

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian Hartman

Re: Legislative and Regulatory Initiatives

Date: March 10, 2008

I am providing my analysis of thirteen (13) legislative and regulatory initiatives in anticipation of the March 13 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive. Finally, I apologize for my inability to address some bills and regulations referred to me.

1. Dept. Of Insurance Final Use of Credit Insurance Reg. [11 DE Reg. 1253 (March 1, 2008)]

The SCPD commented on the original proposed version of these regulations in November, 2007. It then commented on a revised proposed version of the regulations in January, 2008.

In January, the Council observed that the regulations implemented State legislation limiting the use of credit scores in determining auto insurance rates. The Council endorsed the standards subject to correction of two (2) grammatical errors. The Department has now acknowledged the SCPD's comments, corrected both errors, and adopted conforming final regulations.

Since the regulations are final, and the Department incorporated both recommended amendments, no further action is needed.

2. DSS Final Food Stamp Child Support Cooperation Regs. [11 DE Reg. 1243 (March 1, 2008)]

The SCPD and GACEC commented on the proposed version of these regulations in January, 2008. The Delaware Victims Rights Task Force (DVRTF) also submitted similar comments based on my briefing. Other comments were submitted by the Community Legal Aid Society's poverty program and the Delaware Coalition Against Domestic Violence (DCADV). The Division of Social Services has now adopted final regulations incorporating some amendments prompted by the Councils' commentary.

First, the Councils shared some "pros and cons" to requiring parental cooperation with

the DCSE as a condition of receipt of Food Stamps. In its response, DSS acknowledges the pros and cons but suggests that the requirement of cooperation should result in child support orders favoring custodial parents.

Second, the Councils observed that the “good cause” exemption for cooperation based on domestic violence was too narrow. This observation was also submitted by the DVRTV and DCADV. The Division agreed and expanded the definition of “domestic violence” to conform to both federal regulations and other DSS standards.

Third, the Councils noted that the regulations omitted a federal restriction on DCSE collection of fees and costs. In its response, DSS recites that DCSE has agreed to waive the normal \$25 application fee and \$25 collection fee when collections reach \$500.

Fourth, the Councils observed that the federal regulations contemplate DSS serving as the final decision-maker of good cause for failure to cooperate. In contrast, the State regulations indicated that the DCSE was the decision-maker. In response, DSS adopted an amendment to clarify that it would review any DCSE decision prior to DSS sanctioning a beneficiary.

Fifth, the Councils observed that the regulations ostensibly limited an aggrieved beneficiary to a DCSE hearing to the exclusion of a DSS fair hearing. DSS responded that it would provide notice to beneficiaries prior to imposition of any sanction for non-cooperation offering an opportunity for a DSS hearing. The “weakness” in this approach is that the actual regulation implies that the sole hearing is through the DCSE.

I recommend that the SCPD write a “thank you” letter to DSS for favorably considering its comments. The letter should also suggest that DSS reconsider its decision to not amend the actual text of the regulations to clarify that the DCSE hearing is not exclusive. As adopted, there is a single heading for “Administrative Hearings” (p. 1253) which a reasonable person would interpret as limiting aggrieved persons to a DCSE hearing.

3. DSS Final TANF Employment & Training Program Regs. [11 DE Reg. 1241 (March 1, 2008)]

The SCPD and GACEC commented on the proposed version of these regulations in January, 2008. The Division of Social Services proposed amendments to regulations to conform to HHS TANF standards work participation rates and types of countable employment-related activities.

The Councils observed that the State regulations generally tracked the HHS standards. However, the Councils also recommended consideration of two technical amendments.

First, the Councils suggested substituting “Two Employable Parent Families” for “Two Parent Families” to clarify a disregard for families in which one parent is “a disabled work-eligible individual”. DSS notes that the substitution could clarify some aspects of the regulation while leading to confusion in other contexts. No amendment was made.

Second, the Councils suggested amending some dates in charts. DSS declined to effect

the amendments.

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

4. DSS Prop. Child Care Subsidy Regulation [11 DE Reg. 1196 (March 1, 2008)]

The Division of Social Services proposes to adopt a few clarifying amendments to its child care subsidy program regulations.

As background, the CCDBG program is funded by the federal government through the Child Care and Development Block Grant with regulations published at 45 C.F.R. Parts 98 and 99. See §11002.9E of the DSS regulations. The federal regulations require states to establish and periodically revise a sliding fee scale based on income and family size. See 45 C.F.R. §98.42. I attach the latest DSS child care gross income limits which are based on 200% of the federal poverty level. See §11002.9AA.

The amendments are as follows.

1) In §11003.5, DSS proposes to clarify that domestic services workers must be paid the federal minimum wage. This is accurate. Consistent with the attached U.S. DOL fact sheet, domestic workers are covered by the federal minimum wage law. In contrast, the Delaware minimum wage law does not apply to domestic workers. See Title 19 Del.C. §901(3). Parenthetically, the State minimum wage is currently 7.15/hour while the federal minimum wage is currently \$5.85/hour. By July 24, 2009, there will be little difference between the State and federal minimum wages since the federal minimum wage will increase to \$7.25/hour.

2) In §11002.9Q, DSS defines employment as “wages equal to the federal minimum wage or an equivalent”. This does not appear objectionable.

I recommend sharing the above observations with DSS accompanied by the observation that the Council did not identify any concerns with the proposed changes.

5. DDDS Final Eligibility Regulation [11 DE Reg. 1237 (March 1, 2008)]

The SCPD, GACEC, and DDC commented on an initial published version of proposed DDDS eligibility standards in July, 2007. This resulted in a revised set of proposed regulations published in October, 2007. DDDS has now published final regulations with only modest amendments.

First, the Councils observed that the regulations violated the APA insofar as they announced that a public hearing would be convened on the regulations without providing the date, time, and place. DDDS responded that no one contacted the Division concerning a hearing and it believes that no one withheld comments.

Second, the Councils suggested a discrete amendment to ensure proper grammar. DDDS agreed and effected the requested amendment.

Third, the Councils recommended consistency in the use of the terms “disability” and “disorder”. DDDS declined to effect any changes.

Fourth, the Councils recommended an amendment to the residency standard to conform to Duffy v. Meconi. DDDS declined to adopt any amendment and characterized the determination of residency as a non-regulatory matter.

Fifth, the Councils requested deletion of a requirement of “generalized” limitation in intellectual functioning in the definition of “mental retardation” consistent with AAIDD commentary. The Division declined to adopt an amendment, characterizing the AAIDD commentary as only applying to adaptive skills.

Sixth, the Councils observed that the format of the regulations was awkward and punctuation was lacking in several contexts. The Division agreed and added a conjunction and punctuation.

Seventh, the Councils objected to a “grandfather” provision which allowed continued eligibility of DDDS clients only if they continue to meet the eligibility standards under which originally determined eligible. DDDS revised the standards to permit continued eligibility for any citizen who is a Delaware resident meeting either the current or former eligibility standards.

Eighth, the Councils noted that DDDS had reinstated a limited eligibility authorization for persons with brain injury or neurological conditions similar to mental retardation in the October regulation. However, the Councils recommended adoption of less constrictive standards. DDDS declined to adopt any amendment. The Division’s rationale is weak. It characterizes its core focus on persons with “significant cognitive and adaptive behavior deficits”. At p. 1239. The anomaly in this characterization is that 3 of the 5 DDDS eligible conditions (Autism; Asperger’s; Prader Willi) do not require a “significant cognitive deficit”. Persons with such conditions could test as extremely bright and qualify for DDDS eligibility. Indeed, DDDS explicitly recites that no deficit in cognitive functional whatsoever is required for applicants with such conditions: “The regulation clearly does not require an impairment in cognitive functioning in individuals appropriately diagnosed with Autistic Disorder or Asperger’s Disorder.” At p. 1241.

Ninth, the Councils noted that the regulation authorizes eligibility for persons with conditions similar or “related to mental retardation” but not conditions similar or related to Autism, Asperger’s, or Prader Willi Syndrome. DDDS declined to adopt any amendment, thus limiting eligibility to certain diagnoses regardless of the existence of severe cognitive and adaptive behavior deficits. The Division rejects a functional limitations approach: “Any disorder which has some neurological basis could arguably be included if there was some level of cognitive and/or adaptive behavior impairment.”

Finally, the Autism Society of Delaware submitted several recommendations, all of which were rejected (pp. 1240-1241). The Division’s commentary does include one important recital. The Division notes that an actual diagnosis of a qualifying condition is not necessary prior to age 22 so long as the behaviors and symptoms were manifest prior to age 22. At p.

1241.

6. DSAAPD Personal Attendant Services Service Specifications [Pre-publication Revised Draft]

The SCPD commented on a pre-publication draft of Personal Attendant Services (PAS) Services Specifications in February, 2008. The Division has now responded to the Council's commentary through the attached February 27 memo.

In general, the Division adopted edits prompted by the commentary. This resulted in approximately twenty-seven (27) amendments. Since the Division's memo contains seven (7) pages of text outlining the Council's recommendations and DSAAPD's responses, I am not compiling a detailed analysis. Some positive highlights include the following: 1) adoption of statutory references to "basic" and "ancillary" services; 2) clarification that an initial service site can be a non-home environment; 3) deletion of a requirement of "subjection to counseling" and "hiring an attendant on their own" if a consumer exhausts attendants offered by an agency; 4) requirement that provider agency offer grievance system; and 5) requirement that consumer satisfaction surveys be shared with DSAAPD. Some of the less positive aspects of the DSAAPD response include the following: 1) lack of a DSAAPD-sponsored grievance system; and 2) denial of eligibility to persons with solely mental impairments.

I recommend that the SCPD send a "thank you" letter to DSAAPD for favorably considering most of the Council's comments.

7. DMMA Prop. Medicaid Vehicle Resource Regulation [11 DE Reg. 1191 (March 1, 2008)]

The Division of Medicaid and Medical Assistance proposes changes to treatment of vehicles as resources under the Medicaid long-term care program. In general, the amendments are consistent with the attached federal regulations, 20 C.F.R. §§416.1218 and 416.1201©). However, I have three (3) recommendations.

First, the grammar in §20330.1 is problematic. I recommend the following substitute (with changes underlined):

If one vehicle can not be excluded under Section 20310.5, or there is more than one vehicle, the equity value is a resource if it:

- Is owned by an eligible individual/spouse; or
- Cannot be excluded under another provision (e.g. property essential to self support - DSSM 20320.5; co-owner refuses to sell) or conditional benefits do not apply (DSSM 20360).

Second, the federal regulation [20 C.F.R. §416.1218(b)(2)] specifically recites that automobiles not excluded under 20 C.F.R. §416.1218(b)(1) are "non-liquid resources." Although 16 DE Admin Code 20300.2 "captures" this concept, it would be preferable to clarify this status in the proposed §§20310.5 and 20330.1. This could be achieved by inserting "non-

liquid” prior to “resource” in both sections.

Third, proposed §20330.1 contains the following benchmark for valuation of an auto’s equity value: “The equity value is the price it can reasonably sell for on the open market minus any encumbrances.”. The federal standard is more restrictive by limiting equity value to “the price that an item can reasonably be expected to sell for on the open market in the particular geographical area involved; minus...(a)ny encumbrances. [emphasis supplied] See attached 20 C.F.R. 416.1201(c)(2). The federal regulation would not allow a valuation based on an ebay, national, or international internet sale. The DMMA regulation would allow valuation based on a non-Delaware market. At a minimum, I recommend the adoption of the following revised sentence: “The equity value is the price it can reasonably sell for on the open market in Delaware minus any encumbrances.”

I recommend sharing the above observations with DMMA.

8. DMMA Prop. School-Based Wellness Center Funding [11 DE Reg. 1189 (March 1, 2008)]

The Division of Medicaid and Medical Assistance proposes to amend the Medicaid State Plan to add reimbursement methodology for School-Based Wellness Centers. CMS is prompting DMMA to adopt a funding standard. See “Summary of Proposed Amendment” at p. 1189.

DMMA proposes no change in services. It establishes a single rate for each client served in a Wellness Center which would be based on prior year Center costs.

I recommend that the Council advise DMMA that it reviewed the amendment and did not identify any concerns.

9. DHSS Proposed Fair Hearing Procedure Regulation [11 DE Reg. 1193 (March 1, 2008)]

The Department of Health & Social Services proposes to amend its fair hearing regulations.

I have the following observations.

First, in §5000, the definition of “DHSS” merits revision.

A. Paragraph 2 refers to “a managed care company (“MCO”) under contract with DHSS to manage an operation of the Medicaid Program.” The Division of Child Mental Health Services is a Medicaid MCO. It is not a “company”. Moreover, I lack information on whether its status as an MCO is established by “contract”, memorandum of understanding, or other document. DHSS should consider amending this section to accurately include the DCMHS.

B. Paragraph 1 refers to “financial assistance”. This may be too narrow. The Delaware Code contemplates many forms of “public assistance”. See Title 31 Del.C. §§501-502. DSS administers a variety of public assistance benefits, including job training and education. Compare 16 DE Admin Code §5304: “An opportunity for a hearing will be granted to any ...recipient who is aggrieved by any action of the Division of Social Services such as

actions to ...assign Food Stamp Program recipients to a specific employment and training component.” DSS is also involved in medical assistance. Apart from the Chronic Renal Disease Program, DSS is responsible for PASARR hearings. See 16 DE Admin Code §5304.1. Therefore, Par. 1 could be amended to refer to “economic, medical, vocational or child care subsidy assistance”. Parenthetically, 16 DE Admin Code §5304 refers to “economic assistance” rather than “financial assistance”. “Economic” is ostensibly a more encompassing term.

C. DDDS and DSAAPD are not mentioned in the definition of covered DHSS divisions. Both agencies administer some Medicaid waivers. The waivers authorize aggrieved applicants and participants to pursue a fair hearing. See, e.g. attached Appendix F-1:1 from ABI waiver.

D. The DLTCRP is not mentioned in the definition of covered DHSS divisions. Consistent with Title 16 Del.C. §1121(18), residents of licensed long-term care facilities can request a DHSS hearing to contest an involuntary discharge. Pursuant to 16 DE Admin Code §5304.2, DSS processes such fair hearing requests involving nursing homes. However, the DLTCRP has been processing hearings for non-nursing homes with no regulations. See attached October, 2004 correspondence between DLP and DSAAPD. It would be preferable to clarify that such hearings are subject to the Title 16 Admin Code 5000 procedures and clarify if they are processed by DSS or the DLTCRP.

Second, §5405(4) categorically disallows the hearing officer “to assist either party in the presentation of the case”. Since DHSS representatives are professionals routinely involved in hearings, this disallowance disproportionately affects pro se applicants. This provision also violates federal Food Stamp regulations which recite as follows:

(p) Household rights during hearing. The household may not be familiar with the rules of order and it may be necessary to make particular efforts to arrive at the facts of the case in a way that makes the household feel most at ease.

7 C.F.R. §273.15(p). The courts have often imposed an expectation of some assistance to pro se applicants in presenting their case in administrative hearings. See, e.g. Reefer v. Barnhart, 326 F.3d 376, 380 (3d Cir. 2003); Livingston v. Califano, 614 F.2d 342, (3d Cir. 1980); and Dobrowolsky v. Califano, 606 F. 2d 403 (3d Cir. 1979).

Third, §5405(3)(b) changes the order of presentation. The current standard establishes a norm of DHSS presenting first unless the hearing officer exercises discretion to have the individual present first. The amendment requires the party with the burden of proof to proceed first and disallows any hearing officer discretion. This is highly objectionable. The hearing officer should be granted some discretion in establishing the order of presentation. Moreover, it would be preferable to retain the current approach in which the State normally presents first. This is the approach adopted in other administrative hearings. See, e.g. attached Department of Education hearing procedures under Title 14 Del.C. §3135. As a practical level, it may streamline the hearing to have the State present first. For example, if a pro se applicant has been denied eligibility for a program, it is logical to have DHSS present first on the program eligibility standards and specific reasons why the applicant does not meet the standards. If the

applicant proceeds first, the applicant may not be clear on the standards and eligibility deficits. As a result, the presentation will be unfocused and protracted. Moreover, if the unsophisticated pro se applicant simply recites that he believes he is eligible, his appeal will be summarily denied for failure to prove all essential elements of the case with no presentation by the State based on §5405(3)c).

If the proposed changes to §5405(3)b) are retained, DHSS should amend the fourth sentence to read as follows:

The appellant or claimant is the moving party for actions related to initial ineligibility determinations, initial denials of claims or the failure to act upon a claim with reasonable promptness.

My rationale is that any termination or discontinuation of assistance decision amounts to an “ineligibility determination” or “denial”.

Fourth, the amendment to §5405(3)d) is problematic. It recites:

If the ~~second~~ party has presented evidence, the ~~first~~ party may, in the discretion of the hearing office, present rebuttal evidence.

The words “second” and “first” should be retained for clarity. Otherwise, it is unclear which “party” is being referenced.

I recommend sharing the above observations with DHSS.

10. DOE Proposed Tobacco Policy Regulation [11 DE Reg. 1100 (March 1, 2008)]

The Department of Education proposes to amend its standards covering school district and charter school tobacco policies.

I have the following observations.

The current standards require public schools to establish tobacco policies which incorporate certain minimum requirements (e.g. prohibition on use and advertising). Tobacco use is a source of disability (e.g. cancer; COPD) which merits deterrence. The amendment (§4.0) would simply require public schools to submit an electronic version of their policies to the DOE and prospectively forward any revisions to the DOE.

Since the amendment would both facilitate regulatory compliance and compilation of all public school policies by the DOE, I recommend endorsement.

11. H.B. No. 290 (Insurance Coverage: Scalp Hair Prosthesis)

This bill was introduced on February 6 and remained in the House Economic Development Committee as of March 10, 2008.

As background, the Legislature has added mandatory coverage by Delaware-regulated health insurers in recent years in several contexts. For example, insurers must cover formula and specialized food products for PKU [Title 18 Del.C. §§3355]; lead poisoning screening [Title 18 Del.C. §3337]; ovarian cancer monitoring tests [Title 18 Del.C. §3338]; serious mental illness [Title 18 Del.C. §3343]; and colorectal cancer screening [Title 18 Del.C. §3346].

This bill would require regulated group insurers which cover prostheses generally to cover scalp hair prostheses for persons suffering hair loss due to alopecia areata. “Scalp hair prostheses” are defined as artificial substitutes for scalp that are made specifically for a specific individual (lines 10-14).

Consistent with the attachments, alopecia areata is a hair loss condition which affects up to 2% of the population. It affects males and females in equal numbers. Approximately 5% of persons with the condition lose all scalp. It can occur at any age with peak incidence between the ages of 15-29 years of age. It is a medically benign condition which can cause emotional distress. The materials contain the following observation:

AA is a benign condition and most patients are asymptomatic; however, it can cause emotional and psychosocial stress in affected individuals. Self-consciousness concerning physical appearance can become important. Openly addressing these issues with patients is important in helping them cope with the condition.

Reasonable persons could differ on the merits of this legislation. Opponents would characterize scalp prostheses as essentially cosmetic in nature. They would also note that the Legislature has typically mandated insurance coverage for screening or alleviating serious or life-threatening conditions. Proponents would rely on the emotional harm that can be caused by hair loss.

I recommend taking no position on the bill. On the one hand, it would be easier to justify mandatory coverage for the screening and treatment of more debilitating conditions. On the other hand, there is no consumer harm in requiring insurer coverage of scalp prostheses for persons experiencing bald spots due to alopecia areata.

12. H.B. No. 313 (PTSD Workers’ Compensation Coverage)

This bill was introduced on February 6 and remained in the House Labor Committee as of March 10, 2008.

I have the following observations.

First, the Workers’ Compensation statute envisions coverage of employment-related injuries. The definition of “injury” is somewhat narrow in the context of mental or emotional conditions:

(15) “Injury” and “personal injury” mean violence to the physical structure of the body,

such disease or infection as naturally results directly therefrom when reasonably treated and compensable occupational diseases and compensable radiation injuries arising out of and in the course of employment.

Title 19 Del.C. §2301(15). Caselaw, however, has allowed coverage for mental health conditions. See, e.g. State v. Cephas, 637 A.2d 20 (Del. 1994); and Page v. Hercules, 637 A.2d 29 (Del. 1994).

This bill would not amend that definition directly but would add a separate Code section directing coverage of post traumatic stress disorder (PTSD). The bill would add the following provision:

(d) Post Traumatic Stress Disorder shall be covered as a personal injury as long as it is related to the occupation that the employee was engaged in or, if the person was deployed in a combat zone in the National Guard or the military or its reserves during the appropriate time period.

PTSD is a common condition among returning military from Iraq and Afghanistan. Its features are outlined in the attached summaries from veterans' and military sites. It can also occur based on other trauma (e.g. industrial explosion).

I recommend that the SCPD endorse the legislation with the caveat that the Legislature may wish to eventually explicitly expand the general definition of "injury" to encompass mental conditions arising out of the course of employment. Apart from radiation, which is already covered, there may be industrial chemicals which cause memory or central nervous system deficits. Read literally, the current definition of "injury" would ostensibly exclude coverage of such deficits since not caused by a "disease" or "infection".

13. H.B. No. 302 (Organ Donations)

This bill was introduced on January 23, 2008 and remained in the House Health & Human Development Committee as of March 10, 2008. There is a fiscal note.

I have the following observations.

First, the current Delaware Code allows applicants for a driver's license or identification card to designate themselves as an organ donor. Title 16 Del.C. §2724. That designation on the license authorizes a gift of organs upon death with no further consent. Title 16 Del.C. §2727. The bill would substitute a system in which the license/id card application process would include a notice that unless the applicant affirmatively opted out, the individual would be deemed to have consented to organ donation.

Second, the rationale for switching to an "opt out" or "presumed consent" approach to organ donation is that there is a shortage of organ donors and "opt out" systems adopted in some other countries (e.g. Belgium and Austria) have increased the number of donors. See attached

articles.

Third, opposition to a “presumed consent” approach to organ donation has generally focused on ethical issues and lack of popular support. In England, a “presumed consent” bill failed by a 307-60 vote. In a 2005 national survey in the United States, most respondents either opposed (26.7%) or strongly opposed (30.1%) a presumed consent approach to organ donation. See attachments. A few years ago the American Medical Association (AMA) declined to support an “opt out” approach to organ donation. Instead, the AMA recommended some pilot projects to assess the effects of a “presumed consent” approach. The AMA also commented as follows: “Unless there are data to suggest a positive effect on donation, neither presumed consent nor mandated choice for deceased donation should be widely implemented.” See attached AMA Council on Ethical and Judicial Affairs Opinion E.2.155.

In a nutshell, reasonable persons could support or not support “presumed consent” legislation in the context of organ donation. Consistent with the 2005 Executive Summary to the 2005 national survey (attached), the percentage of Americans consenting to organ donation increased from 55% in 1993 to 72% in 2005. Therefore, the national trend, without “presumed consent”, is clearly towards more persons voluntarily opting to be organ donors. H.B. No. 302 recites that 38% of Delaware applicants for licenses and id card have opted to be organ donors (lines 12-14). I suspect that with better advertising and more information, this percentage would likely increase. I recommend not supporting H.B. No. 302 in favor of supporting an information campaign to increase the percentage of donors without resorting to a controversial “opt out” system.

Attachments

A:208bils
F:pub/bjh/legis/p&l/2008/308bils