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MEMORANDUM

DATE: June 2, 2015

TO: The Honorable Bethany Hall-Long

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

RE: S.B. 107 (Home Health & Personal Assistance Agency Services)

The State Council for Persons with Disabilities (SCPD) has reviewed S.B. 107. SCPD generally endorses the legislation but believes there are some ostensible "limitations" in implementing the intent of the legislation. SCPD has the following observations.

As background, the Department of Health & Social Services (DHSS) is required to establish regulatory standards covering both home health agencies and personal assistance agencies. See 16 Del.C. §§122o and 122x.

Home health agencies are statutorily authorized to provide a wide array of home health services, including nursing; audiology; nutrition; social services; home health aides; and speech, occupational, and physical therapy. See 16 Del.C. §122o1. Home health aides are authorized to provide assistance with feeding, bathing, dressing, grooming, and incidental household services. Id.

Personal assistance agencies offer services which do not require the judgment and skills of a nurse or other professional, i.e., assistance with activities of daily living, homemaker services, companion services, and health care support delegated by competent individuals pursuant to 24 Del.C. §1921(a)(19). See 16 Del.C. §122x2.

S.B. 107 is intended to remove restrictions on the settings in which the home health and personal assistance services can be provided. The current law categorically disallows provision of such services to "residents of hospitals and nursing facilities" (lines 11-12 and 18-19). Consistent with the synopsis and informal comments shared with the SCPD, DHSS believes that residents in long-term care or acute care settings may benefit from an option to contract for supplemental home health and personal assistance services. The following are examples:

A. An individual receiving physical therapy from a particular therapist while living at home enters a nursing facility for short-term rehabilitation. The individual may prefer to continue to be served by the same therapist while in the nursing facility.

B. An individual with chronic, complex physical support needs is very comfortable with services of a particular home health aide. The individual enters a hospital on a short-term basis. The individual may prefer that the same home health aide provide assistance with bathing and grooming. By analogy, the Department's attendant services standards (§4.0) allow attendants to provide support services for up to 10 days to participants who are admitted to hospitals.

C. A resident in an assisted living setting receives notice from the facility that his needs have become so extensive that he requires nursing home placement. The resident could contract with a home health agency for sufficient supports to permit continued residency in the assisted living setting.

As noted above, SCPD believes there are limitations in implementing the intent of the legislation.

First, unless DHSS amends its MCO contracts, it is unlikely that MCOs will routinely offer to pay for home health or personal care services within long-term or acute care settings. It is predictable that such services will be viewed as the responsibility of the facility and not medically necessary. As a practical matter, the option to receive home health or personal care services in such settings will be limited to "private pay" individuals.

Second, long-term care facilities and hospitals may balk at allowing health care workers who are not facility employees or contractors to provide services in their settings. The facilities may object based on liability concerns, confusion among other residents about the status of these health care workers, and competition from agencies for optional services otherwise available at higher cost from the facilities. SCPD understands that DHSS anticipates including a requirement in its regulations that the home health/personal assistance agencies must obtain the written approval of the facility before providing services in the facility. SCPD suspects few facilities will be willing to provide such approval without some incentives.

Third, there is a technical problem caused by the interplay among lines 18-19, 16 Del.C. §122x2, and 24 Del.C. §1921(a)(19). Personal assistance services include "services as set out in §1921(a)(19) of Title 24" [16 Del.C. §122x2]. Section 1921, which authorizes delegation of a broad range of health care services, is expressly inapplicable to persons in a "medical facility or a facility regulated pursuant to Chapter 11 of Title 16". Therefore, while S.B. 107 seeks to allow personal assistance to be provided in hospitals and nursing homes, residents may be "hamstrung" in benefitting from personal assistance given the exclusion in §1921. This could be remedied by deleting "who does not reside in a medical facility or a facility regulated pursuant to Chapter 11 of Title 16" in 24 Del.C. §1921(a)(19).

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

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