

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Legislative & Regulatory Initiatives

Date: November 4, 1007

I am providing my analysis of eleven (11) legislative and regulatory initiatives in anticipation of the November 8 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DPH Final Cancer Treatment Program Regulations [11 DE Reg. 680 (November 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in September, 2007. The Councils generally endorsed the standards while recommending two (2) technical amendments. The Division of Public Health agreed and effected both amendments to Section 11.9.

Since the regulations are final, and both recommendations were honored, the Councils may wish to issue a “thank you” letter for favorably considering the comments.

2. DMMA Final LTC Annuity Regulations [11 DE Reg. 676 (November 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in September, 2007. The Councils observed that the standards were consistent with CMS guidance. However, the Councils recommend one (1) amendment to clarify that DMMA, and not an annuity issuer, would be responsible for forwarding notice of the State’s status as the preferred remainder beneficiary.

The Division of Medicaid & Medical Assistance has now issued final regulations. DMMA agreed with the Councils’ suggestion and effected an amendment to Section 320330.10.D.

Since the regulation is final, and DMMA adopted the Councils’ single recommendation, I recommend no further action.

3. DOE Final Immunization Regulations [11 DE Reg. 666 (November 1, 2007)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in September, 2007. Based on CDC recommendations, the Councils endorsed amending existing DOE standards to require children to have two (2) chickenpox immunizations. The DOE has now acknowledged the endorsement and adopted final regulations with no changes.

4. DOE Final Substitute Teacher Regulation [11 DE Reg. 664 (November 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in September, 2007. The Councils observed that the Legislature had repealed a statute [Title 14 Del.C. §1230] which required a certification or permit system for substitute teachers. The Councils nevertheless recommended, even though not required by statute, that some certification/permit be maintained.

The Department has now issued a final regulation effecting the repeal of the substitute teacher permit regulation. The Department notes that the Professional Standards Board licenses and certifies “educators” and that substitute teachers are not considered “educators”. At 664. Although it may be illogical to characterize a substitute teacher as a non-educator, the Professional Standards Board enabling statute literally recites that “the term ‘educator’ does not include substitute teachers”. See attached Title 14 Del.C. §1202(4).

The anomaly in this system is that there are no standards for a substitute teacher. A substitute teacher could be a dolt with no credentials and no education and still teach in Delaware public schools. If a substitute teacher lacking a bachelor’s degree wishes to be paid, the district could simply “recommend” the teacher to the DOE to ensure State payment. See attached Title 14 Del.C. §1326. If the substitute teacher volunteered, or were paid from only local funds, even a recommendation would be unnecessary.

Since the regulation is final, no further action is necessary. The GACEC may wish to determine whether it would be worthwhile to suggest that the House and Senate education committees consider this matter.

5. DOE Final Special Education Teacher Regulation [11 DE Reg. 671, 673 (November 1, 2007)]

In September, the Professional Standards Board and DOE proposed to repeal separate elementary and secondary exceptional children special education teacher certification standards and substitute a generic K-12 certification. The rationale was that there is a single PRAXIS II test covering K-12 grades. See 11 DE Reg. at 266-267 (September 1, 2007). The GACEC and SCPD shared two (2) concerns.

First, the Councils noted that the proposal resulting in a “watering down” of the standards since an applicant could qualify for the certification without a bachelor’s degree. In response, the

Board noted that, although the standards could be read to allow such a result, the Board interprets the standards as still requiring a bachelor's degree. See 11 DE Reg. at 671.

Second, the Councils noted that the skills inherent in teaching elementary versus secondary level students are not co-terminus and that the existence of a single PRAXIS test should not compel adoption of a single, generic certification. The Board acknowledged the concern but noted that some teaching strategies and techniques apply to all age groups. Therefore no change was made from the proposed regulation.

Since the regulations are final, I recommend no further action.

6. DOE Final Early Childhood Teacher Certification Reg. [11 DE Reg. 667 (November 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in September, 2007. The Professional Standards Board and DOE have now adopted final regulations with no amendments.

First, the Councils endorsed the concept of the early childhood teacher certification while recommending that the DOE issue a regulation which would require such certification in pre-kindergarten programs. The Professional Standards Board responded that this "will be considered in future discussions and regulations." At 667.

Second, the Councils observed that the standards ostensibly require an applicant to be employed since eligibility standards contemplated approval of credits by the employing school district or charter school". This was characterized as inconsistent with other regulations authorizing an unemployed applicant to seek certification. The Board responded that there are multiple approaches to qualifying for certification and not all require employment.

Since the regulations are final, I recommend no further action.

7. DOE Proposed Standardized Financial Reporting Reg. [11 DE Reg. 602 (November 1, 2007)]

In the Spring of 2007, perhaps motivated by the financial problems in the Christina School District, the Legislature enacted the attached H.B. No. 21. It requires the Department of Education to issue regulations requiring districts and charter schools to compile financial information on their websites and provide information in writing on request. The Department is now issuing implementing regulations.

I identified only one concern with the regulations. The regulations omit the requirement that districts provide the financial information in writing upon request. Indeed, the synopsis to H.B. No. 21 contemplates that such access would conform to the FOIA. The regulations only require posting on the agency's website.

I recommend that the SCPD endorse the regulation subject to incorporating an amendment to address agency provision of the financial reports in writing upon request.

8. Dept. Of Insurance Prop.Health Insurance Arbitration Reg [11 DE Reg. 637 (November 1, 2007)]

The Councils supported legislation [H.B. No. 92] enacted in the summer of 2007 establishing an arbitration system in which aggrieved health care providers could challenge claim denials. The Department of Insurance is now issuing proposed regulations to implement the legislation.

I have the following observations.

First, overall, the regulations are fairly precise in defining the arbitration process. Other positive features include the following: 1) authorization to arbitrate “partial” denials [§3.0]; 2) no exclusion for application of the regulations to Medicaid MCOs; 3) and inclusion of a non-retaliation provision [§7.0].

Second, I recommend deletion of “his” in Sections 4.1.2 and 4.1.3. since some health providers are females or simply agencies or institutions. See Title 18 Del.C. §333(a)(1). Omission of the masculine pronoun does not create any ambiguity.

Third, §4.5.2 contains a plural pronoun (their) with a singular antecedent (party). Consider the following substitute: The arbitration hearing...possible, to the parties being given the opportunity to explain their views of the previously submitted evidence....

Fourth, §6.0 allows an insurer to obtain an exemption by demonstrating that it has an equivalent arbitration system in place. There is no provision identifying the duration of such an exemption or periodic review by the Commissioner to assess continued eligibility for the exemption. The Department may wish to consider inserting the following in §6.0: “Any approved exemption shall be for a period determined by the Commissioner and shall be subject to the insurer’s affirmative obligation to notify the Department of any material change in its dispute resolution system.”

Fifth, §4.5.7 may categorically bar consideration of “argument” or “documents” not shared with the adverse party through at least five days notice. This “no-exceptions” approach may be too rigid. Compare Superior Court Civil Rule 16.1(k)(6)[(arbitrator “may” bar untimely evidence]. Some small providers will be appearing pro se and may lack legal sophistication. Concomitantly, the scope of §4.5.7 is unclear. Would a party planning to submit brief testimony authorized by §4.5.3 be barred from presenting the testimony unless it has provided advance notice of the witness and summary of testimony five days in advance? The Department may reassess the text of §4.5.7 consistent with these concerns.

I recommend sharing the above observations and recommendations with the Department.
9. H.R. No. 38 [Health Insurance Pool Study]

In March, the SCPD and GACEC endorsed S.B. No. 6 which would establish a State-

subsidized insurance pool to promote the availability of health insurance to small businesses and individuals with less than \$50,000 in income. I attach a copy of the GACEC's March 5, 2007 letter. The bill passed the Senate by a vote of 17-1 on April 5 but remained in committee in the House at the end of the last legislative session. In lieu of acting on S.B. No. 6, the House voted 22-14 on July 1 at 1:57 a.m. to establish a Health Insurance Pools Task Force through H.R. 38. I attach a copy of that legislation.

The attached February 26 and April 6, 2007 News Journal articles describe an intense lobbying campaign against S.B. No. 6 by the insurance industry. The attached November 3, 2007 letter to the editor by the Democratic House Minority Leader and House Minority Whip reiterate concerns with insurance industry lobbying and question the composition of the Task Force.

The Task Force is expected to issue a report with recommendations by March 15, 2008. The Council may wish to consider the following: 1) offering, perhaps in collaboration with the Governor's Commission on Community-based Alternatives for Persons with Disabilities or UCEDD, technical assistance to the Task Force; and 2) monitoring the meetings of the Task Force (e.g. through attendance; reviewing minutes). The insurance pool has great potential for increasing access to affordable health care in the State and may merit Council attention.

10. CMS Prop. Rules on Medicaid Coverage of Rehabilitation Services

The Center for Medicare & Medicaid Services (CMS) published proposed regulations in August which include restrictions on the scope of "rehabilitation services" qualifying for federal Medicaid coverage. Background materials are attached.

There are several concerns with the new regulations. Delaware's DMMA submitted the attached comments which describe the regulatory impact on both children's and adult services.

For DDDS, the impact would be substantial. DDDS funds day habilitation services through Medicaid as "rehabilitation" services. As discussed in the attached NHeLP article, CMS contends that since habilitation is designed to develop new abilities, it does not qualify as "rehabilitation" which focuses on restoring lost function. If finalized, the regulation would disallow Medicaid funding of DDDS day programs for hundreds of individuals.

There are ostensibly approximately 20 states who bill "habilitation" services under the "rehabilitation" option. These states were successful in including language in the latest CHIP bill to impose a 2 year moratorium on implementation of the CMS regulation. However, it is likely to be vetoed.

The SCPD may wish to inform the Delaware Congressional delegation of the potential impact of this regulation on Delaware.

11. Draft Crime Victims with Disabilities Act

Consistent with the attachments, Senator Biden plans to introduce legislation to benefit

crime victims with disabilities.

The 2-page summary summarizes the features of the legislation. The “findings” section recites that adults with disabilities experience violence or abuse at least twice as often as people without disabilities, an estimated 5,000,000 crimes are committed against individuals with developmental disabilities annually, and over 70% of crimes committed against individuals with developmental disabilities are not reported.

The bill is designed to promote coordination among stakeholders in states participating in a grant program to promote better crime reporting, train prosecutors and victim assistance organizations, promote accommodations to crime victims in the criminal justice system, and facilitate coordination among criminal justice agencies and victim assistance agencies.

There would be 1 year planning grants generally capped at \$50,000 followed by 2-year implementation grants capped at \$300,000. A 2 year implementation grant could be “renewed” for an additional 2 year period. Research grants would also be authorized.

The bill appears well intentioned and well drafted. However, I have 2 observations.

First, the scope of the bill is limited to adults with developmental disabilities. It is unclear why the scope is restricted to adults and why it is restricted to “DD” constituents. Perhaps the initial focus is narrowed with the expectation of expansion if this model is effective. However, my preference would be to expand the focus to persons with significant, chronic disabilities irrespective of onset date. For example, the bill will exclude coverage of many veterans with TBI and other war-related conditions.

Second, there is a conspicuous lack of any reference to the P&A system established pursuant to the DD Act, 42 U.S.C. 15001 et seq. Conversely, the bill affirmatively refers to UCEDDs (p. 20), a P&A partner agency under the DD Act. The P&As would logically be a central collaborating agency protecting victims with disabilities and pursuing remedies on their behalf. See 42 U.S.C. 15043. At a minimum, the definition of “adult protective services agency” (p. 6) should explicitly recite that it includes Protection & Advocacy agencies established by 20 U.S.C. 15043. I also recommend that the implementation grant application standards (p. 12) include the state’s P&A as a mandatory participant, or at least include a “preference” for such participation. The Administration on Developmental Disabilities has included such a provision in some of its discretionary grant eligibility standards.

The SCPD may wish to consider sharing its endorsement of the draft bill with Senator Biden’s Office while offering the above observations.

Attachments

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