



STATE OF DELAWARE  
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**MEMORANDUM**

DATE: April 24, 2012

TO: Ms. Deborah Harvey  
Division of Public Health

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

RE: 15 DE Reg. 1424 [DPH Proposed Medical Marijuana Code Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Health's proposal to adopt regulations governing the *State of Delaware Medical Marijuana Act*. The proposed regulation was published as 15 DE Reg. 1424 in the April 1, 2012 issue of the Register of Regulations. SCPD has the following observations.

First, the regulations, including definitions, generally track the statute.

Second, §5.3.6 authorizes a \$150 civil penalty if a patient or caregiver cardholder fails to report a change in address, physician, medical status, etc. This is consistent with Title 16 Del.C. §4912A. However, the regulation should include due process to contest the penalty. Compare §§8.2.5 (record review available to challenge suspension of registry identification card); and 8.4 (hearing available to challenge suspension or revocation of registry identification card).

Also, SCPD recommends clarifying the term "qualified patient's Physician status" in Section 5.3.1. While the regulation may contain be a definition for "Physician", the meaning of "qualified patient's Physician status" could be misconstrued in the reporting context. In addition, the requirement to report a "change in the status of the qualified patient's debilitating medical condition" is overburdening on the patient. For example, a person's medical condition may change from day to day. Fining someone \$150 (Section 5.3.6) for not accurately reporting all changes in their medical condition is not fair. The Division may wish to limit such reporting to a change in condition that disqualifies them from the medical marijuana program.

Third, §8.5.3 recites that "(a)ll hearings held pursuant to this section shall be open to the public." Such hearings would typically involve confidential medical records and otherwise sensitive

evidence. The statute explicitly contemplates that such information is confidential and protected, not “open to the public”. See Title 16 Del.C., §4920A. For similar reasons, §8.14.4 is problematic since it makes a final hearing decision “public information” without redaction. . Cf. 16 DE Admin Code 5000, §5502 [DHSS hearing decisions can be published but in redacted form].

Fourth, in §8.8, substitute “bear” for “endure”.

Fifth, §8.11 imposes the burden of proof on the patient or caregiver in all hearings. The traditional approach in administrative hearings is to impose the burden of proof on the “consumer” for denials of initial applications while imposing the burden of proof on the agency for terminations. The rationale is that there must be some change in circumstances to justify a termination. The agency should have the burden of showing the change in circumstances.

Sixth, the word “Secretary” should be capitalized in §§8.14.1, 8.14.2, and 8.14.3.

Seventh, §8.14.3 contemplates the hearing officer’s issuance of a “recommended decision” which is subject to the Secretary’s revision. Since the Secretary was not involved in the hearing, this approach makes little sense. The general DHSS approach is to authorize its hearing officers to issue a final decision. Compare 16 DE Admin Code 5000, §5304.5.

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

cc: Dr. Karyl Rattay  
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Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

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