

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 2/14/2022

Re: February 2022 Policy and Law Memo

Please find below per your request analysis of pertinent proposed legislation identified by councils as being of interest.

1. SS 1 FOR SENATE BILL 151 – An Act to Amend Title 18, Title 21, And Title 29 Of the Delaware Code Relating to Providing For Driver Education Training, A Driver’s License

Senate Bill “SB 151” seeks to aid youth in foster care by: (1) Establishing a pilot program within the Office of the Child Advocate (“Office”) that would pay the cost of driver education, licensure, and other costs incidental to licensure, and motor vehicle insurance; (2) Prohibiting automobile insurers from using certain factors in determining a foster child’s automobile insurance rates; (3) Prohibiting the DMV from charging certain fees related to licensure for a foster child participating in the Office’s pilot program; and (4) Exempting certain individuals from liability for the negligence of a foster child. This Substitute differs from Senate Bill No. 151 as follows: (1) By directing that the Act is to be implemented the earlier of April 1, 2023, or the date of publication in the Register of Regulations of a notice by the Child Advocate that the Act is to be implemented; (2) By setting the report due dates from the Office of the Child Advocate based on the implementation date of the Act; and (3) By directing the Act to expire, or sunset, 2 years from the implementation date of the Act.

Proposed SB 151 would help youth gain independence and engage in normal, age-appropriate activities. Transportation is one of the largest barriers to even many adults for employment. Public transportation is an option but often not available in rural counties. The mean travel time to work for Delawareans 16 and older was 26.3 minutes.¹

Proposed SB 151 would create a 2-year pilot program in the Office of the Child Advocate that would help teen and young adults in foster care cover the cost of auto insurance or any additional premiums required to include a foster child on a foster parent’s policy. The legislation also would bar insurers from using certain factors related to foster status to determine their rates.

Not all children in foster care have foster parents. Under the bill, children in the custody of the Delaware Department of Children, Youth & Their Families also would be exempted from being required to pay fees charged by the Division of Motor Vehicles to issue, replace or renew a

¹ <https://www.census.gov/quickfacts/DE>

driver's license. ²The Delaware General Assembly passed legislation in 2008 that allowed social services employees to sign documents relating to driver's education and licensing on behalf of a young person in foster care. ³

In 2019, Delaware had 576 children in foster care.⁴ Children between the ages of 16 and 20 years made up 23% of children in care.⁵ While a child in foster care may exit care after their 18th birthday many resources are available until 21 years old. A 2013 survey of young adults who had spent time in Delaware's foster care system also found that only 28% were employed by the time they reached the age of 19 while only 43% were employed at the age of 21.

A total of 19 states have passed or introduced legislation that helps foster teens get their driver's licenses. Other states have passed legislation to remove barriers specific to their state, such as allowing minors to sign contracts for auto insurance or allowing foster youth to sign their own license applications.

Florida

Florida introduced the pilot program in 2014 called Keys to Independence. The program was made permanent in 2017. The program paid the following for youth in foster care:

- a. The increase in foster parent's insurance
- b. Insurance for foster youth with vehicles
- c. All driver's licensing fees
- d. Driver's education; contract with driving schools
- e. Ongoing education and outreach of foster youth/parents, caseworkers, DSS staff, and other stakeholders; and
- f. Consultations with foster parents to address concerns

In 2013, Florida had 20 foster youth individuals with their licenses. In 2018, after the introduction of the program, the state had 387 foster youth individuals with their driver's licenses and 790 had their learner's permits. Florida's program was administered by the nonprofit community-based care of Central Florida. The state allocated \$800,000 and the state only used \$330,129 during the first year.

² <https://bluedelaware.com/2021/07/12/house-passes-legislation-to-help-foster-teens-get-a-license/>

³ Child Trends analysis of data from the Adoption and Foster Care Analysis and Reporting System (AFCARS), made available through the National Data Archive on Child Abuse and Neglect.

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⁵ 133 Children in care between the ages 16-20

Washington

Washington launched a program called Treehouse Driver's Assistance. The 18-month program provided assistance and funding for (1) Driver's education courses; (2) learner's permit and driver's licenses; and (3) automobile insurance. The Treehouse Driver's Assistance is administered by a nonprofit organization. The grant was for \$500,000 from the Washington Department of Social and Health Services.

North Carolina

North Carolina introduced Transportation is Really Possible (TRIP) in July of 2017. The program provides reimbursement for (1) driver's education courses; (2) learner's permit and driver's license fees; (3) automobile insurance to \$1000 total; and (4) fees associated with foster youth vehicle (registration). The Department of Health and Human Services has funding available each year on a first-come, first-served basis.

Virginia

The Commission of Youth investigated the topic in 2018 because most youth who age out of foster care in the U.S. do not have their driver's licenses and found that the cost of insurance is a major barrier to foster youth obtaining their driver's licenses.

The Commission recommended the best way to prioritize foster youth obtaining their driver's licenses is to create a program that: 1) assists youth through all steps of the licensing process and provides solutions when progress is interrupted by a disrupted placement; 2) developing programs for youth in group homes; 3) contracting with private driving education companies; 4) reimbursing insurance costs or directly paying insurance companies; and 5) conducting statewide training and education for all stakeholders.

Recommendation

The DLP suggest that the Councils support the proposed bill to address the barriers for foster youth obtaining a driver's license in Delaware so foster youth experience normalcy when they participate in the same age- and developmentally appropriate activities and experiences as other youth their age. Research has established that a lack of normalcy among foster youth can impede a successful transition to adulthood.

2. HOUSE BILL 293- Amendments to Public Meeting Law

House Bill 293 would amend Section 10004 Open Meetings of Title 29 of the Delaware Code, the Freedom of Information Act.

The Act provides that: "It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic." 29 Del. C. §10001.

With certain enumerated exceptions, the citizens of Delaware can attend a “meeting of all public bodies.” 29 Del. C. §10004(a). A meeting is the “formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing.” 29 Del. C. §10002(g). A public body is defined very broadly, and includes:

Any regulatory, administrative, advisory, executive, appointive or legislative body of the of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

- (1) Is supported in whole or in part by any public funds; or
- (2) Expends or disburses any public funds, including grants, gifts or other Similar disbursements and distributions; or
- (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.

However, public body does not include any caucus of the Senate or House of Representatives. 29 Del. C. §10002(h). With minor exceptions (not relevant here), public body and meeting do not include the activities of the University of Delaware and Delaware State University. 29 Del. C. §10002(i).

The present Act does not require a public body to allow members of the public to speak or comment at a public meeting.⁶ The Bill would amend Section 10004(a) to require that for those meetings open to the public, opportunity must be provided for public comment.⁷ Although this is a significant change, unfortunately, public comment is not defined in the existing Act or in the Bill. Nevertheless, the amendment retains the restriction in the present Act⁸ and includes additional parameters concerning limiting comment by the public. Per HB 293, public bodies

⁶ In interpreting the existing Act, the Attorney General has determined that “FOIA does not require a public body to allow members of the public to speak during a public meeting,” but if it does allow public comment, “then it must treat members of the public fairly and even-handedly.” Del. Op. Att’y Gen., No. 17-IB07 (March 8, 2017); Del. Op. Att’y Gen., No. 04-IB13 (June 1, 2004). See *Reeder v. Delaware Dept. of Ins.*, 2006 WL 510067, at 12 (Del. Ch. Feb. 24, 2006) (“There is nothing in the text of the declaration of policy or the open meeting provision requiring public comment or guaranteeing the public the right to participate by questioning or commenting during meetings. What is provided by FOIA generally, and by the open meetings provision in particular, is public access to attend and listen to meetings.” (citations omitted)) aff’d sub nom. *Reeder v. Delaware Dept. of Ins.*, 931 A.2d 1007 (Del. 2006); Att’y Gen. Op. 03-IB06 (Feb. 11, 2003). However, some public bodies are required under their own enabling statutes to provide an opportunity for public comment at their meetings. See, e.g., the enabling statute for the State Board of Education at 14 Del. C. § 105(c)(1).

⁷ However, “[m]eetings of a public body of the General Assembly are excluded from the requirement to provide an opportunity for public comment because under §9 of Art., II of the Delaware Constitution, the rules of proceedings for legislative meetings are established by the Senate and House of Representatives of each General Assembly.” Synopsis to House Bill No. 293

⁸ The language in the existing Act, “This section shall not prohibit the removal of any person from a public meeting who is wilfully and seriously disruptive of the conduct of such meeting,” 29 Del. C. §10004(d), is retained in the amendment but bifurcated into sections (d) and (d)(1).

can limit “comment that is irrelevant, immaterial, insubstantial, cumulative, or privileged.”⁹ (§10004(d)(2). Public bodies can limit the “time for public comment if the limit is applied uniformly to everyone, providing, or requesting the opportunity to provide comment.” (§10004(d)(3). This mirrors the language applicable to public hearings regarding the issuance of regulations by state agencies. 29 Del. Code §10117.

This amendment is an attempt by the legislature to allow the public body to retain some control over the conduct of any meetings that are open to the public, while granting a public right to comment. The terms used are not defined. While councils should be in favor of the amendment, the application of the restrictions contained in the amendment raises some concerns related to free speech.

The First Amendment of the US Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The right of the members of the public to attend public meetings derives from the First Amendment. This right was made applicable to the States in *De Jonge v. Oregon*, 299 U.S. 353 (1937), where the Supreme Court said:

The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. *Id. at 260.*

While HB 293 provides that meetings open to the public must provide for public comment, it does not guarantee that a person has an unfettered right to say what is on his or her mind. First Amendment rights are not absolute and are not violated in all cases where the content of the comment is restricted.

The existing Act (and amendment) allows for the removal of an individual that is disruptive of the conduct of the meeting. (§10004(d)(1)). However, the individual must actually be disrupting the meeting. In *White v. City of Norwalk*, 900 F2d 1421 (9th Cir. 1990), the Ninth Circuit Court stated that given “the nature of a Council meeting means that a speaker can become “disruptive” in ways that would not meet the test of actual breach of the peace, or of “fighting words” likely to provoke immediate combat. *Id. at 1525-26 (citations omitted).*” “A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented

⁹ Under the present Act, a public body cannot place any restrictions on content. *See* Del. Op. Att’y Gen., No. 05-IB01 (Jan. 3, 2005) (restriction on the content of public comment is not permissible; however, a time limit on public comment is permissible).

from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.” *Id.*

Nevertheless, in affirming the principles in *Norwalk*, the Court said in *Norse* “*Norwalk* permits the City to eject anyone for violation of the City’s rules—rules that were only held to be facially valid to the extent that they require a person actually to disturb a meeting before being ejected. . . . Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc*¹⁰ disruption, or imaginary disruption.” *Norse v City of Santa Cruz*, 629 F3d 966, 976 (9th Cir. 2010) *See also Steinburg v. Chesterfield County Planning Comm’n*, 527 F3d 377, 389-90 (4th Cir. 2008)(individual attended planning commission meeting but was escorted out of the meeting when he refused to limit his comments to the topic of the public hearing and refused to sit down; Court found no violation of his First Amendment rights, saying that argumentative and disruptive behavior cannot be shielded by the First Amendment).

HB 293 further allows the public body to silence comment that is “irrelevant, immaterial, insubstantial, cumulative, or privileged.” (§10004(d)(2)). Again, the individual must actually say something that exceeds the boundaries of acceptable commentary and thus, can be restricted. In construing whether an individual could be silenced at a city council meeting, a federal court in Texas said: “A governmental entity may place limitations on the time, place and manner of speech as long as the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.” *Luckett v City of Grand Prairie*, 2001 WL 285280 (2001) at 5 (*citations omitted*). The court went on to state that under the First Amendment, “government may not grant the use of a forum to people whose views it finds acceptable but deny use to those wishing to express less favored or more controversial views.... Selective exclusions from a public forum may not be based on content alone and may not be justified by reference to content alone. *Id.* at 5, *quoting Police Dept. of Chicago v. Mosley*, 408 U.S. 92. 96 (1972). Here, the person was silenced and not allowed to speak because the mayor “assumed that he (Plaintiff) was going to criticize or “bash” the council and staff, or threaten litigation, which he had done in the past. “[A] speaker cannot use the First Amendment to disrupt a council meeting. The court has no quarrel with this general principle. Had Plaintiff become disruptive, the Mayor could have taken appropriate steps to maintain an orderly and efficient meeting. In this case, however, we do not know whether Plaintiff would have been disruptive. All we know for certain is that he was not disruptive at the two meetings in question.” *Id.* It appears that Plaintiff was not allowed to speak because of what he was going to say or may have said.” *Id.* (*footnote omitted*). The court concluded that the Plaintiff stated a constitutional claim for violation of free speech.

In *Norwalk*, recognizing the complicated nature of the determination, the Court stated: “Of course the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The role of a moderator involves a great deal of discretion. Undoubtedly, abuses can occur, as when a moderator rules speech out of order simply because he disagrees with it, or because it employs words he does not like. . . . Speakers are subject to

¹⁰ *Nunc pro tunc* is Latin that means now for then. “A phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect.” Black’s Law Dictionary (4th Edition 1968).

restriction only when their speech “disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.” *Norwalk* at 1426.

These cases illustrate that application of these restrictions on speech in a public meeting are extremely fact driven and require a balancing of the rights of the public to attend and provide comment with the ability of a public body to establish rules that dictate when public comment can be made, how long the public comment can run, and the topic or topics that the public can comment on. HB 293 expands the public meeting law by requiring public comment and should be supported by councils. That being said, questionable or improper application of the restrictions contained in the amendment may result in censorship and lead to litigation to determine whether the individual’s First Amendment rights were abridged.

3. SENATE SUBSTITUTE 1 FOR SENATE BILL 167 (Landlord Mitigation Fund)¹¹

SS 1 for SB 167 creates the Landlord Mitigation Fund. The bill states that it is to “provide payment for certain expenses incurred by landlords participating in government-sponsored rental assistance program[s].” It was developed to accompany a pending Source of Income Bill¹² to encourage landlord participation in government-sponsored rental assistance programs and to provide a process for a landlord to submit a claim for loss or damages to the Delaware State Housing Authority (DSHA) for reimbursement. Specifically, this fund addresses landlord concern about loss of income due to attempting to meet the inspection and condition requirements of government-sponsored rental assistance programs. In addition, when a tenant vacates without notice or damages the unit the landlord may file a claim for reimbursement. The landlord is prohibited from taking legal action against a tenant for an amount paid under this fund, which may reduce the number of tenants who have claims filed against them in JP court. DSHA has discretion to create the fund, set the maximum amount of reimbursement, and conduct a claim review.

Claims eligible for reimbursement by landlords include:

- (1) Lost rental income due to delays in the public housing authority inspection process, in an amount equal to the lost rental income from the date of offer of housing to the applicant whose housing subsidy program was conditioned on the real property passing inspection until move in by that applicant.
- (2) Lost rental income due to the tenant vacating the tenancy without notice.
- (3) Reimbursement for damages to the real property other than for normal wear and tear, in excess of the security deposit. In order for a claim to be eligible for reimbursement under this subsection, the landlord must provide DSHA with proof of the expenditures for which the landlord is seeking reimbursement.
- (4) Reimbursement for improvements required by the public housing authority inspection. In order for a claim to be eligible for reimbursement under this subsection, (i) the landlord must provide DSHA with proof of the expenditures for which the landlord is seeking reimbursement; and (ii) the landlord must rent to the tenant whose housing subsidy was conditioned on the real property passing inspection.

¹¹ See <https://legis.delaware.gov/BillDetail/79046>

¹² See <https://legis.delaware.gov/BillDetail?LegislationId=48488>

Although this legislation does not address individuals with disabilities directly, any increase in landlord participation in government-sponsored rental assistance programs will positively impact individuals with disabilities. The Delaware Public Housing Authorities administer 5,549 federal vouchers¹³ and the Delaware State Housing Authority (DSHA) administers approximately 800 SRAP vouchers. Of the households using federal Housing Choice Vouchers in Delaware, 31% of non-elderly households and 68% of elderly households had head, spouse or co-head of household with a disability.

However, a mitigation fund on its own is unlikely to have the substantial impact on the landlord participation in government-sponsored rental assistance programs in Delaware. This legislation should be supported in conjunction with the legislation guaranteeing protection from discrimination based on Source of Income.

Furthermore, this legislation DOES NOT prohibit the landlord from using evidence of damage submitted to the mitigation fund as evidence for eviction. The remedy for damages should generally be reimbursement for repair costs, not eviction. Although this fund promotes such a remedy, it does not guarantee that a tenant will not face eviction based on damage to the unit.

Finally, the legislation DOES NOT prohibit any of the Delaware Public Housing Authorities from using a mitigation fund claim as evidence for termination of a benefit. Again, the remedy for damages or for vacating a tenancy should be payment of costs only, not termination of a benefit.

The councils should consider supporting this legislation in conjunction with legislation ensuring Source of Income protection and with the recommendation that any evidence submitted to the fund may not be used for termination of government-sponsored rental assistance.

4. HOUSE BILL 235¹⁴ - the Homeless Bill of Rights

This bill states that the “policy of this State is to assure that all individuals, regardless of housing status, enjoy equality of opportunities, more generally, in order to protect and ensure the peace, health, safety, and general welfare of all inhabitants of the State.” Under this legislation, an individual experiencing homelessness is ensured the same rights and privileges as any other resident including the right to:

- (1) To use and move freely in public spaces, including public sidewalks, public parks, public transportation, and public buildings, in the same manner as any other individual and without discrimination on the basis of the individual’s housing status.
- (2) Not to face discrimination by a State, county, or municipal agency.
- (3) Not to face discrimination while seeking or maintaining housing due to the individual’s lack of a permanent address, the individual’s address being that of a shelter or social service provider, or the individual’s housing status. This right does not,

¹³ [HUD Picture of Subsidized Households \(POSH\) Data](#)

¹⁴ See <https://legis.delaware.gov/BillDetail?LegislationId=78844>

however, entitle an individual facing eviction to a truncated or expedited housing application process that might limit consideration of the reason for eviction in an evaluation of the individual's reliability as a tenant, nor does it prohibit a shelter from establishing and adhering to a policy relating to a maximum length of stay for an individual in that shelter.

(4) Not to face discrimination while seeking temporary shelter because of race, color, religion, creed, age, gender, sexual orientation, gender identity, marital status, familial status, disability, national origin, or housing status, except in the case of temporary shelters specifically designated for a specific gender or familial status, or in the case of funding sources that require certain populations be served. This right does not introduce any new requirement with regard to the obligation of shelters or other providers to update their facilities or provide new accommodations.

(5) To medical and dental care, free from discrimination based on the individual's housing status.

(6) To vote, register to vote, and receive documentation necessary to prove identity for voting without discrimination due to the individual's housing status. This right may not, however, be construed to require a temporary shelter to accept documents on that individual's behalf.

(7) To protection from unlawful disclosure of the individual's records and information provided to temporary shelters, service providers, and State, county, municipal, and private entities, including the right to confidentiality of personal records and information in accordance with all limitations on disclosure established by the Delaware.

An individual who alleges discrimination based on any of the protections listed has the right to file a complaint in writing with the Division of Human Relations within 90 days of the discriminatory practice. The Division then conducts an investigation within 120 days. The matter is resolved by conciliation, referral to the attorney general, or a public hearing before a panel appointed by the State Human Relations Commission. The law outlines the relief sought before the panel which can include monetary damages of one to fifteen thousand dollars based on the prior claims of discrimination against the respondent or, if the claim leads to intervention by the Attorney General, the Attorney General will seek appropriate relief through the courts.

While the proposed legislation does not explicitly address disability, the rights it guarantees will impact individuals with disabilities. All individuals experiencing homelessness are vulnerable, individuals with disabilities are especially so. One particularly vulnerable subpopulation are individuals experiencing chronic homelessness. Chronic homelessness is defined by HUD as an individual with a disabling condition who has either: 1) Experienced homelessness for longer than a year, during which time the individual may have lived in a shelter, Safe Haven, or a place not meant for human habitation; or 2) experienced homelessness four or more times in the last three years.

Nationwide, nineteen (19) percent of the homeless population experiences chronic homelessness and Delaware generally follows this national trend.¹⁵ Individuals experiencing

¹⁵ Due to the lack of an unsheltered count in 2021, Delaware only counted 195 people (8%) who were experiencing chronic homelessness. This is compared to 267 people (23%) were experiencing chronic homelessness on the night of the PIT in 2020 which included an unsheltered count. See Housing Alliance Delaware's 2021 Report "Housing

chronic homelessness often need intensive services and supports to exit homelessness and remain stably housed, and are more likely than other subpopulations to experience unsheltered homelessness and discrimination based on their status. Therefore, this additional protection from discrimination based on housing status will have a positive impact on all individuals experiencing homelessness, including those with disabilities.

The council should consider supporting this legislation. However, in its comments, the council may want to consider making other recommendations around the outreach and support that may be necessary for individuals with disabilities to exercise their rights under this legislation.

and Homelessness in Delaware: Crisis to Recovery.” <https://www.housingalliance.org/housing-alliance-publications>