

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Legislative & Regulatory Initiatives

Date: February 10, 2008

I am providing my analysis of twelve (12) legislative and regulatory initiatives in anticipation of the February 14, 2008 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DMMA Final Prepaid Funeral Regulations [11 DE Reg. 1051 (February 1, 2008)]

The SCPD commented on the proposed version of these regulations in December, 2007. The brief commentary is summarized at 11 DE Reg. 1052.

In a nutshell, the Division of Medicaid & Medical Assistance proposed to increase from \$10,000 to \$15,000 the amount of funds that can be placed in an irrevocable trust for a prepaid funeral. The change was prompted by legislation enacted in 2007. The Council endorsed the proposed standards since it expanded resource exemptions for beneficiaries. DMMA has now acknowledged the endorsement and adopted the final regulations with no further amendments.

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

2. DMMA Final ABI Waiver Program Regulations [11 DE Reg. 1054 (February 1, 2008)]

The SCPD commented on the proposed version of these regulations in December, 2007. In general, the Council noted that the regulations “tracked” the waiver document. However, the Council shared two (2) observations.

First, the Council noted an incorrect citation to assisted living regulations. DMMA agreed and inserted the correct citation.

Second, the Council expressed concern for the following provision: “ABI waiver services

will terminate upon the 31st day of hospitalization.” The Council recommended clarification of whether waiver eligibility was being terminated or only waiver services. The Council also noted that advance notice of impending cessation of services should be provided to the waiver participant. DMMA responded by clarifying that waiver services, not eligibility, would be terminated. DMMA also confirmed that DSAAPD would be responsible for providing advance notice to the participant of the proposed termination of services.

Since the regulations are final, and DMMA provided a requested amendment and clarification, I recommend no further action.

3. Dept. of Insurance Final Discrimination Regulations [11 DE Reg 1060 (February 1, 2008)]

The SCPD and GACEC commented on the proposed version of the regulations in August, 2007. The Department acknowledges the GACEC’s comments but not the SCPD’s similar submission. I understand that Kyle has emailed the Department concerning this oversight.

The Councils submitted four (4) recommendations.

First, the Councils noted that the regulations covered three (3) forms of insurance and suggested issuance of separate regulations for each type of insurance.

Second, the Councils observed that allowing insurers to refuse coverage based on “actual or reasonably anticipated experience” could violate State law protections for individuals with hearing or visual impairments.

Third, the Councils objected to a provision authorizing discrimination if “related to” experience.

Fourth, the Councils observed that allowing insurers to rely on “data”, without limitation, could violate a State law prohibition on insurer use of genetic information.

The Department adopted final regulations with no changes suggested by the Councils. The Department effected one (1) unfavorable amendment solicited by the insurance industry to ensure the regulation conformed to a national model verbatim.

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

4. DOE Prop. Student Teacher Background Check Regulation [11 DE Reg. 984 (February 1, 2008)]

In December, 2007, the DOE published an earlier version of proposed regulations establishing standards for criminal background checks on prospective student teachers. The SCPD issued the following December 17 letter generally endorsing that version of the regulations:
December 17, 2007

*Ms. Susan Haberstroh
Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901*

RE: 11 DE Reg. 711 [Student Teacher Criminal Background Check Regulation]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE) proposal to amend its criminal background check regulation published as 11 DE Reg. 711 in the December 1, 2007 issue of the Register of 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. SCPD endorses the regulation since it may result in protection of children from abuse. Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our position on the proposed regulation.

Sincerely,

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

*cc: The Honorable Valerie Woodruff
Ms. Jean Allen
Ms. Martha Toomey
Ms. Paula Fontello, Esq.
Ms. Mary Cooke, Esq.
Ms Jennifer Kline, Esq.
Mr. Charlie Michels
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens*

11reg711 doe-cbc 12-07.doc

The DOE has now issued a revised version of the proposed regulations to clarify the responsibility of referring institutions of higher education. I recommend reiteration of the Council's general endorsement of the regulation subject to sharing two (2) concerns.

First, although the regulation requires district and charter school retention of the criminal background check information for at least 12 months (§4.1), there is no comparable direction to institutions of higher learning receiving the information consistent with §§2.1.3. to 2.1.5. The DOE may wish to provide regulatory guidance in this context.

Second, §2.1.5 indicates that the institution of higher learning makes the determination of

suitability of the prospective student teacher. Section 2.1.5 also recites that a denied candidate may appeal an adverse decision consistent with standards compiled in §5.0. However, §5.0 only refers to district and charter school decision-making. There are no standards guiding an institution of higher learning on processing appeals. The DOE may wish to address this ostensible oversight.

5. DSAAPD Draft Personal Attendant Services Service Specifications (February 4, 2008)

The Division of Services for Aging & Adults with Physical Disabilities (DSAAPD) has solicited comments on the February 4, 2008 draft of its Personal Attendant Services (PAS) Service Specifications. Under the Community-based Services Act, the SCPD serves as the advisory council to the PAS and all regulations are subject to review and comment by the SCPD (Title 16 Del.C. §§9406-9407).

I have the following observations.

Preliminarily, the Service Standards are poorly written. They often conflict with the statute. Discrete provisions sometimes have little relationship to headings. There are inconsistencies among provisions.

My comments on specific sections are as follows.

Section 1.0: Service Definition

Section 1.1: Insert “mental or” prior to “physical” and substitute “or” for “and” prior to “mobility” to conform to Title 16 Del.C. §9403(5). The statute is very clear that persons with mental disabilities alone may qualify for the PAS. Someone with Alzheimer’s or TBI may require assistance with personal hygiene, dressing and grooming, food preparation, etc. not because of physical limitations but because of cognitive or memory impairments. Moreover, by using the conjunctive term “and”, DSAAPD limits eligibility to individuals who require services in 3 domains (functions of daily living; self-care; mobility).

Section 1.2: This section is grammatically infirm. Its purpose is also unclear. To comport with Title 16 Del.C. §9404(5)c, the following could be substituted: “A consumer may exercise rights through a guardian or appointed representative.”

Section 1.3: This section is convoluted. The following could be substituted: “The consumer shall be affirmatively supported to direct services contained in the consumer’s Individual Service Plan (ISP).”

Section 2.0: Eligibility

Section 2.1: Substitute “attendant(s)” for “attendant”. Consumers may use more than 1 attendant. See also Section 3.2.5.1.

Section 2.2 conflicts with the statute by only referring to “physical” disabilities and is otherwise underinclusive. It would be preferable and more meaningful to simply recite the

standards in Title 16 Del.C. §9403(5).

Section 3.0: Service Activities

Section 3.1: Delete “agency” and substitute “attendant(s)” for “attendant”. Consumers may opt to not use an agency. For example, a consumer may contract with a relative.

Section 3.2: The first part of this section should be deleted since it is redundant. It repeats Section 3.1. Section 3.2 could simply recite as follows: “The ISP shall contain the following:”

Section 3.2.1: Substitute: “For an initial ISP, goals for service as developed between the DSAAPD Case Manager and consumer and as defined in the Service Referral Form.”

Section 3.2.6: Substitute: “Confirmation of the completion of attendant and/or consumer training.”

Section 3.2.7: Delete “agency” and substitute “attendant(s)” for “attendant”.

Sections 3.2.8 and 3.2.9 do not “fit” within Section 3.2 which covers only the contents of the ISP. The concepts reflected in Sections 3.2.8 and 3.2.9 should be transferred to Section 7.0.

Section 3.3: It would be preferable to adopt the statutory list of basic services [Title 16 Del.C. §9403(3)]. Otherwise, the current Section 3.3 is underinclusive. For example, help with use of medical and non-medical equipment, devices, or assistive technology is omitted.

Section 3.4: This section is very problematic and confusing. “On-the-job support” could be a basic service. For example, toileting assistance at work or help with job-related AT qualifies as a basic service. Cooking and meal preparation is clearly a basic service [Title 16 Del.C. §9403(3)c5]. “Assistance with non-technical, routine care of assistive devices” is clearly a basic service [Title 16 Del.C. §9403(3)b]. For clarity, DSAAPD should adopt the statutory nomenclature of “basic services” and “ancillary services” and incorporate the definitions of these terms verbatim from the statute. It is confusing to substitute “support services and companion services” for “ancillary services” since all the services (basic and ancillary) are “support” services. Moreover, DSAAPD’s classification of services under Sections 3.3 and 3.4 conflict with the statute in many contexts.

Section 5.0: Service Unit

Section 5.3: Insert “or initial service site” after home. It is possible for a consumer to only request attendant services at work or college. For example, the consumer may have a “smart house” or family supports at home and opt to use all allotted attendant services hours to facilitate employment or education. Title 16 Del.C. §9403(2) authorizes this approach. Services can be provided “within home or community environments”.

Section 6.0: Service Standards

Section 6.1: Substitute: “If services are delivered through a provider agency, the agency will:”. Not all consumers will opt to use an agency.

Section 6.2: Substitute the following: “The consumer has the option of fulfilling the following functions:”. Title 16 Del.C. §9404(5)(a) contemplates encouragement of consumer fulfillment of itemized functions but the consumer ultimately has the “option” of hiring, supervising, and paying attendants.

Section 6.2.2: Insert “a” prior to “provider”.

Section 6.2.2.1 implies that a consumer who exhausts all attendants offered by a single agency is culpable and “at fault” and therefore will be effectively sanctioned by “subjection” to “counseling” and a requirement to “hire an attendant on their own”. The standard does not offer resort to a another provider agency as an option. Substitute the following: “In the event a provider agency is unable to supply attendant(s) acceptable to a consumer, the consumer may be offered technical assistance to assess the consumer’s rationale for rejection of candidates, referred to another provider agency, or assisted with identification and hiring of non-agency attendant(s).”

Section 6.4: I recommend deletion of this section since the provider agency is responsible for fulfilling the ISP which must include a “viable back-up plan” under Section 3.2.4 and emergency response system under Sections 7.5 and 7.6. The consumer does not have an equal responsibility to obtain “attendants when service hours become difficult to fill.” Alternatively, the following could be substituted: “If, due to unforeseen circumstances, a provider agency is experiencing difficulty in filling all service hours contemplated by an ISP, it will consult with the consumer to assess prospects for ISP revision, a modified schedule, or other alternatives.”

Sections 6.3 and 6.4.1: These sections overlap and should be consolidated.

Section 7.0: Administrative Requirements

Section 7.0: Amend the title as follows: “Administrative Requirements for Provider Agencies” and add the following introduction: “If services are delivered through a provider agency, the agency shall adhere to the following standards:”

Section 7.3: Substitute “the provider is” for “they are” in the first sentence. Substitute “it is” for “they are” in the second sentence.

Section 7.4: Substitute: “If the consumer fails to establish service within 45 working days of the referral, DSAAPD will be notified. DSAAPD will then assess the reason for lack of initiation of service which may be followed by notice of intent to terminate eligibility.” The current standard lacks due process and categorically presumes there can be no justification for delays in initiation of services.

Section 7.6: This section refers to “this purpose” without identification of the purpose. Assuming the reference is intended to refer to emergencies, amend Section 7.5 by adding “, which

may include use of subcontractors.” after the word “emergencies”. Sections 7.6.1 and 7.6.2 could then be renumbered as Sections 7.5.1 and 7.5.2 respectively.

Section 7.8: Insert “a” prior to “case”.

Section 7.8.4: Substitute “attendant(s)” for “attendant”.

Section 7.9.4: Substitute “attendant(s)” for “attendant”. Insert the following introductory phrase: “Despite provision of ISP-listed services,”. Otherwise, a provider could fail to clean and then claim the unsanitary conditions justify discontinuation of services.

Section 8.0: Monitoring Requirements

Section 8.1: Substitute: “If services are delivered by a provider agency, the agency is obligated to meet the following requirements:”

Section 8.1.6: This section is problematic since consumers may be discouraged to disclose dissatisfaction to the provider for fear of retribution. Moreover, if each provider uses a different survey, DSAAPD cannot aggregate data as required by Title 16 Del.C. §9404(7). There should be a uniform survey document and it should be returned to DSAAPD or non-provider agency for compilation and review.

Section 8.1.8: This section is grammatically infirm, i.e., it refers to “obligated to the following additional requirements”. Moreover, it is incomplete since it refers to additional requirements which are omitted.

Miscellaneous

The statute [Title 16 Del.C. §9404(4)] requires DHSS to maintain “an impartial grievance system”. This requirement is omitted from these standards. Paradoxically, although this is designed to be a consumer-oriented program, DSAAPD has included many standards authorizing providers to complain to DSAAPD about a consumer [Sections 7.9.1 through 7.9.7] but there are no comparable provisions authorizing a consumer to complain to DSAAPD about providers.

I recommend that the SCPD share the above preliminary commentary with Easter Seal and compile final comments after consideration of input from Easter Seal and other P&L Committee representatives.

6. S.B. No. 200 (CHIP Premium)

This bill was introduced on January 22, 2008. For background, a fact sheet, a January 23, 2008 News Journal article, and draft bill are attached.

The main purpose of the bill is to promote enrollment in the Delaware Healthy Children Program (DHCP), Delaware’s version of the federal CHIP initiative. The bill characterizes the current \$10.00 to \$25.00 monthly premium as a barrier to program participation. The bill would

eliminate the monthly premium altogether while authorizing DHSS, in its discretion, to charge minimal co-pays.

Consistent with the attachments, families with income between 100 and 200 percent of the poverty level (\$41,300 for family of four) qualify for the DHCP. The program covers children from birth to age 19. The benefits package is comprehensive and includes well-care visits, hospitalization, prescriptions, and dental care. Of the 8,840 children eligible for DHCP, only 45% (4,800) are actively enrolled. As a result, Delaware returns \$3 million of its \$10 million federal allotment annually. Enrollment is linked to improved health, better school performance, and reduced child mortality.

This is an important bill which merits a strong endorsement.

7. H.B. No. 286 (District Facilitation of CHIP Enrollment)

This bipartisan bill was introduced on January 16, 2008 and reported out of committee on January 23, 2008. For background, I attach a January 10, 2008 News Journal article and excerpt from the federal regulation [7 C.F.R. 235.6(f)] upon which the legislation is based.

The bill complements S.B. No. 200 by promoting enrollment in the Delaware Healthy Children Program (Delaware's version of the federal CHIP initiative). As authorized by the federal regulation, school districts would be required to contract with DHSS to share information about children participating in reduced meals/milk programs. Parents could "opt out" of disclosure without affecting their children's eligibility for the reduced meals/milk programs. Safeguards are mandated to limit use of information to screening for CHIP and Medicaid eligibility.

I have the following observations.

First, the Delaware Constitution contemplates that the title of legislation will be accurate. Wilmington Medical Center v. Bradford, 382 A.2d 1338 (Del. 1978); DuPont v. Director of Division of Revenue, 347 A.2d 653 (Del. 1975). Out of an abundance of caution, since H.B. No. 286 is designed to facilitate enrollment in both CHIP and Medicaid, the title could be amended as follows:

AN ACT TO AMEND TITLE 14 AND TITLE 16 OF THE DELAWARE CODE TO ASSIST ENROLLMENT IN THE MEDICAID AND DELAWARE HEALTHY CHILDREN PROGRAMS.

Second, consistent with the federal regulation, charter schools could also participate in this program. However, H.B. No. 286 is limited to districts (line 46). Charter schools are considered public schools. See Title 14 Del.C. §§501 and 503. Indeed, some current and prospective charter schools target "low income" students. See, e.g., attached January 12 and 18, 2008 News Journal

articles describing the Prestige Academy. Moreover, parochial and private schools could also voluntarily participate in sharing information with DHSS to promote Medicaid and CHIP enrollment. In sum, the sponsors could consider amending H.B. No. 286 to cover charter schools and authorize DHSS to contract with non-public schools which are willing to adhere to the same protocols as districts.

Third, the federal regulation contemplates that only the parent/guardian in the household can consent to opt out of sharing information with DHSS:

Only the parent or guardian who is a member of the household or family for purposes of the free and reduced price meal or free milk application may decline the disclosure of eligibility information.

7 C.F.R. 245.6(f)(5). This limitation is not reflected in H.B. No. 236. For clarity, the sponsors may wish to consider inserting “within a qualifying household” after the word “guardian” in line 23.

I recommend endorsement of the legislation subject to the sponsors’ consideration of the above amendments.

8. 285 H.B. No (Single-Gender Charter Schools)

This bill was introduced on January 10, 2008. For background, I have attached January 12 and January 18, 2008 News Journal articles. The bill passed the House on January 22 with five (5) amendments.

I have the following observations.

First, the impetus behind the legislation is an attempt to open the first same-sex charter school in Delaware, the Prestige Academy. Although federal regulations were amended in 2006 to permit same-sex charter schools, in December of 2007 the Delaware Department of Education determined that same-sex charter schools could violate State law. The DOE supports amendments to State law to authorize same-sex charter schools. According to the News Journal articles, the principal opposition to the bill is the teachers’ union, the DSEA. The articles note that charter school teachers are not unionized.

Second, multiple restrictive amendments were added to the bill prior to House passage. They have the following effects: 1) requiring the DOE, not RCCSD, to sponsor/authorize the Prestige Academy; 2) sunseting the statutory authorization allowing new same-sex charter schools in 2013; 3) requiring the DOE to submit a funding proposal to the Legislature for an evaluation of same-sex charter schools for inclusion in the FY 10 budget; 4) requiring the DOE to actively pursue establishment of a same-sex charter school for the opposite gender within 2 years; and 5) requiring same-sex charter schools to issue an annual report to the DOE and Legislature.

I recommend endorsement of the concept of authorizing same-sex charter schools. As the News Journal articles indicate, other states are authorizing such initiatives and the charter school model is intended to facilitate innovation and new practices. Moreover, the Prestige Academy

targets minority and low-income students, a constituency which has not proven successful in the traditional public school system. As the articles note, only 39% of black and Latino boys graduate in 4 years.

9. H.B. No. 297 (Children of Military Families Compact)

This bill was introduced on January 22, 2008. It remained in the House Education Committee as of February 9, 2008. It has a fiscal note.

As background, this 18-page bill is designed to facilitate enrollment and educational opportunities of K-12 children of active duty military. An interstate compact will become effective upon legislative enactment of the compact by at least 10 states (lines 449-450). An interstate commission would be established to issue and enforce standards to facilitate administration of the compact (lines 259-267). Each participating state would have one voting member (line 202). The commission would hire an executive director and staff. Each state would be assessed a fee to cover the costs of the commission based on a formula (lines 434-438).

I have the following observations.

First, the compact contains many positive features. The special education provisions (lines 125-134) appear adequate and contemplate continuation of services and accommodations based on the sending school's IEP or Section 504 plan. If a transferring senior cannot meet diploma standards of the receiving school, the student can receive a diploma by meeting the standards of the sending school (lines 171-176). Receiving schools can accept unofficial records from parents for placement and enrollment while awaiting official transcripts (lines 89-94). Application deadlines for participation in extracurricular and other activities can be waived (lines 154-156).

Second, it is unclear if charter schools would be covered by the compact. The bill refers to local educational agencies (lines 43-44 and 80-81) without reference to Delaware statutory law. Delaware statutory law [Title 14 Del.C. §503] refers to charter schools as a "public school"..."with the "same standing and authority as a Reorganized School District Board of Education". However, they are not technically local educational agencies under the Delaware Code. The sponsors of H.B. No. 297 should preferably clarify whether charter schools are included in the definition of "local educational agency" (lines 43-44) for purposes of the compact.

Third, for grammatical reasons, it would be preferable to substitute "who" for "that" in line 106 and substitute "the student's" for "their" in line 109.

Fourth, each member state is required to establish or identify an entity to coordinate implementation of the compact within the state (lines 178-186). H.B. No. 297 only mentions the requirement without defining the entity. The sponsors may wish to specifically define the entity to fulfill this function.

Subject to the above suggestions, I recommend endorsement of the bill.

10. H.B. No. 301 (Foster Child Higher Education Benefit)

This bill was introduced on January 23, 2008 and remained in the House Education Committee as of February 9, 2008.

As background, the State currently offers higher education assistance to certain classes of children (ages 16-24), including children of deceased veterans, prisoners of war, and state police killed in the line of duty. See Title 14 Del.C. §§3451-3452. Benefits are limited to 4 years of tuition and fees and may vary based on attendance at an in-state versus out-of-state education institution.

H.B. No. 301 would expand eligibility to children in foster care in the State of Delaware as of their 18th birthday or graduation from high school. This is a traditionally underserved “at risk” population. Foster children “aging out” of the foster care system have historically been provided few supports. The DSCY&F has recently been offering more transitional services to better prepare them for adulthood. This bill would be of great benefit to such children and merits endorsement subject to correction of a technical error, i.e., the reference to “§3452e” in line 4 should be to “3452(a)(1)e”.

11. H.B. No. 291 (Driving & Text Messaging)

This bill was introduced on January 17, 2008. As of February 9, it remained in the Public Safety & Homeland Security Committee. For background, I attach a January 25, 2008 News Journal article.

The article notes that a National Insurance survey found that 1 in 5 drivers admit to sending text messages while driving. The article also cites a AAA poll of Delaware motorists in which 29% cited distracted driving as the biggest danger on the road, second only to aggressive driving.

The bill would prohibit holding or viewing a mobile telecommunication device to view or send a text message, picture, or email. Violation would be considered a secondary offense subject to a maximum fine of \$25.00.

Last year, the SCPD endorsed legislation (H.B. No. 78) which would have banned use of hand-held cell phones while driving. That bill was defeated by a 22-10 vote. H.B. No. 291 is more restrained in scope since it only bars text messaging. Given the Council’s interest in deterring accidents resulting in disability (including TBI), I recommend endorsement.

12. SCR No. 24 (Eagle’s Law Revision)

This resolution was introduced on June 30, 2007 and passed the Senate the same day. It never received a House vote and remained in the House Policy Analysis & Government Accountability Committee as of February 9, 2008.

As background, in 2000 the Legislature enacted S.B. No. 115 (Eagle’s Law) which established minimum staffing levels within long-term care facilities. According to SCR No. 24 (lines 9-11), the Director of the Medicaid Fraud Unit issued recommendations to revise the staffing standards. Those recommendations were incorporated into the attached S.B. No. 175. S.B. No. 175

proposes comprehensive revision of staffing standards and imposes strict penalties for violations. S.B. No. 175 contains a fiscal note and remains in the Senate Finance Committee.

I have the following observations.

SCR No. 24 would establish a task force to study the recommendations incorporated in S.B. No. 175. However, the Resolution contemplated quick House action which did not occur. The Task Force was to begin meeting in September, 2007 and issue a report by December 7, 2007 (lines 21-24). It is unclear if the House intends any action on the Resolution. Therefore, the Council may wish to check with the prime sponsors to assess whether the Resolution is moot. If the Resolution remains viable, I recommend endorsement since it would promote a reasoned assessment of a “complex” (lines 7-8) system with significant effect on resident care. The Council may wish to include one suggestion with any endorsement, i.e. expansion of the Task Force membership to include representation from the SCPD. The proposed Task Force limits consumer representation to the elderly (line35) and ignores non-elderly constituents, including pediatric nursing home residents. See Title 16 Del.C. §§1119A and 1119B.

Attachments

D:208bils
F:pub/bjh/legis/2008p&l/208bils