

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory Initiatives

Date: December 9, 2007

I am providing my analysis of twelve (12) regulatory initiatives in anticipation of the December 13 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DPH Lead Paint Hazards Regulation [11 DE Reg. 759 (December 1, 2007)]

The SCPD, GACEC, and DDC commented on the proposed version of these regulations in September, 2007. The September 27, 2007 GACEC letter is attached for facilitated reference.

The Councils issued two (2) recommendations.

First, the Councils suggested that the Division of Public Health consider deletion of references to “Tribal officials” and “Tribal orders”. The Division agreed and deleted five (5) references in §§2.6.4 and 4.5.4.1.

Second, the Councils noted the “disconnect” between the standards on “play areas” versus actual practice and standards issued by other governmental agencies. The DPH standards limited testing to “play areas” defined as areas of “frequent soil contact” while DSCY&F day care regulations and ADA regulations envision substrates of rubber, wood chips, pea gravel, etc. Indeed, the DSCY&F warns that shredded tires may contain contaminants.

The DPH responded as follows:

The Agency consulted with the Environmental Protection Agency (EPA) and contends that Section 1.4 regarding “play areas” reflects the standards of the EPA. When the EPA promulgated its standards for soil hazards, it did not consider the potential lead exposure risk associated with other play area media such as: mulch, wood chips, pea gravel, etc. After a careful review, the Agency has determined that the regulatory definition is congruent with EPA standards. The Agency will advise the EPA to consider Lead Based Paint Hazards standards for non-soil play area substrate.

Although it may have been preferable for DPH to have addressed lead paint hazards in

contexts other than soil, the regulations are final. I recommend no further action.

2. DMMA Final Nursing Home Reimbursement Regulation [11 DE Reg. 792 (December 1, 2007)]

The SCPD and DDC commented on a proposed Medicaid Plan amendment in October, 2007. The Division of Medicaid & Medical Assistance has now adopted final regulations with no changes.

First, the Councils endorsed adoption of flexible standards in creating rates for public facilities. DMMA acknowledged the endorsement.

Second, the Councils recommended substitution of “facility residents” for “residents in Delaware” to clarify that the Medicaid Director could waive State Plan reimbursement limits for beneficiaries in out-of-state facilities (e.g. Voorhees). DMMA responded as follows:

Our intent was that the provision applies to Delaware Medicaid recipients, including individuals who are receiving services in other states. We will take your comment under consideration when the State Plan Amendment is submitted to CMS.

The latter comment is somewhat odd. My impression is that it would be easier to send a revised version to CMS if already changed in the regulation. Perhaps CMS has informally approved the regulatory language and DMMA is reluctant to jeopardize the approval through revisions that have not been shared with CMS in advance.

I recommend no further action.

3. DMMA Final ABI Waiver Regulation [11 DE Reg. 786 (December 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in October, 2007. The Division of Medicaid & Medical Assistance has now issued final regulations with no changes.

First, the Councils observed that the waiver adopted a “commercial-provider services” model in contrast to a “participant directed services” model. The Councils surmised that this could be justified based on the variety of services during the initial 3 year waiver period. DMMA responded that this supposition was accurate.

Second, the Councils described some positive aspects to the waiver. DMMA acknowledged the commentary.

Third, the Councils noted the description of a DSAAPD-DMMA MOU describing agency collaboration in implementing the waiver. The Councils requested a copy. DMMA agreed to supply the copy and forwarded it to the SCPD last month.

Fourth, the Councils identified the lack of consumer satisfaction surveys as a weakness.

DMMA responded that case managers would have monthly in-person contact with participants and would share any concerns with DMMA through quarterly reports.

Fifth, the Councils endorsed the lack of a maximum age limit. DMMA acknowledged the endorsement.

Sixth, the Councils expressed concern that eligibility was limited to persons who required at least one waiver service, apart from case management, not available in another waiver. The Councils provided an example. DMMA acknowledged the accuracy of the example and justified the standard based on focusing the waiver on those persons who would most benefit from its menu of services. Others may apply for the Elderly & Disabled (E&D) Waiver.

Seventh, the Councils suggested that DMMA adopt a slightly more liberal severity test for eligibility which would include persons scoring at a level 9 on the Rancho Los Amigos Level of Cognitive Functioning Scale. DMMA responded that it must limit eligibility given the modest number of available slots.

Eighth, the Councils endorsed use of an aggregate rather than individual cost cap. DMMA acknowledged the endorsement.

Ninth, the Councils suggested consideration of amending the waiting list standards to prioritize persons in crisis. DMMA responded that the waiver is not designed to address persons in crisis.

Tenth, the Councils suggested increasing the income cap from 250% of the FBR to 300% of the FBR. DMMA declined to effect an amendment.

Eleventh, the Councils expressed concern with the requirement that waiver participants receive at least one waiver service, apart from case management, on a monthly basis. The Councils noted that this can result in individuals who are dying or ill having to attend day programs to maintain waiver eligibility. DMMA responded that individuals can opt to apply for other waivers.

Twelfth, the Councils noted the anomaly of capping income at 250% of the FBR while expected 40% of participants to reside in assisted living residences with \$40,000 room and board rates not covered by the waiver. DMMA responded that the waiver cannot cover room and board and most waiver participants will have SSI income which can be used to pay the room and board.

Thirteenth, the Councils objected to the DMMA choice to not allow relative providers. DMMA responded that “consumer direction, including the use of family members to provide care, has clearly established merit as a service delivery model”. However, during the initial 3 year period, DMMA has adopted a commercial provider model.

Fourteenth, the Councils endorsed provision of case management services only by professionals with an RN or LCSW. DMMA acknowledged the endorsement and noted that

credentials are important given the “complex nature of the issues and service needs of the ABI population.”.

Fifteenth, the Councils questioned somewhat austere utilization limits. DMMA responded that they are based on patterns of participants in other waivers and the need to keep costs within bounds.

Sixteenth, the Councils observed the pros and cons of disallowing an agency from providing both case management and other services. DMMA responded that its intent was to prevent conflicts of interest.

Eighteenth, the Councils endorsed a requirement that ABI care plans include back-up plans in the event the regular provider is unavailable. DMMA acknowledged the endorsement.

Nineteenth, the Councils recommended that monthly meetings between case managers and participants occur at service locations. DMMA responded that case managers have discretion in this context.

Twentieth, the Councils endorsed referrals to CLASI for persons requesting hearings. DMMA acknowledged the endorsement.

Twenty-first, the Councils endorsed the prohibition on seclusion and restraint. DMMA acknowledged the endorsement.

Twenty-second, the Councils noted that the waiver incorrectly limits administration of medications to medical personnel or persons who have completed Board of Nursing training. DMMA responded that the Councils are correct in identifying exceptions but opined that the commercial providers allowed in the waiver would not qualify for the exceptions.

Twenty-third, the Councils observed that some reimbursement rates were ostensibly high (e.g. \$26.68 hr for respite) given the commercial provider model. DMMA responded that the rates are based on those in other waivers.

Twenty-fourth, the Councils noted some “tension” among provisions describing supplemental and enhanced payments. DMMA clarified its intent.

Twenty-fifth, the Councils supported the prediction of little turnover among waiver participants. DMMA acknowledged the comment.

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

4. DSS Final Food Stamp Notice Regulation [11 DE Reg. 795 (December 1, 2007)]

The SCPD commented on the proposed version of these regulations in October, 2007. The Division of Social Services has now adopted final regulations with one (1) amendment.

First, the Council observed that DSS failed to provide the rationale for the proposed regulations in its notice as required by the APA. DSS apologized for the omission which it attributed to a publication error.

Second, the Council endorsed a revision contemplating further attempts to reach a household if mail is returned by the Post Office. The Council submitted USDA guidance supporting such attempts. DSS agreed that such attempts should be undertaken which is the basis for the amendment endorsed by the Council.

Third, the Council recommended correcting an incorrect citation. DSS agreed and substituted the correct citation.

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

5. DOE Final School Police Relations Regulation [11 DE Reg. 741 (December 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in October, 2007. The Department of Education has now adopted final regulations with some amendments. A November 12 letter is attached which provides the DOE's rationale for the amendments.

First, the Councils recommended that the DOE consider a time standard (e.g. trained within the past 3 years) for administrators authorized to train others. The DOE agreed and adopted a "24 month" standard.

Second, the Councils observed that Section 6.0 was confusing and overbroad insofar as it required reporting of minor offenses. The DOE agreed that the section was confusing and added some clarifying amendments. However, it did not eliminate the reporting requirement for minor offenses.

Third, the Councils recommended inclusion of a definition of "bullying". The DOE declined to include a definition.

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

6. DOE Final Elementary School Counselor Regulation [11 DE Reg. 745 (December 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in October, 2007. A copy of the October 17, 2007 GACEC letter is attached for facilitated reference. The Professional Standards Board and DOE have now approved final regulations with two (2) amendments. A copy of a November 19 DOE letter is attached which responds to the Councils'

comments.

First, the Councils noted that the lack of a definition of “content area” would allow a school librarian or PE teacher to qualify as a school counselor after completion of 27 semester hours of specified course work. The DOE effected no amendment based on the following rationale:

The Professional Standards Board has considered the comment and determined that in light of the other experience and content knowledge requirements, keeping the educational requirement set forth in 4.1.2 broad is both purposeful and reasonable. .

Second, the Councils noted that someone could serve as a middle school counselor with no counseling certification. The DOE added a sentence recommended by the Councils verbatim.

Third, the Councils suggested amending the experience standard to “count” work in a middle school. The DOE effected no amendment based on the following rationale:

After consideration, the Professional Standards Board determined that in recognition of the fact that elementary and middle level students have unique and often divergent needs, that it is appropriate as a general rule to require experience in an elementary school to obtain certification as a elementary school counselor. The Professional Standards Board also recognizes that there may be unique or exceptional circumstances where an educator’s experience (including Middle Level experience) may qualify under Section 4.2.2 as ‘equivalent’ experience.

Fourth, the Councils suggested a grammatical amendment to §4.1.2. The DOE added the amendment.

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

7. DOE Final Secondary School Counselor Regulation [11 DE Reg. 756 (December 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in October, 2007. A copy of the October 17, 2007 GACEC letter is attached for facilitated reference. The Professional Standards Board and DOE have now approved final regulations with two (2) amendments. A copy of a November 19 DOE letter is attached which responds to the Councils’ comments.

First, the Councils noted that the lack of a definition of “content area” would allow a school librarian or PE teacher to qualify as a school counselor after completion of 27 semester hours of specified course work. The DOE effected no amendment based on the following rationale:

The Professional Standards Board has considered the comment and determined that in light of the other experience and content knowledge requirements, keeping the educational requirement set forth in 4.1.2 broad is both purposeful and reasonable.

Second, the Councils noted that someone could serve as a middle school counselor with no counseling certification. The DOE added a sentence recommended by the Councils verbatim.

Third, the Councils suggested amending the experience standard to “count” work in a middle school. The DOE effected no amendment based on the following rationale:

After consideration, the Professional Standards Board determined that in recognition of the fact that middle and elementary level students have unique and often divergent needs, that it is appropriate as a general rule to require experience in an secondary school to obtain certification as a secondary school counselor. The Professional Standards Board also recognizes that there may be unique or exceptional circumstances where an educator’s experience (including middle level experience) may qualify under Section 4.2.2 as ‘equivalent’ experience.

Fourth, the Councils suggested a grammatical amendment to §4.1.2. The DOE added the amendment.

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

8. DOE Prop. Student Teacher Background Check Reg. [11 DE Reg. 711 (December 1, 2007)]

The Department of Education proposes to amend its criminal background check regulations.

As background, Title 11 Del.C. §8570 requires persons seeking employment with a public school, seeking employment with a contractor for a public school, or otherwise having regular direct access to public schools to undergo a criminal background check. The Department is now amending its regulation to specifically cover persons seeking assignment as student teachers.

The amendments are discrete and add specific references to student teachers throughout the regulation. I did not identify any concerns. Since the regulation may result in protection of children from abuse, I recommend endorsement.

9. Insurance Dept. Prop. Credit Life & Health Insurance Reg. [11 DE Reg. 727 (December 1, 2007)]

The Department of Insurance proposes to adopt some discrete amendments to its standards regulating premiums charged for credit life and health insurance. The proposed changes correct an error in the existing regulation and replace an outdated mortality table with a more current table.

The amendments are technical and benign. I recommend no action.

10. DMMA Proposed ABI Waiver Program Regulation [11 DE Reg. 722 (December 1, 2007)]

The Division of Medicaid & Medical Assistance proposes to replace ABI Waiver program standards adopted in 2004 based on the previous waiver (which was later withdrawn).

The standards basically “track” the waiver document and other regulations adopted this month [11 DE Reg. 786 (December 1, 2007)]. However, I have two (2) observations.

First, the reference to DLTCRP Regulation 5.9 at the end of the regulation is ostensibly an inaccurate citation. The DLTCRP assisted living regulation is codified at 16 DE Admin Code 3225.

Second, DMMA POL-20700.5.1 ABI Program Absences Due To Hospitalization recites that “ABI waiver services will terminate upon the 31st day of hospitalization.” It is unclear if DMMA intends this reference to mean that services are suspended/cease or that the participant is actually terminated from the waiver program. This provision is obtuse and may merit clarification. If the provision is retained, the following could be substituted to conform to the advance notice requirement of 16 DE Admin Code 5301:

1. In the event of an extended hospitalization, DMMA will send advance notice to the participant that all waiver services will terminate upon the 31st day of hospitalization.

This is a more consumer-oriented approach which alerts the participant that he/she may wish to promote discharge from the hospital before the 31st day. Otherwise, the regulation literally contemplates more draconian termination of all services with no advance warning.

If DMMA does intend to terminate waiver eligibility on the 31st day, the consequences to the participant could be severe. The participant would have to reapply for eligibility and be placed at the end of any waiting list [Appendix B:3:3]. The participant may lose the supports necessary for discharge, thus extending the hospital stay even further. It would therefore be preferable to suspend waiver services upon the 31st day of hospitalization rather than terminating the participant’s enrollment in the waiver.

I recommend sharing the above observations with DMMA.

11. DMMA Prepaid Funeral Regulation [11 DE Reg. 721 (December 1, 2007)]

The Division of Medicaid & Medical Assistance proposes to amend its prepaid funeral regulation.

As background, qualifying irrevocable prepaid funerals are generally deemed disregarded assets for purposes of meeting Medicaid resource limits. See, e.g., 16 DE Admin Code 20310.8.5 which recites as follows: A prepaid burial contract (sometimes funded by a life insurance policy) that cannot be revoked and cannot be sold without significant hardship is excluded.

In May, 2007, the Legislature enacted H.B. No. 137 which increased the statutory limit on prepaid funerals from \$10,000 to \$15,000 effective January 1, 2008. DMMA is now proposing to amend its Medicaid regulations to authorize a resource exemption of \$15,000 for conforming arrangements. I did not identify any concerns with the proposed regulations. Since the regulations

expand resource exemptions for beneficiaries, I recommend endorsement.

12. DFS Proposed Child Care Home Regulations [11 DE Reg. 730 (December 1, 2007)]

The Office of Child Care Licensing of the Division of Family Services has issued a 128-page set of child care home regulations.

As background, the Division developed the standards after conducting focus groups and obtaining input from a large task force. DFS notes that the current standards were adopted in 1994 and merited comprehensive revision. There are two sets of regulations. Part 103 covers “family child care homes” in which care is provided for 1-6 children in the licensee’s private home. Part 104 covers “large family child care homes” in which care is provided for 7-12 children in either a private home or non-residential setting. Public hearings have been scheduled in January and comments are due by January 16, 2008.

I have the following observations and recommendations.

PART 103

1. The IDEIA Part C infant and toddlers program is implemented through Title 16 Del.C. Ch. 2. The program is intended to provide instructional, therapy and other services in community settings, including child care homes and facilities. Title 16 Del.C. §214 requires all State agencies to cooperate to ensure effective implementation. There is no mention of individual family service plans (IFSPs) in Part 103. In the past, some day care providers balked at allowing Part C-sponsored professionals to provide services within the day care. It would be helpful if the DFS regulations required or encouraged cooperation. For example, the following §46.1.2 could be added :

46.1.2 For children with disabilities enrolled in the State Infant & Toddler Early Intervention Program [Title 16 Del.C. Ch. 2], the Licensee shall cooperate with Program representatives to facilitate implementation of a child’s individual family service plan [IFSP]. Such cooperation shall include honoring reasonable requests to permit professionals to provide services in the family child care home.

Alternatively, the above sentences could be added to existing §46.3.

2. Although there are a few cryptic references to “nondiscrimination” (e.g. §29.1.2), the regulations do not mention or proscribe discrimination based on race, disability, or other protected classes. At a minimum, §7.2.3 could be renumbered §7.2.4 and the following new §7.2.3 inserted:

7.2.3 Commitment to comply with applicable non-discrimination laws, including the Americans with Disabilities Act [42 U.S.C. 12101] and Delaware Equal Accommodations Law [Title 6 Del.C. Ch. 45].

I attach a December 2, 1991 Delaware Attorney General’s Opinion holding that day care centers are covered by both the ADA and Delaware Equal Accommodations law.

3. In §4.0, definition of “Corrective Action Plan”, delete the extraneous “the” after “specifies”.
4. In §4.0, definition of “Household Member(s)”, DFS should consider whether “Licensee’s” should be substituted for “child’s” prior to “household”.
5. In §4.0, definition of “Institutional Child Abuse or Neglect”, insert “while” before “placed”.
6. In §4.0, definition of “Office of Child Care Licensing”, the grammar at the end is problematic. DFS could consider the following amendment: “...Subchapter III, to license and prescribe, by regulations or otherwise, any reasonable standards for the conduct of child care facilities, institutions, agencies, associations, or organizations.”
7. In §4.0, definition of Pre-school-Age Child”, consider substituting “whichever” for “which ever”.
8. In §4.0, definition of “Substitute”, insert “who” before “meets”.
9. In §4.0, definition of “Supervision”, substitute “is” for “are” before “providing”.
10. In §6.1, amend the last two lines as follows: “...purposes of determining compliance and/or investigating complaints of non-conformity with applicable provisions of these Rules, ~~and~~ or any other applicable codes, regulations, and laws.”
11. In §6.2, last line, effect two amendments: 1) substitute “of non-conformity” for “with” before “applicable”; and 2) substitute “or” for “and” before “any other applicable”.
12. In §7.1, delete comma after “Licensure”.
13. There are several references in which licensees are admonished to maintain “full or substantial compliance”. See, e.g., §§7.2.2; 8.1; 8.2; 9.2.2; and 9.3. These references will prove problematic for the Division in suspension, revocation, and similar enforcement contexts. In effect, the reference to “full or substantial compliance” is equivalent to 100% or 80% fulfillment of the regulations. This disjunctive standard is an invitation to the attorney for a licensee arguing that only “substantial” conformity with standards is required. I recommend deleting “full or substantial” so the references simply require “compliance” without any inconsistent adjectives which “muddy the waters”.
14. Sections 7.11, 17.9 , and 17.10 require any adult in the household of a child care home to sign a release for all medical records and mental health treatment records. This could be perceived as somewhat “overbroad”. In particular, §17.10 reinforces a stereotype that persons “under treatment” for mental illness are likely to be dangerous. Moreover, why is the “vision and hearing” (§7.11.1.3) of a household member who is not involved in child care material to licensing? Confidentiality is also a concern in this context. Section 15.0 requires DFS to provide the reasons for adverse action on a license to the licensee. If DFS discloses medical or mental health information of a household member to the licensee as the basis for the adverse action, the household member’s confidential information is compromised. Indeed, §17.8 requires the licensee to actually possess the health appraisal of the household members which may contain highly confidential information. DFS

should consider revising these sections to reflect legitimate privacy interests.

15. In §8.1, delete the comma after “Licensee”.

16. Amend §9.1.3 as follows: ...Licensing ~~of~~ its intent to comply with the plan.

17. In §11.2.1, substitute “impacts” for “impact”.

18. Section 13.1.1, first sentence, could be raised as a bar to a DFS complaint investigation if an allegation involves both a DFS standard and another agency’s standard. DFS should preserve its discretion by substituting “may” for “shall” to obviate a licensee argument that DFS lacks the authority to investigate a complaint.

19. In §14.1.1, delete the extraneous “the” before “State”.

20. In §14.1.4, insert “of” before “determining” and insert “of non-conformity” after “complaints”. The comma after “Licensing “ should also be deleted.

21. In 14.1.5, delete the comma after “Licensing” and insert “of” after “purposes”.

22. In §16.0, there is no provision for notice to the parents of a variance request. Compare DPH regulations for Adult Day Care, 16 DE Admin Code 4402:

5.15 Waiver of Requirements

5.15.1 Waiver of a standard requires Department approval. Waiver requests must be made in writing, include the full justification behind the request and address issues of safety and infection control. They are an exception to established standards and will only be approved for compelling reason.

5.15.1.1 Waiver requests which could potentially impact the health, safety or welfare of the participants must be shared with the participants and their representatives prior to submission of the waiver request to the Department.

5.15.1.1.1 Participants must be informed that they may voice their objections to any waiver request by contacting the Department.

Compare also DLTCRP ICF regulations, 16 DE Admin Code 3205:

11.0 Waiver of Standards

11.1 Specific standards may be waived by the State Board of Health provided that each of the following conditions are met:

11.1.1 Strict enforcement of the standard would result in unreasonable hardship on the

license.

11.1.2 The Waiver is in accordance with the particular needs of any client of the licensee.

11.1.3 A Waiver must not adversely affect the health, safety, welfare, or rights of any client of the licensee.

11.1.4 The request for a Waiver must be made to the State Board of Health in writing by the licensee with substantial detail justifying the request.

11.1.5 Prior to filing a request for a waiver, the facility shall provide written notice of the request to each resident, each court-appointed guardian of any resident, each person appointed in the durable power of attorney of any resident, each person appointed to be a resident's health care agent under the Death with Dignity Act and each spouse and adult child of any resident. Prior to filing a request for a waiver, the facility shall also provided written notice of the request to the Office of Long Term Care Ombudsman. The notice shall state that the recipient has the right to object to the waiver request orally at the State Board of Health meeting when the request is being considered or in writing to the Board of Health in advance of such meeting.

11.1.6 A Waiver granted by the State Board of Health is not transferable to another licensee in the event of a change of ownership.

11.1.7 A Waiver shall be granted for the term of the license.

Solicitation of parental input would be consistent with other regulations encouraging parental notice and involvement. See, e.g. §§25.7 and 29.1. At a minimum, the following sentence could be added to §16.1:

The Division may require a Licensee to provide notice of a variance request to the parent(s)/guardian(s) of children which offers them the opportunity to provide input on the variance request to the Division.

23. Section 17.6 contains a categorical prohibition on issuance of a license to anyone who has relinquished custody of a child due to "dependency". This is "overbroad". Dependency is defined in Title 10 Del.C. §901. In contrast to abuse and neglect, dependency does not implicate fault. A child may be removed under the "dependency" statute simply because the parent lacks "the financial means to provide for the care of the child". Paradoxically, a parent may actually try to establish a child day care home to obtain income to facilitate family reunification and remove "dependency". Apart from lack of finances, dependency may occur based on extraordinary needs of a child which a parent cannot meet (e.g. child is medically involved and is placed in medical foster home). The DLP has also filed "reverse dependency" petitions in which a parent affirmatively requests a Family Court dependency finding as a basis for a court order directing State agencies to provide services. In sum, "dependency" should not be a categorical bar to a license.

24. In §27.1.3, substitute "each" for "any". Otherwise, a parent caring for a 1 one year old and a 12

year old would literally only need to be versed in first aid and CPR for the 12 year old.

25. Section 29.1.3 is grammatically awkward and merits revision.

26. Amend §29.1.7, substitute “sharing the record” for “share these”.

27. In §30.1.7, DFS should consider substituting “prescription and non-prescription” for “prescribed” since the licensee would benefit from a parental statement regarding over-the-counter medications too. The regulations contemplate use of “non-prescription medication” (§53.5).

28. In §33.5, substitute “is” for “are” before “maintained”.

29. In §33.11, the reference to “nearest” is problematic. In New Castle County, the “nearest” police department may not have jurisdiction, i.e., the County police may have jurisdiction in a subdivision even though the State police troop is closer. Similarly, the nearest hospital may lack an emergency room or not be within the parent’s insurance network. Poison control centers may also not be nearby. Consider deleting of “the nearest” and substitution of “appropriate”.

30. There is some ostensible inconsistency between standards which require that children be “cared for in ground level space” (§§33.17 and 44.1) versus standards authorizing care in basements (§33.20) and other floors (§33.21).

31. Section 34.1 is somewhat inane. It literally requires a certification from a licensed veterinarian that every guppy, goldfish, snail, or hermit crab is free of disease. This could be very expensive and of no real value in protecting children from disease.

32. Section 38.2 violates State law. There is no exemption for bike helmets based on wheel size. See Title 21 Del.C. §4198K. See also safety statistics in S.B. No. 174 introduced in September, 2007. A child can incur head trauma from a fall from a 16 inch wheel bike as well as from a 20 inch wheel bike.

33. Since the regulations (Section 38) cover bikes and scooters, DFS may wish to address child use of motorized skateboards and scooters consistent with 21 Del.C. §4198N. For example, helmets are required. Moreover, minors under age 12 can only ride such devices on property owned by parents so they should not be used by anyone under 12 at a child care site. Such devices are becoming increasingly commonplace.

34. Section 38.2.2 categorically bars a child from wearing a helmet while using playground equipment. This is inane. Children may benefit from a helmet to reduce prospects of injury when negotiating a skateboard ramp, climbing apparatus, etc.

35. In §39.6, delete the extraneous “all” before “during”.

36. In §41.4.1, it is unclear if DFS intended to include the word “not” before “rinsed”.

37. Section 44.5 literally requires all children (regardless of age) to sleep in a bed at night with a

pillow and blanket. This is inconsistent with requirements that infants be placed in cribs or playpens (§43.1.5) without a pillow, quilt, etc. (§43.3.6).

38. In §47.2, substitute “are” for “be” before “available”.

39. In §47.3, substitute “loose” for “lose”.

40. The “time-out” and “restraint” standards in §48 are detailed and merit endorsement. The ban on corporal punishment (§48.2.5) likewise merits endorsement.

41. In §48.2.4.1, substitute “Children” for “hildren”.

42. In §49.12, consider adding a reference to palatable temperatures. Compare DDDS Neighborhood Home Regulation, 16 DE Admin Code 3310:

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

43. In §52.3.7.2, a word is missing (e.g. “develop” or “require”) before “a written plan”.

PART 104

44. In §3.0, Infant/Toddler Home definition, insert “seven (7) to” before “twelve”.

45. In §3.0, Toddler definition, delete extraneous “and “ before “months”.

46. The IDEIA Part C infant and toddlers program is implemented through Title 16 Del.C. Ch. 2. The program is intended to provide instructional, therapy and other services in community settings, including child care homes and facilities. Title 16 Del.C. §214 requires all State agencies to cooperate to ensure effective implementation. There are a few references to individual family service plans (IFSPs) in Part 104. See §§3.0 (definition of IFSP), 44.1.9, and 44.2.2. In the past, some day care providers balked at allowing Part C-sponsored professionals to provide services within the day care. It would be helpful if the DFS regulations required or encouraged cooperation. For example, the following §60.2.2 could be added: :

60.2.2 For children with disabilities enrolled in the State Infant & Toddler Early Intervention Program [Title 16 Del.C. Ch. 2], the Licensee shall cooperate with Program representatives to facilitate implementation of a child’s individual family service plan [IFSP]. Such cooperation shall include honoring reasonable requests to permit professionals to provide services in the family child care home.

Alternatively, the above sentences could be added to existing §60.5.

47. Although there are a few cryptic references to “nondiscrimination” (e.g. §43.1.2), the regulations do not mention or proscribe discrimination based on race, disability, or other protected classes. At a minimum, §8.2.2 could be renumbered §8.2.4 and the following new §8.2.3 inserted:

8.2.3 Commitment to comply with applicable non-discrimination laws, including the Americans with Disabilities Act [42 U.S.C. 12101] and Delaware Equal Accommodations Law [Title 6 Del.C. Ch. 45].

I attach a December 2, 1991 Delaware Attorney General’s Opinion holding that day care centers are covered by both the ADA and Delaware Equal Accommodations law.

48. There are several references in which licensees are admonished to maintain “full or substantial compliance”. See, e.g., §§8.2.2; 8.3; 9.1; 9.2; 10.2.2; and 10.3. These references will prove problematic for the Division in suspension, revocation, and similar enforcement contexts. In effect, the reference to “full or substantial compliance” is equivalent to 100% or 80% fulfillment of the regulations. This disjunctive standard is an invitation to the attorney for a licensee arguing that only “substantial” conformity with standards is required. I recommend simply deleting “full or substantial” so the references simply require “compliance” without any inconsistent adjectives which “muddy the waters”. Compare §14.1.

49. In §10.1, some words are missing after “issued to”.

50. Consider amending §10.1.3 to read “...its intent to comply with the plan.”

51. In §17.0, there is no provision for notice to the parents of a variance request. Compare DPH regulations for Adult Day Care, 16 DE Admin Code 4402:

5.15 Waiver of Requirements

5.15.1 Waiver of a standard requires Department approval. Waiver requests must be made in writing, include the full justification behind the request and address issues of safety and infection control. They are an exception to established standards and will only be approved for compelling reason.

5.15.1.1 Waiver requests which could potentially impact the health, safety or welfare of the participants must be shared with the participants and their representatives prior

to submission of the waiver request to the Department.

5.15.1.1.1 Participants must be informed that they may voice their objections to any waiver request by contacting the Department.

Compare also DLTCRP ICF regulations, 16 DE Admin Code 3205:

11.0 Waiver of Standards

11.1 Specific standards may be waived by the State Board of Health provided that each of the following conditions are met:

11.1.1 Strict enforcement of the standard would result in unreasonable hardship on the license.

11.1.2 The Waiver is in accordance with the particular needs of any client of the licensee.

11.1.3 A Waiver must not adversely affect the health, safety, welfare, or rights of any client of the licensee.

11.1.4 The request for a Waiver must be made to the State Board of Health in writing by the licensee with substantial detail justifying the request.

11.1.5 Prior to filing a request for a waiver, the facility shall provide written notice of the request to each resident, each court-appointed guardian of any resident, each person appointed in the durable power of attorney of any resident, each person appointed to be a resident's health care agent under the Death with Dignity Act and each spouse and adult child of any resident. Prior to filing a request for a waiver, the facility shall also provided written notice of the request to the Office of Long Term Care Ombudsman. The notice shall state that the recipient has the right to object to the waiver request orally at the State Board of Health meeting when the request is being considered or in writing to the Board of Health in advance of such meeting.

11.1.6 A Waiver granted by the State Board of Health is not transferable to another licensee in the event of a change of ownership.

11.1.7 A Waiver shall be granted for the term of the license.

Solicitation of parental input would be consistent with other regulations encouraging parental notice and involvement. See, e.g. §§6.2, 38.7, 42.1, and 43.1. At a minimum, The following sentence could be added to §17.1:

The Division may require a Licensee to provide notice of a variance request to the parent(s)/guardian(s) of children which offers them the opportunity to provide input on the variance request to the Division.

52. Section 18.8 requires any adult in the household of a child care home to sign a release for all medical records and mental health treatment records. This could be perceived as somewhat “overbroad”. In particular, §18.8 reinforces a stereotype that persons “under treatment” for mental illness are likely to be dangerous. Confidentiality is also a concern in this context. Section 16.0 requires DFS to provide the reasons for adverse action on a license to the licensee. If DFS discloses medical or mental health information of a household member to the licensee as the basis for the adverse action, the household member’s confidential information is compromised. Indeed, §18.6 requires the licensee to actually possess the health appraisal of the household members which may contain highly confidential information. DFS should consider revising these sections to reflect legitimate privacy interests.

53. Section 22.1.3 should be deleted as redundant since the “diploma or equivalent” standard is included in §22.1.1.

54. Section 34.2 ostensibly bars interference with initially reporting suspected abuse or neglect. However, it is weak in proscribing retaliation after the report. Compare Title 16 Del.C. §§1135 and 1154. DFS should consider adding a subsection to §34.0:

The Licensee shall not engage in retaliation or reprisals against any staff member, parent/guardian, or any other person for reporting abuse or neglect or cooperating with an investigation of abuse or neglect.

55. Section 58.5 literally requires all children (regardless of age) to sleep in a bed at night with a pillow and blanket. This is inconsistent with requirements that infants be placed in cribs or playpens (§57.1.5) without a pillow, quilt, etc. (§57.3.6).

56. Section 61.8 prohibits “the use of walkers”. This is ostensibly intended to prohibit use of the 4-wheeled “carts” by toddlers. However, an older child with mobility limitations might use a “walker” similar to those used by the elderly to assist with ambulation as a preferable alternative to a wheelchair. DFS should not categorically bar “walkers” in such situations.

I recommend sharing the above observations with DFS. Given the references to the Part C program, a copy of the comments should also be provided to the Interagency Coordinating Council authorized by Title 16 Del.C. §217.

Attachments

B:1207bils
F:pub/bjh/legis/2007p&l/1207bils