2 and 2.5 times the amount to qualify would get a quarter.

State Rep. Deborah Hudson

State Sen. Greg Lavelle

The remainder of that student's allotment would go to their home district as normal, Hudson said.

Students whose families make more than 2.5 times the reduced-price lunch level would not qualify to receive money for one of these accounts.

"I don't want people to think this is just money going to rich kids going to a fancy private school," Hudson said. "This is an opportunity for kids to go to a school they couldn't get to in any other way."

One thing that needs to be worked out, Hudson said, is exactly how much the state spends "per student." When the state doles out money to districts, it does so through a complicated system called "unit count," in which certain numbers of students "earn" schools "units" for teachers, principals, assistant principals, etc.

The state also gives out additional money for students with special needs.

Delaware schools spend an average of $12,622 per child statewide, according to Department of Education figures. On average, 59 percent of school funding comes from the state, the rest coming from local taxes and federal sources.

As a rough average, that means the state doles out something like $7,446 a student.

That amount wouldn't cover tuition at many private schools: Salesianum's tuition this year was $13,700; tuition at St. Mark's High School next year is $10,500, and elementary tuition at Ursuline Academy is $14,150.

It would, however, cover tuition at most elementary schools operated by the Diocese of Wilmington, with some money left over.

Schools would have to meet certain requirements to participate. They would have to comply with all health and safety laws, hold a valid occupancy permit and comply with all non-discrimination policies.

To ensure financial accountability, schools would be required to provide parents with receipts for all expenses. They would also have to prove to the state that they are financially viable without the money from the accounts.

After a student graduates from college, or four years after they graduate high school, any money left over in the account would be returned to the state.

Delaware is one of several states mulling education savings accounts, or ESAs. Seven states have seen bills introduced to create them this year, including Oklahoma, Kansas, Iowa, Missouri, Mississippi and Tennessee, according to the Friedman Foundation for Educational Choice, a national group that supports the accounts.

Florida's legislature passed a similar bill this year, which is awaiting its governor's signature.

Arizona already has such a system in place, called Empowerment Scholarship Accounts. Launched in 2011, the state has gradually expanded the eligibility requirements so more students can access them.

In the past school year, 731 students used such an account to attend 75 participating private schools.

Arizona's system has seen some controversy. The state school board association, teachers union and association of school business officials sued to block the program. A court ruled the ESAs were constitutional, as did an appeals court, and the groups have appealed to the state Supreme Court.

Educational savings accounts are one of many possible policy tools supported by "school choice" advocates. Others include "tuition tax credits," which give businesses and individuals tax breaks for supporting funds that pay students' private school tuition, and vouchers, in which the state gives parents the money to pay private school tuition.

Contact Matthew Albright at malbright@delawareonline.com or at 324-2428. Follow him on Twitter @TNJ_malbright.

NATIONAL CONFERENCE of STATE LEGISLATURES

SCHOOL VOUCHERS

School vouchers, also referred to as opportunity scholarships, are state-funded scholarships that pay for students to attend private school rather than public school. Private schools must meet minimum standards established by legislatures in order to accept voucher recipients. Legislatures also set parameters for student eligibility that typically target subgroups of students. These can be low-income students that meet a specified income threshold, students attending chronically low performing schools, students with disabilities, or students in military families or foster care.

History

The practice of state support for private school education has existed in Maine and Vermont for nearly 140 years. They have ongoing programs that provide public funding to private schools for rural students who do not have a public school in close proximity to their home. However, it was economist Milton Friedman's 1955 paper, "The Role of Government in Education", that launched modern efforts to use public dollars to pay private school tuition in hopes that competition among schools will lead to increased student achievement and decreased education costs.

In 1989,the Wisconsin legislature passed the nation's first modern school voucher program targeting students from low income households in the Milwaukee School District.

In 2001, Florida enacted the John M. McKay Scholarships Program for Students with Disabilities becoming the first state to offer private school vouchers to students with disabilities.

In 2004, the first federally funded and administered voucher program was enacted by Congress in Washington, D.C. It offered private school vouchers to low income students, giving priority to those attending low-performing public schools

In 2007, the Utah legislature passed legislation creating the first statewide universal school voucher program, meaning it was available to any student in state with no limitations on student eligibility. A petition effort successfully placed the legislation on the state ballot for voter approval. In November 2007, the ballot measure was voted down and the new voucher program was never implemented. Utah's existing special needs voucher program was not affected by the vote.

In 2011, Indiana created the nation's first state-wide school voucher program for low income students

Arguments For and Against

What the Proponents Say: Private school choice proponents contend that when parents can choose where to send their child to school, they will choose the highest performing options. Those schools performing poorly will be forced to either improve or risk losing students and the funding tied to those students. While public school choice policies like charter schools serve a similar purpose, private schools have more flexibility in staffing, budgeting, curriculum, academic standards and accountability systems than even charter schools. This flexibility, supporters argue, fosters the best environment for market competition and cost efficiency.

>What the Opponents Say: Opponents of private school choice raise a number of concerns. They argue shifting a handful of students from a public school into private schools will not decrease what the public school must pay for teachers and facilities, but funding for those costs will decrease as students leave. Some also see government incentives to attend private religious schools as violating the separation of church and state. Others believe the positive effects of school competition on student achievement are overstated by proponents.

What the Research Says

When compared to similar public school students, voucher recipients have generally performed at the same level on reading and math assessments according to the Center on Education Policy's review of school voucher research,

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though some gains have been found among low income and minority students who receive vouchers.

Other research has found voucher recipients are more likely to graduate from higher school than their public school counterparts. School competition was also found to slightly improve student achievement in some Milwaukee schools that lost students to school vouchers and under Florida's tax credit scholarship program, although other researchers have questioned the ability to tie these improvements to school vouchers rather than other school reforms.

What States Have Done

There are 13 states plus the District of Columbia with school voucher programs. Of those, eight states offer vouchers to special needs students, four states plus D.C. offer them to low income students or students from failing schools, and two offer them to certain rural students. Louisiana and Ohio have programs for both low income and special needs students.

Compare how each state has approached their school voucher laws including which students qualify, how private schools are regulated, and the size of each state's voucher by visiting the State-by-State Comparison of Voucher Laws webpage.

Webinar - School Vouchers: Legal and Constitutional Issues

June 20th, 2013 - A presentation on the legal and constitutional issues surrounding the issue of school vouchers.

Josh Cunningham, Policy Specialist, NCSL - Presents the national policy landscape on private school choice and discusses major US Supreme Court decisions effecting school vouchers
Anne Sappenfield, Senior Staff Attorney, Legislative Council, Wisconsin - Explains the Milwuakee and Racine County Parental Choice Programs in Wisconsin and discusses the state-level legal challenges to the program.
Allen Morford, Attorney, Legislative Services Agency, Indiana - Explains the Indiana Choice Scholarship Program and the recent Indiana Supreme Court decision upholding the Constitutionality of the program.
Julie Pelegrin, Deputy Director, Legislative Legal Services, Colorado - Explains the Colorado Opportunity Contract Pilot Program and the 2004 Colorado Supreme Court decision that ruled the program unconstitutional. She also discusses the nation's first county-initiated voucher program in Douglas County, CO and the current legal challenge to that program.

Click here for the full podcast of the webinar including slideshow and audio

Click here to download the slideshow (PDF)

Association: Vouchers

Alexandra Usher and Nancy Kober. "Keeping Informed about School Vouchers: A Review of Major Developments and Research," Center for Education Policy, July 2011

NCSL Contact

Josh Cunningham

Denver
7700 East First Place
Denver, CO 80230
Tel: 303-364-7700 | Fax: 303-364-78(

Washington
444 North Capitol Street, N.W., Suite
Washington, D.C. 20001
Tel: 202-624-5400 | Fax: 202-737-10(

New voucher plan for special-needs students revives dispute

By Erin Richards of the Journal Sentinel
Jan. 20, 2014

A proposal to allow special-needs students to attend private schools at taxpayer expense is being revived, the latest effort by Republicans in the Legislature to give parents more options outside traditional public schools.

The proposal is a revamped version of a measure that failed in Gov. Scott Walker's 2013-'15 budget.

That measure would have allowed 5% of students with disabilities to attend schools outside their home districts with the help of a taxpayer-funded voucher. As part of a broader compromise, the portion on students with disabilities was dropped in favor of a limited expansion of private school vouchers statewide.

The revived Wisconsin Special Needs Scholarship bill is scheduled to be introduced Tuesday by state Sens. Leah Vukmir (R-Wauwatosa) and Alberta Darling (R-River Hills) and Reps. John Jagler (R-Watertown) and Dean Knudson (R-Hudson).

The primary concern of those who oppose special-needs vouchers is that private schools are not obligated to follow federal disability laws. They point to examples in other states where — in their eyes — underqualified operators have declared themselves experts, opened schools and started tapping taxpayer money.

The operators of a private voucher school in Milwaukee that abruptly closed last month after receiving $2 million in taxpayer money are now operating a private school in Florida — bolstered by taxpayer funds from that state's special-needs voucher program.

Only seven children are enrolled in the school, and only two are getting taxpayer money, but it's the kind of toehold that worries public-school advocates.

The spirit of the new proposal has revived tensions between familiar foes: Republicans and school-choice advocates who support the bill vs. the state's primary disability rights group and teachers unions that oppose it.

Supporters of the bill believe taxpayer-funded subsidies would allow parents to pursue an education better-suited for their special-needs child, potentially at a private school.

Opponents believe the proposal is another attempt by conservatives to siphon more funding into the private sector. They believe the most complete services for special-needs students are in the public schools.

"It's a battering ram at the public schoolhouse doors," Christina Brey, spokeswoman for the Wisconsin Education Association Council, the largest state teachers union, said Monday.

"The idea that we'll continue to see rewrites on legislation that has been dismissed shows a lack of respect for the will of the parents of special-needs children" who opposed the measure the first time it was introduced, Brey added.

Accountability issues

The revamped bill is likely to require that students first fail to get a public school placement outside their district through the state's open enrollment program before they are eligible for a special-needs voucher they could use in a private school.

But Lisa Pugh, the director of Disability Rights Wisconsin, said parents of children with special needs routinely get denied through open enrollment because districts often have limited open enrollment seats, and even more limited special-education resources.

Pugh said her group is working with the state to improve the open enrollment process for special-needs families. But, she said, placing special needs students in private schools is not the answer.

"We haven't seen support for real accountability in the private school sector that would ensure that students with disabilities would be protected," Pugh said Monday.

There has been a bill in the works for months that would place more accountability measures on the private schools that receive public dollars, but it has not yet been introduced.

In the meantime, private schools do not have to employ certified special education teachers, and they are not subject to the same mandates as public schools under the federal Individuals with Disabilities in Education Act.

Then there's LifeSkills Academy.

The private school participated in the longstanding Milwaukee Parental Choice Program before abruptly closing its doors in December and forcing children to find a new school midyear. Virtually no children there were proficient in reading or math, according to the past two years of state test scores.

But operators Taron and Rodney Monroe opened a new private school in Florida, LifeSkills Academy II, and got approved to accept taxpayer money for students through the state's special-needs voucher program.

A spokeswoman for the Florida Department of Education confirmed that the school in Daytona Beach had received about $2,700 so far this year for students participating in the state's special-needs voucher program.

Though it's a small amount of public money, critics following the story from Wisconsin were aghast.

"The idea of such a school simply declaring (itself an) expert in special education should send shivers down the spine of every parent of a student with disability-related educational needs," said Joanne Juhnke, a Madison parent and the chair of a grass-roots group called Stop Special Needs Vouchers.

Florida and seven other states offer some kind of program for students with disabilities to attend private schools with public funding.

Supporters of special-needs vouchers, also called special-needs scholarships, say it comes down to flexibility and more options.

They say public funding would help schools receiving special-needs children — especially if they are private schools — have the resources necessary to serve the child adequately.

The American Federation for Children, a national school choice advocacy group, has said the proposal in Wisconsin would give the parents of children with special needs more choices to find the best fit for their child.

Jagler has a daughter with Down syndrome and said last year when the idea was first floated that most parents of special-needs children, including himself, are comfortable with services in the local public schools.

"But the school exerts control in the educational setting, and if they don't go forward with what's expected of them, or if you can't get the right teachers, a lot of times parents are stuck," he said at the time.

Knudson said Monday that the latest bill is more "narrowly tailored" than the previous proposal to help the small population of families who don't feel their children are getting the best services in public schools.

"We started from scratch and really tried to address the concerns we'd heard over the years," he said.

Indiana public schools fight to keep kids

By Tom Coyne
Associated Press

SOUTH BEND, Ind. — Struggling Indiana public school districts are buying billboard space, airing radio ads and even sending principals door-to-door in an unusual marketing campaign aimed at persuading parents not to move their children to private schools as the nation's largest voucher program doubles in size.

The promotional efforts are an attempt to prevent the kind of student exodus that administrators have long feared might result from allowing students to attend private school using public money. Millions of dollars could be drained from the state's public education system due to any exodus.

The Indiana voucher program, passed by the Legislature in 2011, is the biggest test yet of an idea sought for years by conservative Republicans, who say it offers families more choices and gives public schools greater incentive to improve.

But school officials worry about the potential loss of thousands of students.

A district loses $5,300 to $8,400 for each student who leaves.

Unlike voucher programs in other states that are limited to poor families and failing school districts, the Indiana subsidies are open to a much broader range of people, including parents with a household income up to nearly $64,000 for a family of four.

The median income for an Indiana family of four was just over $67,000 in 2010, making many of the state's nearly 1 million public school students eligible.

Last year, the effect of the new vouchers was limited because the law passed just four months before the start of school, and many parents were still unfamiliar with the program.

But this year, more than 8,000 students have already applied for vouchers, and there is room for up to 15,000.

The number of participants could grow even more next year, when the ceiling on the number of vouchers is eliminated.

Leaders of poor urban schools, which suffered the most defections last year, are especially worried.

After 113 of its students departed for private schools last year, the Evansville Vanderburgh district spent $5,700 to erect two billboards and place ads at bus stops.

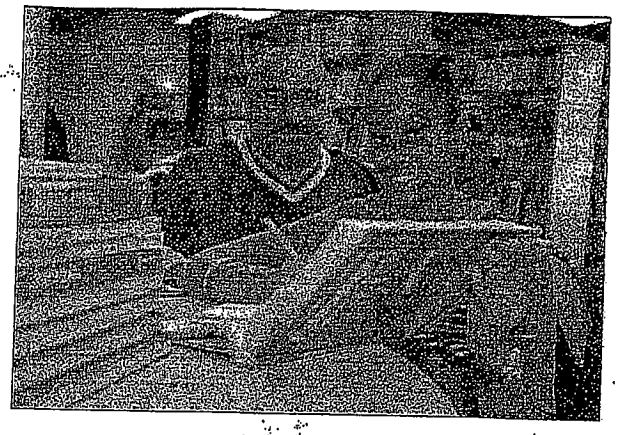
In Fort Wayne, public schools lost 392 students to vouchers last year, the most in the state.

That cost the district more than $2.6 million in state aid and led officials to cut 10 teaching positions at elementary schools.

Principals have gone door to door in neighborhoods to make their case for the city's public schools.

The district has spent $32,000 on a marketing campaign.

No one knows yet whether the marketing is paying off. Indiana schools won't count students until September.



Phillip Covington and his son, Giovanni, work on a math lesson at Todd Academy in Indianapolis.
MICHAEL CONROY/AP

8-21-12
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Cite as 3 EHLR 552:183

JOHN M. GRYMES and JOYCE M. GRYMES, on their own behalf and as parents and next friend of JAMES GRYMES, a minor,
Plaintiffs

v.

KENNETH C. MADDEN, Individually and as Superintendent of Public Instruction and Secretary of the State Board of Education; THE STATE BOARD OF EDUCATION; ALBERT H. JONES, President; RICHARD M. FARMER, Vice-President; ROBERT W. ALLEN, HARRY CAMPER, ELISE GROSSMAN, KENNETH HILTON, and RAYMOND TOMASETTI, members of the State Board of Education, Individually and in their official capacities; RICHARD LINNETT, Individually and as Superintendent of Schools, Marshallton-McKean School District and Executive Secretary of the Marshallton-McKean School Board; THE MARSHALLTON-McKEAN SCHOOL DISTRICT; THE MARSHALLTON-McKEAN SCHOOL BOARD; and BRUCE FURAMN, MARY DiVIRGILIO, LEONARD MROZ, ERNEST LINDSAY, and ROBERT SHELLENBARGER, members of the Marshallton-McKean School Board, Individually and in their official capacities,
Defendants

Civil Action No. 78-105

In the United States District Court for the District of Delaware

May 3, 1979

Stapleton, District Judge

Counsel for Plaintiffs: Brian J. Hartman, Esquire, Community Legal Aid Society, Wilmington, Delaware

Counsel for "State Defendants": Regina M. Small, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware

Counsel for "Local Defendants": Edward W. Cooch, Jr., Esquire, Richard R. Cooch, Esquire, and Jeoffrey L. Burtch, Esquire, of Cooch and Taylor, Wilmington, Delaware

Action to review a determination of the State Board of Education that a handicapped child was not entitled, under State law, to private placement with financial aid. Plaintiffs seek a declaratory judgment that the child is a "complex or rare handicapped person" under State law, the costs of tuition, transportation, and related services for the child's attendance at a private school, and costs and attorneys' fees.

HELD, plaintiffs are entitled, since they have received partial tuition reimbursement, to the difference between the reimbursement they have received and the financial aid to which they are entitled under State law, *e.g.*, full tuition, transportation and maintenance. Although hearing officer concluded that child did not meet one prong of definition of "complex or rare handicapped person," he made no finding as to whether the child met the second prong of the definition. The hearing officer was erroneous in his apparent belief that LEA could ascertain whether it could provide suitable program *after* the due process hearing. Because the LEA had the burden of justifying its refusal to approve private placement and because that necessarily required showing that the child could "benefit from the regularly offered free appropriate public educational programs," the hearing officer should have reversed the initial decision and order full tuition reimbursement.

OPINION

The parents of James Grymes brought this action on their own behalf and as parents and next friends of James against the Delaware State Board of Education, its Secretary and members in their official capacities (hereinafter referred to as "the State defendants"), and against the Marshallton-McKean School District and the Marshallton-McKean School Board, its Secretary and members (hereinafter referred to as "the local defendants"),[1] to review a determination

[1] The New Castle County School District was substituted for the Marshallton-McKean School District and the Marshallton-McKean School Board, its Secretary and members. Doc. No. 28.

of the State Board of Education that James was not entitled to private placement with financial aid under 14 De. C. § 3124(a) (1977 Supp.). Jurisdiction is predicated on 20 U.S.C. § 1415(e)(2) and (4). The relief they seek is a declaratory judgment that James is a "complex or rare handicapped person," as that term is used in 14 Del. C. § 3124(c) (1977 Supp.), the costs of tuition, transportation and related services for James' attendance at the Beechwood School and the assessment of costs and reasonable attorneys' fees.

Presently before the Court are the plaintiffs' motion, pursuant to F.R.Civ.P. 12(c), for judgment on the pleadings and the defendants' motion for summary judgment. Because I will consider the record of the State proceedings in ruling on the plaintiffs' motion, I will treat it as a motion for summary judgment. *See* F.R.Civ.P. 12(c); 5 C. Wright & A. Miller, Federal Practice & Procedure § 1366 (1969).

Until August 13, 1977, as part of its state appropriations to public education,[2] the Delaware General Assembly authorized partial tuition reimbursement for handicapped children, including learning disabled children, for whom there was no adequate public school program within reasonable transportation distance of their homes. 14 Del. C. § 1703(f) (repealed). The determination of entitlement to partial tuition reimbursement was to be made by evaluation and placement committees established by the State Board of Education. *Id.*

The evaluation and placement committee of the Marshallton-McKean School District recommended on January 6, 1977 that James Grymes be placed at Beechwood School with partial tuition reimbursement pursuant to Subsection 1703(f). As a part of its recommendation, the committee found that James was learning disabled and that Marshallton-McKean and surrounding districts lacked an adequate program for the child. On July 8, 1977, the local defendants forwarded the committee's recommendation to the State defendants.

On August 13, 1977, the Governor signed Senate Bill No. 353 which, among other things, repealed 14 Del. C. § 1703(f) and enacted 14 Del. C. § 3124 as part of a new subchapter dealing with handicapped persons. Section 3120 of the subchapter provides that the State shall provide handicapped persons with a "free and appropriate public education designed to meet his or her needs." Section 3121 contemplates the development and maintenance of "special classes and facilities [in the public schools] to meet the needs of handicapped persons . . ." As a complement to Section 3121, Subsection 3124(a) provides in pertinent part that "[p]rivate placement with financial aid shall be granted only to a 'complex or rare' handicapped person . . ."

By letter dated August 26, 1977, agents of the local defendants informed the Grymes that James was no longer eligible for private placement with financial aid under the new law. The Grymes challenged that action and, accordingly, a hearing was held pursuant to 14 Del. C. § 3124(b) on November 11, 1977. On November 16, 1977 the hearing examiner issued his ruling, in which he concluded that the decision to deny tuition to the Grymes had been a "proper judgment under the law."[3] The Grymes appealed the ruling pursuant to Section 3124(b) to the State Board of Education. The reviewing officer concluded that James Grymes should not be certified as a complex or rare handicapped person on the basis of "the record before the hearing examiner."[4]

James attended the Beechwood School during its summer program in 1977 and he continued to attend the school during the entire 1977-1978 school year.

On February 10, 1978 the Governor signed Senate Bill No. 402, reenacting the provisions of the repealed 14 Del. C. § 1703(f) for a one year period. Under that legislation, the Grymes received partial tuition reimbursement for the 1977-1978 school year.

It is undisputed that the nonindividual defendants have received Federal financial assistance under Chapter 33 of Title 20 of the United States Code. Having received such financial assistance, they are subject to 20 U.S.C. § 1415, which requires them to afford a due process hearing with written findings of fact and decisions in situations such as the present one. This Court has jurisdiction to review those findings of fact and decisions under 20 U.S.C. § 1415(e)(4), without regard to amount in controversy.

The standard of review in a case such as the present one is very broad:

> the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the Court determines is appropriate.

20 U.S.C. § 1416(e)(2).

As discussed earlier, 14 Del. C. § 3124(a) authorizes full tuition reimbursement for "rare or complex" handicapped persons. Section 3124(a) provides a two-prong definition of "rare or complex." A person may be certified as "rare or complex" if he or she either (1) suffers from two or more handicaps[5] or (2) "is so severly afflicted by a single handicap, that the total impact of the condition means that he or she cannot benefit from the regularly offered free appropriate public educational programs." *Id.*

When the Grymes were advised that their son did not qualify for private placement under this new standard, they invoked their right to a hearing under 14 Del. C. § 3124(b). Under the State regulations governing such hearings it is conceded that the school administration had the burden of

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[2] Chapter 17 of Title 14 of the Delaware Code.

[3] Doc. No. 16, Tab B at p.16.

[4] Doc. No. 16, Tab 5 at p.1.

[5] The subsection refers to "the defined handicaps." The definitional section of the subchapter, Section 3101, contains no definition of "handicap" *per se*, but it defines "Handicapped person" as a person between the ages of 2 and 20 inclusive "who because of *mental, physical, emotional or learning disability problems as defined by the State Board of Education*, requires special educational services in order to develop his or her capabilities." Subsection 3101(4) (emphasis added) The Administrative Manual for Programs for Exceptional Children (October, 1977) lists and describes ten conditions contemplated by the repealed Section 1703. Learning disability is one of the conditions listed.

justifying their refusal to provide full tuition for private placement under 14 Del. C. § 3124(a).[6]

Both the hearing examiner and the State Board of Education concluded that James Grymes did not suffer from two handicaps, such that he would be a "rare or complex" handicapped person within the first prong of the Section 3124(a) definition. The hearing examiner did find, however, and the State Board did not disagree, that James Grymes suffered from a single handicap as that word is used in Section 3124(a).[7]

Despite the fact that James was found to have a handicap, the hearing examiner made no finding as to whether the "total impact" of that condition was such that he could not "benefit from the regularly offered free appropriate public educational programs." Indeed, the hearing examiner could not have made such a finding because no information was supplied to him about the educational programs then available for children having learning disabilities like that of James. The decision that the denial of tuition had been proper was based, not on a factual finding that the District could presently meet James' educational needs, but rather on a conclusion that the District had a duty to attempt to meet those needs and that, if it turned out that the District was unable to do so, it must provide tuition relief.[8]

The hearing examiner appears to have been of the view that someone at some point after the Section 3124(b) due process hearing would determine whether the District could develop a program suitable for James. If so, he was in error. The statutory scheme contemplates that a determination will be made as to whether a child is a "complex and rare handicapped person" as defined in the statute and that, if there is a dispute about that initial determination, a hearing will be held before an impartial hearing examiner and a final determination made. The supporting regulatory scheme also contemplates that this final determination will be made with reasonable speed. Section 2 of the "Hearing Procedures" provides, for example, that "the hearing process at the local level shall reach a final decision and a copy of findings of fact and decision be mailed to each of the parties or their representatives within 45 calendar days."

The Grymes had a right to tuition aid if their son was a rare and complex handicapped person. They had a right to have that issue determined promptly in a proceeding with certain procedural safeguards. The regulations provided for no such proceeding other than that which the hearing examiner conducted. During that proceeding the District provided no basis for concluding that it had the present ability to meet the special educational needs resulting from James' handicap. Because the District has the burden of justifying its refusal to approve private placement and because that necessarily required showing that James could "benefit from the regularly offered free appropriate public educational programs," it follows that the hearing examiner should have reversed the initial decision and ordered that full tuition be made available.

The defendants claim that, if there was error, it was harmless error because they could and would have proven the availability of a suitable program for James if they had known it was their burden to do so. In support of this contention, defendants have presented an affidavit describing the public education program available to James in the fall of 1977. As has already been indicated, however, Delaware's program for educating handicapped persons contemplates that within a relatively short period of time the District will be called upon to make a showing of what it has to offer the handicapped person. I believe one of the purposes of this requirement is to provide those responsible for a handicapped person's education with a basis for making an informed decision about where and how that education will take place. This objective of the program would be frustrated if the District were permitted to ignore its obligation altogether in the due process hearing and then attempt to justify its actions in court a year and a half later.

The defendants' argument that the error, if any, was harmless because the Grymes intended to send James to private school whether or not they received reimbursement is also unpersuasive. While it is true that the Grymes elected to keep James in private school after receiving notice that tuition reimbursement would be denied, there is nothing in the record to indicate what they would have decided had the District carried its burden of demonstrating an appropriate public program for James.

The relief contemplated by the statute is full tuition reimbursement, transportation and maintenance in accordance with the definitions contained in section 3124(c). The Grymes have received partial tuition reimbursement. They are entitled, therefore, to the difference between the partial tuition reimbursement that they have received and the financial aid to which they are entitled under Section 3124(c).

The parties shall agree on what the dollar figure is and notify the Court, so a final judgment can be entered.

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[6] The Administrative Manual for Programs for Exceptional Children (October, 1977) provides that "[t]he burden of sustaining the district or any other public agency proposal or refusal to act is upon the district and/or agency." *Id.* at 16.

[7] The hearing examiner concluded that James had "a marked learning disability" and that if a suitable program could not be developed "tuition relief must be made available to the Grymes for Jimmy to continue at the Beechwood School until such time as placement is available in the . . . District."

[8] The hearing examiner stated;

> . . . In the event that the parents decide to return Jimmy to the public schools of the state, the Marshallton-McKean School District must be prepared to offer Jimmy instruction in one of the learning disability classes suitable to his need or to find suitable placement in the New Castle County Consortium. Whichever program is chosen, it shall be done after consultation with the Parents, Mr. and Mrs. John Grymes. If neither placement is available at present and additional units and support are not given to the district through a request to the State Department of Public Instruction, then some tuition relief must be made available to the Grymes for Jimmy to continue at the Beechwood School until such time as placement is available in the Marshallton-McKean School District.
>
> . . .

Doc. 16, Tab A at pp. 15-16.

STATE OF DELAWARE
OFFICE OF THE CONTROLLER GENERAL
LEGISLATIVE HALL
P.O. Box 1401
DOVER, DELAWARE 19901

November 8, 1977

Mrs. Phyllis Torres
Lay Advocate for Developmental Disabilities
Community Legal Aid Society, Inc.
913 Washington Street
Wilmington, Delaware 19801

Dear Mrs. Torres:

This will acknowledge receipt of your letter of November 4, 1977.

House Bill No. 300, as amended, the State's Operating Budget for the year ending June 30, 1978, provided a line item appropriation under (95-01-003) Educational Contingency as follows:

Learning Disabilities - Tuition $167,411*

(*) Reduced from $169,000 per compliance with Section 95 of House Bill No. 300, as amended.

Furthermore, the Department of Public Instruction is charged with the administration of this appropriation under the terms and provisions of paragraph (f) of §1703, Chapter 17, Title 14, Delaware Code.

Senate Bill No. 353 was signed by the Governor on August 13, 1977, to be effective July 1, 1977. Section 2 of Senate Bill No. 353 strikes paragraph (f) of §1703, Chapter 17, Title 14, Delaware Code.

According to the Validity Balance Report dated November 4, 1977, no monies have been disbursed from the line item appropriation of $167,411 for Learning Disabilities - Tuition.

Yours very truly,

Duane O. Olsen
Controller General

DOO:mak

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

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

MEMORANDUM

DATE: May 30, 2013

TO: All Members of the Delaware State Senate and House of Representatives

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

RE: S.B. 56 [Medicaid Coverage of Adult Dental Services]

The State Council for Persons with Disabilities (SCPD) has reviewed S.B. 56 which expands Delaware's Public Assistance Code to provide preventative and urgent dental care to all eligible Medicaid recipients. Payments for preventative or urgent dental care treatments shall be subject to a $10.00 recipient copay and the total amount of dental care assistance provided to an eligible recipient shall not exceed $1,000.00 per year, except that an additional $1,500.00 may be authorized on an emergency basis for urgent dental care treatments through a review process established by the State Dental Director. SCPD endorses the proposed legislation and has the following observations.

Research on dental health suggests that poor oral health is linked to increased risks for chronic health conditions such as heart disease and diabetes. This problem is even more pronounced among individuals with disabilities because of their notoriously limited access to dental care. A survey conducted on the health status of individuals with disabilities in Delaware showed that almost a quarter (24.3%) of adults surveyed did not receive regular dental care. Adults who depend on state health insurance do not have dental care coverage through Medicaid.

While many of us have some anxiety, financial difficulty, or other challenge associated with our access to dental care, individuals with disabilities often face multiple difficulties. Recent studies have shown that one's knowledge of dental care is a major predictor of dental health. Patients with cognitive disabilities are often dependent on others for assistance, whether for transportation, home care activities, decision-making about treatment, and/or payment. Physical disabilities can limit a patient's ability to practice effective dental hygiene and access adequate care in a dental office. While Delaware offers a good Medicaid program to meet the needs of children who qualify, virtually no financial assistance is available for adults with unmet dental needs.

In summary, the lack of state funding for adults with disabilities is a major impediment to dental car, and poor dental health is known to be a factor in a wide range of non-dental medical conditions.

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

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

sb 56 medicaid coverage of adult dental 5-30-13

NATION/WORLD

HEALTH

Dental problems — sometimes deadly — drive more people to ERs

Lack of insurance, access largely to blame

Laura Ungar
USA TODAY

JACK GRUBER, USA TODAY

University of Maryland School of Dentistry Urgent Care Clinic serves low-income patients referred from the ER, lacking dental insurance, or with emergency needs.

What started as a toothache from a lost filling became a raging infection that landed Christopher Smith in the emergency room, then in intensive care on a ventilator and feeding tube.

"It came on so quickly and violently. I was terrified," says Smith, 41, of Jeffersonville, Ind., who lacked dental insurance and hadn't been to a dentist for years before the problem arose last month. "I had no idea it could get this serious this quickly."

Smith is one of a growing number of patients seeking help in the ER for long-delayed dental care. An analysis of the most recent federal data by the American Dental Association shows dental ER visits doubled from 1.1 million in 2000 to 2.2 million in 2012, or one visit every 15 seconds. ADA officials, as well as dentists across the nation, say the problem persists despite health reform.

"This is something I deal with daily," says George Kushner, director of the oral and maxillofacial surgery program at the University of Louisville. "And there is not a week that goes by that we don't have someone hospitalized ... People still die from their teeth in the U.S."

Often, what drives people to the ER is pain, "like a cavity that hurts them so much they can't take it anymore," says Jeffrey Hackman, ER clinical operations director at Truman Medical Center-Hospital Hill in Kansas City, who's noticed a significant rise in the number of dental visits over the past five years.

Limited insurance coverage is a major culprit; all but 15% of dental ER visits are by the uninsured or people with government insurance. The Affordable Care Act requires health plans to cover dental services for children but not adults; federal officials say "essential" benefits were based on services included in employer-sponsored medical plans. Medicaid plans for adults vary by state and often cover only a short list of basic services. Medicare generally doesn't cover dental care at all.

By law, ERs have to see patients even if they can't pay. But although they often provide little more than painkillers and antibiotics to dental patients, they cost more than three times as much as a routine dental visit, averaging $749 a visit if the patient isn't hospitalized — and costing the U.S. health care system $1.6 billion a year.

"If we were going to the dentist more often, we could avoid a lot of this," says Ruchi Sahota, a California dentist and consumer adviser for the ADA. "Prevention is priceless."

ACCESS A CHALLENGE

But federal figures show four in 10 adults had no dental visit in the past year, and one big reason is cost. Just over a third of working-age adults, and 64% of seniors, lacked dental coverage of any kind in 2012, meaning they had to pay for everything out-of-pocket.

Meanwhile, the 10% of adults with Medicaid dental plans struggle to find dentists to take them; studies have shown that less than 20% of dentists accept Medicaid in some states, largely because reimbursements dip as low as 14% of private insurance reimbursement last year. Add to that a shortage of more than 7,000 dentists in the United States.

Americans who go without care pay a price. More than a quarter of working-age adults, and one in five seniors, have untreated cavities, and 19% of seniors have lost all their teeth. When poor people do get care, dentists say they usually get only basic services.

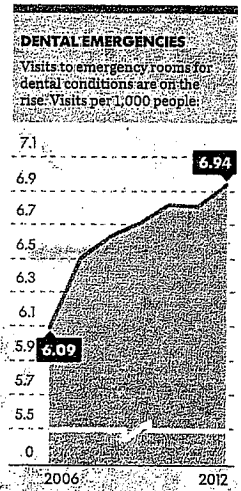
Besides lacking coverage, dentists say people tend to ignore dental problems until things get really bad, which can happen outside of business hours and send them to ERs.

Smith learned the hard way just how crucial oral health is.

The reggae vocalist and part-time security system installer says he'd been without dental insurance for a couple of years and hadn't been to a dentist for longer than that, when a filling fell out of a bottom left molar on June 6. He tried to fix it with a do-it-yourself kit, but the temporary filling came out during a concert that night. He tried to numb it with Anbesol the next day, but the pain got worse as his jaw swelled, and he drove to the emergency room at 4 a.m. the following morning.

Doctors there referred him to a nearby dentist, who saw the worsening infection and sent him back to the ER, where his tooth was removed. At home, the infection drained into his neck, making it difficult to breathe — prompting a third trip to the ER. As he sat in the waiting room, the swelling doubled. "I could feel my windpipe close," he recalls.

Doctors admitted him, cut into his neck to insert a drain for the infection and gave him strong antibiotics — and kept him in the hospital for a week. A day after returning home, all he felt up to doing was resting with his dachshund, Sinatra. The scar in his neck was visible, and his still-swollen jaw made it impossible to open his mouth all the way.



Sources 2015 American Dental Association analysis of 2006-2012 Nationwide Emergency Department Sample data, 2006-2012 Medical Expenditure Panel Survey data, and 2006-2012 U.S. Census data

FRANK POMPA, USA TODAY

TOWARD SOLUTIONS

Dentists say patients can be much better served by getting regular care in the community, where many issues that bring people to ERs can be handled and serious problems prevented. Community health centers with dental clinics offer one long-standing alternative for low-cost care, and another newly touted option involves university dental school clinics.

The University of Maryland School of Dentistry, for example, has a pre-doctoral clinic, where students provide a range care under the close supervision of faculty, and a walk-in clinic for people with urgent needs.

An ADA report last year found that dental ER visits had fallen between 2012 and 2014 in Maryland amid state reforms such as increased Medicaid reimbursement for dentists and a larger provider network — inspired in part by the 2007 death of a 12-year-old boy from a brain infection that began as a toothache.

The ADA also points to ER referral programs across the nation to get patients into dental-school treatment.

Officials say there currently are 125 such programs, up from eight a year ago. In Kansas City, patients at Truman have only to walk across the street when they're referred to the University of Missouri clinic.

Smith says ER staff helped him sign up for Indiana Medicaid, and now that he's been referred to a dentist who has agreed to take him, he plans to get regular checkups and take meticulous care of his teeth at home.

Michael McCunniff, chairman of the University of Missouri-Kansas City Department of Public Health and Behavioral Science, says that's a much better plan — for all Americans — than forgoing care and frantically seeking help in the ER.

"All that does is put a Band-Aid on the problem," he says. "It doesn't cure it."

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NASHP
NATIONAL ACADEMY FOR STATE HEALTH POLICY

Adult Dental Benefits in Medicaid: Recent Experiences from Seven States

Andrew Snyder and Keerti Kanchinadam

The National Academy for State Health Policy (NASHP) conducted interviews with state administrative and legislative branch officials as well as dental stakeholders in California, Colorado, Illinois, Iowa, Massachusetts, Virginia, and Washington, all of which have recently taken action to add, reinstate, or enhance their Medicaid adult dental benefit.

This brief summarizes policy lessons and themes about why states decided to take up this coverage option and how they are implementing it. Accompanying case studies provide a more in-depth look at each state's adult dental benefit.

Key Findings

- There is growing recognition of the importance of oral health as it relates to overall health—including pregnancy, avoidable emergency room utilization, and chronic conditions such as diabetes and heart disease—as well as employability. These data points, as well as personal experiences with individuals who cannot access routine dental care, resonated with key state decision-makers.

- Policymakers generally support providing adult dental benefits to Medicaid enrollees, but prioritizing spending on the benefit can be challenging, given the need of states to balance limited resources with many competing priorities.

- Engagement by high-level state policymakers, including legislative leaders, governors' staff, and Medicaid agency leadership, along with active legislative outreach by dental associations and oral health coalitions is important to raise the profile of the issue.

- In many states, enhancements are progressing incrementally. In some states the benefit is being extended only to certain groups of enrollees such as pregnant women or the Medicaid expansion population. In other states the benefit is capped with a dollar limit.

- Many states expanding their adult dental benefit have done so by building on improvements made to their children's dental coverage programs over the last decade. This includes leveraging existing contractual relationships, provider networks, and care coordination efforts.

- States' decisions on adult dental coverage were affected by their broader work on implementing health reform. Enhanced federal funding through the Affordable Care Act's (ACA) Medicaid expansion motivated action in several states. Some states are also beginning to consider how dental services may fit into payment and delivery system reform efforts such as the State Innovation Models Initiative.

Introduction

Oral health is an important but often neglected part of overall health, particularly for adults. For children, states are required to cover dental services in Medicaid and the Children's Health Insurance Program (CHIP), also the ACA extended dental benefits to more children through health insurance exchanges and Medicaid expansion. While implementation issues remain, Medicaid-enrolled children have seen significant gains in access to dental coverage and care over the last 10 years.[1] In contrast, adult dental coverage is an optional benefit in Medicaid and the ACA does not address dental benefits for adults. As a result, Medicaid adult dental benefits vary significantly across states. In 2015, only 15 offered extensive adult dental benefits, 17 states offered a more limited package, 15 states offered emergency-only dental benefits, and 4 states offered no adult dental benefit.[2]

Poor and near-poor adults ages 35-44 are more than twice as likely to experience gum disease and untreated tooth decay than non-poor adults, and almost twice as likely to have lost a tooth due to those conditions.

A 2012 survey found that 91 percent of adults aged 20-64 had dental caries and 27 percent had untreated tooth decay.[3] Poor and near-poor adults ages 35-44 are more than twice as likely to experience gum disease and untreated tooth decay than non-poor adults, and almost twice as likely to have lost a tooth due to those conditions. Poor seniors are more than twice as likely to have lost all of their natural teeth than non-poor seniors.[4]

Historically, states have cut back Medicaid adult dental benefits due to state fiscal challenges, including in the wake of the 2007-2009 recession. In the past two years, however, a number of states have decided to enhance the dental benefits provided to adult Medicaid enrollees.

NASHP examined recent experiences in seven states that acted to add, reinstate, or introduce adult dental benefits in the last two years: California, Colorado, Illinois, Iowa, Massachusetts, Virginia, and Washington. These states took a range of approaches to adult dental benefits in regard to benefits, program administration, and the legislative or administrative vehicles for advancing the policy change. Across these states, however, some common themes emerged around:

- Key policymakers and advocates who were engaged in the decision, and the key data points that were important in making the case;
- States' adoption of incremental improvements in order to balance dental benefits with other competing budgetary priorities;

Case Studies

For more on the actions taken on Adult Dental Benefits in the states listed in Table 1, see the Case Studies starting on page 13.

- Application of lessons learned from improvements to states' pediatric dental benefits to adult populations; and
- Desire among states to explore how dental benefits might fit within their broader work on payment and delivery system reform in future.

These findings were informed by interviews with a range of experts in each state including state officials—Medicaid leaders, legislators, and governors' health policy advisors—and state dental associations, oral health coalitions, and other key stakeholders conducted between February and May 2015. This brief summarizes the high-level themes that emerged from our interviews. More detailed descriptions of the approaches taken in each of the seven states are provided in case studies in Appendix II. Below is a chart that summarizes the actions taken in each of the seven states, the legislative or administrative vehicle used, date of implementation, and the benefits offered.

Table 1. Actions Taken on Adult Dental Benefits in Seven States

State	Legislative or Administrative Vehicle	Date Implemented	Benefits and Populations Covered
California	State budget, AB 82 (2013)	May 2014	Reinstated most benefits for all Medicaid-enrolled adults, with $1,800 annual "soft cap" that can be exceeded when medical necessity is proven. Additional services covered for pregnant women.
Colorado	SB 242 (2013)	April 2014	Introduced benefits for all Medicaid-enrolled adults, with $1,000 annual cap. Dentures are exempt from the cap.
Illinois	State budget, SB 741 (2014)	July 2014	Reinstated benefits for all Medicaid-enrolled adults. Additional preventive services covered for pregnant women. (Gov. Rauner's proposed FY2015 budget would cut the rates paid for adult dental services.)
Iowa	Section 1115 Medicaid waiver	May 2014	Introduced "earned benefit" to Medicaid expansion population; individuals who establish a regular source of care qualify for more expansive benefits.
Massachusetts	Annual state budgets	January 2013 March 2014 May 2015	Reinstated services for all adults incrementally – first fillings for front teeth, then all fillings, then dentures. Additional services covered for persons determined eligible through the Department of Developmental Services.
Virginia	Governor's Healthy Virginia plan (2014)	March 2015	Introduced dental benefit for adult pregnant women over age 21.
Washington	FY 2013-2015 biennial operating budget	January 2014	Reinstated extensive benefits for all Medicaid-enrolled adults.

Key Themes Among States

Partnerships and Gathering Support

Leadership

Involvement by legislative and administrative branch champions was critical in each state that NASHP interviewed. The champions in several states were people with particularly high authority—including Frank Chopp, Washington State Speaker of the House, Darrell Steinberg, California Senate President pro tempore, and Virginia Gov. Terry McAuliffe. Interviewees noted that the addition of adult dental benefits did not usually face organized opposition, but the involvement of high-level champions was important to make and keep adult dental benefits a priority in the midst of many other state concerns.

Oral health coalition members, stakeholders, and provider groups across states focused primarily on the message that oral health is part of overall health—and that there are linkages between oral health and health conditions such as diabetes, heart disease, and potentially, adverse birth outcomes.[5] Data on use of hospital emergency departments (EDs) for preventable dental conditions, and increases in such visits in states following elimination of adult dental benefits was also noted as important. However, interviewees identified that it was particularly compelling for policymakers to personally meet individuals experiencing pain and tooth loss from untreated dental conditions. Attendance at dental association sponsored events in California and Virginia, where free dental care was provided to underserved communities, was noted as a key factor in policymakers' engagement in the issue.

Relationship building

In all states, efforts to advocate for, implement, and operationalize a new benefit program required the collaboration of many different partners. The most frequently cited partners were oral health stakeholder groups such as state dental associations, dental hygiene associations, oral health coalitions, and oral health-focused philanthropies. The ability of these groups to lobby legislators was noted as an important factor in several states. Oral health stakeholders noted the importance of engaging a broader group of voices from outside of the dental community, like community health centers, anti-poverty groups, and advocates for seniors and individuals with disabilities.

In most states, strong partnership with the state's dental association was an important factor. Several state dental associations indicated that they decided to advocate for the addition of

benefits, even if the policy didn't fully address the concerns of their membership with program administration and provider reimbursement rates, as a way to demonstrate their support for improving oral health and access to care for Medicaid-enrolled individuals.

Good relations between dental associations, oral health coalitions, and Medicaid agencies within a state helped keep dental benefits in front of key decision-makers, so that action could be taken on adult benefits when a window of opportunity opened. All states NASHP spoke with said that the new benefit came about as a result of years of effort and taking advantage of a ripe opportunity, for example opportunities presented by enhanced federal funding for Medicaid expansion under the ACA.

Approach and Implementation

Financing strategies

Most states financed their adult dental benefit through state general funds, and the benefit was often introduced in the context of a state's biennial budget process. One exception was Colorado, which redirected a portion of a trust fund that funded the state's high-risk pool, made obsolete through the ACA, to serve as the state share of funding for its new adult dental benefit.

Interviewees across all seven states shared that an adult dental benefit, particularly one limited to certain services or populations, is a relatively minor budget item in the context of state Medicaid budgets. In 2013, the National Health Expenditure Accounts estimated that total state and local spending on dental services for children and adults in Medicaid was about $3.2 billion, equaling less than two percent of total state and local spending on Medicaid.[6] Washington's restoration of a dental benefit for 874,000 Medicaid-enrolled adults required $23 million in state funding; Virginia's benefit for 45,000 pregnant women is projected to cost approximately $3 million in the first two years.

Officials in several states reported that the ACA presented a unique opportunity to expand dental coverage to many new enrollees at a reduced cost to the state. In particular, states that opted to expand Medicaid eligibility to individuals up to 133 percent were able to leverage the 100 percent federal match made available through the ACA to help mitigate the cost of a new adult dental benefit. The availability of new federal funding through Medicaid expansion was particularly important in Washington's consideration of an adult benefit. Although the state could have opted to only cover dental services for the expansion population, state officials felt it was important to offer coverage to all adults to ensure continuity and equity of coverage for all enrollees.[7]

Research on links between improvements in oral health and potential reductions in overall health care spending, while compelling to state officials, generally didn't factor into states' budgeting for adult dental benefits. Interviewees in several states noted that demonstrating and booking short-term cost savings is challenging for states that are tied to short annual or biennial budgets and often lack proper systems to coordinate savings that cross medical and dental spheres—for example, reductions in ED usage from improved access to routine dental care. However there was general support for the idea that dental coverage could save money in the long-term, particularly as states move towards efforts to integrate dental and medical services within larger payment and delivery system reforms.

All seven states voiced concern about the perpetual vulnerability of the benefit; because it is categorized as "optional," it can be cut or scaled back during times of fiscal stress. Most states felt confident that the benefits they introduced are going to be fiscally sustainable for the foreseeable future, though Illinois is already considering a potential cutback in adult benefits as part of its 2015 budget negotiations.

Incremental Approaches

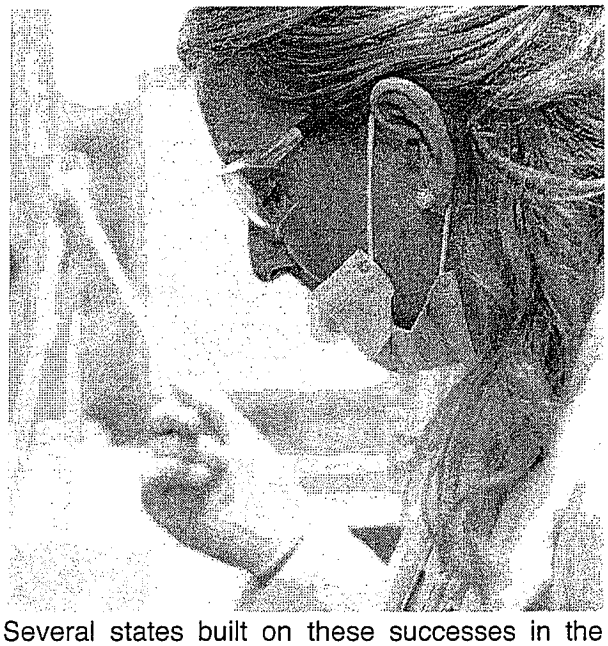
Most interviewees expressed a desire to extend full dental benefits to all adults in Medicaid, allowing enrollees to obtain medically necessary care for tooth decay and gum disease. However, many

states pursued an incremental expansion of benefits—by limiting the benefit to certain populations, specific covered services, or placing a dollar limit on the benefit package. For example, Virginia extended comprehensive dental benefits only to women enrolled in Medicaid during pregnancy and 60 days postpartum; non-pregnant adults in Medicaid are covered only for emergency dental services. Over the last three years Massachusetts has gradually added services including fillings, initially for front teeth only, later for all teeth, and dentures back into its adult benefit package. In Colorado, the new dental benefit is comprehensive and available to all adults enrolled in Medicaid, however the benefit is capped at $1,000 per enrollee per year. Dentures are exempt from the benefit cap.

In most cases, the state chose an incremental expansion because of fiscal concerns. There was wide acknowledgement among interviewees that an incremental benefit is better than no benefit, and there was also a desire among states to limit benefits within what their budget would bear, to reduce the possibility of future cutbacks. Multiple interviewees noted that a "pendulum swing" of repeated expansions and contractions had created challenges and confusion for enrollees, providers, and Medicaid agencies alike. During periods of reduced benefits, enrollees frequently forego care due to inability to pay. Providers—both dentists and safety net providers like community health centers—reported feeling strain from multiple changes to states' benefit packages, in regard to their ability to develop treatment plans for Medicaid-enrolled patients who may no longer have coverage for necessary services. State officials must manage the administrative challenge of stopping and restarting benefits, and face pent-up demand when benefits are restored—particularly for expensive services like dentures, which might have been avoided with routine dental care.

Building on Existing Programs

States across the country have made great progress in improving Medicaid-enrolled children's access to dental care over the last decade.[8]



Several states built on these successes in the policies they adopted for their adult dental Medicaid benefit. In particular, states focused on administrative simplification, including the use of specialized dental administrative vendors, and development of supports to help connect enrollees to dental care.

- **Iowa's** unique Dental Wellness Plan incorporates a tiered "earned" benefit approach for the newly eligible Medicaid expansion population that conditions certain benefits on patients establishing a relationship with a dentist whom they see regularly. To help ensure that adults can build those relationships, Iowa is building on the network of Title V-funded county-based dental care coordinators that it has built over the last 10 years through its I-Smile children's dental program. Iowa also used the tiered structure to increase the capitation rate for the Dental Wellness Plan, enabling it to address some longstanding concerns about provider reimbursement rates.

- **Virginia** used its successful Smiles for Children program as the basis for its benefit for pregnant women. Smiles for Children has built up strong dentist participation since its introduction in 2005 due to simpler administration and higher reimbursement rates.
- **Colorado** used its CHIP benefit—which uses

a specialized dental vendor—as a model for its transition to a new Administrative Services Organization (ASO).

Other states NASHP interviewed reinstated the same benefits, administrative processes, and reimbursement rates that had been cut in previous years. Many of these states saw that as a first step, and expressed a desire to continue improving program administration and provider participation in future years.

Officials in several states reported that the ACA presented a unique opportunity to expand dental coverage to many new enrollees at a reduced cost to the state.

Outreach and Education

States indicated that outreach and education to both newly eligible enrollees and providers will be crucial to the ongoing success of the new benefit including ensuring that enrollees connect to regular and ongoing care. In addition to initiatives like Iowa's use of dental care coordinators, states are also working in partnership with stakeholders in the dental and medical communities to ensure that outreach and education efforts are successful. In Virginia, the state has partnered with OBGYNs and pediatricians to help communicate the availability of dental benefits for pregnant women, and to spread information to patients and providers that receiving dental care during pregnancy is safe and appropriate. Colorado is working closely with its state dental association to recruit dentists to serve Medicaid-enrolled clients. Despite progress, provider recruitment and network adequacy remain a concern in many states.

Evaluating Success

NASHP spoke with state officials and stakeholders about how they would gauge whether they had achieved their policy goals from introduction or reinstatement of adult dental benefits. States are primarily looking to traditional measures to gauge their success, including utilization rates among enrollees, provider participation rates, and calls to customer service hotlines from enrollees seeking care.

NASHP spoke to many of these states very soon after their adult dental benefits were implemented, so few were able to provide detailed findings. Some states, however, are reporting early successes in improving access to care and provider engagement.

- **In Iowa**, Delta Dental (the administrator of the Dental Wellness Program) reported that, as of February 2015, 36,500 of the program's 115,000 enrollees had received a dental service since the program began in May 2014.[9]
- **In Washington** State, more than 204,000 Medicaid-enrolled adults received a dental service in CY 2014, an increase from the roughly 136,000 adults who received services in CY 2010—the year before services were cut back. Howev-

er, this happened in the context of a doubling of the number of enrollees (from 410,000 to 874,000) due to Medicaid expansion, so the rate at which enrollees used services fell from 33 percent to 23 percent.[10]

- **Colorado** reported some success from their provider recruitment efforts, conducted in collaboration with the Colorado Dental Association (CDA). The CDA reported that the number of Medicaid-participating dentists had grown 17 percent between 2012 and 2014.[11]

Additionally, several states are setting concrete expectations around linkages between dental benefits and overall health spending. Colorado has set yearly performance standards for its administrative services contractor. In year two, the state is focusing on decreased utilization of the emergency room for non-emergency dental care. In Iowa, because the Dental Wellness Plan is being implemented through a section 1115 demonstration waiver, the state, in partnership with the University of Iowa Public Policy Center, has developed a detailed evaluation plan that will attempt to track whether enrollment in the Dental Wellness Plan results in reduced ED utilization, and also measure whether enrollees receiving dental services experience better outcomes related to chronic conditions like diabetes.[12]

Looking Forward

Officials and advocates in many states saw the addition or restoration of adult dental benefits as the first step in addressing oral health for Medicaid-enrolled adults, with more action being necessary to ensure that enrollees can effectively access care. In Colorado, the state legislature has followed up the initial introduction of a dental benefit with subsequent action to provide coverage for dentures (outside of the $1,000 annual cap) and to provide reimbursement rate increases for targeted services. State officials in Iowa are considering how the Dental Wellness Plan might fit into the state's shift toward managed care for all Medicaid-enrolled populations. In Washington, oral health stakeholders are working to partner with the Washington Health Care Authority to research the possibility of developing a targeted, enhanced benefit for pregnant women and people with diabetes, modeled after the state's successful Access to Baby and Child Dentistry program. Other states like Illinois, however, are already facing the possibility of cutbacks to benefits in the context of a changing state budget picture.

States are also looking for ways to expand their ability to provide dental services beyond the traditional dental office. California recently enacted legislation to permit Medicaid reimbursement to dentists who provide dental care via telehealth.[13] This supports programs such as the Virtual Dental Home, a model where dental hygienists and assistants provide preventive and limited restorative services in community settings like nursing homes, schools, and Head Start sites, with connection via telehealth to a supervising dentist. Colorado will soon begin a pilot project to replicate the Virtual Dental Home model, funded by the Caring for Colorado Foundation.[14]

Lastly, officials and advocates in several states are looking closely at ways to weave oral health into broader payment and delivery system reforms, to reflect oral health's connection to overall health. Stakeholders from the Virginia Oral Health Coalition will be leading a workgroup through Virginia's State Innovation Model (SIM) design planning process. They will make recommendations on strategies that Accountable Communities for Health (ACH), regional multi-sector collaboratives that make decisions about allocation of health care resources, can use to address the oral health of their communities. In Washington, although oral health was not addressed in detail in the state's SIM Innovation Plan, state officials indicated that they expected several ACHs to identify oral health as a priority area for improvement. Colorado is considering ways to facilitate collaboration between its dental ASO and its Regional Care Coordination Organizations (the state's Medicaid-focused accountable care entities). Colorado is also examining ways to develop better linkages between dental claims data and its all-payer claims database.

Conclusion

Adult dental coverage's status as an optional Medicaid benefit means that it is an area where states have some latitude to make cutbacks, so benefits tend to contract during difficult budget circumstances—such as the 2007-2009 recession—and expand as fiscal pressures ease. States that NASHP examined took a variety of approaches to adding, reinstating, or introducing adult dental benefits, but they have attempted to do so in a way that is fiscally sustainable, and also provides meaningful access for program enrollees. Many have also built on lessons learned from improvements to their Medicaid dental programs for children.

The idea of providing adult dental benefits to Medicaid enrollees is generally supported by policymakers—who frequently cited the importance of oral health, high levels of unmet need among low-income populations, and links between oral health and overall health. However, prioritizing spending on the benefit can be challenging, given states' need to balance limited resources and many competing priorities. Important factors in these seven states included funding opportunities through the ACA, personal engagement by high-level state policymakers, and strong partnerships with dental associations and oral health coalitions to raise the profile of the issue and assist in implementation of the benefit.

These seven states' experiences may be instructive for other states considering addressing adult dental coverage. The case studies in Appendix II of this brief provide much more detail on the strategies that each state pursued.

Endnotes

1. Andrew Snyder, Keerti Kanchinadam, et. al. Improving Integration of Dental Health Benefits in Health Insurance Marketplaces (Washington, DC: National Academy for State Health Policy, 2014).

2. The American Dental Association classifies Medicaid adult dental benefits into the following categories: Extensive benefits: A comprehensive mix of services, including more than 100 diagnostic, preventive, and minor and major restorative procedures approved by the American Dental Association (ADA); per-person annual expenditure cap is at least $1,000. Limited: Fewer than 100 diagnostic, preventive, and minor restorative procedures recognized by the ADA; per-person annual expenditure for care is $1,000 or less. Emergency Only: Relief of pain under defined emergency situations. (Center for Health Care Strategies, "Medicaid Adult Dental Benefits: An Overview." Retrieved May 21, 2015. http://www.chcs.org/media/Adult-Oral-Health-Fact-Sheet_21915.pdf.)

3. Bruce Dye, et. al. Dental Caries and Tooth Loss in Adults in the United States, 2011-2012. NHCS Data Brief no. 197 (Hyattsville, MD: National Center for Health Statistics, May 2015).

4. Bruce Dye and Gina Thornton-Evans, "Trends in oral health by poverty status as measured by Healthy People 2010 objectives," Public Health Reports 125: no. 6, 817-830 (May-June 2010). Poor is defined as income less than or equal to 100 percent of the Federal Poverty Level (FPL). Near-poor is defined as income between 100 and 199 percent FPL, and non-poor as income greater than or equal to 200 percent FPL.

5. Andrew Snyder, Oral Health And The Triple Aim: Evidence And Strategies To Improve Care And Reduce Costs (Washington, DC: National Academy for State Health Policy, 2015).

6. Centers for Medicare and Medicaid Services, "National Health Expenditures by type of service and source of funds, CY 1960-2013." Retrieved May 26, 2015. https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html.

7. Interview with MaryAnne Lindeblad, Nathan Johnson, and Gail Krieger, Washington Health Care Authority, April 8, 2015.

8. Centers for Medicare and Medicaid Services, CMS Oral Health Initiative and Other Dental-Related Items (Baltimore, MD: U.S. Department of Health and Human Services, April 2013), CIB-04-18-13.

9. Interview with Beth Jones and Gretchen Hageman, Delta Dental of Iowa, February 25, 2015.

10. Personal communication with Nathan Johnson, Chief Policy Officer, Washington State Health Care Authority, April 8, 2015.

11. Interview with Colorado Dental Association, March 26, 2015.

12. Iowa Medicaid Enterprise and University of Iowa Public Policy Center, "Iowa Dental Wellness Plan Evaluation." (September 2014). Retrieved May 26, 2015. http://dhs.iowa.gov/sites/default/files/DentalWellnessPlanEvaluationDesign_Sept2014.pdf.

13. California Assembly Bill 1174. Approved by Governor September 27, 2014.

14. Caring for Colorado Foundation, "Caring for Colorado Announces New, Major Investments," news release, January 26, 2015, http://www.caringforcolorado.org/post/newsroom/caring-colorado-announces-new-major-investments.

About the National Academy for State Health Policy:

The National Academy for State Health Policy (NASHP) is an independent academy of state health policymakers working together to identify emerging issues, develop policy solutions, and improve state health policy and practice. As a non-profit, non-partisan organization dedicated to helping states achieve excellence in health policy and practice, NASHP pro- vides a forum on critical health issues across branches and agencies of state government. NASHP resources are available at: www.nashp.org.

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Appendix I: Interviewee List

CALIFORNIA
Bob Isman
Former Dental Program Consultant
California Department of Health Care Services

Jenny Kattlove
Senior Director of Programs
The Children's Partnership

René Mollow
Deputy Director, Health Care Benefits and Eligibility
California Department of Health Care Services

Nik Ratliff
Section Chief, Contract Management and Administration
California Department of Health Care Services

Nicette Short
Director of Public Policy
California Dental Association

Darrell Steinberg
Shareholder
Greenberg Traurig, LLP
Former Senate President pro Tempore, California State Senate

Chris Wordlaw
Section Chief, Provider and Beneficiary Services
California Department of Health Care Services

COLORADO
Alyssa Aberle
President
Colorado Dental Hygienist Association

Deborah Foote
Executive Director
Oral Health Colorado

Bill Heller
Provider Relations and Dental Program Division Director
Department of Health Care Policy & Financing

Greg Hill
Executive Director
Colorado Dental Association

Jeff Kahl
Co-Chair of Council on Governmental Relations
Colorado Dental Association

Brett Kessler
President
Colorado Dental Association

Jennifer Miles
President, Miles Consulting, Inc.

Carol Morrow
Second Vice President and Secretary
Colorado Dental Association

Jeanne Nicholson
Former Senator
Colorado Senate

IOWA
Lawrence Carl
Executive Director
Iowa Dental Association

Peter Damiano
Director, Public Policy Center
Professor, Preventive and Community Dentistry, University of Iowa

Sabrina Johnson
Policy Specialist
Iowa Medicaid Enterprise

Beth Jones
Public Benefit Manager
Delta Dental of Iowa

Gretchen Hageman
Dental Wellness Plan Director
Delta Dental of Iowa

Sally Nadolsky
EPSDT Manager
Iowa Medicaid Enterprise

Bob Russell
Public Health Dental Director
Iowa Department of Public Health

Robert Schlueter
Bureau Chief of Adult & Children's Medical Programs
Iowa Medicaid Enterprise

Andria Seip
Affordable Care Act Project Manager
Iowa Medicaid Enterprise

Jennifer Vermeer
Assistant Vice President for Health Policy and Population Health
University of Iowa Health Care

ILLINOIS
Mona Van Kanegan
Co-founder and Co-director of Oral Health Forum
Heartland Alliance

Dave Marsh
Director of Government Relations
Illinois State Dental Society

Gina Swehla
Acting Bureau Chief
Illinois Department of Healthcare and Family Services

MASSACHUSETTS
Patricia Edraos
Health Resources/Policy Director
Mass League of Community Health Centers

Stacia Castro
Specialty Provider Network Manager
MassHealth

Ellen Factor
Director of Dental Practice
Massachusetts Dental Society

Brian Rosman
Research Director
Health Care for All

John Scibak
Representative
Massachusetts House of Representatives

Shannon Wells
Oral Health Affairs Manager
Mass League of Community Health Centers

Jane Willen
Dental Program Manager
MassHealth

VIRGINIA
Terry Dickinson
Executive Director
Virginia Dental Association

Pat Finnerty
President, Board of Directors, Virginia Dental Association Foundation
Senior Advisor, DentaQuest Foundation

Joseph Flores
Deputy Secretary of Health and Human Resources
Office of the Secretary of Health and Human Resources

Sarah Holland
Executive Director
Virginia Oral Health Coalition

Anna Healy James
Policy Director
Office of Governor McAuliffe

Cheryl Roberts
Deputy Director of Programs
Department of Medical Assistance Services

Myra Shook
Dental Program Manager
Department of Medical Assistance Services

Bryan Tomlinson
Division Director of Health Care Services
Department of Medical Assistance Services

WASHINGTON

Sarah Vander Beek
Chief Dental Officer
Neighborcare Health

Walt Bowen
President
Washington State Senior Citizens' Lobby

Eileen Cody
Representative
Washington State House of Representatives

Robert Crittenden
Senior Health Policy Advisor
Office of Governor Inslee

Colleen Gaylord
Chair, Regulation & Practice Committee
Washington State Dental Hygienist Association

Bracken Killpack
Executive Director
Washington State Dental Association

Tony Lee
Senior Fellow
Solid Ground

Nathan Johnson
Chief Policy Officer
Washington State Health Care Authority

Gail Krieger
Section Manager
Washington State Health Care Authority

MaryAnne Lindeblad
Medicaid Director
Washington State Health Care Authority

Kelly Richburg
Policy Advocate/Analyst
Washington Dental Service Foundation

Laura Smith
President and CEO
Washington Dental Service Foundation

Education will be prominent when Legislature returns

Matthew Albright, The News Journal 8:49 a.m. EST January 7, 2016

(Photo: SUBMITTED)

The General Assembly has a lengthy to-do list of education issues in the session that starts next week, including several proposals to increase services for at-risk kids and a few items that could prove controversial.

"There are so many discussions about education that have been going on recently that I think now you're going to see us try to make some real long-term fixes," said Rep. Earl Jaques, D-Glasgow, who chairs the House Education Committee.

The first big school issue will likely be a battle over a bill to protect parents who opt their kids out of the state standardized test. (/story/news/education/2016/01/04/opt-out-veto/78270050/) The bill's sponsor, Rep. John Kowalko, D-Newark, plans to attempt an override of Gov. Jack Markell's veto on Jan. 14, the third day of the new session.

DELAWAREONLINE

Juniors won't have to take Smarter Balanced exam

(http://www.delawareonline.com/story/news/2016/01/06/juniors-wont-have-take-smarter-balanced-exam/78367630/?from=global&sessionKey=&autologin=)

DELAWAREONLINE

Lawmakers want to boost after-school programs

(http://www.delawareonline.com/story/news/education/2016/01/06/after-school-program/78372696/?from=global&sessionKey=&autologin=)

But there are plenty of other issues to be heard through the rest of the legislative session, which ends June 30.

Perhaps the biggest is the Wilmington Education Improvement Commission's plan. (https://sites.udel.edu/cas-weic/files/2015/12/WEIC-Draft-121515-sm-1abypow.pdf)

The Commission wants to see the Christina School District's city schools and students handed over to the Red Clay School District, arguing a more streamlined and coherent system of school governance will set the stage for long-overdue improvements to the city's schools.

It also wants to see schools statewide that serve at-risk kids — especially those from low-income families or who are learning English as a second language — receive more funding to address their students' unique needs.

Many lawmakers say they're not sure what the Commission's odds of winning legislative approval are.

"I wake up some mornings and I think, 'Oh yeah, this is going to get done,' " Jaques said. "Then some mornings I wake up and I think, 'OK, I'm not so sure.' "

On the at-risk funding issue, the biggest sticking point appears to be scale and cost. (/story/news/2015/12/04/school-funding-povert/76728852/)

State Rep. Debra Heffernan, D-Bellefonte, proposed a bill last year that would tweak the state's system to give extra resources to schools serving low-income students. Her bill would cost $12.5 million.

Budget forecasts for the state are rosier than originally feared, but the state also doesn't have tons of extra money to spend.

Recognizing that costs may be a factor, the Commission's leaders have suggested testing the system by giving the extra funds to the schools affected by redistricting at first; other lawmakers would prefer to see the money doled out to the schools across the state that have the highest percentages of kids in poverty.

On the redistricting issue, residents in the areas that would be affected are nervous that their tax burden might go up — despite assurances from commission leaders — or that their schools could be disrupted.

State Rep. Kim Williams, D-Newport, is a former Red Clay School Board member who says she and many legislators have not made up their minds yet on the proposal. She wants to make sure, for example, that Red Clay doesn't foot the bill for the transition costs of redistricting.

"I am going to sit back, listen and make a decision that I think is best," Williams said. "I don't really know how my colleagues are going to vote. I think we're going to see what the Governor proposes in his budget and have some conversations and then make a decision."

There are other proposals in the works to bolster the state's support for at-risk students.

House Majority Leader Valerie Longhurst, D-Bear, plans to announce Wednesday a boost to after-school programs in schools that serve low-income kids.

Williams, who is vice-chair of the House Education Committee, is leading an attempt to provide more special education services to young students.

Currently, schools get more funding for students with special needs (/story/news/local/2015/01/28/lawmakers-want-expanded-special-needs-service/22490423/) in grades 4-12 and for students with intensive and complex special needs in grades K-3. The state does not, however, provide extra money for students in grades K-3 with basic special needs, like developmental delays and ADHD.

Williams and other lawmakers want to "close that gap," which would cost about $11 million.

Many of these proposals come with price tags attached, and lawmakers will face tough choices in figuring out how to pay for them.

"I'm not saying some of these things aren't needed, I'm just saying I don't see a whole lot of new money available to go into education right now," said Senate Minority Leader Gary Simpson, R-Milford. "It's going to be a tough load to tow."

Sen. F. Gary Simpson *(Photo: GARY EMEIGH/THE NEWS JOURNAL)*

Jaques said the fact that there are several proposals for new spending that many legislators think are important could spur them to seek savings elsewhere in the education budget. Lawmakers have been deep in discussions for months, for example, on how to trim state-level administration to get more money into classrooms.

"What I tell my committee members all the time is, 'look, education is already a big part of the budget and it's not going to get much bigger than that because there are other needs,' " Jaques said. "We've got to figure out how to spend that money as wisely as possible."

Charter schools may also become an issue. Williams, for example, has proposed a bill that would have the state auditor's office select and manage the firms that audit charters, much like it does for traditional schools.

Williams says that will help prevent a repeat of a series of high-profile scandals at charter schools over the past few years in which school leaders used school money to make personal purchases.

But charter advocates oppose the bill, arguing they are supposed to be free from bureaucratic rules in exchange for stiffer accountability.

Several task forces also are working in the background and could end up leading to legislation.

Those groups are looking at things like the amount of testing, teacher evaluations, school spending and teacher pay.

Markell has called for an overhaul of teacher pay in his last two State of the State addresses, but this will be his last legislative session to secure such change.

The governor has made education one of his top priorities and may have his own requests for the Legislature. He is scheduled to give the State of the State address on Jan. 21 and will unveil his proposed budget soon after.

Contact Matthew Albright at malbright@delawareonline.com, (302) 324-2428 or on Twitter @TNJ_malbright

Red Clay votes to close charter school

12-17-15 NJ

MATTHEW ALBRIGHT
THE NEWS JOURNAL

The Red Clay School Board has voted to close Delaware College Preparatory Academy, a Wilmington charter school with 186 students.

Board members voted swiftly not to renew the school's charter without discussion at a meeting Wednesday night. They followed the recommendations of a committee of district officials who said it is on precarious financial footing and students are struggling academically.

DCPA is one of a handful of charter schools authorized by the Red Clay School District, not the state. Located at 510 W. 28th St., it serves kids in kindergarten through fifth grade and has been open for seven years.

Enrollment at DCPA has declined each year, which is a major fiscal problem for charter schools because they receive state funding based on the number of students. The school has been forced to lay off teachers and ended the last school year with a balance of only a few thousand dollars.

Audits have found school leaders haven't followed the rules for spending school money, a particularly touchy subject given high-profile revelations that leaders of other charter schools spent thousands of dollars in public money on personal purchases.

The school board president sought reimbursement for $7,437 for spending more than two years old and for $11,054 that were "highly questionable" and unsupported by receipts or documentation, the auditors found.

Test scores suggest DCPA students are behind the curve, on top of its financial problems. The percentage of students scoring proficient on the new Smarter Balanced Assessment was 12 to 25 percent lower than the Red Clay average, depending on the grade and subject.

Angeline Dennis, the school's executive director, acknowledged the school had issues but said she and her staff were beginning to turn things around. She said the school has seen four different leaders in its seven years, but said her administration has started to bring some stability and things like a new curriculum, hired a new financial firm, and stepped up efforts to recruit students.

"I stand before you asking you keep an open mind and consider the progress we've made during the last two years of my tenure," Dennis said.

Ellen Kraft, who taught at the school for the past five years, also spoke in defense of the school.

"I work with a wonderful group of teachers and paraprofessionals. They are extremely dedicated and passionate," Kraft said. "We love our jobs and we need our jobs."

Two other Wilmington charter schools, Moyer Academy and Reach Academy, closed at the end of the last school year.

The State Board of Education is set to decide Thursday whether to close another city charter, the Delaware MET.

Contact Matthew Albright at malbright@delawareonline.com, (302) 324-2428 or on Twitter @TNJ_malbright.

The News Journal – 12/02/2015

State accountability panel: Close Delaware MET charter school

MATTHEW ALBRIGHT

THE NEWS JOURNAL

Problems with safety, discipline, leadership, finances and instruction have led a state panel to recommend closing a Wilmington charter school – and relocating its students – said the The Delaware Met's problems are severe enough to merit the disruption of moving students mid-way through a school year. About 210 students attend the school.

Secretary of Education Steven Godowsky and the State Board of Education will decide at the board's Dec. 17 meeting whether to accept the recommendation and shutter the school. The state has scheduled a public hearing for parents, employees and community members to voice their views at 5 p.m. Dec. 7 in the Carvel State Office Building at Ninth and French streets in Wilmington, across the street from the school.

Should Godowsky and the state board back the recommendation, the school would close Jan. 22, the end of the second marking period.

Delaware MET opened this August and struggled right out of the gate. In late September, it closed its doors temporarily and the school board held an emergency meeting in which it considered closing.

The state board placed the school on formal review on Oct. 15. That review found a slew of problems.

The committee says the school hasn't maintained discipline and has struggled to maintain a safe campus. Lesson plans didn't fit the state's academic standards, it found, and the school was falling short of implementing its instructional model.

Delaware MET also has failed to adequately serve students with special needs – the committee found the school was out of compliance on all 59 of its Individualized Education Plans, the contracts that lay out what services students with disabilities receive.

The committee also worries that the school isn't financially viable because too many students had left. Charter schools get state funding on a per-student basis, and the school is isn't paying for some required programs, the committee said.

Should Delaware Met close as recommended, it would be the first charter to be shut down mid-way through the school year.

If the school does close, students would automatically return to their traditional school district, unless parents choose to "choice" them to another district school or charter school that is accepting students. Schools that receive Delaware MET students would receive prorated funding from the state to help accommodate the added enrollment.

Both Moyer Academy and Reach Academy, two other Wilmington charter schools, were shut down last year.

Learning

Doors close on bittersweet note

By Arabelle Osicky
Pencader Charter

NEW CASTLE — *"Nah nah nah nah, hey hey hey, goodbye."*

As a school year ends, students might find themselves humming the familiar tune featured in the 2000 Disney film "Remember the Titans." At the high school level, seniors move on and everyone else plan on seeing each other in the fall.

At Pencader Charter High School, which opened in New Castle in 2006 along the Delaware River, no Titans will be coming back.

Although Pencader seniors already were expecting to leave their friends and teachers, all the students, faculty and staff of the school recently were forced to deal with this difficult transition.

The decision was made on Feb. 21 by the Delaware Department of Education to close Pencader after the 2012-2013 school year. Three months after this news spread, the effects hit students and teachers.

In mid-May, school leader Steve Quimby still had a hard time believing what had happened.

"I don't know how I'll feel about it," Quimby said then about the last day of school, which was May 23 for the students. Graduation was June 6. "I don't know if I'll be sad or if I'll be too busy to think about it. I think it will really sink in when the buildings are empty."

This year alone, Pencader went through many struggles unknown to most schools: having to lay off teachers due to budget cuts, trying to convince the Department of Education to keep it open, learning of its impending closing and eventually ending the year early after declaring bankruptcy.

For many Titans, the emotions were mixed. While the last day in Pencader's history would be sad, it also would mark the end of a long, stressful year.

"I feel like it's going to be a joyful but sad day," said sophomore Juan Ruiz, who swam for Pencader. "We made memories with our friends but we also have to say goodbye."

"Mixed emotions," echoed social studies teacher Stefanie Moyer. "Sad to see some of my students leave but excited to start a new chapter in my life."

Science teacher Terence Blanch saw the positives in the situation.

"Because it's been stressful," said Blanch, "I'm actually looking forward to it."

Although Pencader Charter endured hardships, it has also had its high points.

This year alone it hosted a homecoming dance, two spirit weeks, a dodgeball tournament, a student vs. faculty basketball game, a charity fashion show and more.

Cross country and track and field were resurrected for runners, and the boys lacrosse team won seven straight games, tying for the highest winning streak since the 2010-2011 cross country season.

Tyler Nolan enjoys himself as seniors gather for the June 6 graduation of Pencader Charter's last graduating class. Additional photographs at delawareonline.com/graduations. KIRK SMITH/THE NEWS JOURNAL

Seven members of the Business Professionals of America team qualified for the national competition in Florida after the March state competition, and eight students received medals in the state Science Olympiad competition a few days later.

Both Math League teams qualified for and attended the state competition in April, with the upperclassman team earning a first-place regional trophy and the freshman team a second-place regional trophy.

Although these events have given students positive memories, most at the school agreed on what they would miss the most about Pencader: the people.

"The kids," said Quimby. "Absolutely the kids."

"I'm going to miss my friends and some of the teachers," added Ruiz.

"Pencader is like a family," reflected science teacher Kate McEvoy.

"It was a fun experience to have, meeting all these different people and having fun together," said sophomore Tyler Evans, a member of the school's BPA team.

Some will always remember the Titans.

If you wish to submit articles to be considered for publication in Crossroads, email kwhite@delawareonline.com.

TOP STORY EDUCATION

4-26-13
NJ

School getting $350K bailout

Pencader Charter gets state help to pay bills

By Matthew Albright
The News Journal

The standoff between the state Department of Education and Pencader Charter is over after the state agreed Thursday evening to pitch in $350,000 to brace the troubled school's budget through the end of the year, school and state officials said.

"It's been a long haul, but I think in the end we've come to a decision that's best for children, teachers and parents," said Frank McIntosh, the school's president.

School officials announced earlier this month that they didn't have enough money to pay for closing costs or teacher salaries, which could have caused bankruptcy and an early closure. It also would have sent the school's students back to their traditional feeder schools, which could have played havoc with students' academic schedules and possibly disrupted seniors' graduation.

Pencader is set to close at the end of this year after the state pulled its charter in February. McIntosh said the state's intervention means students will be able to finish out the year at

See PENCADER, Page A2

Pencader: Still faces a shortfall

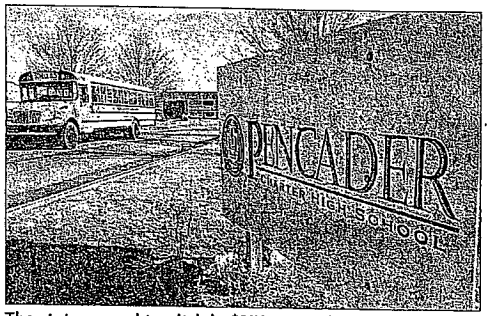
Continued from Page A1

Pencader and teachers will receive all of their pay.

In a statement released Thursday night, a Department of Education spokeswoman said the money will be used only to cover outstanding payroll. The statement also says Pencader promised to have record transfers and other transitional needs completed by the time it closes in June.

"The State chose to work with Pencader's leadership because we both recognize that the educators who could have lost salary that they had earned are innocent parties in this. We want to ensure they receive their proper compensation and that students are able to complete their school year," Department of Education Chief of Staff Mary Kate McLaughlin said in the statement.

"Make no mistake, this is a burden to the State," McLaughlin also said. "But at the end of the day, these are teachers who have earned salaries by educating hundreds of Delaware's students. While we may not have a legal obligation to cover their salaries for Pencader, we value their work and want to ensure these educators are not the ones hurt by the school's financial mistakes."



The state agreed to pitch in $350,000 to help Pencader Charter High School in New Castle make it through the end of the year. ASHLEY BARNAS/NEWS JOURNAL FILE

The statement said Pencader still faces a $113,000 shortfall it will need to fill by negotiating with its creditors. McIntosh said he was confident the school would be able to do that.

Pencader and the state have feuded over whose responsibility the budget shortfall was and accused each other of poor communication.

School leaders said the shortfall was the state's fault because monitors had signed off on a budget created by a previous administration they knew didn't include enough money for closing. State officials countered that the school had outspent its budget in some categories.

McLaughlin sent an email to McIntosh earlier this week saying Pencader wasn't cooperating in efforts to find ways to save money. McIntosh said his staff was cooperating fully and accused the state of trying to "throw mud" at the school.

"But at the end of the day, these are teachers who have earned salaries by educating hundreds of Delaware's students."

MARY KATE MCLAUGHLIN
Chief of staff for the state Department of Education

Still, McIntosh said he hoped the feud was over.

"If we could have come to an agreement sooner, that would have been favorable," he said. "But in the end, they evaluated the situation and did the right thing. I have to give them credit for that."

Contact Matthew Albright at 324-2428 or at malbright@delawareonline.com.

Pencader, state still at odds

4-23-13 NJ

By Matthew Albright
The News Journal

The relationship between Pencader Charter School and the state Department of Education appears to be deteriorating.

The two sides are still battling over who is responsible for filling a $350,000 hole in the school's budget, with no resolution in sight. If that hole isn't filled, Pencader officials say the school, scheduled to shutdown at the end of the year, might have to close earlier.

Both state and Pencader officials say the other side isn't communicating well.

In an email sent to Pencader leaders on Monday, DOE Chief of Staff Mary Kate McLaughlin said the school wasn't giving the state enough information to help find a solution.

McLaughlin said in the letter that state financial staff had found "significant discrepancies" in correspondences from Pencader in explaining why the school needed the $350,000.

"In an attempt to resolve the discrepancies, Pencader has been unable to provide responses to specific requests from DOE, [the Office of Management and Budget] and Finance staff as we seek to determine a path forward for the school," she wrote.

Frank McIntosh, president of the Pencader school board, balked at accusations that his staff wasn't cooperating.

"Honestly, we don't know what discrepancies they're talking about. We don't know what questions they have that we supposedly haven't answered," he said. "All they're doing is throwing mud at us."

If the school closes early, its hundreds of students would head to feeder schools, causing problems with academic schedules and creating logistical hurdles for the affected districts.

McIntosh wrote to parents last week that he had given the state until Tuesday to make a decision or the school would start the process of closing early. But on Tuesday afternoon, he said that wouldn't happen right away.

In the email, McLaughlin asked the charter school in New Castle to "refrain from references to a self-determined April 23rd 'deadline' for the state to render a decision" and to give the state time to process everything. She also reiterated the state's "expectation" that Pencader allow its seniors to graduate and its students to transfer.

A DOE spokeswoman said that the school had sent the state more information Tuesday morning and that the department was processing it.

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

Howard L. Griffin, President and Publisher
David F. Ledford, Executive Editor
John Sweeney, Editorial Page Editor

QUOTE OF THE DAY
"... the IRS would probably view the method in which these retirees were rehired as a 'sham transaction.'" — **DAVID C. CRAIK, DELAWARE PENSION ADMINISTRATOR** in a letter to Pencader Charter School officials

OUR VIEW

Charter school needs better steering

A year after escaping a state order shutdown due to financial mismanagement, Pencader Charter Business and Finance High School remains in dire need of critical budgetary and administrative oversight.

UNCLEAR FUTURE

This time last summer the challenge had to do with the fact that the school used up its share of state revenues before the school year ended.

But it won a reprieve, thanks to a fierce public relations campaign by students, parents and staffers, who argued the school's high academic test scores, that earned it a second chance.

Recent revelations of School Leader Ann Lewis' undocumented professional qualifications – combined with questionable salaries for minimal classroom for her husband and questionable bookkeeping that possibly violates Internal Revenue Service law – call into question the school's ability to fulfill its original mission.

In today's front-page story, reporter Nichole Dobo details how such a promising charter jeopardizes its future and that of its student with illegally questionable operations.

For example, Bob Lewis fired this spring for calling a student a "bitch," has been rehired at a salary of $6,500 a month to teach just one class on "morals and ethics" to freshmen. But he was not listed as a teacher for the school, now he makes more than double the salary of teachers who work a full day. Through a bookkeeping trick, Lewis's husband and a few other favored employees were reclassified as outside contractors, allowing them to draw an additional salary and collect pensions from earlier state teaching jobs.

Thankfully the State Board of Pension saw through the ruse, which abuse independent contractor guidelines, and is seeking to have the money repaid.

"If state employers replace regular jobs with independent contractors then contributions from working people to the pension plan will decrease. This will hurt the ability of the state to meet future pension obligations," David C. Craik, the Delaware pension administrator.

What is most troubling is that the Commission's staff had offered to walk Pencader through the necessary regulatory procedures to assure its hiring and bookeeping was in compliance with standard public fiduciary requirements. But their offer was not heeded.

For a school chartered with a mission to teach business and finance to young developing minds, Pencader's leadership on this matter exhibits a galling hubris about their duty.

The actions require yet another consideration by the state Board of Education and Delaware's Department of Education with regard to the future leadership of Pencader and its ability to live up to the integrity of its charter.

Pencader teachers appeal ruling

State finds conflict with pension, pay

9:15 AM, Jul 22, 2012 | 16 Comments Recommend 62 people recommend this.

Pencader School Leader Ann Lewis

Written by
Nichole Dobo
The News Journal

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Local
Education

When the state Pension Office told officials at Pencader Charter Business and Finance High School that three of its teachers were double-dipping last October, collecting a state pension and a salary, its head of school, Ann Lewis, terminated the three.

"Due to the Office of Pension's stance that you cannot work as a seasonal employee, your employment with Pencader Charter High School is terminated effective October 1, 2011," states a one-sentence letter signed by "Ann E. Lewis Ph.D." addressed to her husband, who was one of the three teachers, and copied to the state.

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Pencader school leader Ann Lewis (left) prepares for the start of the Pencader Charter board meeting last month at the New Castle-area school. / WILLIAM BRETZGER/NEWS JOURNAL FILE

Aug. 22, 2002: The Delaware Pension Office letter states approval for Bob Lewis pension. Letter includes return-to-

More

Or so the Pension Office thought.

School leader Ann Lewis instructed those working under her to remove the teachers, including her husband, Bob Lewis, from the state's payroll system in October. The three teachers were transformed into independent contractors. Ann Lewis' husband collected about $6,500 a month from the school while continuing to draw his state pension.

About six months after the termination letter, Lewis' husband made headlines. Bob Lewis was fired after a Pencader student recorded him using the word "bitch" while admonishing a teenage girl in a math class.

Pension Administrator David Craik said the school told his office the teachers had been terminated. Craik believed the school no longer employed the teachers. But in March Craik realized this wasn't the case when he read in The News Journal about Bob Lewis' remarks.

The state determined all three instructors had remained at the school as independent contractors.

According to testimony at a recent pension hearing, Bob Lewis said he was responsible for teaching only one class, morals and ethics, in return for nearly $6,500 a month. The rest of his time at the school, he said, was volunteering.

The Pension Office wants the three instructors to repay benefits they collected during that time. For Bob Lewis, that figure is $25,610.58. The teachers have appealed the state ruling. Bob Lewis and an English teacher had hearings July 11. The third teacher has a hearing in September.

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

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Education department and charters share blame for failures

COMMUNITY VIEW

BARBARA J. FINNAN

Once again there are Delaware charter schools in trouble. And once again the major contributing factor is poor fiscal management by their school boards and administrators.

This should never be the case. There are regulations in place under Delaware's Title 14 to insure that charters are run on a sound financial basis, with the Department of Education as the monitoring and enforcing body.

So, why, you might ask, has this happened again? The answer is not as simple as it might first appear.

The language in Delaware's Title 14 is very clear: DOE is "to develop a program of financial training to instruct members of ... the boards of charter schools, in properly discharging their responsibility to insure that public funds, including both state and local funds, are appropriately managed and expended ... The aforementioned boards shall be required to attend such training as may be required by the Department."

Title 14 also states that the Department shall prepare a report for the governor and the General Assembly on the success or failure of charter schools and propose changes in state law necessary to improve or change the charter school program. The last such report provided by the Department of Education was in 2007.

Charter schools are also to have citizen oversight committees and regularly post school spending information for the public to see.

The infractions, mistakes and negligence on these issues are astounding. The very first problem in attempting to provide transparency for parents and the public is the difficulty in knowing where to find a particular charter school on DOE's site.

If a school has been chartered by a district, such as several in Red Clay, one must know where to look to review the information for that school.

It would seem to be common sense to have all charters clearly identifiable, no matter who chartered them.

We are told repeatedly that they are public schools. They certainly receive public funds. Therefore, there is no reason why they should not be included on the same site as the rest.

In addition charter reports do not seem to be updated with any timeliness or accuracy.

For instance, Moyer Academy, a Wilmington charter school, was in such deep trouble a year ago that the state took it over and turned management over to an online for-profit entity known as K-12, Inc. Despite that, when I recently read Moyer's report on the DOE site all things looked fairly rosy, including the state's Academic Review rating of 3 out 5 stars.

If you have no explanation for what this rating means – and I could find none – one might assume the score made them fairly average. Not so.

Regarding the financial morass most recently highlighted in several news accounts, the required training may or may not have occurred, been attended or resulted in a detailed report.

No matter. It appears there are no significant consequences for anyone at DOE for not monitoring their assigned charter closely, nor are there any consequences for a charter that ignores any of the requirements.

Yes, they might eventually wind up with a warning and, at the most, probation.

But at this time, even with the latest proposed charter legislation, there are no teeth in this tiger. Relying on the honesty and goodwill of people handling money is a recipe for disaster.

I don't know who is responsible for deciding what consequences there should be for noncompliance for either DOE or the charters, but it should have been done long ago and certainly needs to be done now.

At this point the only ones feeling any consequences – and they are severe – are parents who chose the school, students who attend and have made friends and hopefully academic gains, and the teachers at Claymont's Reach Academy for Girls, who have little expectation of receiving all the contracted pay they already earned during the school year.

So, who's minding the store? More important, who is supposed to be?

Barbara J. Finnan is a retired school teacher and a member of The News Journal's Community View board.

7-5-11 NJ

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DELAWARE AND THE REGION

SHARE YOUR COMMUNITY NEWS

Mail it to Around Delaware, Box 15505, Wilmington, DE 19850. Fax it to 324-5509 or email it to: newsdesk@delawareonline.com. Please submit items three weeks before the event. Call 324-2851.

LOTTERIES

Recording of numbers drawn in Delaware: (800) 338-6200, (302) 736-1436 (out of state)

DELAWARE

Play 3 Day	7-4-9
Play 4 Day	6-8-2-5
Play 3 Night	1-3-8
Play 4 Night	1-2-4-8

Cash 5 (Aug. 16)
1-20-23-25-29
Doubler **3**

Lotto (Aug. 19)
2-25-28-30-33-35

MARYLAND

Pick 3 Day	6-0-4
Pick 4 Day	5-2-1-2
Pick 3 Night	9-1-6
Pick 4 Night	1-1-6-7

Bonus Match 5
4-26-28-36-39
Bonus Ball **19**

Multi-Match (Aug. 18)
9-10-13-19-24-26

NEW JERSEY

Pick 3 Day
5-9-5

Pick 4 Day
9-9-6-4

Pick 3 Night
2-9-4

Pick 4 Night
5-2-6-6

Cash 5
8-13-18-24-25

Pick 6 (Aug. 18)
4-5-10-13-16-33

PENNSYLVANIA

Daily Day	2-8-1
Big 4 Day	5-2-4-3
Daily Night	0-1-3
Big 4 Night	6-9-5-8
Quinto Day	5-0-7-6-4
Quinto Night	3-2-1-5-5

Cash 5
10-19-24-36-43

Match 6 (Aug. 18)
8-20-26-27-29-

Treasure Hunt
4-12-19-21-22

Charter school revisions signed

Law gives more oversight on financial matters, board members

By DOUG DENISON
The News Journal

Gov. Jack Markell signed legislation Friday strengthening the state's procedures for dealing with charter schools that fall into financial trouble and mandating background checks for charter school leaders.

House Bill 205 requires charters to produce annual audits for public review and gives the Department of Education greater oversight authority when it comes to charter finances.

For charter schools in dire straits, the new law authorizes the state budget director to assemble a team of experts responsible for thoroughly reviewing school finances and providing information to parents and school staff. Such teams would also have the ability to make certain financial decisions during the recovery stage. Similar rules exist for struggling school districts.

The law also forces charter schools to submit their charter renewal requests to the Department of Education earlier so that if a charter is not granted, parents have more time to place their students in other schools. It also adds more urgency to the process by which a well-performing school can inherit a struggling school's charter and keep the institution open.

A key part of HB 205 requires the DOE to perform background checks on charter school board members, and bars those convicted of felonies or crimes related to children from serving on boards. A board member also must disclose any financial connections he or she has with the school.

The General Assembly worked quickly to pass the legislation in June, prompted by a News Journal report that revealed the founder of the all-girls Reach Academy charter school in Claymont was a convicted child abuser, had filed for bankruptcy several times, and was spending school money with a company with which he was affiliated.

Financial woes at Reach Academy and Pencader Business and Finance Charter School in New Castle threatened to close both schools this summer, but a special probationary arrangement agreed to by Secretary of Education Lillian Lowery convinced the state Board of Education to keep the schools open.

With the signing of HB 205, officials are hoping schools in financial trouble can be fixed before closure becomes imminent.

Bill sponsor Rep. Teresa Schooley, D-Newark, said the new law is a good revision to the charter school code, established in 1996.

"There have been some really successful charter schools and some that have not been so successful," she said. "This bill is a real good attempt at fixing some of the issues that came to light in the last couple of months."

Contact Doug Denison at 678-4271 or ddenison@delawareonline.com.

Charter school bill passes House

Legislation now moves to Senate

By J.L. MILLER
The News Journal

DOVER — Legislation to reform Delaware's charter school system by requiring background checks for charter founders and board members and placing the schools under tighter financial oversight got a unanimous passing grade in the House Thursday.

House Bill 205, sponsored by Rep. Terry Schooley, D-Newark, was prompted by a News Journal investigation that found the state Department of Education failed to check the credentials or criminal background of the founder of Reach Academy. Reach Academy is facing closure amid serious financial problems and a fight over control of the board.

The legislation, which now moves to the Senate for consideration, would require yearly mandatory external audits for charter schools and allow the Office of Management and Budget to analyze the financial status of a struggling school and manage some of the school's finances. It also would require that decisions to close a school be made no later than January so parents can enter their children in the school-choice program and meet deadlines to get into charter schools.

"It's not a perfect bill, but I think it's a good start," said Rep. Harvey Kenton, R-Milford.

One flaw, Newark Democrat John Kowalko said, is the fact that a "highly successful charter school operator" is not defined in the bill. Highly successful operators would be able to take over struggling schools to keep them from closing. Schooley acknowledged there are problems with the bill and said talks will be considered during the legislative break to possibly fine-tune the legislation.

Contact J.L. Miller at 883-3322 or jlmiller@delawareonline.com.

Correcting charter flaws deserves fast-tracking

9:32 PM, Jun. 14, 2011|

Only the highest priority should demand any fast-tracking of legislation this close to the end of the General Assembly session.

Sunday's News Journal article "Checkered past goes unchecked," about the state's first all-girls public school, meets the standard. Through court documents and witness interviews, reporter Nicole Dobo detailed how Reach Academy founder Anthony White has been convicted of crimes against a child and is a serial bankruptcy filer, with multiple aliases.

In this its maiden year, the academy has had four heads of school, run out of money to pay teachers, and left a significant renter's debt as a tenant of a local church's school building.

House Speaker Robert Gilligan, summed up the bipartisan legislative response: "Incomprehensible."

Both houses are responding rapidly and responsibly. New legislation requiring background checks for charter board members is being prepared for a vote before this session ends with the month.

Thankfully, the entire Legislature sees the wisdom in carving out time in the coming days to correct a flawed policy so that it prevents those with criminal backgrounds and inexperience at managing public dollars from holding any operating role at charter schools.

With the same sense of immediacy, Gov. Jack Markell's office says he is prepared to sign the legislation.

Whatever the final wording, this new bill must put an end to accusations and facts that the operating boards of charter schools are held to lower child welfare and fiscal integrity standards than their counterparts in traditional public schools.

End lax oversight of charter schools

12:41 AM, Jun. 13, 2011|

Believe it or not, there is something more egregious than a school board president with a record of serial bankruptcies, multiple aliases and accusations of sexually assaulting one of his children:

The state agencies responsible for approval of charter schools have no process in place to prevent an Anthony White reign at Reach Academy, the state's first public school for girls. ("Checkered past goes unchecked," Sunday.)

In their ambitious argument for improving public education, charter schools claim themselves a better option for academic success. Many live up to that promise. Their "best-for-less" model plays to the mandate for better test scores, with less regard for better physical facilities like traditional public schools have.

Unfortunately, in exchange for such contractual promises, the scrutiny of major players -- head of school, board members and finance officers -- is intolerable. These un-elected "school boards" are a window of opportunity for unchecked malfeasance.

Board opponents and the media do the work of accountability for claims made by candidates, a process clearly the responsibility of the Delaware Department of Education, State Board of Education and the Charter School Accountability Committee.

As a result, charter board membership is too often a gift by social association or reputation. This perversion of "The Delaware Way" is how an apparent "operator" was able to help run Reach into the ground financially.

Reports of a $900,000 deficit in the school's first few months are documented in part by $31,000 for unspecified services on invoices paid to Mr. White's nonprofit school.

The mea culpa of state officials on this one is too late.

However, it's not too late to end the carte blanche agreement of lax oversight by the General Assembly and state officials out of desperation for tangible education reform.

What's happened at Reach Academy demands a plan for financial accountability with stricter review deadlines throughout

the school year.

The state's seat at the table of these school boards' fiscal and administrative operations can no longer be left up to a proxy assumption that the reformer's good will is being carried out.

Diana Ravitch, former convert of the Bush administration's No Child Left Behind polices, recently said: "Charter schools vary in quality from excellent to abysmal."

No longer should students and their parents be the first ones to find this out in Delaware.

148TH GENERAL ASSEMBLY

FISCAL NOTE

BILL:	HOUSE BILL NO. 175
SPONSOR:	Representative M. Smith
DESCRIPTION:	AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE RELATING TO EXCEPTIONAL CHILDREN.

ASSUMPTIONS:

1. This Act is effective upon appropriation.
2. This Act establishes a Unified Sports Pilot Program in all public high schools serving students with disabilities and with a track and field program in operation during the 2013-2014 school year. The pilot program is for the 2015-2016 school year.
3. This Act requires Special Olympics Delaware to provide uniforms, equipment and training for high schools participating in the pilot Unified Sports Pilot Program. Public high schools participating in the program provide coaches, staff and transportation.
4. There are approximately 30 public high schools expected to participate in the Unified Sports Pilot Program. The total cost per school for three to four events per track and field season is expected to be $1,500 ($1,000 for a coach's stipend and $500 for transportation).

Cost:

Fiscal Year 2016:	$45,000 (30 schools X $1,500 per school)
Fiscal Year 2017:	$0
Fiscal Year 2018:	$0

(Amounts are shown in whole dollars)

Office of Controller General
June 16, 2015
MJ:MJ
0271480021

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

January 25, 2013

Dear Colleague:

Extracurricular athletics—which include club, intramural, or interscholastic (*e.g.,* freshman, junior varsity, varsity) athletics at all education levels—are an important component of an overall education program. The United States Government Accountability Office (GAO) published a report that underscored that access to, and participation in, extracurricular athletic opportunities provide important health and social benefits to all students, particularly those with disabilities.[1] These benefits can include socialization, improved teamwork and leadership skills, and fitness. Unfortunately, the GAO found that students with disabilities are not being afforded an equal opportunity to participate in extracurricular athletics in public elementary and secondary schools.[2]

To ensure that students with disabilities consistently have opportunities to participate in extracurricular athletics equal to those of other students, the GAO recommended that the United States Department of Education (Department) clarify and communicate schools' responsibilities under Section 504 of the Rehabilitation Act of 1973 (Section 504) regarding the provision of extracurricular athletics. The Department's Office for Civil Rights (OCR) is responsible for enforcing Section 504, which is a Federal law

[1] United States Government Accountability Office, *Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics,* No. GAO-10-519, at 1, 31 (June 2010), *available at* http://www.gao.gov/assets/310/305770.pdf.

[2] *Id.* at 20-22, 25-26.

designed to protect the rights of individuals with disabilities in programs and activities (including traditional public schools and charter schools) that receive Federal financial assistance.[3]

In response to the GAO's recommendation, this guidance provides an overview of the obligations of public elementary and secondary schools under Section 504 and the Department's Section 504 regulations, cautions against making decisions based on presumptions and stereotypes, details the specific Section 504 regulations that require students with disabilities to have an equal opportunity for participation in nonacademic and extracurricular services and activities, and discusses the provision of separate or different athletic opportunities. The specific details of the illustrative examples offered in this guidance are focused on the elementary and secondary school context. Nonetheless, students with disabilities at the postsecondary level must also be provided an equal opportunity to participate in athletics, including intercollegiate, club, and intramural athletics.[4]

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[3] 29 U.S.C. § 794(a), (b). Pursuant to a delegation by the Attorney General of the United States, OCR shares in the enforcement of Title II of the Americans with Disabilities Act of 1990, which is a Federal law prohibiting disability discrimination in the services, programs, and activities of state and local governments (including public school districts), regardless of whether they receive Federal financial assistance. 42 U.S.C. § 12132. Violations of Section 504 that result from school districts' failure to meet the obligations identified in this letter also constitute violations of Title II. 42 U.S.C. § 12201(a). To the extent that Title II provides greater protection than Section 504, covered entities must comply with Title II's substantive requirements.

OCR also enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs that receive Federal financial assistance. 20 U.S.C. § 1681. For more information about the application of Title IX in athletics, see OCR's "Reading Room," "Documents – Title IX," at http://www.ed.gov/ocr/publications.html#TitleIX-Docs.

[4] 34 C.F.R. §§ 104.4, 104.47. The U.S. Department of Education has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

I. *Overview of Section 504 Requirements*

To better understand the obligations of school districts with respect to extracurricular athletics for students with disabilities, it is helpful to review Section 504's requirements.

Under the Department's Section 504 regulations, a school district is required to provide a qualified student with a disability an opportunity to benefit from the school district's program equal to that of students without disabilities. For purposes of Section 504, a person with a disability is one who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.[5] With respect to public elementary and secondary educational services, "qualified" means a person (i) of an age during which persons without disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).[6]

Of course, simply because a student is a "qualified" student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district; school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory.

Among other things, the Department's Section 504 regulations prohibit school districts from:

- denying a qualified student with a disability the opportunity to participate in or benefit from an aid, benefit, or service;
- affording a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others;

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[5] 29 U.S.C. § 705(9)(B), (20)(B) (as amended by the Americans with Disabilities Act Amendments Act of 2008); 34 C.F.R. § 104.3(j). For additional information on the broadened meaning of disability after the effective date of the 2008 Amendments Act, see OCR's 2012 Dear Colleague Letter and Frequently Asked Questions document, available at http://www.ed.gov/ocr/letters/colleague-201109.html, and http://www.ed.gov/ocr/docs/dcl-504faq-201109.html.

[6] 34 C.F.R. § 104.3(*l*)(2).

- providing a qualified student with a disability with an aid, benefit, or service that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student's needs;

- providing different or separate aid, benefits, or services to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with aid, benefits, or services that are as effective as those provided to others; and

- otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.[7]

The Department's Section 504 regulations also require school districts to provide a free appropriate public education (Section 504 FAPE) to each qualified person with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the person's disability.[8]

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[7] 34 C.F.R. § 104.4(b)(1)(i)-(iv), (vii), (2), (3). Among the many specific applications of these general requirements, Section 504 prohibits harassment on the basis of disability, including harassment that occurs during extracurricular athletic activities. OCR issued a Dear Colleague letter dated October 26, 2010, that addresses harassment, including disability harassment, in educational settings. *See* Dear Colleague Letter: Harassment and Bullying, available at http://www.ed.gov/ocr/letters/colleague-201010.html. For additional information on disability-based harassment, see OCR's Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), available at http://www.ed.gov/ocr/docs/disabharassltr.html.

[8] 34 C.F.R. § 104.33(a). Section 504 FAPE may include services a student requires in order to ensure that he or she has an equal opportunity to participate in extracurricular and other nonacademic activities. One way to meet the Section 504 FAPE obligation is to implement an individualized education program (IEP) developed in accordance with the IDEA. 34 C.F.R. § 104.33(b)(2). Because the IDEA is not enforced by OCR, this document is not intended as an explanation of IDEA requirements or implementing regulations, which include the requirement that a student's IEP address the special education, related services, supplementary aids and services, program modifications, and supports for school personnel to be provided to enable the student to, among other things, participate in extracurricular and other nonacademic activities. 34 C.F.R. § 300.320(a)(4)(ii). In general, OCR would view a school district's failure to address participation or requests for participation in extracurricular athletics for a qualified student with a disability with an IEP in a manner consistent with IDEA requirements as a failure to ensure Section 504 FAPE and an equal opportunity for participation.

A school district must also adopt grievance procedures that incorporate appropriate due process standards and that provide for prompt and equitable resolution of complaints alleging violations of the Section 504 regulations.[9]

A school district's legal obligation to comply with Section 504 and the Department's regulations supersedes any rule of any association, organization, club, or league that would render a student ineligible to participate, or limit the eligibility of a student to participate, in any aid, benefit, or service on the basis of disability.[10] Indeed, it would violate a school district's obligations under Section 504 to provide significant assistance to any association, organization, club, league, or other third party that discriminates on the basis of disability in providing any aid, benefit, or service to the school district's students.[11] To avoid violating their Section 504 obligations in the context of extracurricular athletics, school districts should work with their athletic associations to ensure that students with disabilities are not denied an equal opportunity to participate in interscholastic athletics.[12]

II. ***Do Not Act On Generalizations and Stereotypes***

A school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular. A school district also may not rely on generalizations about what students with a type of disability are capable of—one student with a certain type of disability may not be able to play a certain type of sport, but another student with the same disability may be able to play that sport.

Example 1: A student has a learning disability and is a person with a disability as defined by Section 504. While in middle school, this student enjoyed participating in her school's lacrosse club. As she enters the ninth grade in high school, she tries out and is

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[9] 34 C.F.R. § 104.7(b).

[10] 34 C.F.R. § 104.10(a), 34 C.F.R. § 104.4(b)(1).

[11] 34 C.F.R. § 104.4(b)(1)(v); 34 C.F.R. pt. 104, App. A § 104.4 at 367 (2012).

[12] OCR would find that an interscholastic athletic association is subject to Section 504 if it receives Federal financial assistance or its members are recipients of Federal financial assistance who have ceded to the association controlling authority over portions of their athletic program. *Cf. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, Inc.*, 80 F.Supp.2d 729, 733-35 (W.D. Mich. 2000) (at urging of the United States, court finding that an entity with controlling authority over a program or activity receiving Federal financial assistance is subject to Title IX's anti-discrimination rule). Where an athletic association is covered by Section 504, OCR would find that the school district's obligations set out in this letter would apply with equal force to the covered athletic association.

selected as a member of the high school's lacrosse team. The coach is aware of this student's learning disability and believes that all students with the student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game. Based on this assumption, the coach decides never to play this student during games. In his opinion, participating fully in all the team practice sessions is good enough.

> *Analysis*: OCR would find that the coach's decision violates Section 504. The coach denied this student an equal opportunity to participate on the team by relying solely on characteristics he believed to be associated with her disability. A school district, including its athletic staff, must not operate on generalizations or assumptions about disability or how a particular disability limits any particular student. Rather, the coach should have permitted this student an equal opportunity to participate in this athletic activity, which includes the opportunity to participate in the games as well as the practices. The student, of course, does not have a right to participate in the games; but the coach's decision on whether the student gets to participate in games must be based on the same criteria the coach uses for all other players (such as performance reflected during practice sessions).

III. ***Ensure Equal Opportunity for Participation***

A school district that offers extracurricular athletics must do so in such manner as is necessary to afford qualified students with disabilities an equal opportunity for participation.[13] This means making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would be a fundamental alteration to its program.[14] Of course, a school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity. A school district, however, must consider whether safe participation by any particular student with a disability can be assured through reasonable modifications or the provision of aids and services.[15]

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[13] 34 C.F.R. § 104.37(a), (c).

[14] *See Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) (Section 504 may require reasonable modifications to a program or benefit to assure meaningful access to qualified persons with disabilities); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (Section 504 does not prohibit a college from excluding a person with a serious hearing impairment as not qualified where accommodating the impairment would require a fundamental alteration in the college's program).

[15] 34 C.F.R. § 104.4(b)(1).

Schools may require a level of skill or ability for participation in a competitive program or activity; equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on an athletic team for which other students must try out. A school district must, however, afford qualified students with disabilities an equal opportunity for participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student.[16] This means that a school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity, unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity.

In considering whether a reasonable modification is legally required, the school district must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the school district must allow it unless doing so would result in a fundamental alteration of the nature of the extracurricular athletic activity. A modification might constitute a fundamental alteration if it alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally (such as adding an extra base in baseball). Alternatively, a change that has only a peripheral impact on the activity or game itself might nevertheless give a particular player with a disability an unfair advantage over others and, for that reason, fundamentally alter the character of the competition. Even if a specific modification would constitute a fundamental alteration, the school district would still be required to determine if other modifications might be available that would permit the student's participation.

[16] 34 C.F.R. § 104.37(a), (c); 34 C.F.R. § 104.34(b); 34 C.F.R. § 104.4(b)(1)(ii).

To comply with its obligations under Section 504, a school district must also provide a qualified student with a disability with needed aids and services, if the failure to do so would deny that student an equal opportunity for participation in extracurricular activities in an integrated manner to the maximum extent appropriate to the needs of the student.[17]

Example 2: A high school student has a disability as defined by Section 504 due to a hearing impairment. The student is interested in running track for the school team. He is especially interested in the sprinting events such as the 100 and 200 meter dashes. At the tryouts for the track team, the start of each race was signaled by the coach's assistant using a visual cue, and the student's speed was fast enough to qualify him for the team in those events. After the student makes the team, the coach also signals the start of races during practice with the same visual cue. Before the first scheduled meet, the student asks the district that a visual cue be used at the meet simultaneously when the starter pistol sounds to alert him to the start of the race. Two neighboring districts use a visual cue as an alternative start in their track and field meets. Those districts report that their runners easily adjusted to the visual cue and did not complain about being distracted by the use of the visual cue.

After conducting an individualized inquiry and determining that the modification is necessary for the student to compete at meets, the district nevertheless refuses the student's request because the district is concerned that the use of a visual cue may distract other runners and trigger complaints once the track season begins. The coach tells the student that although he may practice with the team, he will not be allowed to participate in meets.

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[17] 34 C.F.R. § 104.37(a), (c); 34 C.F.R. § 104.34(b); 34 C.F.R. § 104.4(b)(1)(ii). Although a school district may also raise the defense that a needed modification or aid or service would constitute an undue burden to its program, based on OCR's experience, such a defense would rarely, if ever, prevail in the context of extracurricular athletics; for this reason, to the extent the examples in this letter touch on applicable defenses, the discussion focuses on the fundamental alteration defense. To be clear, however, neither the fundamental alteration nor undue burden defense is available in the context of a school district's obligation to provide a FAPE under the IDEA or Section 504. *See* 20 U.S.C. § 1414(d)(1); 34 C.F.R. § 104.33. Moreover, whenever the IDEA would impose a duty to provide aids and services needed for participation in extracurricular athletics (as discussed in footnote 8 above), OCR would likewise rarely, if ever, find that providing the same needed aids and services for extracurricular athletics constitutes a fundamental alteration under Section 504 for students not eligible under the IDEA.

Analysis: OCR would find that the school district's decision violates Section 504.

While a school district is entitled to set its requirements as to skill, ability, and other benchmarks, it must provide a reasonable modification if necessary, unless doing so would fundamentally alter the nature of the activity. Here, the student met the benchmark requirements as to speed and skill in the 100 and 200 meter dashes to make the team. Once the school district determined that the requested modification was necessary, the school district was then obligated to provide the visual cue unless it determined that providing it would constitute a fundamental alteration of the activity.

In this example, OCR would find that the evidence demonstrated that the use of a visual cue does not alter an essential aspect of the activity or give this student an unfair advantage over others. The school district should have permitted the use of a visual cue and allowed the student to compete.

Example 3: A high school student was born with only one hand and is a student with a disability as defined by Section 504. This student would like to participate on the school's swim team. The requirements for joining the swim team include having a certain level of swimming ability and being able to compete at meets. The student has the required swimming ability and wishes to compete. She asks the school district to waive the "two-hand touch" finish it requires of all swimmers in swim meets, and to permit her to finish with a "one-hand touch." The school district refuses the request because it determines that permitting the student to finish with a "one-hand touch" would give the student an unfair advantage over the other swimmers.

Analysis: A school district must conduct an individualized assessment to determine whether the requested modification is necessary for the student's participation, and must determine whether permitting it would fundamentally alter the nature of the activity. Here, modification of the two-hand touch is necessary for the student to participate. In determining whether making the necessary modification – eliminating the two-hand touch rule – would fundamentally alter the nature of the swim competition, the school district must evaluate whether the requested modification alters an essential aspect of the activity or would give this student an unfair advantage over other swimmers.

OCR would find a one-hand touch does not alter an essential aspect of the activity. If, however, the evidence demonstrated that the school district's judgment was correct that she would gain an unfair advantage over others who are judged on the touching of both hands, then a complete waiver of the rule would constitute a fundamental alteration and not be required.

In such circumstances, the school district would still be required to determine if other modifications were available that would permit her participation. In this situation, for example, the school district might determine that it would not constitute an unfair advantage over other swimmers to judge the student to have finished when she touched the wall with one hand and her other arm was simultaneously stretched forward. If so, the school district should have permitted this modification of this rule and allowed the student to compete.

Example 4: An elementary school student with diabetes is determined not eligible for services under the IDEA. Under the school district's Section 504 procedures, however, he is determined to have a disability. In order to participate in the regular classroom setting, the student is provided services under Section 504 that include assistance with glucose testing and insulin administration from trained school personnel. Later in the year, this student wants to join the school-sponsored gymnastics club that meets after school. The only eligibility requirement is that all gymnastics club members must attend that school. When the parent asks the school to provide the glucose testing and insulin administration that the student needs to participate in the gymnastics club, school personnel agree that it is necessary but respond that they are not required to provide him with such assistance because gymnastics club is an extracurricular activity.

Analysis: OCR would find that the school's decision violates Section 504. The student needs assistance in glucose testing and insulin administration in order to participate in activities during and after school. To meet the requirements of Section 504 FAPE, the school district must provide this needed assistance during the school day.

In addition, the school district must provide this assistance after school under Section 504 so that the student can participate in the gymnastics club, unless doing so would be a fundamental alteration of the district's education program. Because the school district always has a legal obligation under IDEA to provide aids or services in its education program to enable any IDEA-eligible students to participate in extracurricular

activities,[18] providing these aids or services after school to a student with a disability not eligible under the IDEA would rarely, if ever, be a fundamental alteration of its education program. This remains true even if there are currently no IDEA-eligible students in the district who need these aids or services.

In this example, OCR would find that the school district must provide glucose testing and insulin administration for this student during the gymnastics club in order to comply with its Section 504 obligations. The student needs this assistance in order to participate in the gymnastics club, and because this assistance is available under the IDEA for extracurricular activities, providing this assistance to this student would not constitute a fundamental alteration of the district's education program.[19]

IV. ***Offering Separate or Different Athletic Opportunities***

As stated above, in providing or arranging for the provision of extracurricular athletics, a school district must ensure that a student with a disability participates with students without disabilities to the maximum extent appropriate to the needs of that student with a disability.[20] The provision of *unnecessarily* separate or different services is discriminatory.[21] OCR thus encourages school districts to work with their community and athletic associations to develop broad opportunities to include students with disabilities in all extracurricular athletic activities.

Students with disabilities who cannot participate in the school district's existing extracurricular athletics program – even with reasonable modifications or aids and services – should still have an equal opportunity to receive the benefits of extracurricular athletics. When the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district's existing extracurricular athletic program, the school district should create additional opportunities for those students with disabilities.

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[18] 20 U.S.C. §§ 1412(a)(1), 1414(d)(1)(A)(i)(IV)(bb); 34 CFR §§ 300.320(a)(4)(ii), 300.107, 300.117; *see also* footnotes 8 & 17, above.

[19] 34 C.F.R. § 104.37.

[20] 34 C.F.R. § 104.34(b).

[21] 34 C.F.R. pt. 104, App. A § 104.4 at 367 (2012); 34 C.F.R. pt. 104, App. A § 104.37 at 376 (2012).

In those circumstances, a school district should offer students with disabilities opportunities for athletic activities that are separate or different from those offered to students without disabilities. These athletic opportunities provided by school districts should be supported equally, as with a school district's other athletic activities. School districts must be flexible as they develop programs that consider the unmet interests of students with disabilities. For example, an ever-increasing number of school districts across the country are creating disability-specific teams for sports such as wheelchair tennis or wheelchair basketball. When the number of students with disabilities at an individual school is insufficient to field a team, school districts can also: (1) develop district-wide or regional teams for students with disabilities as opposed to a school-based team in order to provide competitive experiences; (2) mix male and female students with disabilities on teams together; or (3) offer "allied" or "unified" sports teams on which students with disabilities participate with students without disabilities.[22] OCR urges school districts, in coordination with students, families, community and advocacy organizations, athletic associations, and other interested parties, to support these and other creative ways to expand such opportunities for students with disabilities.[23]

V. ***Conclusion***

OCR is committed to working with schools, students, families, community and advocacy organizations, athletic associations, and other interested parties to ensure that students with disabilities are provided an equal opportunity to participate in extracurricular athletics. Individuals who believe they have been subjected to discrimination may also file a complaint with OCR or in court.[24]

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[22] The Department's Office of Special Education and Rehabilitative Services issued a guidance document that, among other things, includes suggestions on ways to increase opportunities for children with disabilities to participate in physical education and athletic activities. That guidance, *Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics*, dated August 2011, is available at http://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf.

[23] It bears repeating, however, that a qualified student with a disability who would be able to participate in the school district's existing extracurricular athletics program, with or without reasonable modifications or the provision of aids and services that would not fundamentally alter the program, may neither be denied that opportunity nor be limited to opportunities to participate in athletic activities that are separate or different. 34 C.F.R. § 104.37(c)(2).

[24] 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.7(b)); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

For the OCR regional office serving your area, please visit: http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm, or call OCR's Customer Service Team at 1-800-421-3481 (TDD 1-877-521-2172).

Please do not hesitate to contact us if we can provide assistance in your efforts to address this issue or if you have other civil rights concerns. I look forward to continuing our work together to ensure that students with disabilities receive an equal opportunity to participate in a school district's education program.

Sincerely,

/s/

Seth M. Galanter
Acting Assistant Secretary for Civil Rights

Delaware's First Unified Flag Football League

Oct 21, 2015 | Posted by Krystle Rich | Featured Sports, Football, Local Sports, News

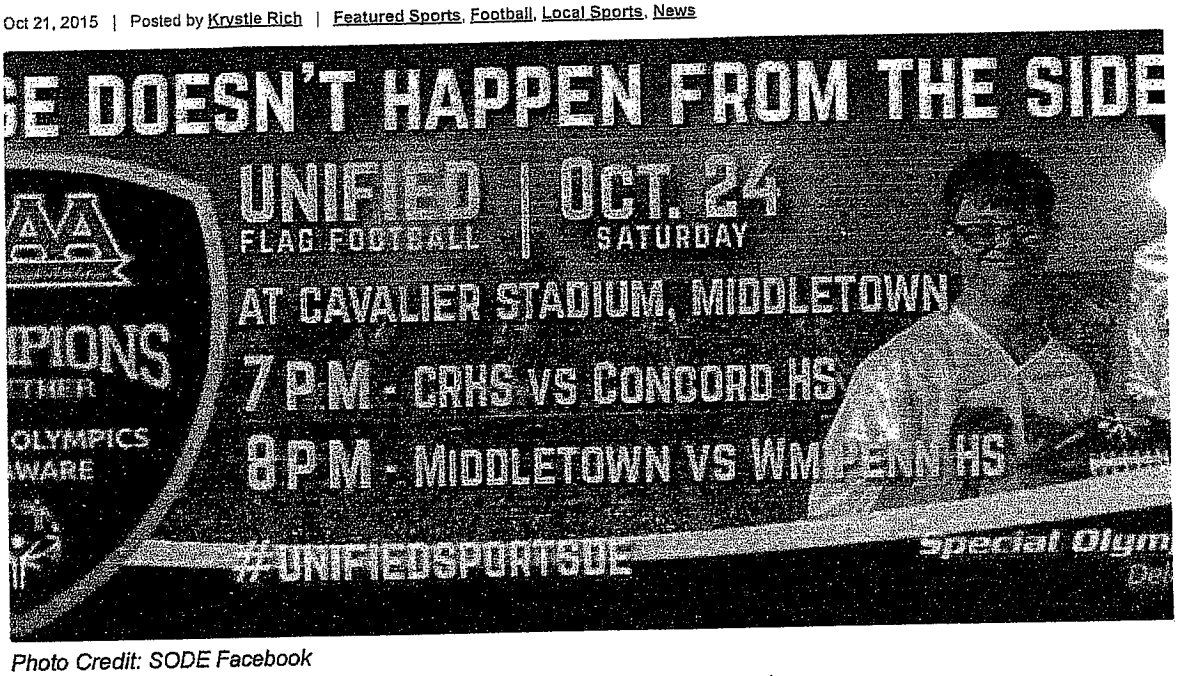

Photo Credit: SODE Facebook

DOVER, Del- It is time for student athletes with disabilities to get more respect.

The Delaware Interscholastic Athlete Association (DIAA) and Special Olympics Delaware (SODE) are teaming up to do just that.

The new program centered around flag football will team up student athletes with and without disabilities to complete on the same fields as varsity high school players.

"The goal is to untimely have is every public high school in Delaware to have a unified flag football team where special needs students get together with high school athletes," Jon Buzby, SODE *Director of Media Relations said.*

Breaking barriers between athletes with and without disabilities is a goal of unified sports. Building friendships on and off the field is what the program aims for.

"If our special athletes are teamed up with athletes from different high schools and are part of that sports culture, they will be respected as people and athletes," Buzby said. "That's what they deserve."

The four schools participating in the pilot program are: Caesar Rodney, Concord, Middletown and William Penn.

The first game kicks off on Saturday, Oct. 24 at Cavalier Stadium in Middletown. Admission is free to the general public.

7 p.m. Concord vs. Caesar Rodney
8 p.m Middletown vs. William Penn.
Other game scheduled:

Oct. 31, SODE Fall Festival at St. Andrews School, Time TBD
Dec. 5, Delaware Stadium, Time TBD.
For more information on joining a league, contact Jon Buzby:

jbuzby@udel.edu

Work: (302) 831-3484

Cell: (302) 740-1033

MIDDLETOWN
TRANSCRIPT

By Mike Santa Barbara

Print Page

November 11, 2015 2:39PM

Special Olympics Delaware and DIAA team up to bring unified sports state-wide

In January 2013, the United States Department of Education released a directive stating that athletics was a civil right for people with disabilities, while also offering guidelines to include those students in all sports.

PHOTO/ SUBMITTED PHOTO

Ian Snitch, Alex Roberts, Ryan Beckman, Davonte Bessix, and Dalton Johnson are pictured here together at a unified flag-football practice at Middletown High School.

Special Olympics Delaware and the DIAA (Delaware Interscholastic Athletic Association) have taken that mandate a step forward by creating unified sports teams which have players with and without disabilities. While the organizations hope the teams will one day reach throughout the state, Middletown High School is already participating.

The DIAA first introduced a unified sports program in high school track & field three year ago, and since then the number of participating schools has grown.

"Our track and field program has grown from five teams in year one to what we expect to be 16 or more this upcoming fourth season," said Gary Cimaglia, Senior Director of Sports for Special Olympics of Delaware. "Ultimately, we'd like to have DIAA sanctioned unified sports in each of the three typical high school seasons."

During the fall season, Special Olympics Delaware and the DIAA started a flag-football pilot program which featured Middletown and three other high schools: William Penn, Caesar Rodney, and Concord.

Games were played featuring unified teams which included those with disabilities and varsity players. Players were treated to all of the activities and fanfare that goes along with preparing for a big football game.

"Football is the most popular high school sport in general so it seemed only natural to try and make flag football, which is an official Special Olympics sport," Cimaglia said. "Our hope is that our unified sports flag football teams will eventually be treated at each school just like the existing freshman, junior varsity, and varsity teams. We want our teams to practice often and compete weekly, because it's only fair that they have the same opportunities to improve their game as the other student-athletes in their school do."

Sports have always been an outlet for student-athletes to show off their skills on their respective fields of play. Though being a part of team goes much deeper than what occurs during game day. Players on a team are connected by the schools and communities they represent, helping teach life-lessons as they work together fighting for a common goal. With the programs created by Special Olympics Delaware and the DIAA, student-athletes of all abilities will get the chance to reap those benefits.

The reach of these programs doesn't start and end with those finally getting their shot at taking the field alongside their fellow students. Current varsity players and coaches working side-by-side with those with disabilities can only help to educate and bring acceptance.

In the very near future we could see unified varsity sports in every sport up and down the state. And if the reaction from the most recent flag-football pilot is any indication, that future could come sooner rather than later.

"The positive response from the pilot event has been overwhelming," said Kylie Melvin, director of youth and school initiatives for Delaware Special Olympics. "From the players to the coaches, to the families and spectators, and even the outpouring of media interest, we are just thrilled with the outcome. As one of our longtime volunteer coaches said, 'there's no turning back now!'"

The four teams that met in the pilot program last month will come together once more before the football season ends, on Dec. 5 at Delaware Stadium during the DIAA Division I and Division II State Football Championship games.

Unified Sports

Unified Sports®

(http://www.specialolympics.org/unified_sports.aspx) is a registered program of Special Olympics that combines approximately equal numbers of athletes with and without intellectual disability on sports teams for training and competition.

All Unified Sports® players, both athletes and special partners, are of similar age and matched sport skill ability. Unified Sports® teams are placed in competitive divisions based on their skill abilities, and range from training divisions (with a skill-learning focus) to high level competition.

Team sports are about having fun, promoting physical health and bringing people together. Special Olympics Unified Sports® teams do all of that – and shatter stereotypes about intellectual disability in the process.

Unified Sports is a moving and exciting initiative for higher ability athletes of all ages, from youth to adults. Mixed teams provide the public direct opportunities to experience first-hand the capabilities and courage of Special Olympics athletes. By having fun together in a variety of sports ranging from basketball to golf to figure skating, Unified Sports athletes and partners improve their physical fitness, sharpen their skills, challenge the competition and help to overcome prejudices about intellectual disability.

Special Olympics Unified Sports has partnered with the Delaware Interescholastic Athletic Association. This partnership was introduced at the 2013 Delaware Track & Field state championship in May. WATCH THE VIDEO ... (http://www.youtube.com/watch?v=40gjd-QwJyE)

HOME

SERVICES
- Assistance for Caregivers
- Home and Community-Based Services
- Information and Supports
- Residential Care
- Rights and Protections

INFORMATION

Adult Protective Services

Description The Adult Protective Service (APS) Program responds to cases of suspected abuse, neglect, or exploitation of impaired adults. Specifically, the program serves persons who are aged 18 or over, who have a physical or mental impairment, and who are not living in a long term care facility (for example, a nursing home). The APS program is staffed by trained social workers who provide assistance.

Eligibility Adults, aged 18 or over with physical or mental impairments who are living in the community and who are subject to abuse, neglect or exploitation.

Availability Statewide

Info or Enrollment APS is operated by Delaware Health and Social Services Office of the Secretary. For assistance, contact the Delaware Aging and Disability Resource Center (ADRC) by phone or email.

More Resources
Guide to Services for Older Delawareans and Persons with Disabilities
Delaware Aging and Disability Resource Center Service Provider Search

Related Links
National Center on Elder Abuse
National Committee for the Prevention of Elder Abuse
National Adult Protective Services Association
U.S Department of Justice - Elder Justice Initiative
National Resource Center on Domestic Violence: Preventing and Responding to Domestic and Sexual Violence in Later Life

Last Updated: Wednesday September 30 2015

(http://www.delaware.gov) (http://www.delaware.gov)

(http://www.flickr.com/photos/delchildrensdept/) (https://twitter.com/DelKids)
(http://news.delaware.gov/feed/)

News & Updates

May 13, 2015

DSCYF Partnership With Three Delaware Radio Companies to Recruit Foster & Adoptive Families (/news/pr/pr-20150513-FosterCareRecruitmentEffort.pdf)

March 31, 2015

Free Forum on Best Safety Practices for Those Working With Children (/news/pr/pr-20150331-BackgroundSafetyCheckForum.pdf)

March 2, 2015

Our Kids Matter: Foster ~ Adopt ~ Love (/fs/fs_kidsmatter.shtml)

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- (http://www.deldhub.com)

Department of Services for Children, Youth and Their Families
Stop child abuse - call the Report Line at 1-800-292-9582
Child Priority Response Hotline: 1-800-969-HELP(4357)

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(http://www.flickr.com/photos/delchildrensdept/) (https://twitter.com/DelKids)
(http://news.delaware.gov/feed/)
News & Updates

Child Abuse and Neglect Reporting

Online Child Abuse and Neglect Report

STOP CHILD ABUSE 800-292-9582
SEE THE SIGNS. MAKE THE CALL. iseethesigns.org

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Division of Family Services(/fs/fs.
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Child Care Licensing (/occl/occl.shtml)
Foster Care (fostercare.shtml)
Independent Living Services (/fs/independent-living.shtml)
Reporting Child Abuse and Neglect (fs_iseethesigns.shtml)
FAQs (fostercare_faq.shtml)
Audio PSA's and Clips
Child Abuse Prevention – Keep Safe (/multimedia/audio/Child Abuse Prev_KeepSafe.mp3)
Child Abuse Prevention – Time Out (/multimedia/audio/Child Abuse Prev_TimeOut.mp3)

Mandatory Reporting of Child Abuse and Neglect in Delaware

Identifying Signs of Abuse – The signs of child abuse and neglect are not always as obvious as a broken bone or bruise. Click here (/pdfs/ists_SignsofChildAbuseMandatoryReporting.pdf) to learn more about some of the signs of abuse/neglect. You can also learn more about the signs of child sexual abuse here (/fs/fs_iseethesigns_learn.shtml#iseeLearnMyths) and the myths surrounding the issue.

Reporting Abuse and the Investigation Process - It's important for citizens and professionals to know what to expect when they call to report a case of suspected abuse/neglect. For instance, because of historic call volume, callers may be on hold for a short period of time. Click here (/pdfs/ists_MakingaReportforSuspectedChildAbuse.pdf) to learn what you should be prepared to share with our Report Line staff. Also, have you ever wondered what happens after you hang up? Click here (/pdfs/ists_InvestigatingReportsofChildAbuse.pdf) for information on the Investigative Process.

Information for Professionals

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Law Enforcement

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Mandatory Reporting Form

Ending Discrimination for Delaware's Homeless

Protecting the Rights of Our Most Vulnerable Citizens

This report brings attention to the families and individuals in Delaware experiencing homelessness, or at risk of homelessness, who face discrimination due to their housing status, source(s) of income, and/or disability status while on the streets and when seeking access to housing, employment, and temporary shelter.

Prepared by the Policy Committee on Ending Homelessness in Delaware, a Working Group of the Homeless Planning Council of Delaware

March 2013

Policy Committee on Ending Homelessness in Delaware

A Working Group of the Homeless Planning Council of Delaware

Committee Membership:

- Rachel Beatty
  - Research Assistant, University of Delaware, Center for Community Research and Service
- Lonnie Edwards
  - Chairman, Family Resource Coalition
- Rosemary Haines
  - Delaware Interagency Council on Homelessness
- Charles Johnson
  - Founder of H.A.R.P., Homeless People Are Real People Too
- Kate LeFranc
  - Head of Christiana Presbyterian Church
- Karen G. Matteson
  - Director of Strategy for Post-Secondary Education - $tand By Me (Delaware Financial Empowerment Partnership)
- Susan Starrett
  - Executive Director, Homeless Planning Council of Delaware
- DeBorah Gilbert White
  - Ph.D., Diversity and Inclusion Consultant

Table of Contents

EXECUTIVE SUMMARY

This report aims to bring the attention of Delaware legislators to the families and individuals experiencing homelessness, or at risk of homelessness, who face discrimination due to their housing status, source of income, and disability status while on the streets and when seeking access to housing, employment, and temporary shelter.[1] In July 2012, Rhode Island passed the first Homeless Persons' Bill of Rights in the nation, providing protections for all citizens of their State regardless of their housing status.

Discriminatory practices aggravate the problem by unnecessarily prolonging experiences of homelessness and burdening the State's criminal justice, homeless services, and human services systems. As part of a comprehensive strategy to prevent and end homelessness in Delaware we must ensure that persons experiencing and at risk of homelessness receive equal treatment under the law, and have equal access to the goods a services necessary to end their homelessness.

HOMELESSNESS, DISCRIMINATION, AND CRIMINALIZATION

➢ ***DISCRIMINATION IN ACCESS TO TEMPORARY SHELTER:*** Temporary shelters in Delaware discriminate against persons due to their disability status, whether physical or psychiatric disability. Unlike other citizens in Delaware, disabled persons experiencing or at risk of homelessness are subject to overt housing discrimination by the very system meant to serve them.

POLICY RECOMMENDATIONS:

- Develop a Homeless Persons' Bill of Rights for the State of Delaware that requires all shelter providers to comply with the American Disabilities Act and Delaware's Fair Housing Act.

➢ ***CRIMINALIZATION ON THE STREET:*** Persons living on the streets are vulnerable to policies that target the homeless for performing necessary life-sustaining activities (e.g. eating, sleeping, sitting, standing) that they have no option but to perform in public places. Laws that make it illegal to do things that persons experiencing homelessness must do as a result of their homeless status criminalize homelessness. Persons experiencing homelessness are frequently treated unequally by authorities with regards to their use of public space in our communities. This criminalization of homelessness

[1] See APPENDIX A: Definitions

places unnecessary burdens on Delaware's criminal justice system. It also saddles the homeless with fines they cannot afford, and criminal records that inhibit their ability to access housing, employment, and the essential human services they need to end their homelessness.

POLICY RECOMMENDATIONS:

- Develop a Homeless Persons' Bill of Rights for the State of Delaware that ensures equal treatment under the law, equal access to and use of public space for all Delaware citizens, regardless of their housing status.
- Pursue alternative justice system strategies to criminalization such as police training, human services and police department collaborations, police department homeless liaisons, and homeless diversion or community courts.
- Review municipal and state codes, and their enforcement, to ensure that laws do not unfairly target the homeless due to their housing status.

HOUSING AND EMPLOYMENT DISCRIMINATION

➢ ***FAIR HOUSING AND EQUAL EMPLOYMENT OPPORTUNITY:*** Persons experiencing or at risk of homelessness are frequently denied access to housing and employment for which they would otherwise be eligible due to practices by landlords and employers that discriminate against applicants based on their housing status and/or source(s) of income. These practices aggravate the problem by denying individuals and families equal opportunities to access the housing and income they need to end their homelessness.

POLICY RECOMMENDATIONS:

- Develop a Homeless Persons' Bill of Rights for the State of Delaware that protects all individuals and families in Delaware experiencing or at risk of homelessness from discrimination based on their housing status and source of income.
- Add "housing status" and "source(s) of income" to Delaware's Fair Housing Act and Delaware's Equal Opportunity Law.

I. HOMELESSNESS

A. SYSTEM GOALS

The Homeless Planning Council of Delaware (HPC) was informally established in early 1998 and incorporated as a 501 (c) 3 non-profit agency in June 2000. The HPC is an active, cooperative coalition of public, nonprofit and private-sector organizations and individuals working together year-round to address issues related to homelessness in Delaware. The HPC is dedicated to seeking innovative and evidence-based solutions to prevent and end homelessness in the State of Delaware. In 2012, the Policy Committee on Ending Homelessness in Delaware was formed as a working group of HPC to tackle policy issues that directly affect our efforts to end homelessness in the State.

Homelessness is not a simple problem affecting some, but is a complex housing issue that has many causes, solutions and outcomes. The HPC seeks to prevent new entries into homelessness by increasing the availability of homeless prevention, diversion, and rapid re-housing resources in Delaware. These resources help families and individuals experiencing or at risk of homelessness maintain their current housing, or move as quickly as possible out of homelessness and back in to stable housing.

The HPC aims to develop system-wide practices that focus not only on providing temporary shelter for those in need, but moving people out of the homeless services system and into to stable housing as quickly as possible. While temporary shelters help families and individuals in crisis cope with homelessness, they do little to end homelessness quickly and efficiently for those whom they serve.

Despite our State's best efforts, rates of homelessness in Delaware have remained steady for more than 30 years. During that time, new programs have been created – mostly emergency and temporary shelters - and yet there has been no decrease in the rate of homelessness. If we are dedicated to ending homelessness we must dedicate ourselves to seeking new solutions and making changes to how we address the problem at a systems level.

Our goal is for every Delawarean to have a stable and permanent home in which to live. In order to achieve this goal it is essential to ensure that persons experiencing or at risk of homelessness receive equal treatment, and have fair and equal access to the basic goods and services - such as housing, employment, and shelter - that are necessary to end their homelessness. The HPC is currently working in partnership with others, including the Delaware Interagency Council on Homelessness, to develop Delaware's upcoming Plan to Prevent and End Homelessness. We will align our plan with *Opening Doors*, the Federal Strategic Plan to Prevent and End Homelessness, and the HEARTH Act of 2009.

B. THE CURRENT STATE OF HOMELESSNESS

Too many Americans are unable to afford and access adequate housing. As a result, they are finding themselves with no other option but to live in emergency and temporary shelters. Due to lack of shelter space and/or inappropriate shelter options, others are forced to live in unsanitary and often-times life threatening conditions in places not meant for human habitation (under bridges, in parks, in vehicles, etc). In 2012, approximately 1/3 (38%) of the homeless captured in the National Point in Time Homeless Count were unsheltered.

In the United States it is estimated that 643,067 people experience homelessness on any given night. Approximately 13% of Americans experiencing homelessness in 2012 were Veterans of our armed forces. 38% of homeless persons in the United States in 2012 were members of families, making up a total of 77,157 American families. Chronically homeless individuals accounted for 15.8% of the homeless population in 2012.[2]

In the State of Delaware it is estimated that 6,572 people, including adults and children, experienced homelessness in 2012. According to Delaware's 2012 Point in Time Survey, 43% of homeless individuals were female, 40% were members of families with at least one child, and 24% were children under the age of 18. Approximately 7.5% of persons experiencing homelessness reported being victims of domestic violence. Delaware's Department of Education reports 3,063 homeless children and youth in

[2] U.S. Department of Housing and Urban Development. (2011). Point In Time.

Delaware schools during the 2011-2012 school year.[3] In 2011, approximately 10% of persons experiencing homelessness reported having been in the foster care system at some point in their lives[4].

Veterans accounted for 14% of all homeless individuals in Delaware in 2012, while African Americans continue to be overrepresented in Delaware's homeless population. African Americans make up 21% of the state's population, but represent approximately 60% of Delaware's homeless population.[5]

C. RHODE ISLAND'S HOMELESS PERSONS' BILL OF RIGHTS

In July 2012, Rhode Island passed the first Homeless Persons' Bill of Rights in the nation, providing protections for citizens of their State on the basis of their housing status. There are at least five other states where advocates are organizing a Homeless Bill of Rights, including Texas, Oregon, California, Nebraska, and Michigan[6].

The Rhode Island Homeless Persons' Bill of Rights grants persons experiencing homelessness the "same rights and privileges as any other citizen of the state" with regards to: use of public space, equal treatment by police, access to employment, access to housing, access to quality emergency physical and mental health care, voting, legal counsel, confidentiality of records, and access to public benefits. The Bill states that:

> It is hereby declared to be the policy of the state [of Rhode Island] to assure to all individuals regardless of race, color, religion, sex, sexual orientation, gender identity or expression, marital status, country of ancestral origin, or disability, age, familial status, [or] **housing status**...equal opportunity to live in decent, safe, sanitary, and healthful accommodations anywhere within the state in order that the peace, health, safety, and general welfare of all the inhabitants of the state may be protected and insured[7]

[3] The DOE definition of homeless children and youth means individuals that lack a fixed or regular residence, including those living doubled up with family or friends, in motels/hotels, and other such temporary locations.
[4] Homeless Planning Council of Delaware (2011). Point In Time Data.
[5] Delaware HMIS FY2011 Data Report. (2012). Homeless Planning Council of Delaware.
[6] International Freedom Coalition. Nationwide Legislation Watch. http://strongfamiliesnow.org/bor/homeless-bill-of-rights/bill-status/. Accessed 11/27/2012
[7] Rhode Island Homeless Persons' Bill of Rights, 34-37.1, 20-28

In this Bill they define the term "housing status" as "the status of having or not having a fixed or regular residence, including the status of living on the streets or in a homeless shelter or similar temporary residence." [8]

D. EQUAL ACCESS TO TEMPORARY SHELTER

The Fair Housing Amendments Act of 1988 (FHAA) prohibits discrimination in the sale or rental of housing on the basis of disability. As a result of the Olmstead settlement with the Department of Justice in July 2011, Delaware has made significant progress towards ensuring that individuals with a diagnosed psychiatric disability have access to permanent community-based housing. However, it is also necessary to ensure that psychiatrically and physically disabled persons experiencing or at risk of homelessness are protected from discrimination with regards to equal access to temporary shelter in situations of crisis. In this report, "temporary shelter" means any emergency, transitional, or temporary shelter provided to individuals and/or families experiencing homelessness by any federal, state, faith-based, non-profit, or private agency.

Eight hundred and forty-six (37%) of the adults served by Delaware's homeless services system in FY 2011 reported having a disability of long duration[9]. Approximately 10% of Delaware's homeless in 2011 were physically disabled.[10] During Delaware's Registry Week in June 2012 for the 100,000 Homes Campaign, volunteers located and interviewed a total of 186 homeless individuals living on the streets in Delaware over the course of 3 mornings. Of those persons, 78% reported one or more behavioral health issue, while 40% reported a dual diagnosis of mental illness and substance abuse disorder.[11] In Delaware's 2012 Point in Time survey, 27% of individuals reported having a diagnosed mental illness, and 24% reported having a substance abuse problem.

Homeless individuals diagnosed with physical and psychiatric disabilities, including co-occurring disorders (recurring mental illness *and* recurring substance abuse disorder), are at greater risk of being denied access to shelter than the general homeless population in Delaware due to their disability

[8] Rhode Island Homeless Persons' Bill of Rights, 34-37-3, 27-29
[9] Homeless Planning Council of Delaware. (2012). Delaware HMIS FY2011 Data Report.
[10] Homeless Planning Council of Delaware (2011). Point In Time Data.
[11] Homeless Planning Council of Delaware. (2012). Delaware Registry Week Community Brief Back Fact Sheet.

status. Individuals who are physically disabled are frequently turned away from temporary shelters because the facility is not accessible to them. Many individuals with psychiatric disabilities are turned away at the door, or discharged to the street and back into homelessness by providers. Consequently, those who are most vulnerable and in greatest need are often the least served in our homeless services system.

E. THE CRIMINALIZATION OF HOMELESSNESS

In 2009, the United States Congress passed the HEARTH Act. The HEARTH Act required the U.S. Interagency Council on Homelessness to promote alternatives to codes and statutes that criminalize homelessness. As a result, The U.S. Interagency Council on Homelessness (USICH) and Department of Justice (DOJ) issued the report "Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness." This report officially recognizes, for the first time, that in addition to possible violations under the U.S. Constitution, the criminalization of homelessness may implicate our human rights treaty obligations under the International Covenant on Civil and Political Rights, which the United States ratified in 1992.[12]

However, cities, towns, and municipalities across the nation continue to pass ordinances (such as anti-loitering and anti-lurking) and perform sweeps of homeless areas that target persons experiencing homeless for performing life-sustaining activities such as sitting, sleeping, and eating in public places. These are necessary activities which persons experiencing homelessness have no choice but to perform on public property. Across 27 large cities surveyed in 2010, an average of 27% of persons experienced homelessness in these cities were turned away from shelters due to lack of shelter beds[13]. Criminalization of homelessness is ineffective in addressing the real problem – a lack of affordable housing and shelter beds.

In the City of Wilmington an individual cited for "Loitering for the Purpose of Begging" can be fined up to $750.00. In Smyrna Delaware Code, Section 42-108, it is stated that "It shall be unlawful for any

[12] National Law Center on Poverty and Homelessness. (2012). Human Right to Housing Report Card.
[13] National Law Center on Poverty and Homelessness. (2011). Criminalizing Crisis Report: the Criminalization of Homelessness in U.S. Cities.

person to prowl at night in the alleys...and such person shall be guilty of night prowling." Anyone cited for this violation is subject to fines.

Many times persons experiencing street homelessness are unable to pay court fees and/or fines. When individuals fail to pay fines, they may be served with an active arrest warrant and/or forced to serve time in prison.

> "I have been locked up just for asking someone to help me. A police officer heard me ask and arrested me for Loitering for the Purpose of Begging. I have been arrested many times for this, given a fine I cannot pay, and then locked up again for non-payment of fines. The last time I did 90 days in Gander Hill. This is serious stuff we deal with daily."
>
> - Person experiencing Homelessness in Delaware, 2012

Individuals with active arrest warrants may be turned away from shelters, forcing them to live out on the streets where they are subject to acquiring more violations and fines. Serving time in prison for nuisance violations further aggravates the problem. It places unnecessary financial burdens on the criminal justice system as it is costly to the state not only to process each case but to shelter someone overnight in prison. In Delaware it cost an average of $99/day to imprison one inmate.[14] In Delaware's emergency shelters, it costs an average of $30/night to shelter an individual. In permanent supportive housing, it costs an average of $40/night to permanently house an individual in the community. [15]

In Delaware's 2012 Point in Time Survey, 32% of respondents reported having been incarcerated at some point in time. When homeless persons are incarcerated for nuisance violations it becomes increasingly difficult for them to reintegrate into mainstream society, and contributes to their recidivism back into the criminal justice system. Firstly, it saddles them with criminal records, making it more difficult for them to access housing and employment. Secondly, incarceration disrupts their access to essential services. That person may miss work, lose their public benefits (depending on length of incarceration), lose important vital documents (state ID, social security card, etc.), or miss important appointments for housing, benefits or other vital services. All of these consequences prolong a person's experience of homelessness.

[14] Delaware Department of Correction. (2012). Annual Report 2011-2012.
[15] Homeless Planning Council of Delaware. (2012). System Evaluator Tool.

> "I was trying to help this guy find a place to stay. I called shelters all over Wilmington. I finally had an appointment set up for him at [the shelter] and he got locked up for sleeping on his friend's porch. His friend told him that he could sleep there, but wasn't home at the time. He missed his appointment at the shelter and had to start all over. This kind of thing was a daily occurrence for him."
>
> – Delaware Service Provider, 2013

II. HOUSING

A. THE UNITED STATES AND THE HUMAN RIGHT TO HOUSING

In 1948 the United States led the world in developing the Universal Declaration of Human Rights, which states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, ***housing*** and medical care and necessary social services..."[16] In 2009 the United States published the U.S. Human Rights Commitments and Pledges. In this document it is stated that:

> "The deep commitment of the United States to championing the human rights enshrined in the Universal Declaration of Human Rights is driven by the founding values of our nation and the conviction that international peace, security, and prosperity are strengthened when human rights and fundamental freedoms are respected and protected."

The United States is also signatory to the International Covenant on Economic, Social and Cultural Rights[17]. Article 11 of the Covenant recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and ***housing,*** and to the continuous improvement of living conditions." In 2010, President Obama stated that it is "simply unacceptable for individuals, families, children, and our nation's veterans to be faced with homelessness in this country."[18] More recently, on November 29, 2012, the City Council of Madison, Wisconsin joined New

[16] Universal Declaration of Human Rights. (1948). Art. 25(1).
[17] United Nations Treaty Collection. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en Accessed 12/5/12.
[18] National Law Center on Poverty and Homelessness. (2011). Simply Unacceptable: Homelessness and the Human Right to Housing In the United States.

York City in recognizing housing as a human right by passing a city resolution and pledging to take concrete steps to realize that right for all citizens of their city.[19]

B. DELAWARE'S AFFORDABLE HOUSING CRISIS

It is not surprising that there has been increased attention to the issue of homelessness on a federal and state level since the housing market crisis in 2008. Currently, nearly 12 million renters and homeowner households in the United States pay over 50 percent of their annual income for housing.[20] In 2011 alone 5,112 mortgage foreclosure complaints were filed in Delaware.[21] The State of Delaware has done tremendous work in the areas of foreclosure prevention, including Delaware's Mandatory Mediation Program and the Attorney General's more recent National Mortgage Servicing Settlement. However, housing in Delaware, whether renter or owner-occupied, continues to be unaffordable for many Delawareans. The capability to secure and maintain affordable housing is a socio-economic issue. Households with one person working full-time at minimum wage cannot afford the local fair-market rent for a two-bedroom apartment anywhere in the United States.[22]

In 2012, the fair market rent for a 2 bedroom apartment in Delaware was $970.00. In order to afford that level of housing cost at 30% of household income, a household must earn $38,784.00 annually. For a single adult working 40 hrs/week, 52 weeks/year, the hourly housing wage for a 2 bedroom apartment in Delaware is $18.65/hour. In Delaware, a minimum wage worker earns $7.25/hour. The estimated mean renter earns $7.47/hour.[23] This means that there is an approximately $10.00/hour wage gap between the mean renter wage in Delaware and the market-based rent for a 2-bedroom apartment.

For many working professional Delawareans, wages are not keeping pace with housing costs. Professionals unable to afford a 2 bedroom apartment in Delaware include pre-school teacher

[19] National Law Center on Poverty and Homelessness. (2012). Human Right to Housing Report Card.
[20] U.S. Department of Housing and Urban Development. (2012). *Affordable Housing*. http://portal.hud.gov/, Accessed December 2012
[21] Delaware State Housing Authority. (2012). 2011 Delaware Foreclosure Filing Data
[22] U.S. Department of Housing and Urban Development. (2012). *Affordable Housing*. http://portal.hud.gov/, Accessed December 2012
[23] National Low Income Housing Coalition. (2012). Out of Reach: Delaware Housing Wage Report.

($11.05/hr), Pharmacy Technician ($12.09/hr), Bank Teller ($11.76/hr), and Nursing Aide ($13.11/hr).[24] Furthermore, approximately 21,552 (24.2%) renter households in Delaware are severely cost-burdened, with housing costs exceeding 50% of their income. These households are one missed pay check or one medical emergency away from homelessness.

For those Delawareans unable to work due to disability, they often must rely solely on Supplemental Security Income (SSI) of $698.00/month in order to meet their most basic needs – including shelter. However, nowhere in the State of Delaware can someone receiving SSI afford a one-bedroom apartment at fair market value. A national study of housing affordability needs for SSI recipients determined that average rents for efficiency apartments required 66% of the SSI check, one-bedroom required 80%, and in 9% of counties fair-market rent for a one-bedroom apartment exceeded the total amount of SSI benefits.[25]

C. FAIR HOUSING: HOUSING STATUS AND SOURCE OF INCOME

When persons experiencing homelessness seek access to housing they are unable to present potential landlords with a current or permanent address. Those staying in temporary shelters or institutions often must use the address of the shelter or institution on their rental applications.

Others must report income from state or federal sources, such as Social Security Income, General Assistance, Temporary Assistance for Needy Families, or housing subsidies such as Section 8 Housing Choice Vouchers. Persons experiencing and at risk of homelessness are often discriminated against by potential landlords due to their housing status and/or source(s) of income when applying for a rental unit.

"Housing Status" means the type and location of housing in which an individual resides or has resided, and the status of having or not having a fixed or regular residence; including, but not limited to: 1) The status of living or having lived on the street, in a homeless shelter or other temporary residence, 2) The

[24] Delaware State Housing Authority. (2012). Delaware Housing Fact Sheet.
[25] Doak, M. J. (2006). Homless in America: How could it happen here? Farmington Hills, MI: Thomson Gale.

status of living or having lived in an institution (e.g. mental or physical health facility) or; 3) The status of living or having lived in public housing, at a particular address, or in a particular neighborhood.

"Source of Income" means any lawful source of money paid directly or indirectly to a renter or buyer of housing, including but not limited to: 1) Income derived from any lawful profession or occupation 2) Income derived from any government or private assistance, grant, or loan program, including Welfare, Social Security, and Section 8 and other housing voucher programs; or 3) Income derived from annuity, alimony or child support.

In Delaware 11.2% of the population lives below the poverty level. [26] In 2012, 4,553 HUD vouchers were under lease in Delaware, with a waiting list that can last for several years.[27] In 2011, 16,240 individuals in Delaware were recipients of Supplemental Security Income.[28] Many of these households are living on extremely low incomes, and are one medical emergency or missed pay check away from homelessness.

From 2000 – 2010 42% of fair housing complaints in Delaware were disability-related. Source of Income discrimination (SSI, SSDI, housing assistance like Housing Opportunities for People with AIDS) is a common fair housing issue for people with disabilities, as they often rely on subsidy and entitlement income.[29] Eight hundred and forty-six (37%) of the adults served by Delaware's homeless services system in FY 2011 reported having a disability of long duration.[30]

Under current Delaware law there are no protections in place for individuals and families based on source of income or housing status. Delaware Code, Chapter 46, states that:

[26] U.S. Census Bureau. (2011). http://quickfacts.census.gov/qfd/states/10000.html, Accessed 1/10/13.
[27] Voucher Management System. (2012) HUD Delaware Field Office.
[28] Social Security Administration. (2011). SSI Recipeints by State. http://www.socialsecurity.gov/policy/docs/statcomps/ssi_sc/2011/de.html. Accessed 1/9/12.
[29] Delaware Housing Coalition, the Housing Sub-Committee of the Governor's Commission on Community Based Alternatives for People with Disabilities, and State Council on Persons with Disabilities. (2012). Community and Choice: Housing Needs for People with Disabilities in Delaware.
[30] Homeless Planning Council of Delaware. (2012). Delaware HMIS FY2011 Data Report,

> This chapter is intended to eliminate, as to housing offered to the public for sale, rent or exchange, discrimination based upon race, color, national origin, religion, creed, sex, marital status, familial status, age, sexual orientation or disability...

Currently landlords in Delaware are permitted to discriminate against those citizens most in need of housing, even when they are able to afford the rental unit and meet all other rental requirements. This discrimination in access to housing aggravates the problem of homelessness. It keeps people living in shelters and on the streets for longer periods of time than necessary, and places low income and disabled individuals at higher risk of homelessness due to unequal access to housing. It also places an unnecessary cost burden on Delaware's shelter and human services system by contributing to, rather than helping to solve, the problem.

Rhode Island is currently the only state that prohibits discrimination based on housing status. Twelve states and the District of Columbia prohibit source of income discrimination. They are California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont and Wisconsin.[31] The City of Wilmington, along with the City of Chicago and others, also provides protections in its fair housing code for source of income. In Chapter 35, Article III of City of Wilmington Code, it is stated that:

> The provisions of this article are intended to eliminate, as to housing offered to the public for sale or rent, discrimination based upon race, age, marital status, creed, color, sex, sexual orientation, handicap, national origin or ***economic status as a welfare recipient, person dependent on fixed income*** or as a parent with a minor child or minor children.

D. EQUAL EMPLOYMENT OPPORTUNITY

Persons and families experiencing homelessness are often discriminated against due to their housing status by potential employers when seeking access to employment in the State of Delaware.

> "Just this month I was overlooked for employment because of my address at the [shelter]. I was told that the director of the company said not to hire anyone who lives

[31]National Multi Housing Council. Fair Housing Act Protected Classes/Sources of Income Discrimination. http://www.nmhc.org/Content/ContentList.cfm?NavID=599. Accessed December 2012.

> at the [shelter]. How are we supposed to better our situation if this kind of thing continues?" –Person Experiencing Homelessness in Delaware, 2012

In Delaware, there are no protections against this kind of discrimination. In Chapter 7 of Current Delaware Code, Title 19, it is stated that:

> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment or otherwise to discriminate against any individual because of race, marital status, genetic information, color, age, religion, sex, sexual orientation, or national origin...

Recognizing the need to combat the effects of bias and bigotry throughout Cook County Illinois, the Cook County Board of Commissioners adopted the Cook County Human Rights Ordinance on March 16, 1993. The Ordinance is designed to protect all people who live and work in the County from discrimination in employment and housing, among other things. The Ordinance prohibits discrimination when based upon a person's race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status, ***source of income***, gender identity, or ***housing status.***

III. POLICY RECOMMENDATIONS

Not one adult or child should experience the trauma and dehumanization of homelessness. The fact is that a lack of stable, safe, and affordable housing has forced thousands of Americans out of their homes. As individuals and families struggle to lift themselves out of homelessness they often face practices by potential landlords, employers, service providers, or the police that are discriminatory. These practices not only fail to address the root problem – a lack of affordable housing – but aggravate the problem by preventing access to essential services and opportunities for those most in need.

In order to prevent and end homelessness in Delaware we must ensure that persons experiencing or at risk of homelessness receive equal treatment, and have equal access to employment, housing, and shelter. We suggest that Delaware take the following actions:

A. Develop a Homeless Persons' Bill of Rights in Delaware

We suggest that Delaware follow Rhode Island's example and develop legislation that guarantees persons experiencing homelessness the same rights and privileges as any other citizen of the state, particularly with regards to equal access to temporary shelter, equal use of public space and treatment by police, and equal access to housing and employment.

Equal Access to Temporary Shelter

A Homeless Persons' Bill of Rights in Delaware must require that all temporary housing providers in Delaware comply with the American Disabilities Act and the Delaware Fair Housing Act. This will ensure that persons with disabilities experiencing homelessness in Delaware have equal and fair access to temporary shelter. Without equal access, those most in need of services, care, and housing will continue to be under served.

Equal Use of Public Space and Equal Treatment by Police

A Homeless Persons' Bill of Rights in Delaware must ensure that persons experiencing homelessness in the state enjoy the same rights as other citizens. The intentional targeting of homeless individuals by police officers for being present in public spaces, performing legal and life sustaining activities in public spaces, or violating nuisance laws is discriminatory. It further marginalizes our most vulnerable community members, burdens the criminal justice system, and creates significant barriers for persons experiencing homelessness as they seek access to shelter, employment, essential human services, and housing. If we intend to end homelessness in Delaware we must ensure that people have equal opportunity to access the goods and services they need to do so.

Equal Access to Housing and Employment

A Homeless Persons' Bill of Rights in Delaware should require housing providers and employers to treat all applicants equally, regardless of their housing status or sources of income. In our efforts to prevent and end homelessness, fair housing and equal employment opportunity are essential for helping to move people out of homelessness and into permanent housing.

B. Pursue alternative justice system strategies to criminalization.

The criminalization of homelessness is costly, ineffective, and aggravates the problem. As part of a comprehensive strategy to end homelessness in Delaware, we must pursue creative alternatives to criminalization in our communities.

Homeless Persons' Diversion Court

Delaware Superior Court has developed multiple programs to provide more efficient and cost-effective services through specialized courts such as Drug Court, Mental Health Court, Reentry Court, and Veterans' Court. Each of these courts targets a particular population with the goal of

achieving better outcomes for that population. We recommend the development of a diversion court program designed to divert homeless individuals charged with nuisance violations from Delaware's criminal justice system and to the services that they need to end their homelessness. Examples of innovative programs include San Diego's Homeless Court Program and Houston's Homeless Court.[32]

Community Court Programs

We also recognize that community court programs can play a large role in diverting persons experiencing homelessness from the system. Community courts employ a non-traditional restorative approach to addressing minor, non-violent crime at a community level. Community courts are "neighborhood-focused courts that attempt to harness the power of the justice system to address local problems. They can take many forms, but all focus on creative partnerships and problem solving."[33] Communities across the country in California, Connecticut, Colorado, Indiana, Minnesota, New York, New Jersey, and many others, are developing community courts in their jurisdictions.

Police Training

We also suggest that trainings be conducted with police departments throughout the state that focus specifically on the rights of persons experiencing homelessness. Police officers should be trained on legal issues related to the enforcement of nuisance laws against homeless persons, and alternatives to criminal intervention.

Homeless Liaison Officers

Each police department, law enforcement agency, and public safety agency in Delaware, including the Delaware State Police, should establish one or more officers as designated

[32] United States Interagency Council on Homelessness. (2012). Searching Out Solutions: Constructive Alternatives to Criminalization.pp31-32.
[33] Center for Court Innovation. Community Court: Overview. http://www.courtinnovation.org/topic/community-court. Accessed 2/6/13.

homeless liaisons. These persons will serve as the points of contact for the department on issues of homelessness, meet with homeless service providers in the community, intentionally build relationships with local providers and homeless persons, and help connect homeless persons to services.[34]

State-wide Review of Public Nuisance Codes

Public nuisance laws are important means by which jurisdictions keep their communities pleasant, safe, and clean for everyone. However, criminalizing persons in a community who are experiencing homelessness for violating minor nuisance codes is a costly and ineffective solution. Municipalities across the state, in collaboration with police departments, should review their public nuisance laws and enforcement practices and make changes where needed in order to ensure that the basic rights of each individual in their community are protected, regardless of their housing status.

C. Revise Delaware Fair Housing and Equal Employment Law

Discriminatory housing and employment practices aggravate the problem of homelessness in Delaware. They further marginalize our most vulnerable citizens and deny individuals and families equal access to the income and housing they need to end their episode of homelessness.

Add "source of income" and "housing status" to Delaware's Fair Housing and Equal Employment Law

Adding source of income and housing status to our Fair Housing and Equal Opportunity laws would protect persons experiencing or at risk of homelessness from discriminatory landlords and employers. These additions to Delaware's laws would not require landlords or employers to accept everyone. They would be free to use the same legitimate criteria that they currently use to screen all potential employees and tenants, such as rental history, ability to pay,

[34] National Law Center on Homelessness and Poverty. (2011). Criminalizing Crisis: the Criminalization of Homelessness in U.S. Cities; Advocacy Manual.

references, employment history, etc. However, under these new protections, it would be unlawful for them to categorically refuse to rent to or employ a person due to that persons' housing status or source of income.

APPENDIX A: DEFINITIONS

"Housing Status" means the type and location of housing in which an individual resides or has resided, and the status of having or not having a fixed or regular residence; including, but not limited to:

1) The status of living or having lived on the street, in a homeless shelter or other temporary residence,
2) The status of living or having lived in an institution (e.g. a mental health facility, physical health facility, or other institution) or;
3) The status of living or having lived in public housing, at a particular address, or in a particular neighborhood.

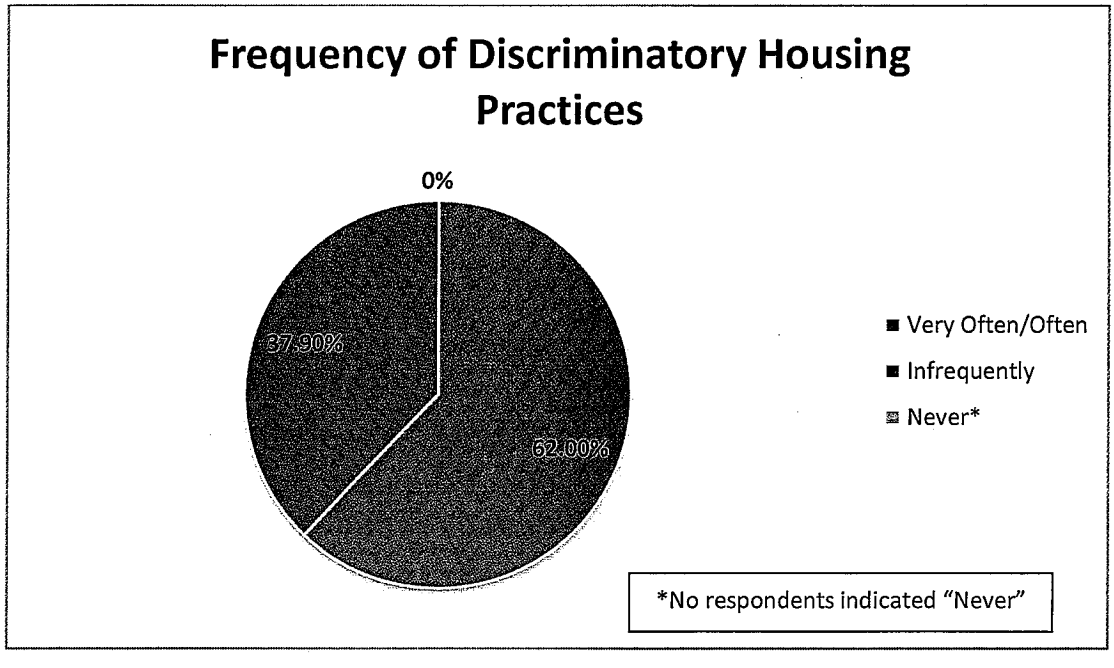
"Source of Income" means any lawful source of money paid directly or indirectly to a renter or buyer of housing, including but not limited to:

1) Income derived from any lawful profession or occupation
2) Income derived from any government or private assistance, grant, or loan program, including Welfare, Social Security, Section 8 and other housing voucher programs; or
3) Income derived from annuity, alimony or child support.

"Temporary Shelter" means any emergency, transitional, or temporary shelter provided to individuals and/or families experiencing homelessness by any federal, state, faith-based, non-profit, or private agency.

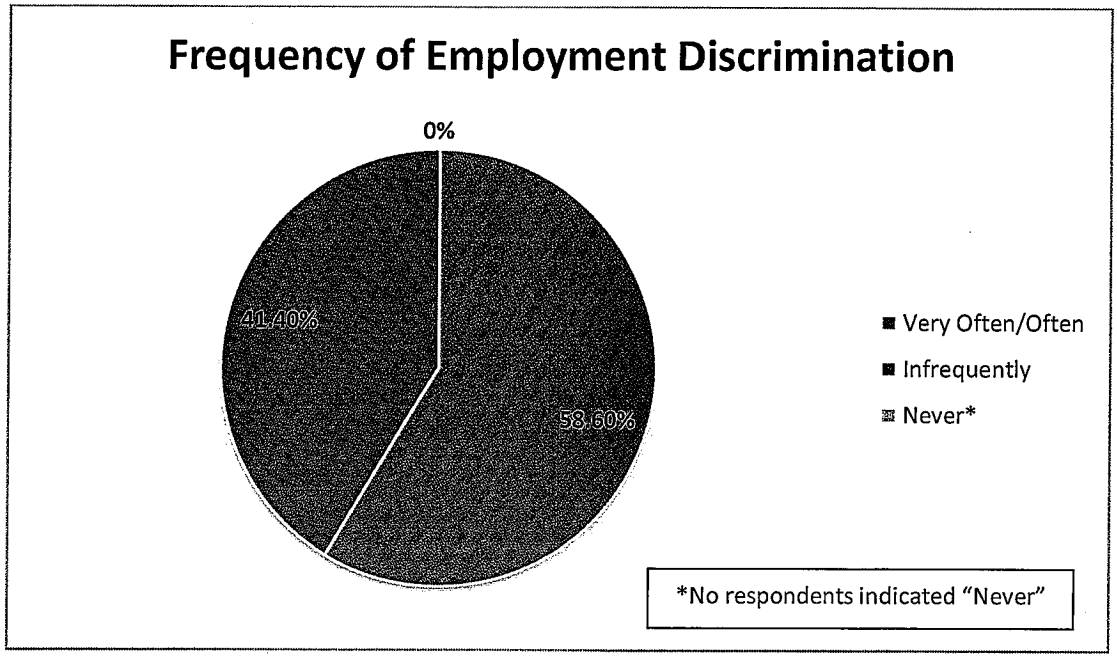
APPENDIX B: HOUSING DISCRIMINATION CHART

The below charts represent results of an opinion survey distributed to all homeless service provider agencies in the State of Delaware in November 2012. Responses represent the impressions of provider staff (including directors and case Workers) regarding the indicated concern specific to persons experiencing homelessness in the State of Delaware.



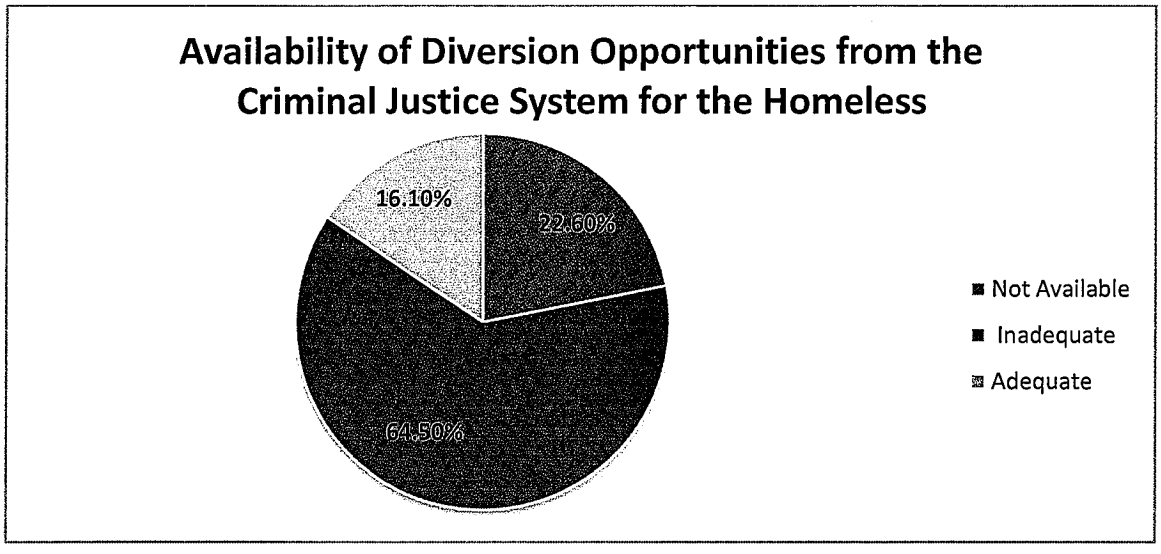
APPENDIX C: EMPLOYMENT DISCRIMINATION CHART

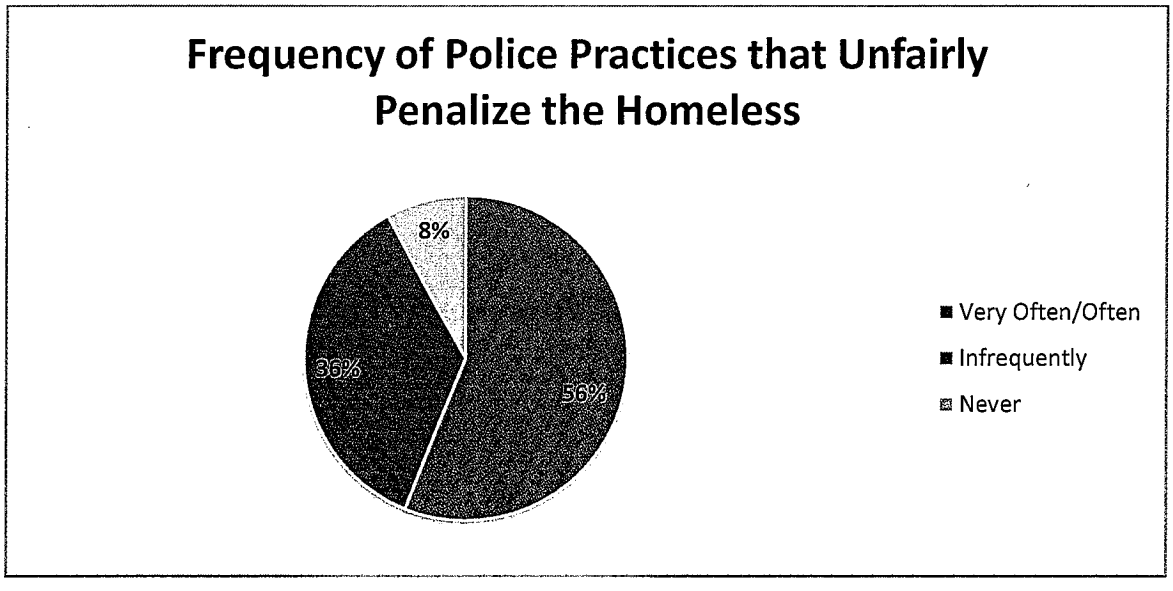
The below charts represent results of an opinion survey distributed to all homeless service provider agencies in the State of Delaware in November 2012. Responses represent the impressions of provider staff (including directors and case workers) regarding the indicated concerns specific to persons experiencing homelessness in the State of Delaware.



APPENDIX D: CRIMINALIZATION CHARTS

The below charts represent results of an opinion survey distributed to all homeless service provider agencies in the State of Delaware in November 2012. Responses represent the impressions of provider staff (including directors and case Workers) regarding the indicated concerns specific to persons experiencing homelessness in the State of Delaware.

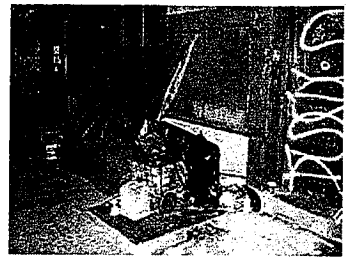




Homeless Bill of Rights

From Wikipedia, the free encyclopedia

The **Homeless Bill of Rights** (also **Homeless Person's Bill of Rights** and **Acts of Living bill**) refers to legislation protecting the civil and human rights of homeless people. These laws affirm that homeless people have equal rights to medical care, free speech, free movement, voting, opportunities for employment, and privacy. Legislation of this type has become law in Rhode Island, Connecticut and Illinois and is under consideration by several other U.S. states.



Homeless Bill of Rights laws affirm that people living on the street have a reasonable expectation of privacy in their property.

Contents

Controversy over Legislation Affecting the Homeless

At issue in homeless bills of rights are local codes that outlaw loitering, vagrancy, sitting or lying on the sidewalk, begging, eating in public, and other behaviors. These codes disproportionately affect homeless people.[1]

The National Law Center on Homelessness and Poverty concludes its report on the "criminalization of homelessness" with an exhortation to change the laws:[1]

> Laws that criminalize visible homelessness are immoral and offend our basic human instincts. They are contrary to the fundamental religious and political principals from which the American people seek guidance, and their existence demonstrates that we have fallen vastly short of our religious and foundational aspirations.

The "Beds Not Bars" slogan suggests that society must help homeless people instead of outlawing their behavior.

Business interests, represented by the California Chamber of Commerce, have called Assemblymember Tom Ammiano's Homeless Person's Bill of Rights [2] a "job killer" which would create "costly and unreasonable mandates on employers."[3] Some municipalities and local politicians also oppose the laws, which impose state authority to overturn local regulations. San Francisco Supervisor Scott Wiener commented:[4]

> Our local laws against forming encampments, passing out and blocking sidewalks, and otherwise monopolizing public spaces would be wiped off the books. Think we have a street behavior problem now? Just wait until this passes.

Skid Row in Los Angeles is sometimes mentioned as an area that would deteriorate if homelessness was not regulated

The *Los Angeles Times* suggested in an editorial that the Homeless Bill of Rights does not go far enough unless accompanied by economic resources allocated to provide housing.[5] Joel John Roberts, CEO of People Assisting the Homeless, argued similarly that the Homeless Bill of Rights may be toothless and even enabling. Roberts writes:[6]

> There needs to be a balance between criminalizing homelessness with ordinances that persecute people who are forced to live on the street, and giving those same people the right to do whatever they want without any consequences.... A more powerful Bill of Rights for people who are homeless, however, would consist of one simple right: the right to housing.

Legislation in the United States

The idea of a "Homeless Bill of Rights" has been discussed periodically in the U.S., and was presented formally by a group of New York City ministers on Martin Luther King, Jr. Day, 1992.[7] City Councilperson Peter Vallone introduced several versions of such a Bill in 1998, despite strong opposition from Mayor Rudy Giuliani.[8]

Puerto Rico and some states have passed laws adding homeless people to their lists of groups protected against hate crimes.[9]

Rhode Island

Rhode Island was the first state in the U.S. to pass a "Homeless Bill of Rights". John Joyce, who was homeless for a period in his life, is responsible for the initial introduction of the bill. The Rhode Island law, S-2052, was ratified in the state of Rhode Island on June 21, 2012 and signed into law by Governor Lincoln Chafee on June 27.[10] It amends the Rhode Island Fair Housing Act with wording intended to protect the rights of homeless people and prevent discrimination against them. It is the first U.S. state-level law designed to protect the rights of homeless people.

Excerpt from Rhode Island bill S-2052

- 34-37.1-3. Bill of Rights. – No person's rights, privileges, or access to public services may be denied or abridged solely because he or she is homeless. Such a person 1 shall be granted the same rights and privileges as any other resident of this state. A person experiencing homelessness:

1. Has the right to use and move freely in public spaces, including, but not limited to, public sidewalks, public parks, public transportation and public buildings, in the same manner as any other person, and without discrimination on the basis of his or her housing status;
2. Has the right to equal treatment by all state and municipal agencies, without discrimination on the basis of housing status;
3. Has the right not to face discrimination while seeking or maintaining employment due to his or her lack of permanent mailing address, or his or her mailing address being that of a shelter or social service provider;
4. Has the right to emergency medical care free from discrimination based on his or her housing status;
5. Has the right to vote, register to vote, and receive documentation necessary to prove identity for voting without discrimination due to his or her housing status;
6. Has the right to protection from disclosure of his or her records and information provided to homeless shelters and service providers to state, municipal and private entities without appropriate legal authority; and the right to confidentiality of personal records and information in accordance with all limitations on disclosure established by the Federal Homeless Management Information Systems, the Federal Health Insurance Portability and Accountability Act, and the Federal Violence Against Women Act; and
7. Has the right to a reasonable expectation of privacy in his or her personal property to the same extent as personal property in a permanent residence.

The well-established Rhode Island Coalition for the Homeless (and a newer subgroup called Rhode Island Homeless Advocacy Project) collaborated with the more radical Occupy Providence group to lobby successfully for the Bill.[11][12]

The law does not guarantee positive rights such as housing or food, and some homeless advocates are concerned that it has not had enough impact.[13]

Connecticut

On June 5, the Connecticut Assembly passed a Homeless Bill of Rights (SB 896) with seven protections similar to those passed in Rhode Island. Pending signature by Governor Dan Malloy, the bill would take effect on October 1, 2013. The Connecticut law significantly includes freedom from police harassment in its first section.[14]

Excerpt from Connecticut bill SB 896

(a) There is created a Homeless Person's Bill of Rights to guarantee that the rights, privacy and property of homeless persons are adequately safeguarded and protected under the laws of this state. The rights afforded homeless persons to ensure that their person, privacy and property are safeguarded and protected, as set forth in subsection (b) of this section, are available only insofar as they are implemented in accordance with other parts of the general statutes, state rules and regulations, federal law, the state Constitution and the United States Constitution. For purposes of this section, "homeless person" means any person who does not have a fixed or regular residence and who may live on the street or outdoors, or in a homeless shelter or another temporary residence.

(b) Each homeless person in this state has the right to:

1. Move freely in public spaces, including on public sidewalks, in public parks, on public transportation and in public buildings without harassment or intimidation from law enforcement officers in the same manner as other persons;
2. Have equal opportunities for employment;
3. Receive emergency medical care;
4. Register to vote and to vote;
5. Have personal information protected;
6. Have a reasonable expectation of privacy in his or her personal property; and
7. Receive equal treatment by state and municipal agencies.

(c) Each municipality shall conspicuously post in the usual location for municipal notices a notice entitled "HOMELESS PERSON'S BILL OF RIGHTS" that contains the text set forth in subsection (b) of this section.

Illinois

On August 22, 2013 Illinois became the second state to adopt a homeless bill of rights.[15]

Excerpt from Illinois bill SB 1210

Section 10. Bill of Rights.

(a) No person's rights, privileges, or access to public services may be denied or abridged solely because he or she is homeless. Such a person shall be granted the same rights and privileges as any other citizen of this State. A person experiencing homelessness has the following rights:

1. the right to use and move freely in public spaces, including but not limited to public sidewalks, public parks, public transportation, and public buildings, in the same manner as any other person and without discrimination on the basis of his or her housing status;
2. the right to equal treatment by all State and municipal agencies, without discrimination on the basis of housing status;
3. the right not to face discrimination while seeking or maintaining employment due to his or her lack of permanent mailing address, or his or her mailing address being that of a shelter or social service provider;
4. the right to emergency medical care free from discrimination based on his or her housing status;
5. the right to vote, register to vote, and receive documentation necessary to prove identity for voting without discrimination due to his or her housing status;
6. the right to protection from disclosure of his or her records and information provided to homeless shelters and service providers to State, municipal, and private entities without appropriate legal authority; and the right to confidentiality of personal records and information in accordance with all limitations on disclosure established by the federal Homeless Management Information Systems, the federal Health Insurance Portability and Accountability Act, and the federal Violence Against Women Act; and
7. the right to a reasonable expectation of privacy in his or her personal property to the same extent as personal property in a permanent residence.

(b) As used in this Act, "housing status" has the same meaning as that contained in Section 1-103 of the Illinois Human Rights Act.

California

State Assemblymember Tom Ammiano (D-San Francisco) introduced a Homeless Person's Bill of Rights[2] to the California Assembly in December 2012.[16] In May 2013, the Appropriations Committee postponed debate until January 2014.[4] Assemblymember Ammiano said in a statement that his bill was suspended largely because of the costs of setting up new infrastructure and enforcing the new rules.[4] A report by the Chair of the Assembly Appropriations Committee estimates that setting up hygiene centers across the state would cost $216 million, with ongoing operating costs of $81 million annually.[2] The report also estimates that setting up facilities for annual law enforcement reports would cost $8.2 million, with ongoing operating costs of $4.1 million annually.[2] Without providing estimates, the report notes that other costs, some potentially significant, include those associated with the right to counsel conferred to the homeless for defending against infractions, and those associated with defending against lawsuits brought against cities by the homeless alleging violations of rights conveyed under the bill.[2]

California's Homeless Bill of Rights(Right2Rest Act), SB 608, was introduced by Senator Carol Liu (D) in February 2015. The "Right to Rest Act," would, among other things, protect the rights of homeless people to move freely, rest, eat, perform religious observations in public space as well as protect their right to occupy a legally parked motor vehicle. Also refer to UC Berkeley's Policy Advocacy Clinic Presents: California's New Vagrancy Laws a New Report on the Growing Criminalzation of Homeless People in California.

A vote was not rendered during the 2015 process in the Housing and Transportation Committee and was asked to come back for a vote in the next California legislation session with amendments in order to get the necessary votes and pass to the next house. Please refer to the Western Regional Advocacy Project (WRAP) in San Francisco, who drafted the legislation along with other homeless, housing, public/social policy advocates. The Right2Rest is the first of three campaigns in California's Homeless Bill of Rights (Right2Rest, Legal Representation, and Hygiene Centers). Both Oregon and Washington states have same/similar legislation and are working with WRAP to draft and pass a Homeless Bill of Rights in their perspective states. Homes should be a human right.

See also

- Bill of Rights
- Human rights in the United States
- Aggressive panhandling

References

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2. Assem. Bill No. 5 (2013-2014 Reg. Sess.) (http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB5)
3. "Updated homeless 'bill of rights' passes CA legislative committee (http://blogs.sacbee.com/capitolalertlatest/2013/04/updated-homeless-bill-of-rights-passes-committee.html)"; *Sacramento Bee*, 23 April 2013.
4. T.J. Johnston, "State Homeless 'Bill of Rights' Put on Hold Until Next Year (http://sfpublicpress.org/news/2013-05/state-homeless-bill-of-rights-put-on-hold-until-next-year)"; *San Francisco Public Press*, 30 May 2013.
5. Editorial: "Homeless rights bill is wrong: There's no point in criminalizing homelessness. But a proposed 'bill of rights' is not the answer either. What the homeless really need are resources (http://www.latimes.com/news/opinion/editorials/la-ed-homeless-bill-of-rights-20130111,0,1281934.story)", *Los Angeles Times*, 11 January 2013.
6. Joel John Roberts, "Is a Homelessness Bill of Rights Just a Bill of Goods? (http://www.huffingtonpost.com/joel-john-roberts/homelessness-bill-of-rights_b_1617389.html)", *Huffington Post*, 22 June 2012.
7. Hatchett, David. "Homeless 'Bill of Rights' to revive Dr. King's 'fading voice'", *New York Amsterdam News*, 11 January 1992; accessed via ProQuest (http://search.proquest.com/docview/226364509), 11 July 2013.
8. Glenn Thrus, "Vallone Plans to Beat Rudy on Homeless Rights Bill (http://www.citylimits.org/news/articles/504/vallone-plans-to-beat-rudy-on-homeless-rights-bill#.Ud7tBb8mz34)", *City Limits*, 31 August 1998.
9. "Hate Crimes Against the Homeless: An Organizing Manual for Concerned Citizens (http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes *National Coalition for the Homeless*, January 2012.
10. "Hundreds celebrate signing of Homeless Bill of Rights". WPRO. 2012-06-27.
11. Robert Wengronowitz, "Lessons From Occupy Providence", *The Sociological Quarterly* 54(2), March 2013. Accessed via Wiley (http://onlinelibrary.wiley.com/doi/10.1111/tsq.2013.54.issue-2/issu 3 July 2013. "OP would not have been able to negotiate the deal with the City without the decades-long effort by RICH and later RIHAP to create organizational infrastructure—for example, communication networks, development of coalitional relationships, and media contacts. In fact, RICH's infrastructure itself significantly supported the founding of RIHAP. Rhode Island became the first state to pass a Homeless Bill of Rights in late June 2012, an action less likely without RICH, RIHAP, OP, and their ability to work across differences. For instance, some RICH members were concerned that OP was "too radical," but OP was fortunate in that RICH considers seriously the concept of coalition building. Ryczek (2011, capitalization in original) defended the collaboration this way to RICH members: 'Coalitions rarely see eye to eye on each and every single factor concerning their common interests... We certainly...will not agree on all issues. Yet, where common ground and common goals DO exist it must be our role to move on such commonalities.'"
12. Mallory Moretti, "Occupy Prov. marches for homelessness: Governor allows tents on State House law (http://www.wpri.com/dpp/news/local_news/providence/occupy-providence-march-rally-for-homelessness-affordable-housing-in-rhode-island)"; *WPRI*, 10 December 2011.
13. Jake Grovum, "Nation's 1st Homeless Bill of Rights Slow to Cause Change in Rhode Island (http://www.governing.com/news/state/sl-first-homeless-bill-of-rights.html)", 12 November 2012.
14. Scott Keyes, "Connecticut Passes Landmark 'Homeless Person's Bill Of Rights' Law (http://thinkprogress.org/justice/2013/06/12/2139181/connecticut-homeless/?mobile=nc)", *ThinkProgress*, 12 June 2013.
15. http://www.chicagohomeless.org/illinois-becomes-2nd-state-to-enact-a-homeless-bill-of-rights/
16. Kevin Fagan, "Tom Ammiano backs homeless rights bill (http://www.sfgate.com/news/article/Tom-Ammiano-backs-homeless-rights-bill-4091599.php)"; *San Francisco Chronicle*, 4 December 2012.

External links

- Text (http://webserver.rilin.state.ri.us/PublicLaws/law12/law12356.htm) of the Rhode Island bill

- Text (http://www.ilga.gov/legislation/fulltext.asp?DocName=09500HB1878eng&GA=95&SessionId=51&DocTypeId=HB&LegID=30714&DocNum=1878&GAID=9&Session=) of the Illinois bill
- Interview (http://occupiedprovidencejournal.wordpress.com/tag/homeless-bill-of-rights/) with late Rhode Island homeless advocate John Joyce

Retrieved from "https://en.wikipedia.org/w/index.php?title=Homeless_Bill_of_Rights&oldid=689414556"

Categories: Homelessness in the United States | Rhode Island law | Human rights instruments | Homelessness and law

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