

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory & Policy Initiatives

Date: December 9, 2008

I am providing my analysis of thirteen (13) regulatory and policy initiatives in anticipation of the December 11 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive. I was unable to address all of the regulations referred by the councils, including the 200+ page DFS Final Child Care Licensing standards appearing at 12 DE Reg. 810 (December 1, 2008). Time permitting, I will address that regulation at the January meeting.

### 1. DOE Final Teacher of Gifted/Talented Students Regulation [12 DE 785 (December 1, 2008)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2008. The Councils did not identify any substantive concerns with the proposed standards but did share several grammatical and stylistic recommendations. I attach the October 23 GACEC letter for facilitated reference. The DOE adopted amendments based on each of the comments.

First, the Councils recommended correcting the numbering in Section 4.0. The DOE corrected the numbering.

Second, the Councils identified a grammatical error in Section 4.2 which the DOE corrected.

Third, the Councils recommended capitalization of “certificate” in Section 4.2. This was corrected.

Fourth, the Councils recommended revision of a citation in Section 4.2. The DOE revised the citation.

Fifth, the Councils recommended revision of a second citation in Section 4.2. The DOE revised the citation.

Sixth, the Councils recommended substitution of a colon for a semi-colon in new Section

4.2.2. The substitution was effected.

Seventh, the Councils identified a grammatical error in new Section 4.1.3. The DOE corrected the reference.

Eighth, the Councils recommended capitalization of “certificate” in new Section 4.1.3. The DOE capitalized the word.

Ninth, the Councils recommended revision of a citation in new Section 4.1.3. The DOE revised the citation.

Tenth, the Councils recommended substitution of a colon for a semi-colon in new Section 4.1.3. The substitution was effected.

Since the Councils shared only non-substantive recommendations, and the DOE made all revisions recommended by the Councils, no further action is warranted.

## 2. DOE Final Possession, Use or Distribution of Drugs & Alcohol Reg. [12 DE Reg. 781 (12/1/08)]

The GACEC commented on the proposed version of this regulation in October, 2008. I attach a copy of the Council’s October 23 letter and attachment for facilitated reference.

In a nutshell, the GACEC did not identify any concerns with the portions of the regulation being revised. However, it observed that an existing section was objectionable. First, Section 3.11 requires a parent to sign a waiver of liability as a precondition of a student possessing an asthma inhaler or epipen. Second, it authorizes a school nurse to impose limitations on student use and possession of an inhaler or epipen. A Region III OCR LOF was shared which held that requiring a liability waiver as a precondition of administration of allergy medication to a special education student violated Section 504.

The DOE effected no amendment to the regulation and did not express any intention to prospectively amend the regulation. Unless the DOE shared an intention to prospectively amend the regulation in this context through correspondence, I recommend that the GACEC submit a letter or email request to clarify whether the DOE intends to change the regulation. The letter or email should be directed to both Susan Haberstroh and the DOE’s Section 504 coordinator.

## 3. DMMA Final Transition to Medicare Program Regulation [12 DE Reg. 788 (December 1, 2008)]

The SCPD and GACEC commented on the proposed version of this regulation in September. The Division of Medicaid & Medical Assistance has now adopted a final regulation incorporating two (2) amendments prompted by the Councils.

First, the Councils endorsed the overall regulation since it expands Medicaid eligibility. DMMA acknowledged the endorsement.

Second, the Councils recommended substitution of “Medicare” for “Medical” in Par. (9). DMMA responded that this was a publication error. The final regulation corrects the error at p. 791.

Third, the Councils identified an inconsistency between two sections. DMMA amended §17801 to resolve the inconsistency.

Fourth, the Councils noted some “tension” among references to income. DMMA responded that the standards comport with a federal regulation. No change was made.

Since the regulation is final, and DMMA incorporated amendments prompted by the Councils, I recommend no further action.

4. DSS Final TANF Employment & Training Program Reg. [12 DE Reg. 793 (December 1, 2008)]

The SCPD and GACEC commented on the proposed version of this regulation in September, 2008. The Division of Social Services has now adopted a final regulation incorporating one (1) amendment prompted by the Councils.

First, the Councils recommended an amendment to clarify that persons with disabilities participating in vocational programs would be provided “supports” to ensure “effective” participation. DSS added the word “supports”.

Second, the Councils observed that a federal regulation provides states with the option of exempting both SSI and SSDI beneficiaries from mandatory participation in Employment and Training related activities. The Council suggested that DSS consider incorporating the exemption in the regulation. DSS responded that it exempts “an individual determined unemployable by a health care professional”. At p. 795. As a practical matter, an SSI or SSDI beneficiary would generally have “been determined unemployable by a health care professional”. However, it would have been preferable to explicitly exempt SSI and SSDI beneficiaries.

Third, the Councils endorsed a disability-related provision which implemented a federal regulation. DSS acknowledged the endorsement.

Since the regulation is final, I recommend no further action.

5. DOL Final Employment. Discrimination Complaint Processing Reg. [12 DE Reg. 797 (12/1/08)]

The SCPD and DDC commented on the proposed version of this regulation in August, 2008. I attach a copy of the SCPD’s August 28 letter for facilitated reference. The DOL has now adopted final regulations.

First, the Councils recommended that the regulation be amended to permit the filing of a complaint without a personal appearance under certain circumstances. The DOL made no change.

Second, the Councils recommended that complaint-related information (e.g. forms; interview questionnaire) be published on the Department's website. Consistent with the attached October 30 DOL letter, and website except, the Department has added many questionnaires and intake forms to the website.

Third, the Councils recommended an amendment to Section 3.1.3. No change was effected.

Fourth, the Councils questioned the rationale for submission of an employer's witness list to the DOL without sharing a copy with the charging party. No change was effected.

Other organizations also submitted comments which prompted some non-substantive amendments. The Department did not disclose its rationale for rejecting recommendations. However, this may be permissible since the Administrative Procedures Act does not literally require findings when a "rule of procedure" is being adopted. See Title 29 Del.C. §10118(b)(2). Since the regulation is final, I recommend no further action.

#### 6. HRC Final Fair Housing Regulation [12 DE Reg. 814 (December 1, 2008)]

The SCPD, GACEC, and DDC commented on the initial proposed version of this regulation in April, 2008. Comments covered two sets of standards, i.e. those covering the Equal Accommodations law and those covering Fair Housing law. The Human Relations Commission then issued a revised proposed regulation in August. All three councils submitted comments on the revised proposed regulation. However, the HRC only acknowledges receipt of the DDC's comments. At p. 815. The HRC issued a final Equal Accommodations regulation in October, 2008. The HRC is now issuing a final Fair Housing regulation.

The Councils submitted six (6) comments as follows:

1. The Councils recommended a reordering of the definition section to place all definitions in alphabetical order. The HRC effected a conforming edit.

2. The Councils recommended substituting "occupancy" for "tenancy" in Section 1.0. The HRC did not adopt the suggestion.

3. The Councils objected to a categorical prohibition on consideration of a motion not filed within 10 business days prior to hearing. The HRC adopted an amendment allowing a panel to consider untimely motions.

4. The Councils expressed concern with the timetable to request a subpoena. The HRC amended the timetable.

5. The Councils identified a missing period. The HRC corrected the omission.

6. The Councils suggested adding a third prong to the criteria for "housing for older

persons” based on the relevant statute. The HRC declined to make any change.

Since the regulation is final, I recommend no further action.

7. DSS Prop. Court Appointed Special Advocate Regulation [12 DE Reg. 743 (December 1, 2008)]

The Division of Social Services proposes to amend a confidentiality regulation.

The attached Title 31, Chapter 36 establishes a Court-Appointed Special Advocate (CASA) program in which the Family Court appoints individuals to represent a child’s interests in Family Court proceedings. See Title 31 Del.C. §§3602(5) and 3606. The CASA is entitled to have access to all records related to the child . See Title 31 Del.C. §§3606(f) and 3610.

The DSS regulation implements these statutes by allowing a CASA to access DSS records. However, DSS proposes to delete the following sentence: “The CASA must also be notified of any staffing, investigations or proceedings regarding the child, so that they may participate and represent the child.” DSS proposes the deletion since “DSS staff do not have this information.” This sentence may “date back” to the period pre-dating the establishment of the DSCY&F when DSS was responsible for activities now conducted by DFS. The enabling statute does contemplate that the “Division” (defined as DFS) notify the CASA of placement changes and complaints regarding a child.

I recommend that the SCPD notify DSS that it has reviewed the regulation and did not identify any concerns with the proposed revision.

8. DMMA Proposed Attendant Services Waiver Regulation [12 DE Reg. 740 (December 1, 2008)]

The Division of Medicaid & Medical Assistance proposes to delete standards related to the attendant services waiver. As background, the Division published proposed standards in the Fall of 2006 to implement a proposed attendant services waiver. Unfortunately, DMMA identified some “downsides” to the waiver. After a meeting with representatives of the SCPD and DDC, it was decided to abandon the waiver in favor of eliminating the waiting list with an infusion of Tobacco funds. This was accomplished in 2007. The following excerpt from my February, 2007 P&L Committee memo summarizes these developments. I therefore recommend endorsement of the proposed regulation which is essentially a “housekeeping” measure to conform to the waiver withdrawal effected in February, 2007.

7. DMMA Indep. Plus Attendant Services Waiver Withdrawal [10 DE Reg. 1301 (2/1/07)]

This is an information item.

The Committee reviewed the proposed version of this initiative in December, 2006. At that time, no action was taken on the proposal based on the following analysis:

*The Division of Medicaid and Medical Assistance submitted an application for an Attendant Services HCBS waiver to CMS on October 31, 2006. The Division has now published its solicitation of comments on the waiver.*

*As proposed, the waiver would include the following services: adult day care, respite, emergency response system, personal care services, attendant services, fiscal agent, support broker, and case management. Definitions of these services are provided in Appendix C. Services would be provided consistent with individual service plans. Participants would have the option of self-directing services. Participants would have to meet a nursing home standard of care. The effective date is July 1, 2007.*

*Representatives of the DDC, SCPD, DMMA, and I met on Friday, December 8, to discuss concerns with the waiver. Independence Plus waivers use an individual cap on services roughly equal to the average cost of nursing home care (approximately \$5,900 monthly). Approximately \$1,000 is earmarked for administrative supports (e.g. fiscal agent and support broker) irrespective of the extent of use of such supports. This leaves approximately \$4,900 for other services. This would be insufficient to meet the needs of persons for some combination of extensive personal care and attendant services. In contrast, the existing E&D waiver uses an aggregate cap in which costs of “high end” users are offset by “low end” users. Thus, the group determined that it would be more beneficial to have individuals enroll in the E&D waiver supplemented by a non-Medicaid attendant services program. DMMA therefore plans to withdraw the attendant services waiver and support increased funding (e.g. through Tobacco funds) for attendant services. Given this development, commentary on the actual waiver is moot. I recommend no action.*

As an update, the Tobacco Committee subsequently approved inclusion of sufficient funds to eliminate the waiting list for the attendant services program. DMMA has now formally issued notice of withdrawal of the Independent Plus Waiver application with the following comment:

Eligible clients will continue to be placed in the State’s Attendant Services Program. This option offers more services to the client population than would be available under the Waiver. I recommend no further action apart from submission of testimony in support of this use of Tobacco Committee funds in the DHSS JFC hearings.

9. DSS Prop. Food Stamp Resources Regulation [12 DE Reg. 744 (December 1, 2008)]

The Division of Social Services proposes to revise the resource standards used in the Food Stamp Program to implement Section 4104 of the Food, Conservation, and Energy Act of 2008 (a/ka the Farm Bill). For background, I attach an excerpt from a Center on Budget and Policy Priorities publication, "Implementing New Changes to the Food Stamp Program: A Provision By Provision Analysis of the 2008 Farm Bill". As it indicates, Section 4104 is designed to have three (3) effects: 1) adjust the Food Stamp asset limit to reflect inflation; 2) exclude all tax-preferred retirement accounts from countable assets; and 3) exclude educational savings accounts from countable income. With the exception of the inflationary adjustment, the Federal law mandates the changes by October 1, 2008 and the proposed regulation, though published in December, has an October 1, 2008 effective date.

The proposed DSS regulation excludes retirement accounts and educational savings accounts at Section 9049P. I did not identify any concerns with the proposed standards which appear to correspond to the table in the Center on Budget and Policy Priorities guidance (p. 22).

The inflation adjustment will take effect over several years and is not addressed in the current regulation. As the Center guidance indicates, the current asset limits (\$2,000 per household; \$3,000 per household with member over 60 or with disability) have not changed since 1986. Applying their "real 1986 values", the asset limits in 2008 should be \$3,700 and \$5,500 respectively. Center Guidance at 19.

I have only one recommendation in the context of the overall regulation.

Section 9046A8 includes the following as a countable resource per household: "the portion of the equity value of a funeral agreement that exceeds \$1,500". In contrast, Section 9049E contains the following exclusion from resources per household: "value of one bona fide funeral agreement (not exceeding \$1,500) per household member." If spouses in a household each had a funeral agreement for \$1,500, or a combined spousal funeral agreement with \$1,500 coverage apiece, Section 9046 would arguably result in a countable resource of 1,500. Under Section 9049, there would be 0 countable resources. It would be preferable to clarify in Section 9046 that the standard is "per household member".

I recommend endorsement of the regulation subject to sharing the above recommendation.

#### 10. DDDS Proposed Eligibility Criteria [12 DE Reg. 738 (December 1, 2008)]

The Division of Developmental Disabilities Services proposes to adopt revised eligibility standards. I understand that the intent is to limit eligibility for all DDDS services to persons who are Medicaid eligible.

In a nutshell, new applicants must meet financial (income/assets) limits for DDDS Medicaid waivers (§1.6). They must also meet an ICF/MR level of care. Existing clients may be

“grandfathered” if they meet either: 1) the eligibility standards under which the individual initially established eligibility; or 2) the new requirements. Such “grandfathered” clients will only be eligible for non-Medicaid services offered by DDDS.

I have the following observations.

First, although the Division has informally estimated that more than 90% of its existing clients will qualify under the more restrictive standards, I question the accuracy of this estimate. For example, many DDDS clients do not meet an ICF/MR standard of care. Consistent with the attached CMS glossary, the ICF/MR regulations limit eligibility to persons who need “24-hour supervision” [42 C.F.R. 1009] and “active treatment” [42 C.F.R. 483.440(a)], defined as follows:

(a) Standard: Active treatment.

(1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, ...

(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

[emphasis supplied] Many, if not most, individuals with Asperger’s Syndrome do not meet this standard. Likewise, individuals functioning in the EMD range of mental retardation may not meet the standard. Indeed, DSS adopts the position that persons functioning in the TMD range do not necessarily meet an ICF/MR level of care. See, e.g., the attached administrative hearing decision in In re J.L., a minor, DCIS No. 151936MI (DHSS January 17, 1997) [child with moderate mental retardation unqualified for Medicaid eligibility due to failure to meet ICF/MR level of care].

Although the Division may adopt a “liberal” interpretation of the ICF/MR standard, a CMS audit could result in significant financial penalties to the State.

Second, the categorical ICF/MR requirement may actually undermine the Division’s plan to have all clients enrolled in Medicaid. There may be DDDS-eligible clients who qualify for Medicaid based on poverty bases or SSI. Not all SSI beneficiaries with mental retardation and related conditions will meet an ICF/MR standard. Compare 42 C.F.R. 435.225 [individuals must meet both SSI medical eligibility standard and level of care standard to qualify under Medicaid Katie Beckett program]. The DDDS regulation results in the anomaly of current non-waiver Medicaid beneficiaries being excluded from DDDS eligibility.

Third, DDDS clients typically have co-occurring disabilities and health conditions. They may spend several weeks in a hospital (including DPC) or skilled care setting. In order to qualify

for such settings, the clients must meet a hospital or NF level of care. Once they qualify for such level of care, DDDS would have to terminate their DDDS eligibility since they no longer meet an ICF/MR level of care. This is not the current practice but would be literally required by the new regulation.

Fourth, the regulations provide a disincentive for individuals to strive for financial independence since they must curb income and resources or else lose DDDS eligibility. The Congressional background to the DSS Food Stamp regulation reviewed this month [12 DE Reg. 744] is instructive. Congress decided to raise financial eligibility criteria to encourage long-term independence:

On a bipartisan basis, policymakers agree that asset development is important to helping low-income Americans transition out of poverty. Accumulating assets allows low-income individuals to mitigate material hardships during periods of unemployment or illness, suffer less of a decline in their living standard during retirement, or make investments in their own education or housing that increase their financial stability.

See attached Center on Budget and Policy Priorities publication, "Implementing New Changes to the Food Stamp Program: A Provision By Provision Analysis of the 2008 Farm Bill" at 19. The DDDS regulation essentially punishes productivity and encourages clients to remain in poverty to maintain DDDS eligibility.

Fifth, I suspect that DDDS intends to limit new clients to Medicaid enrollees to ensure a federal subsidy for services. However, literally, the standards only require an applicant to meet DDDS waiver standards. The applicant could opt to not apply for Medicaid and still be eligible for DDDS services. From the consumer perspective, this is a preferable outcome for multiple reasons. If there are no open waiver slots, an individual meeting all waiver criteria may be on a waiting list. Moreover, some DDDS clients may opt to enroll in other DHSS waivers (e.g. ABI waiver; Elderly/Disabled waiver).

Given the above considerations, I recommend opposition to the proposed regulation.

#### 11. DOE Prop. Discipline Alternative Program Regulation [12 DE Reg. 707 (December 1, 2008)]

The Legislature first authorized and funded alternative schools through enactment of H.B. No. 247 in 1994 to ensure that expelled students, and students facing expulsion, would continue to be educated, albeit in more structured settings. Districts immediately objected, preferring to simply "dump" students with disciplinary problems without providing alternative programs. In response, the Attorney General's Office issued the attached September 29, 1994 opinion interpreting H.B. No. 247 as contemplating enrollment of expelled students in alternative programs.

Over the years, districts have varied considerably in their commitment to offer alternative

programs to students. The Legislature responded in 2008 with enactment of the attached H.B. No. 326. This bill notes that compulsory attendance laws apply to all children between the ages of 5 and 16. It also observes that “the intent of Delaware’s compulsory attendances statutes is not met when students who are eligible for placement in a Consortium Alternative Program are simply expelled by a local school district or charter school and not placed in such a program.” The bill amends the Delaware Code by establishing a presumption that eligible students “expelled or suspended pending expulsion” be placed in Alternative Programs. The bill directs the DOE to issue implementing regulations. The DOE has now published proposed regulations in the Register.

I have the following observations.

First, H.B. No. 326 explicitly applies to charter schools. In contrast, the regulation directs that districts “shall place a student” in an alternative program (Section 1.2) while retaining an obtuse “may refer a student” reference (Section 12.1) for charter schools. A more affirmative mandate should be incorporated for charter schools.

Second, Section 1.2 merits wholesale revision.

A. It anomalously recites that “districts shall place a student at the ...Alternative Program site if the district board: (1.2.4) Determines the student is not eligible for placement at the “Alternative Placement”. I suspect that the DOE intended the term “eligible” to be “ineligible” in Section 1.2.4.

B. Section 1.2 contains subparts with conjunctions which are both cumulative (“and”) and disjunctive (“or”). This is confusing. If Subsections 1.1, 1.2, and 1.3 are meant to be disjunctive, it would be preferable to compile them into a separate subpart. For example, Section 1.2 could be restructured as follows:

1.2 Districts shall place... if board:

1.2.1 Has either:

1.2.1 Expelled...; or

1.2.2. Determined ...engaged in conduct...; or

1.2.3 Determined ...exhibited...; and

1.2.2 Determined student not ineligible...

C. Subsection 1.2.2 is “overbroad” and should be deleted. It essentially states that when a board decides that a student’s conduct “permits” expulsion, it must place the student in an alternative program. It is currently possible for a district to decide to not expel a student while pursuing other options (e.g. counseling; medication; behavioral contract). H.B. No. 326 is not intended to bar districts from retaining students in regular schools with supports in lieu of expulsion.

D. H.B. No. 326 imposes the presumption of placement in an alternative setting for students actually “suspended pending expulsion”. This concept is not reproduced in Section 1.2. It could be substituted for Subsection 1.2.2 which, as described in the preceding paragraph, should be deleted.

E. The “shall place” directive in Section 1.2 is overbroad as applied to students with disabilities. Districts cannot change the placement of a §504 covered student without convening an MDT, providing parental notice, conducting a manifestation determination, and offering a hearing accompanied by maintenance of the status quo placement. See excerpt from attached article on discipline. Likewise, unidentified students described at 14 DE Admin Code 926, Section 34.0, cannot be simply placed in an alternative program. Finally, although there is a pro forma reference to IDEA-eligible students in Section 11.0, it is obtuse. To correct these deficiencies, the DOE could adopt the following approach: 1) expand Section 11.0 to cover §504 students and unidentified students under Section 34.0; 2) expand Section 11.0 to include more affirmative references to procedural protections; and 3) amend Section 1.2 by adding the following introductory preface: “*Subject to Section 11.0, local school districts shall place...*”

Third, Section 3.0 requires a local board to document its specific rationale for non-placement in an alternative program. However, although the DOE may intend that this decision (with rationale) be sent to the DOE, Section 3.0 only requires a district to “report” the decision to the DOE. Thus, a district could simply “report” to the DOE that it reached a decision not to place a student in an alternative program. The DOE should consider substituting “provided” or “submitted” for “reported”.

Section 3.0 should also be amended to also require forwarding a copy to the parent. The last sentence could be amended as follows: “Such decisions shall be submitted ...of such decision with a copy to the student’s parent.

Fourth, Section 13.0 would benefit from an amendment. The following sentence could be inserted after the existing first sentence: “The Department of Education shall annually evaluate the decisions acquired pursuant to Section 3.0 to assess the reasons for non-placement of students in alternative programs, including lack of space and the number, age, race, and special education status of excluded students by district.”

I recommend sharing the above commentary with the DOE, SBE, and members of the House and Senate education committees.

12. DVR Final Order of Selection (November, 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 an October 29 memo to the SCPD and November 3 letter to the GACEC. The P&L Committee reviewed the latter documents at the November 13 meeting but deferred further commentary pending receipt of the final policy. Since the final policy has been provided, it is now possible to review edits. To facilitate review, my November analysis is reproduced in *italics* below supplemented by underlined observations based on the final document.

*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. The policy has been obtained.*

*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. Some additional language was added to Section 11.7.*

*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. The recital appears as Section 11.4 b.*

*Fourth, the Councils recommended incorporation of an explicit “grandfather” provision for existing clients. DVR indicates that “this information has been added to the policy”. The “grandfather” provision is incorporated in Section 11.5.*

*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”. The policy [Sections 11.3 and 11.4c] does not explicitly recite that other agency decisions will be considered.*

*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. Although the August version of the policy included a reference to SRA review, later editions omit any reference to SRA. This is unfortunate.*

*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.” Conforming references have been added to Sections 11.4d and 11.7.*

*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. This observation did not contemplate amendment to the policy.*

*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.” Sections 11.4c and 11.6 envision DVR counselor documentation of the basis for classification and notification of the qualifying category to the applicant. However, the applicant is not provided with the basis for the classification decision which may violate due process. See Ortiz v. Eichler, 794 F.2d 889 (3d Cir. 1989).*

*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. Section 11.3, Priority Category II, does include separate “a” and “b” sections with “a” covering SSDI/SSI beneficiaries and “b” covering non-SSDI/SSI beneficiaries. However, there is no prioritization of “a” over “b”. The DDC issued the attached November 18 inquiry to DVR recommending consideration of an amendment.*

*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). DVR incorporated multiple edits prompted by the earlier commentary. I recommend awaiting a response to the DDC’s November 18 inquiry.*

### 13. DDDS Human Rights Committee Policy (Update)

At the November 9 SCPD P&L meeting, I provided an overview of the final DDDS HRC policy. The SCPD and GACEC had submitted comments on the proposed policy in the Spring of 2008 which resulting in several amendments. In the conclusion, I included the following recommendation:

*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 he underlined concern identified in Par. 3 above.*

Paragraph 3 recited as follows:

*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.*

I presented the above concern to DDDS at the November 25, 2008 DDDS Advisory Council meeting. After the briefing, DDDS administrators acknowledged their recognition of the problem and promised to amend the policy.

#### Attachments

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