



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**

Margaret M. O'Neill Bldg., Suite 1, Room 311  
410 Federal Street  
Dover, Delaware 19901  
302-739-3621

The Honorable John Carney  
Governor

John McNeal  
SCPD Director

**MEMORANDUM**

DATE: May 29, 2020

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

FROM: Mr. J. Todd Webb, Chairperson *JTW*  
State Council for Persons with Disabilities

RE: H.B. 144 (Enhanced Felony for Crimes Against Health Care Workers)

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 144, which proposes to further expand the conditions in 11 Del. C. 612 (3)-(5) to include hospital constables, in addition to "any person providing health care treatment or employed by a health care provider which such person is performing a work-related duty." This language is extremely broad, and in many cases would essentially include anyone employed by a particular facility or program. This would presumably include direct service professionals serving individuals with disabilities in community settings, as well as all employees at facilities such as group homes and psychiatric hospitals. Presumably the perpetrator in the vast majority of such cases would be the patient or service recipient, a person with a disability, most likely a behavioral health related disability. As second degree assault is considered a felony, the consequences could be significant for individual defendants in terms of sentencing as well as the collateral consequences of a felony conviction.

HB 144 passed in the House on January 21, 2020 and was reported out of the Senate's Corrections and Public Safety Committee on January 29, 2020. HB 144 proposes to further broaden the statutory definition of assault in the second degree at 11 Del. C. § 612. Prior to the

passage of HB 214 in 2016, an assault that would otherwise be considered a third degree assault (a misdemeanor) would automatically be considered a second degree assault (a felony) in cases where the perpetrator had recklessly or intentionally caused injury to a law enforcement officer, first responder, or public transit operator. See 11 Del. C. § 612(3)). In 2016, the Legislature passed HB 214, which expanded the automatic re-designation to assault in the second degree to include cases in which the perpetrator had intentionally caused physical injury to a “the operator of an ambulance, a rescue squad member, licensed practical nurse, registered nurse, paramedic, or licensed medical doctor while such person is performing a work-related duty,” as well as “any other person... rendering emergency care.” See 11 Del. C. § 612 (4)-(5).

The News Journal recently published two op-eds relating to the bill. The first, by Karen Lantz, Esq. of the ACLU of Delaware and Jack Guerin of the ACLU’s Coalition for Smart Justice, was recently published in the News Journal criticizing the bill, stating that it “[would move] Delaware in the wrong direction on criminal justice reform.” They also refer to the alternative strategy of “workplace violence prevention programs” and mentions that legislation has passed in numerous other states requiring hospitals to have workplace violence prevention programs as opposed to increasing criminal penalties for assault. A rebuttal, penned by Wayne Smith of the Delaware Healthcare Association and Marcy Jack of Beebe Healthcare, contends that the strategies of workplace violence prevention and broadening the criminal statute are complementary and should be pursued together. Mr. Smith and Ms. Jack cite to statistics regarding the widespread occurrence of assaults on health care workers, and assert that not amending the statute to include all health care workers would result in a situation where workers are not equally valued, as the same incident occurring within a health care facility would be considered a felony in some cases and not in others, depending on the job title of the victim. Finally, the rebuttal article emphasizes that acts covered by subsection (4) of the statute would need to be “intentional” to be considered assault under the statutory definition, and therefore the amended statute would not unfairly target individuals experiencing a behavioral health crisis. Advocates on both sides of the issue agree that the assault of health care workers is a serious problem that the State should be working to address. It has been widely reported that approximately 75% of workplace assaults take place in health care settings. See e.g., ABC News coverage available at <https://abcnews.go.com/Health/epidemic-75-workplace-assaults-happen-health-care-workers/story?id=67685999>.

The bills’ supporters correctly point out that the acts must be “intentional” to be automatically deemed a felony under § 212(4), however they overstate how clearly this would protect individuals with behavioral health conditions from unnecessary criminalization. There is no explicit exception in the statute for individuals with disabilities or other health conditions in circumstances that may increase the likelihood of such incidents. Many individuals may be easily agitated or prone to bursts of aggression as a result of their condition, but could still legally be found to have “intentionally” caused injury to another person. Incidents involving individuals receiving inpatient care at psychiatric facilities are already often reported to police; expanding when such incidents would be considered felonies may encourage further reporting of these incidents and increasing criminalization of these individuals, as opposed to focusing on treatment and supporting the development of appropriate behaviors and coping skills.

In programs and facilities serving individuals with disabilities, inadequate staffing numbers and poor training of direct care staff often contribute to incidents escalating to the level of physical assault. Staff may not be paying sufficient attention to an increasingly agitated individual or may not feel empowered to de-escalate conflict. In these situations, the alleged perpetrators should not face greater punishment for not receiving the appropriate care. Further, as the ACLU's op-ed points out, alleged perpetrators of assault in these circumstances would still face consequences such as prison time or a fine for the misdemeanor charge. Saddling often vulnerable individuals with felony convictions would potentially create larger obstacles to employment as well as certain types of housing and residential programs.

There has been a push for legislation similar to that proposed by HB 144 around the country, often led by nursing unions and other trade organizations. In Massachusetts, after similar legislation was enacted, advocates proposed an amendment making it clear that any individual who was being transported or held in a psychiatric facility under the provisions of the state's civil commitment law or has otherwise been "determined by mental health providers to need psychiatric evaluation or treatment" could not be charged with a felony under the Massachusetts statute. This bill, H.1342, was scheduled for hearing in October 2019 but does not appear to ever have been voted on.

Balancing the safety of health care workers with the rights and wellbeing of the often vulnerable individuals they serve is always a delicate balance. SCPD opposes this bill as currently written and suggests that language such as that which appears in the Massachusetts bill could be introduced to further clarify that the new provisions would not apply in certain circumstances where an individual is actively receiving psychiatric treatment or other behavior related support.

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

cc: Ms. Laura Waterland, Esq.  
ACLU  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

HB 144- enhanced felony for crimes against health care workers 5-29-20