

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory & Policy Initiatives

Date: November 9, 2008

I am providing my analysis of thirteen (13) regulatory and policy initiatives in anticipation of the November 13 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DOE Final Driver Education Regulation [12 DE Reg. 670 (November 1, 2008)]

This is an information item.

The SCPD and GACEC commented on the proposed version of this regulation in September, 2008. In a nutshell, the Department was issuing standards to implement a fee structure for nonpublic school student participation in driver's education training. The Department received many negative comments opposing the concept underlying the regulation. The Department responded that its regulation merely implemented the Legislature's directive. The Councils endorsed the proposed standards subject to substituting "nonpublic" for "nonpolitical" in Section 1.1.

The Department has now adopted final regulations which effect the substitution. I recommend no further action.

2. DOE Final Public/Private/Nonpublic School Definition Reg [12 DE Reg. 668 (11/1/08)]

This is an information item.

The SCPD and GACEC commented on the proposed version of this regulation in August, 2008. The Councils expressed concern that differentiating "homeschools" from "private schools" could result in the following: 1) lack of application of the special education "childfind" duty to "homeschooled" students; and 2) lack of access to IDEA-authorized private school services by "homeschooled" students.

The Department has now adopted a final regulation with no changes.

First, the DOE agrees that districts must offer “childfind” services to “homeschooled” students and indicates that it “has informed school districts [that] their duty to identify, locate, and evaluate students with disabilities applies to students who are homeschooled”. At 668. The Department does not identify the date or method of communication to districts.

Second, it interprets the federal “private school” regulations as not applicable to “homeschooled” students: “Neither federal nor state law extend these provisions to homeschooled children”. This is not entirely accurate. The U.S. Department of Education published IDEA guidance on private school students in March, 2006. An excerpt is attached. In relevant part, it instructs as follows:

Question F-2: Are home schooled children considered parentally placed private school children?

Answer: Whether home schooled children with disabilities are considered parentally placed private school children with disabilities is determined by the state. If the state recognizes home schools or home day care as private elementary schools and secondary schools, children with disabilities in those home schools or home day care must be treated in the same way as other parentally placed private school children with disabilities.

Thus, federal law does “allow” at least some home schools to be counted as private schools under the IDEA. Moreover, a “multi-family homeschool” as described in the attached Title 14 Del.C. §2703A, could, as a practical matter, operate like a private school. Moreover, if a “preschool” or “day care program” met the criteria of an elementary school, enrollees would be considered private school students. See attached March, 2006 guidance at p. 11.

The Councils may wish to consider whether further action is warranted. There are “gray areas” in the law.

### 3. DDDS Final HRC Policy (October, 2008)

The DLP submitted a 10-paragraph critique of the DDDS HRC policy on March 27, 2008. The GACEC and SCPD issued April 22, 2008 and May 1 letters respectively to DDDS endorsing the DLP critique. DDDS then issued a July 28 revised draft of the HRC policy. The SCPD issued the attached September 16, 2008 letter with comments on the revised draft.

The Division has now adopted a final HRC policy incorporating some DLP and SCPD recommendations.

### March Comments

1. We recommended clarification of whether the HRC would review rights restrictions for both residential and non-residential DDDS clients. We noted one option would be to cover both residential clients and those enrolled in day programs. DDDS incorporated the latter option into Section V.A.4.

2. We recommended incorporating the concept of a surrogate decision-maker (e.g. by power of attorney) into Section IV. We also recommended deletion of references to the authority of “a person who has otherwise exhibited special care and concern.” DDDS incorporated a reference to “legally recognized agents” within Section IV.F.1 and deleted references to “person who has otherwise exhibited special care and concern”.

3. We recommended reconsideration of a provision contemplating HRC review of “all individual rights restrictions”. Consistent with Section V.A.4, it appears that the HRC jurisdiction remains broad. However, there is a cross reference to the DDDS Individual Rights Review Policy. I lack a copy of that policy which should be obtained for reference.

4. We recommended at least adding a preference for including a DLP representative on the HRC. Section V.H was added to provide the DLP the option of serving on each HRC.

5. We recommended addressing HRC member liability. The new policy does not directly address liability but diminishes exposure by making the community-based HRCs advisory.

6. We recommended deletion of the following sentence: “Any member involved in the development of a proposal or issue to be addressed by the HRC is excluded from voting on the respective topic.” DDDS deleted the sentence in favor of a more functional conflict standard. See Section V.P.

7. We recommended adoption of consistent standards in HRC and PROBIS policies. Unless the PROBIS policy has been revised, there is still some lack of clarity. For example, the HRC policy contemplates “re-review” within 365 days (Section VI, Table, Par. 6; Section IV.A.5) but also contemplates HRC review only after PROBIS review (Section V.A.1) which could occur beyond one year.

8. We recommended clarification that the HRC reviews more than “consent”. DDDS incorporated a broader review mandate into Sections V.A 1; V.A.3; V.A.4; and Section VI.

9. We recommended clarification that the HRC will continue to review psychotropic medications. HRC review of some drugs is incorporated into Sections IV.C and V.A.1.

10. We recommended correction of a grammatical error. Section V.D was revised. However, there is a new grammatical error in this section, i.e., “person” should be “persons”.

### September Comments

1. We noted that federal ICF/MR regulations required at least the Stockley HRC acting as more than an “advisor”. Sections V.A.1.a and VI, Table, Par. 4 contemplate broader jurisdiction for the Stockley Center HRC. However, all HRCs still act in an advisory capacity only. See Section VII.

2. We recommended authorization for the HRCs to make systemic recommendations to the Division Director and Deputy Director. DDDS maintained a model in which HRCs issue recommendations only to the Executive Director of Stockley, Director of Community Services, and Director of Special Populations. See Sections V.A.6; V.L; and VII.

3. We objected to limiting HRC review of “medication for the sole purpose of behavior management in the absence of a psychiatric diagnosis”. See Sections IV.C and V.A.1. We noted that ICF/MR regulations require the Stockley HRC to review “drug usage” irrespective of presence or absence of psychiatric diagnosis. We also noted that physicians do not generally prescribe psychotropic medications without a psychiatric diagnosis. DDDS incorporated a broader review provision (Section V.A.1) for the Stockley HRC. It did not change the jurisdiction of the community-based HRCs. A literal interpretation of the above standard will eliminate 80-90% of the NCC HRC reviews. For perspective, I checked the diagnoses of all cases reviewed by the NCC HRC at its latest (October 16, 2008) meeting. Of the 31 medication reviews, 26 clients had psychiatric diagnoses and the remaining 5 had diagnoses of autism only. Under the new HRC policy, the HRC would not review usage of psychotropic drugs for 84% (26/31) of the DDDS clients previously subject to review.

4. We shared five concerns related to the surrogacy section. DDDS overhauled the section.

5. We identified an incomplete note. This was corrected.

6. We identified two redundant paragraphs. This was corrected.

7. We noted that the requirement that each HRC have five members could be problematic since the NCC HRC has not had five members in recent memory. DDDS changed the minimum composition to four members. See Section V.H.

8. We recommended establishing a quorum of 1/3 of the membership in lieu of a 51.0% standard. The “51%” standard was retained. See Section V.P. This means that 3 of the 4 NCC HRC members must be present for a quorum.

9. We recommended affirmatively memorializing the existing practice of allowing the DLP representatives to include brief information about HRC activities in DLP federal reports. DDDS added a conforming authorization to Section V.F.

10. We recommended DDDS consideration of whether it collects information described in Par. 6 of Exhibit C. There was no change in the form.

Since the policy is final, and DDDS incorporated many edits prompted by the Councils, I recommend issuing a “thank-you” letter or email. The HRCs, and the DDDS Advisory Council, may wish to follow up on the underlined concern identified in Par. 3 above.

#### 4. DVR Revised Order of Selection Policy (November 3, 2008)

DVR presented an overview of its proposed Order of Selection policy at the October 9, 2008 SCPD P&L Committee meeting. DVR had provided an August 20 draft in early October which formed the basis for an October 8 DLP analysis. Unfortunately, this was a superseded draft. A new draft was reviewed at the October 9 meeting. Both the SCPD and GACEC then issued comments resulting in the attached October 29 memo to the SCPD and November 3 letter to the GACEC.

I have the following observations on the responses. For facilitated reference, I will follow the sequence in the response to the GACEC.

First, the Councils are somewhat “hamstrung” in analyzing the final policy since it has not been provided. Only the response to Council commentary is available. I recommend that the Councils solicit the actual final policy.

Second, the Councils recommended “fleshing out” the I&R and counseling sections of the policy. DVR indicates that “(l)anguage was added to support this requirement.” Reliance is also placed on the Disability Navigator Program.

Third, the Councils recommended an explicit recital that the Order of Selection does not affect diagnostic and evaluation services. DVR agreed and added a provision.

Fourth, the Councils recommended incorporation of an explicit “grandfather” provision for existing clients. DVR indicates that “this information has been added to the policy”.

Fifth, the Councils recommended that DVR defer to other State agency findings that an applicant meets SSDI/SSI medical eligibility criteria. DVR declined to adopt this approach but will use other agency findings as “a resource in making appropriate decisions”.

Sixth, the Councils recommended incorporation of a standard contemplating review of the policy and its implementation by the State Rehabilitation Council. DVR indicates that the SRC was involved in the “development of policies”. DVR did not address prospective review by the SRC to assess implementation.

Seventh, the Councils recommended inclusion of referral information to the DLP for SSI/SSDI beneficiaries affected by the policy. DVR agreed to “make arrangements to obtain and distribute [DLP] materials with materials from the Client Assistance Program.”

Eighth, the Councils identified a potential problem if DVR and DVI orders of selection have different eligibility criteria since disability-based distinctions are barred by RSA regulations. DVR indicates that RSA will review the State Plan amendment for compliance with federal standards.

Ninth, the Councils promoted adoption of an objective assessment system and sharing of findings with applicants. DVR responded that “(c)ounselors will document specific information about applicable functional limitations (and)...(c)lients will be informed of the results of these determinations...(and) have access to the record of such determination.”

Tenth, DVR did not address the suggestion in the October 8 memo that SSI/SSDI beneficiaries be given priority status within categories. For example, an SSI/SSDI beneficiary in the SD category could be given precedence over non-SSI/SSDI beneficiaries within the SD category. This would promote implementation of the federal Ticket-to-Work initiative.

I recommend that the Councils take the following action: 1) thank DVR for responding to Council suggestions, 2) solicit a copy of the final policy; and 3) solicit consideration of the option identified in the “Tenth” paragraph above. This concept was proffered through the GACEC’s October 24 letter (Par. 4.b.) and the SCPD’s October 24 memo (Par. 3b).

5. DOE Proposed Career Technical Education Program Reg. [12 DE Reg. 562 (November 1, 2008)]

The Department proposes to adopt a few discrete amendments to its Career Technical Education Program regulations. The most significant amendment is to insert some teacher qualification standards at Sections 2.5 and 2.6. I did not identify any substantive concerns with the amendments. However, the DOE may wish to consider the following.

First, Section 3.5 could be amended for clarity by using subparts:

3.5. In order to qualify for career and technical education funding units, the students shall:

3.5.1. Possess minimum occupational competencies specified by the Career and Technical Education Teacher Coordinator before being placed in cooperative employment;

3.5.2. Be in their senior year or otherwise approved pursuant to 3.4;

3.5.3. Be in a Cooperative Education Work Experience Program that relates directly to the student’s current or completed career and technical education pathway;

3.5.4. Meet the requirements of 3.1 through 3.4; and

3.5.5. Be supervised through on-site visits by an assigned Career and Technical Education Program Teacher Coordinator or Career Guidance Counselor.

Second, delete the semicolon in the first line of Section 4.5.

I recommend sharing the above observations and recommendations with the DOE and SBE.

6. DOE Proposed Promotion Regulation [12 DE Reg. 556 (November 1, 2008)]

The Department of Education proposes to amend its “promotion” regulation. This is essentially a “housekeeping” measure. It requires charter schools and districts to submit an electronic version of promotion policies to the DOE. Revisions would also have to be submitted within 90 days of adoption.

I did not identify any substantive concerns with the proposed revisions. There was an ostensible “typo” at Section 1.1, i.e. an extraneous hyphen appears after “925”.

I recommend commenting as follows: “The Council reviewed the regulation and did not identify any substantive concerns. However, the Department may wish to delete the extraneous hyphen after “925” in Section 1.1.

7. DOE Proposed “Twelve Month Program” Regulation [12 DE Reg. 569 (November 1, 2008)]

Last Spring, the SCPD and GACEC supported DLP-authored legislation [H.B. No. 391]. The bill would have required districts to include a parental notice and acknowledgment section in IEPs so parents of qualifying students would be aware of their right to opt for a 12-month program. The DOE opposed the bill but later compromised by agreeing to issue a conforming regulation if action on the bill were deferred. In September, SCPD, GACEC, and DLP representatives negotiated with the DOE and reached consensus on addition of the new Section 20.6 reflected in the proposed regulation.

Since the new Section 20.6 reflects the above consensus, and the amendments to Section 20.4 are unobjectionable, I recommend a strong endorsement.

8. DOE Proposed Graduation & Diploma Regulation [12 DE Reg. 557 (November 1, 2008)]

The SCPD and GACEC commented on a previous version of these proposed regulations last month. I attach the SCPD’s October 28 letter and the GACEC’s October 23 letter. The DOE is publishing the new proposal “because of the proposed delay of the World Language graduation requirement from the class of 2013 to the class of 2015.” At 558. Apart from the “World Language” edit, the standards are ostensibly identical to the October version. It is therefore appropriate to reiterate the Councils’ October comments with one caveat.

The GACEC added two comments not reflected in the SCPD letter.

First, the GACEC noted that the class of 2015 will need 24 credits to graduate. See Section 5.1. This means that students with 5 credits after 1 year of high school and 10 credits after 2 years of high school will not really be “on track” to graduate as contemplated by Section 4.2.5. The DOE may wish to amend Section 4.2.5 to differentiate the “on track” criteria based on graduating class.

Second, the GACEC questioned the rationale for deletion of the credit in computer literacy.

The SCPD may wish to reiterate its October commentary supplemented by the above concerns identified by the GACEC.

9. DOE Prop. Tuition Billing for Special Schools/Programs Reg. [12 DE Reg. 566 (11/1/08)]

The DOE is proposing regulations to implement Section 418 of the FY 09 budget bill. Section 418 is reproduced in full in the regulation (p. 566).

As background, public schools ostensibly had some discretion in reallocating state units generally targeted for special schools and programs under Title 14 Del.C. §1703. For example, §1703(o) literally allowed districts, with DOE approval, to expend funds for special schools and 12-month programs for “directly related educational projects and/or programs.” I infer that the budget epilg seeks to curtail such discretion to the extent it would result in an increase in the tuition tax rate or tuition billing amount.

The regulation is very technical and its impact is difficult to assess without sufficient background in Delaware public school finance. Moreover, some provisions are cryptic or border on the unintelligible. For example, the definition of “indirect costs” in Section 2.0 includes the following sentence: “These costs benefit more than one cost objective (e.g. award; project or activity) and cannot be readily and specifically identified with a particular cost objective without efforts disproportionate to the results achieved.”

I recommend that the Councils either obtain further information on the regulation from a knowledgeable source or defer commentary. For example, the SCPD or GACEC could consider solicitation of a presentation on the regulation. Alternatively, the Councils could solicit informal input from a special school administrator such as the principal of the Leach School.

10. Del. Health Care Commission Prop. DHIN Regulation [12 DE Reg. 540 (November 1, 2008)]

As background, enabling legislation was enacted in 1997 establishing the Delaware Health Information Network [“DHIN”]. A copy of law [Title 16 Del.C. §§9920-9927] is attached. The legislation contemplates establishment of “a community-based health information network to facilitate communication of patient clinical and financial information.” See Title 16 Del.C. §9922. Further details about this initiative are contained in the attached excerpt from the January 7, 2008 SCPD BIC meeting summarizing a presentation by Gina Davis, the project director. Finally, I attach a June 27, 2008 News Journal article noting that Delaware has been chosen by CMS to participate in a pilot project to pay physicians to switch from paper files to electronic medical records. I assume this would facilitate implementation of the DHIN.

The Delaware Health Care Commission is now issuing proposed regulations to guide implementation of the project. Overall, the draft leaves much to be desired. In particular, there are numerous grammatical irregularities, “odd” choices of language, and a few substantively problematic provisions.

First, in §1.1, since the reference to the statutory citation is in apposition, some additional

commas are necessary. Alternatively, the entire citation could be enclosed in parentheses.

Second, in §2.1, second sentence, delete “shall” before the word “identify” and insert “include” before the word “such”.

Third, in §2.1, last sentence, the reference to “other regulations that involve the DHIN” is problematic. In effect, participants are required to agree “to be bound without reservation” to abide by some unidentified regulations that may cryptically “involve” the DHIN.

Fourth, §2.2, first sentence, contains an “odd” reference to Director and Committee review to their satisfaction. This connotes a subjective standard, i.e., review until they are “happy”.

Fifth, §2.3 contains the following sentence: “The Board will provide the information and requirement that will comprise the notice of withdrawal.” This makes no sense.

Sixth, the third sentence in §3.2 contains 107 words with multiple subparts. It should be divided into shorter provisions for clarity.

Seventh, §3.2.3 is grammatically infirm. It essentially recites that an “(a)ssociate warrants that it shall implement and...to prevent the Use or Disclosure...”.

Eighth, §3.2.5 presupposes that each entity will have a “privacy officer”. There is no definition of a “privacy officer” and no explicit requirement in the regulations that each entity have a “privacy officer”.

Ninth, §3.2.9 is unintelligible. Query how one can communicate by alternative locations.

Tenth, §4.1 is unintelligible. It recites as follows: “Application for and participation in DHIN requires each participating entity and its agents and employees to the following in addition to the obligations imposed elsewhere.”

Eleventh, in §4.1.1, I assume “participates” should be “participants”.

Twelfth, in §4.1.4, the word “effected” should be “affected”.

Thirteenth, §5.2 recites that a committee can award “financial penalties”. This may be ultra vires. The enabling statute contemplates prosecution of violators by the Attorney General’s Office but does not explicitly authorize a committee to impose financial penalties. See Title 16 Del.C. §9926.

Fourteenth, in §5.3, substitute “which” for “who”.

Fifteenth, in §6.1, first sentence, insert a comma after “DHIN”.

Sixteenth, the last sentence in §8.1 is somewhat oddly worded. It recites as follows: “These standards shall adopt national standards to the extent such is feasible.”

Seventeenth, to enhance enforcement, §3.2.12 should be deleted.

Eighteenth, §7.2 is somewhat paternalistic. It imposes a categorical precondition of consultation with a health care provider before a consumer can limit access to health care information.

The above concerns do not comprise an exhaustive list of “weak” or problematic provisions. The regulation would benefit from extensive edits. The authors should strive for short sentences as juxtaposed to convoluted sentences with many clauses and extraneous content. One “strategy” would be to include encompassing definitions. For example, a single regulation could define participants, “Business Associates”, and other entities as including “employees, agents, representatives and subcontractors”. This would obviate several references in §§3.2.8; 3.2.10; 3.2.13; and 4.1. In conclusion, I recommend that the SCPD recommend significant revision of the proposed regulations prior to adoption.

#### 11. DLTCRP Proposed Nursing Facility Regulation [12 DE Reg. 592 (November 1, 2008)]

The Division of Long-term Care Residents Protection (“DLTCRP”) proposes to repeal separate regulations covering “skilled” and “intermediate” nursing facilities and adopt a single regulation covering both. The 18-page regulation is generally well written and easy to follow.

I have the following observations and recommendations.

1. In Section 2.2, the definition of “Advance Directive” only encompasses “springing” instruments “should the individual become incapacitated”. An instrument can be created (e.g. durable POA) which is immediately effective and provides an agent authority to act irrespective of the capacity of the resident. The Division should consider deletion of “should the individual become incapacitated”.

2. In Section 2.6, the definition of “extensive remodeling” is limited to modifying the “square footage of any room intended for resident use”. The term is used in Sections 4.9 and 7.1. If changes to an existing facility do not qualify as “extensive remodeling”, the requirement to comply with “Guidelines for Design” is literally inapplicable. See Section 7.1. The Division may wish to expand the definition to prompt broader conformity with the “Guidelines”.

3. In Section 2.10, insert “of” between “delivery” and “quality”.

4. In Section 2.15, delete “their” since it is a plural pronoun with a singular antecedent (resident). Alternatively, substitute “the resident’s”.

5. In Section 2.17, the DLP has observed several instances in which residential staff have deactivated power wheel chairs to essentially effect a “restraint”. The definition in this section would not “capture” such a restraint or “entrapment” under Section 10.8.5. Consider adding the

following sentence: “Restraint also includes the deactivation of mobility enabling assistive technology.”

6. In Section 2.19, the criteria for a “social worker” are somewhat minimal. It would enhance the quality of services to require a licensed social worker [Title 24 Del.C. Ch. 39]. Alternatively, requiring a Master’s degree would generally enhance quality.

7. In Section 2.19, the Division could also consider adding a clarifying reference that a licensed professional mental health counselor [Title 24 Del.C. Ch. 30] may qualify as a social worker. At a minimum, “mental health counseling” could be added to the list of qualifying human services fields.

8. In Section 2.0, the Division may wish to consider adding a definition of “advance practice nurse” [Title 24 Del.C. §1902(b)]. There are multiple references to advanced practice nurses within the regulations. See, e.g., Sections 6.3.5 and 6.3.6.

9. Section 3.7 should be amended to include the requirement of “posting” of the bill or rights to conform to Title 16 Del.C. §1123.

10. In Section 3.7, the Division should consider substituting “and” for “and/or” since the latter is disjunctive and could be interpreted as authorizing a facility to choose to comply with either federal regulations or the State bill of rights statute.

11. Sections 5.4.2.3 and 5.4.2.7 authorize operation of a nursing home with no on-site nurse during the third shift. This standard does not enhance resident safety and care and should be reconsidered. There should at least be an LPN on- site during the third shift.

12. Section 6.2.2 contemplates quarterly statements of resident personal funds. A resident can obtain more frequent statements on request. The Division may wish to consider adopting a norm of more frequent statements. Nursing homes typically bill on a monthly basis and could include the statement with the monthly bill. Indeed, Title 16 Del.C. §1121(3) requires nursing facilities to provide monthly statements.

13. There is some “tension” between Sections 6.3.3 and 6.10.2. The former section establishes a norm of a physician review of medications post hospitalization while the latter section contemplates pharmacist review post hospitalization.

14. In Section 6.5.3, I recommend adding “assistive technology needs”. The regulations contemplate a social worker review of adaptive equipment needs (§6.7.11) but the social worker credentials are minimal (as noted in Par. 6 above) and an AT assessment should be included as part of the medical review under Section 6.5.3. Compare §§11.2 and 13.2.10 of the DLTCRP assisted living regulations, 16 DE Admin Code 3225.

15. Section 6.6.2 could be improved by including a reference to civic activities such as voting. This would implement the following directive in the bill of rights: “(29) Every patient and resident shall be encouraged to exercise the patient’s or resident’s own rights as a citizen of the

State and the United States of America.” The elderly, in particular, view voting as a “civic duty”. Consider the following amendment: Scheduled activities...shall include...educational opportunities, *civic activities such as voting*, and interaction with community groups.” Alternatively, to encompass participation in candidate forums, etc., consider the following amendment: “Scheduled activities...shall include...educational opportunities, *civic activities such as participation in the electoral process*, and interaction with community groups.” By including voting among “activities”, transportation or assistance with absentee ballots would be “captured” by Section 6.6.4.

16. In Section 6.8, the “meals” section could be improved. For example, the DLTCRP assisted living regulations include an expectation that food be “palatable”. See §12.1.2 of 16 DE Admin Code 3225. DLTCRP neighborhood home regulations are even more descriptive. See Section 7.0 of 16 DE Admin Code 3310. Section 7.0 includes the following provisions:

7.7. Meals shall be served so that they are flavorful, attractive in appearance, at appropriate serving temperature, and have preserved their nutritional value.

7.3. Persons shall be offered opportunities for choices in food selection...

7.8. Meals should be provided in locations which provide the opportunity for socialization, choice, sanitation, and also support the person’s preferences.

17. Section 6.11.1.6 disallows self-administration of even over-the-counter medications unless approved by both a physician and interdisciplinary team. This may be a bit “overbroad” since a resident could not even use lip balm (chapstick) or lotions without physician and team approval.

18. Sections 7.3.4 and 7.4.1.2 require facilities to be equipped with a resident call system and have handrails on both sides of corridors. However, ICF/MRs serving “developmentally disabled residents” are exempt. Apart from lack of “people-first” language, these exemptions are problematic. On a practical level, residents of the Stockley Center and Mary Campbell Center (assuming it includes an ICF/MR unit) would benefit from handrails and a call system. Legally, the exemption ostensibly constitutes discrimination against persons with mental retardation in violation of the ADA, Section 504, and the Equal Accommodations law.

19. Section 7.4.2.5 allows four (4) residents per room. This is not conducive to privacy and suggests a “warehousing” approach.

20. Several sections deal with infection control and sanitary practices. Consistent with the attached articles, the incidence of C.diff, MRSA, and other treatment-resistant pathogens is alarming. See, e.g., the attached articles. It appears that resident laundry should not be commingled, that high temperatures should be used in washing, and that bleach should be routinely

used. The Division should consider the following amendments.

a. Temperature is addressed at §7.6.3.1. However, the 160 degree temperature standard only applies to on-site laundry. Section 7.6.4 should be amended to also impose a temperature standard for off-site laundry.

b. There is no prohibition on mass or commingled laundry, even of undergarments. This should be made explicit.

c. At a minimum, Section 7.6.3 could require that bleach be available in the on-site laundry area. Better yet, the Division could consider requiring all laundry susceptible to washing with bleach, including all undergarments, be washed with bleach.

21. Section 7.7.2.5 requires that each resident have “a chair suitable for resident relaxation” Although implied, the text does not indicate whether this chair must be in the resident’s room as juxtaposed to a common area. It is also unclear if a single chair in a room with four residents would suffice or if four chairs would be required in a room with four residents.

22. Section 10.3 requires maintenance of records for 6 years for adults after discharge but only 3 years for minors after attaining the age of majority. The rationale for the shorter period is unclear. Since the statute of limitations for a suit by the minor would generally not begin to run until the minor turned 18, longer record retention would be prudent. For similar reasons, the 3 year maintenance period for retention of incident reports in Section 10.6 may be unduly short.

23. Although facilities are generally required to comply with the bill of rights (Title 16 Del.C. §1121) under Section 3.7, the Division includes some references to specific rights throughout the regulations. See, e.g., Sections 6.5.8. Given the importance of discharge, it would be preferable to include some specific standards in the regulations conforming to Title 16 Del.C. §1121(18).

I recommend sharing the above observations with the Division and Long-term Care Ombudsman.

12. Dept of Insurance Prop. Arbitration & Review Reg.. [12 DE Reg. 611 (November 1, 2008)]

The Department of Insurance proposes to issue new standards covering internal review,

arbitration, and independent utilization review of health insurance claims. In general, the standards are logically organized and designed to promote timely decision-making.

I have only a few observations.

First, in Section 2.0, the definition of “medical necessity” is underinclusive since it only covers service and products related to treatment of “illness, injury, disease symptoms”. This would not cover treatment for congenital or acquired conditions such as cerebral palsy and spina bifida. I recommend that “condition” be inserted between illness and injury. Alternatively, to achieve consistency with the definition of “health care services”, the word “disability” could be inserted.

Second, Section 6.1.3.3 requires an insured to pay a non-refundable \$75.00 filing fee for arbitration. Section 6.7.1 contemplates the insurer covering arbitration costs beyond the \$75.00 fee. Although the filing fee would be very reasonable for most consumers, it may prove a barrier to persons in poverty. The Department may wish to consider authorizing the filing of an application for arbitration in forma pauperis. Judicial standards for IFP applications could be adopted.

I recommend sharing the above observations with the Department of Insurance.

### 13. Delaware Violent Crimes Comp. Bd. Prop Regulations [12 DE Reg. 546 (November 1, 2008)]

The Delaware Violent Crimes Compensation Board is established by Title 11 Del.C. Ch. 90. A new executive director was appointed earlier this year who is attempting to improve the overall operation of the Board and staff. As part of that initiative, the Board is issuing this set of proposed revisions to its regulations.

I have the following observations.

1. In Section 1.1, the reference to “States that do not have a funded Victim Compensation Program” is not entirely accurate. The relevant statute [Title 11 Del.C. §9005(6)b] authorizes Delaware awards for out-of-state occurrences even if the other state has a funded program. The key determinant is whether the other state’s program offers equal benefits. At a minimum, the Board may wish to consider adding “offering equal benefits” after “Program”.

2. Section 1.1 was easier to understand in its superseded format using subparts rather than a 98-word “run-on” sentence. I recommend that the concepts embodied in Section 1.1 be divided into

subparts.

3. Section 2.0 is problematic. At the outset, Section 2.1 recites that the definitions in the enabling statute are incorporated into the regulations by reference followed by a colon and recapitulation of definitions compiled in Title 11 Del.C. §9002. Unfortunately, the regulatory definitions diverge significantly from the statutory definitions which “muddies the waters”. The following are examples:

a. The definition of “crime” omits “driving under the influence of any alcohol or drug or driving with a prohibited blood alcohol concentration, or hit-and-run” and “any act of domestic violence or abuse.” Compare Title 11 Del.C. §§9002(3)f and 9002(3)g.

b. The definition of “personal injury” is manifestly narrower than the statute. The statute covers “mental, emotional, or psychological harm” while the regulation only covers “extreme mental suffering”. [emphasis supplied] See Title 11 Del.C. §9002(8).

c. The definition of “pecuniary loss” does not comport with Title 11 Del.C. §9002(7). For example, it omits crime scene cleanup, moving expenses, essential personal safety property, and insurance deductibles.

It is misleading to recite that the statutory definitions are incorporated by reference and then to list definitions which are inconsistent with the statutory definitions.

4. In Section 2.0, definition of “permanent and total disability”, substitute “or” for “of” between “working” and “functioning”.

5. In Section 7.1, delete the comma between “be” and “or”. I also recommend that the section recite that the rules will be available on the Board’s website.

6. Section 10.4 recites that case files and records fall under the “open records provision of the Freedom of Information Act, 29 Del. Laws, c. 100. “ There are multiple problems with this section. I assume the citation should be to 29 Del.C. Ch. 100. Unfortunately, that chapter has multiple sections dealing with records. It is unclear if the Board views its records as generally available to the public or generally excluded from public review. The “open meetings” statute (as juxtaposed to the “records” statute, authorizes the Board to close meetings for claims involving sex offenses, offenses involving children, or unadjudicated crimes. See Title 29 Del.C. §§10003 and 10004(h)(7)a. Does the Board intend the records filed in such cases to be open to the public? Does the Board wish to reserve discretion to bar access to other sensitive records (e.g. those related to victims of domestic violence)? The access to records provision merits clarification.

7. In Section 17.2, substitute “depositions” for “dispositions”.

8. In Section 18.1, capitalize “special” at the beginning of the second sentence.

9. In Section 18.2, delete the commas after “evidence” and “material” AND substitute “are” for “is” after “finds”.

10. Section 18.6 attempts to track Title 29 Del.C. §10004(h). However, it is literally narrower since the statute contemplates closing the entire “meeting” for certain cases while the regulation only closes the Board deliberation part of the meeting/hearing. It would be preferable to adopt the statutory standard of closing the entire proceeding. Moreover, as noted above under Par. 6, the Board may wish to add an authorization retaining some discretion to close proceedings in other contexts (e.g. those involving domestic violence).

11. In Section 18.8, there are two “typos”. I assume “repoen” should be “reopen”.

12. In Section 19.1, delete the comma after “attorney”.

13. In Section 20.4, the phrase “(h)ourly fee rate to be determined by the Board” lacks a predicate and is not a complete sentence.

14. In Section 25.4, substitute “25.1” for “27.1”.

I recommend sharing the above observations with the Violent Crimes Compensation Board with courtesy copies to the Victim Rights Task Force and Disability Committee of the Victim Rights Task Force.

Attachments

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