

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian Hartman

Re: Recent Legislative, Regulatory & Policy Initiatives

Date: April 4, 2008

I am providing my analysis of twelve (12) legislative, regulatory, and policy initiatives through this memo in anticipation of the April 10 SCPD Policy & Law Committee meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DOE Final Standard Certificate Regulation [11 DE Reg. 1375 (April 1, 2008)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in January, 2008. Both Councils endorsed the revised standards. The Department of Education has now acknowledged the endorsements and adopted final regulations with no changes.

2. DOE Proposed Education Profile Report Regulation [11 DE Reg. 1297 (April 1, 2008)]

The Department of Education proposes to amend its standards related to publication of education profiles.

I have the following observations.

As background, the Legislature enacted S.B. No. 76 in 2003 to facilitate compliance with the federal No Child Left Behind Act. The prime sponsors were Sen. Sokola and Rep. Reynolds. That legislation is codified, in part, as the attached Title 14 Del.C. §124A. The legislation is intended to enable assessment of educational trends, to permit parents and citizens to compare schools and districts, and to promote accountability. Annual educational profile reports must include information on the following: student testing and achievement; accountability; school safety, discipline, and attendance; student-staff ratios; pupil and staff demographics; district revenues, expenditures, tax rates and wealth; school curricular offerings; and community involvement.

The proposed regulations will have the effect of diluting meaningful access to the education

profile reports and may violate the letter of the statute. Under the revised regulations, the full annual education profile report would be published only on the DOE website. A brief “paper” summary of the report (less than 4 pages long), but not the full report, would be printed.

The synopsis recites as follows:

The amendments provide that the print format of the school, district, and state profiles may vary from the web version because the print format is intended to summarize the detail contained on the website.

Section 2.0 recites as follows:

The State shall have the profiles available on the Department of Education website on or before August 1st of each year. In addition, subject to an annual appropriation in the annual state budget act, the profiles shall be published in a print format as determined by the Department that does not exceed four pages. The print format is intended to summarize the detail contained on the website.

[emphasis supplied]

In contrast, the statute requires the printing and distribution of the educational profiles:

(f) The Education Profiles will be published, subject to an annual appropriation in the annual state budget act, at the expense of the State. Said profiles will be printed by the Department of Education in sufficient quantity and supplied to local school districts in sufficient quantity for distribution to district staff, parents and the community at large.

[emphasis supplied]

The statute does not authorize the DOE to print only a 3-4 page summary of the educational profile. The statute envisions the printing and distribution of detailed profiles “in a user-friendly form that permits educationally meaningful comparisons among schools” [Title 14 Del.C. §124A(b)] and compilation of all required information on a “school-specific basis” [Title 14 Del.C. §124A(c)]. The statute clearly promotes wide distribution of the education profiles in a “paper” format readily usable by everyone. Under the statute, the only justification for deferring publication of the “print” report would be the lack of an annual appropriation.

I recommend opposition to the proposed regulation. The Council may also wish to share its commentary with the Senate and House education committees. Finally, the Council may wish to forward a courtesy copy of its commentary to NCC Councilman Jea Street.

3. DSS Prop. Child Subsidy “Necessity of Child Care” Reg. [11 DE Reg. 1328 (April 1, 2008)]

The Division of Social Services proposes to amend its “necessity of childcare” standards

used in the Child Care Subsidy program.

As background, the Child Care Subsidy Program is designed to supplement the care children receive from their parents when the parents work, parent(s) participate in an employment and training program, parent(s) have a special need requiring absence from the home, or the children need to be protected from abuse/neglect. See attached 16 DE Admin. Code §11002.2.

The proposed amendment expands eligibility. The current standard disallows eligibility if there is another “responsible and capable adult in the household (such as another family member)”. DSS proposes to delete this limitation based on the rationale that “only parents are legally obligated to care for their child.”

Parenthetically, I note that similar issues are presented in the Medicaid program when a parent seeks private duty nursing or personal assistance for a child with a disability. MCOs have historically manifested reluctance to fund such services based on a vary narrow view of parental justification and need.

Since the amendment favors eligibility and recognizes that parents cannot “force” other adults in a household to care for children, I recommend endorsement.

4. DMMA Proposed Medicaid Buy-in Program Regulations [11 DE Reg. 1316 (April 1, 2008)]

The Division of Medicaid and Medical Assistance proposes to add Medicaid Buy-in (MBI) standards to both the Medicaid State Plan and Division of Social Services Manual (DSSM). For general background on the program, see attached March 1, 2007 Delaware State News article and National Assistive Technology Advocacy Project Newsletter (Fall, 2006) at pp. 364-366.

The Delaware MBI program will be known as the “Medicaid for Workers with Disabilities (MWD)” program. At 1316. To be eligible, an individual must be between the ages of 16 and 65 and meet the SSI medical disability standard (§17904). There is no resource cap (p. 1319). Countable income must not exceed 275% of the federal poverty level (FPL), equivalent to approximately \$28,600 in income for a single person living alone ($\$10,400 \times 2.75 = \$28,600$). A sliding scale would be used to determine the amount of a monthly premium. See p. 1325 and §17912 on p. 1327. Qualified persons who pay the required premium would be Medicaid-eligible. The regulations would be effective June 1, 2008.

I have the following observations.

First, the “Summary of the Proposed Amendment” is somewhat underinclusive. It recites as follows: “This program will allow disabled individuals receiving Medicaid to return to the workplace without losing their Medicaid coverage, by paying a monthly premium, if applicable.” The could be construed as a representation that the MBI is only available to current Medicaid beneficiaries who would lose eligibility based on returning to work. In fact, individuals who have

never been on Medicaid can also qualify. See, e.g. the above National Assistive Technology Advocacy Project Newsletter article at p. 365 and attached Delaware Medicaid Buy-in presentation materials from January 27, 2005 LIFE Conference identifying the following target groups:

- SSDI/Medicare beneficiaries who have to spend down to qualify for Medicaid
- SSDI beneficiaries who have to spend down to qualify for Medicaid
- SSI recipients with income at or above SSA limits
- SSI recipients with resources at or above the SSA limits
- Workers who are not receiving Medicaid or SSI/DI who meet the SSA disability definition in all ways except financial tests

Second, DMMA could have imposed a resource test. The absence of a resource cap merits endorsement. See pp. 1318-1320.

Third, the Plan amendment on the bottom of p.1323, bottom of p.1324, and top of p.1325 contemplate that everyone pays a premium. However, §17912 clarifies that persons earning up to 100% FPL pay no premium. At a minimum, it would be preferable to amend the table on the top of p. 1325 to include an initial row for “0% - 100%” and “\$0” or “none” for amount of premium. The table in §17912 could include the same clarifying edits.

Fourth, it would be preferable to include a “Resource” section in the DSSM, perhaps as §17906 (renumbering other sections), which would recite, consistent with p. 1319, that there are no resource or asset eligibility criteria for this program.

Fifth, in §17904, I recommend that DMMA add the following: “The Division may also accept pre-existing documentation (e.g. school district or DVR assessment) which confirms that the individual meets SSI disability standard (e.g. I.Q. of 59 or less).” Otherwise, the Division has no choice but to pay for an evaluation despite clear documentation that the person meets the SSI standards.

Sixth, §17912 recites that an individual or couple whose AGI exceeds \$90,008 must pay the highest premium. In contrast, the CMS “note” on p. 1324 recites that “the agency MUST require that individuals whose annual adjusted gross income, as defined in IRS statute, exceeds \$75,000 pay 100% of premiums.” The above AT article (p. 365) recites as follows: “States must require a 100 percent premium payment for individuals with adjusted gross incomes greater than \$75,000 unless states choose to subsidize the premium using their own funds.” It is unclear if: 1) the CMS standard has been increased to \$90,008 in 2008; or 2) DMMA is subsidizing premiums for persons with AGI between \$75,001 and \$90,007. DMMA may wish to reassess the accuracy of the \$90,008 figure.

Seventh, §17909 contemplates application of standard SSI deeming rules. For 16 and 17 year old applicants, this would generally mean deeming of parental income. However, §17910.2 only refers to spousal deeming. DMMA may wish to consider incorporating a reference to parental deeming for 16-17 year old program participants.

I recommend that the above observations be shared with the Division.

5. S.B. No. 174 (Bicycle & Motorized Scooter/Skateboard Legislation)

I plan to share the following commentary with the SCPD Brain Injury Committee at its April 7 meeting. Policy & Law Committee membership may wish to join the effort to secure more endorsements of the legislation.

In 2005, the SCPD Brain Injury Committee sponsored DLP-authored legislation (S.B. No. 58) which raised the age for wearing a helmet while riding a bicycle, motorized scooter, or motorized skateboard from the 16th birthday to the 18th birthday and updated the helmet certification standards in the Delaware Code. See attached May 2 SCPD memo endorsing S.B. No. 58. That bill passed the Senate but not the House in the last General Assembly.

Similar legislation (H.B. No. 174) was introduced in September, 2007. It passed the Senate after considerable debate on March 20, 2008. The Office of Highway Safety testified in favor of the bill. Consistent with the attached letters, the legislation has been endorsed by the Office of Highway Safety, the Department of Safety and Homeland Security, and the Division of Public Health. Since this bill faces an uncertain future in the House, I recommend that the SCPD solicit letters of endorsement from other organizations and agencies. This approach in 2005 resulted in endorsements from several organizations. I also recommend soliciting a letter of support from DMMA based on the following: 1) Office of Highway Safety's medical cost estimate for injured motorcyclists without helmets (March 27 News Journal article); and 2) Maryland estimate of impact on Medicaid of injured motorcyclists without helmets referenced in SCPD's letter of endorsement on S.B. No. 46

Parenthetically, consistent with the attached March 28, 2008 News Journal article, an 18 year old riding a bike with dark clothes and no helmet at night was recently killed in Kent County. Since he was 18, the bill would technically not have covered this rider. However, it provides an illustration of the need for this type of legislation to cover typical risk-taking behavior by teenagers.

The importance of requiring helmet use by 16-17 year old teens is statistically supported by the attached CDC chart illustrating that this is a very high-risk age group for TBI. The chart could be included or referenced in communication with legislators.

6. HRC Prop. Equal Accommodations & Fair Housing Regs. [11 DE Reg. 1357 (April 1, 2008)]

The Human Relations Commission proposes amendments to its regulations covering the processing of complaints under both the Equal Accommodations and Fair Housing statutes, Title 6 Del.C. Chs. 45 and 46. A public hearing to receive comments is scheduled for May 8, 2008.

I have the following observations and recommendations.

EQUAL ACCOMMODATIONS REGULATIONS

First, in the “Introduction” section, first sentence, delete “under”.

Second, in the “Introduction” section, last sentence, the HRC recites that the revised regulations will apply to causes of action arising under the Equal Accommodation Act after May 8, 2008. Section 11.3 explicitly applies the APA to any amendment to the existing regulations. Under the APA, non-emergency regulations cannot become final until “10 days from the date the order adopting, amending or repealing a regulation has been published in its final form, in full or as a summary, in the Register of Regulations...” See Title 29 Del.C. §10118(g). With a public hearing scheduled for May 8, the earliest final regulations could be published in the Register is June 1, 2008. If the HRC is confident of publication of the final regulation in the June Register, it could consider adoption of an effective date of approximately June 11.

Third, a period should be inserted at the end of §1.2, definition of “minor”.

Fourth, the HRC should consider deletion of the definition of “Persons Entitled to Protection” in §1.2. I could not locate any reference to the term in the regulations and the definition is therefore superfluous. Moreover, the definition is oddly worded. It essentially states that all persons in Delaware are protected. Finally, the term “handicap” should be deleted to comport with the deletion of “handicap” in §1.1 based on Title 6 Del.C. §4502(6).

Fifth §2.6.3 is “underinclusive”. It refers to “owner, lessee, proprietor, manager or superintendent”. The statute [Title 6 Del.C. §4504(a)(b)] now includes the following: director, supervisor, agent or employee.

Sixth, §2.8 recites that service of the complaint shall be made in accordance with “12.2 of these Regulations”. There is no §12.2 in the Regulations.

Seventh, in §4.3, substitute “attorney” for “attorneys”.

Eighth, in §5.1.8, first sentence, substitute “to” for “on” after “due”.

Ninth, §5.1.10 is “underinclusive”. It only refers to a right of appeal of an order dismissing a complaint by “the Panel” while §5.0 includes circumstances under which dismissal can be authorized by “a single Commissioner” (§5.1.2) or Panel Chair or designee (§5.1.6). The HRC could consider amending §5.1.10 as follows: “Any final order dismissing a complaint under this section is subject to Superior Court review pursuant to 6 Del.C. §4511.”

Tenth, in §7.1, third sentence, retain the word “conciliation” rather than substituting “fact-finding”. My rationale is as follows:

A. The title of Regulation 7.0 is “Conciliation”.

B. Conciliation is different from fact-finding. Compare the HRC’s Fair Housing regulations. A “fact-finding” conference is part of investigation (§4.3) which is distinct from “conciliation” (§5.0).

C. The Equal Accommodations statute refers to “conciliation” (§4507) and includes a helpful definition of “conciliation [§4502(4)]. There is no definition of “fact-finding”.

D. The conference under §7.0 may involve no “fact-finding” whatsoever (e.g. facts may be undisputed) and settlement terms could be the sole topic of discussion.

Eleventh, §8.5 changes the time period to request a subpoena from 10 calendar days to 20 business days prior to hearing. This is a long time. It would be less objectionable if there were a regulation establishing a long notice of hearing timeframe (e.g. minimum of 60 days). Otherwise, if a party were provided 30 calendar days notice of hearing, there would be no time to request a subpoena. A compromise would be 15 business days. Since §11.0 converts periods of less than 11 days to “business days”, the current 10 calendar day standard is essentially 10 business days. A 15 business day standard would amount to an extension of 5 business days in the regulation.

Twelfth, §8.6 authorizes “another person who is not a Party” to serve a subpoena. This conflicts with Title 6 Del.C.§4510(a), first sentence.

Thirteenth, I recommend adopting the same time frame for disclosure of witnesses and exhibits under §§8.8 and 8.10. As a practical matter, this will generally result in a single combined submission rather than two submissions. Moreover, the interests served by the advance disclosure are the same. I recommend amending §8.8 by establishing a 10 business day standard to conform to the 10 business day standard in §8.10. This would be the same timetable adopted in the HRC’s Fair Housing regulations, §§10.1 and 10.2.

Fourteenth, §8.9 categorically precludes consideration of any motion not delivered 10 business days prior to hearing. This is too rigid. Literally, a party could not even file a motion for a continuance based on good cause 9 business days prior to hearing. In all other contexts, the Commission reserves discretion in addressing late submissions. See §§8.2 and 8.5 and 8.10.1. The no-exceptions approach also creates a conflict with §11.1.2.

Fifteenth, the HRC Fair Housing regulation (§10.1.1) authorizes a panel to inspect or view the location involved in the case. This could be particularly helpful in an accessibility dispute. The HRC may wish to amend §8.10 to incorporate such an authorization in the Equal Accommodation standards.

Sixteenth, in §9.3, first sentence, some words are missing. Insert “any Party” after “order”.

FAIR HOUSING REGULATIONS

Seventeenth, in §1.0, move “Special Administration Fund” to appear after “Respondent” to match Title 6 Del.C. §4602.

Eighteenth, although the concept of “direct threat” usually appears in the context of a tenancy [Title 6 Del.C. §4603© }}, it could arise in some other housing contexts as well. Consider substituting “occupancy” for “tenancy” at the end of §1.0, definition of “direct threat”. By analogy, the “reasonable accommodation” definition is not limited to “tenancy”.

Nineteenth, §10.3 categorically precludes consideration of any motion not delivered 10 business days prior to hearing. This is too rigid. Literally, a party could not even file a motion for a continuance based on good cause 9 business days prior to hearing. The no-exceptions approach creates a conflict with §14.1.2.

Twentieth, §11.5 requires a request for subpoena to be submitted at least 20 business days prior to hearing. This is a long time. It would be less objectionable if there were a regulation establishing a long notice of hearing timeframe (e.g. minimum of 60 days). Otherwise, if a party were provided 30 calendar days notice of hearing, there would be no time to request a subpoena. A compromise would be 15 business days.

Twenty-first, the period is missing at the end of §14.1.2.

Twenty-second, §15.0 appears to address only 2 of the 3 means of qualifying as “housing for older persons” in Title 6 Del.C. §4202(16). The HRC may wish to consider whether §15.0 should be amended to address Title 6 Del.C. §4602(16)a.

I recommend sharing the above observations and recommendations with the Human Relations Commission. I also recommend consideration of an appearance at the May 8 public hearing.

7. DDDS Human Rights Committee Policy Revision

The Division of Developmental Disabilities Services plans to revise its Human Rights Committee (HRC) policy. I attach a copy of the current policy and the related DDDS Behavior/Mental Health Support Policy. The HRCs review rights complaints, restrictive behavioral plans, and psychotropic medications.

I submitted the following March 30 memo to DDDS with my comments. The SCPD may wish to consider endorsement or development of its own commentary.

Memo

To: Mary Anderson
From: Brian Hartman
Subject: Human Rights Committee Policy
Date: September 11, 2008

I understand that the Division plans to revise the January, 2004 Human Rights Committee policy. I have the following observations and recommendations. Given time constraints, my comments should be considered preliminary and non-exhaustive.

1. In practice, the NCC HRC has historically reviewed residential DDDS clients. I do not recall reviewing rights restrictions and psychotropic medications for non-residential clients, including non-residential Special Populations clients who may be participating in day programs such as the Chimes. The HRC has reviewed individual rights complaints filed by non-residential clients. The policy ostensibly authorizes the HRC to review rights restrictions, psychotropic medications, and rights complaints for all DDDS clients irrespective of setting and status, including clients only participating in respite. DDDS should consider whether the policy should conform to current practice (e.g. only covering rights restrictions and psychotropic medications for residential clients). One option would be to cover both residential clients and non-residential clients enrolled in day programs.

2. In Section IV, definition of “Alternative Decision Maker”, DDDS should consider adding an agent or attorney-in-fact appointed by the client through a power of attorney or similar surrogate appointment document. I know there is a Stockley Center Advance Health Care Directive Policy authorizing clients to appoint an agent to make health care decisions. A conforming reference should be added to Appendix B. III.

I also recommend deletion of the reference to “a person who has otherwise exhibited special care and concern about a person receiving services”. There is no legal authority for a “caring” person to give consent to rights restrictions and medications. For residential clients, Title 16 Del.C. §§1121(33) and 1122 only authorize next of kin decision-making. For persons with no family, Title 16 Del.C. §2507(b)(3) authorizes health care decisions (but not restriction of rights) decision-making by a person who has exhibited special care and concern only if appointed as the guardian for that purpose by the Court of Chancery.”

Parenthetically since there are similar references to obtaining consent from persons with simply an “existing relationship...willing to make decisions” in Appendix B, §V, these references should also be deleted. There is no legal authority for such persons providing consent to psychotropic medications and restrictive procedures.

3. Section V.D.7 indicates that the HRC reviews “all individual rights restrictions”. I have no objection to this authorization. However, DDDS should recognize that this is a fairly broad statement which would include review of even minor restrictions. My recollection is that DDDS did not envision HRC review of some planned restrictions consistent with PEACE or MANDT protocols.

4. In Section V.I., DDDS could consider adding at least a preference for including a representative of the Disabilities Law Program on the HRC. The DDDS Mortality Review Committee policy names a DLP representative as a mandatory member of that committee. This would also conform to long-term practice. The DLP currently has membership in all DDDS HRCs. Pat Shipe has many years of service on the Stockley and downstate community HRCs and I have likewise served on the NCC HRC for many years.

5. I understand that the HRC member liability issue raised with the Division Director has prompted

some consideration of options. The HRC policy revision should not be finalized until liability options have been assessed. Some options would include: 1) renaming the “committee” a “board” or “commission” to promote limitation of liability under Title 10 Del.C. §4001; and 2) specifically characterizing members as “public officers” under Title 10Del.C. §4001.

6. In Section V.Q, I recommend deletion of the following sentence: “Any member involved in the development of a proposal or issue to be addressed by the HRC is excluded from voting on that respective topic.” Literally, this would mean anyone proposing a motion could not vote on it. A member could not vote on a recommendation he/she proposes under Section V.D.4. There could be conflicts of interest in other contexts since contractors can be HRC members (§V.I.). For example, a Keystone representative should abstain from review of Keystone clients. The limitation on voting by anyone involved in a proposal, however, makes little sense.

7. The interrelationship between PROBIS and HRC is not reflected in the HRC policy and is not clearly reflected in the Behavior/Mental Health Support Policy. Lack of clarity does lead to indecision and implementation problems. For example, in practice, HRCs have declined to review medications and restrictions until first reviewed by PROBIS. However, PROBIS could theoretically decide to only review an intervention every 10 years. See Behavior/Mental Health Support Policy at §V.S, §V.V and §VI. 24. Section V.S. contemplates at least annual PROBIS and HRC reviews of interventions but the latter sections allows PROBIS to defer reviews forever. If deferred, a case would never return to HRC for review, much less every year.

8. DDS policies contain conflicting information about the role of the HRC. The Behavior/Mental Health Support Policy (§V.EE.5) specifically limits HRC review to an assessment of proper consent. In contrast, the HRC policy (II) envisions a broader review based on protection of all rights in the LTC Bill of Rights Act. This would include a review of whether chemical and physical restraints are being imposed for discipline or convenience [§1121(7)]; telephone restrictions violate §1121(11); privacy is unduly compromised under §1121(14) (e.g. video monitoring in bedroom); or restrictions on access to personal property are reasonable or violate §1121(17). The HRC Policy (§V.D.3) requires not only assessment of consent, but also review of “due process”, assessment of whether Human Rights Review Questions have been comprehensively answered, and “restriction of rights or risk to protections is justified”. See also HRC Policy, §V.S, contemplating HRC review of whether “individual’s rights and personal dignity continue to be respected.” Historically, the HRC has assessed more than “proper consent” and the contrary references in the Behavior/Mental Health Support Policy should be deleted. The HRC is a “human rights” committee, not simply a reviewer of “consent”. HRCs were intended to reflect the conscience of the community. See Par. 9 below.

9. The Behavior/Mental Health Support Policy also makes PROBIS the exclusive reviewer of consent for psychotropic medications and affirmatively disallows HRC review of the existence of proper consent to psychotropic medications (§VII). This has never been the practice. Most of the cases reviewed by all of the HRCs involve potential chemical restraints, i.e., psychotropic medications. Historically, the genesis of the HRC was the ICF/MR regulations which required maintenance of a “specially designed committee” to “review, approve, an monitor individual programs designed to manage inappropriate behavior”, insure “these programs are conducted only with ...written informed consent”, and make suggestions ...about practices and programs as they relate to drug usage, physical restraints, time-out rooms, application of painful or noxious stimuli,

control of inappropriate behavior, protection of client rights and funds, and any other area that the committee believes need to be addressed.” 42 C.F.R. §483.440(f)(3).

10. In the HRC policy, §V.N, the word “release” should be “released”.

8. S.B. No. 222 (Early Childhood Education Quality Improvement Program)

This bill was introduced on March 20 and remained in the Senate Education Committee as of March 31, 2008.

As background, the Delaware Code authorizes the Department of Education to provide early childhood education through contracts with public and private providers, including federal Head Start programs. The Interagency Resource Management Committee (IRMC) oversees this initiative. See attached Title 14 Del.C. Ch. 30. I attach the latest IRMC report (covering 2006) published on the Web.

S.B. No. 222 would require the DOE to establish a specific quality rating and improvement component for the early childhood education program, i.e., the Delaware Stars for Early Success system (lines 25-28). The specific features of the system are outlined at lines 29-45. The standards could exceed minimum child care licensing criteria. The standards would be based on “best practices”. Information would be shared with families. Provider strengths and weaknesses would be identified and shared with the respective provider. Technical assistance would be offered to providers.

I recommend endorsement of the concept of the legislation. I lack specific information about the comparative merits of the particular Delaware Stars for Early Success system being codified. The bill recites that it has been successfully piloted (lines 11-12). If the SCPD or GACEC obtains further specifics on the positive features of the system, the endorsement could be embellished.

9. S.B. No. 227 (Gold Alert Program for Missing Persons)

This bill was introduced on March 20. It has been assigned to the Senate Finance Committee.

As background, Colorado adopted legislation in 2007 which expanded the familiar Amber Alert system to missing senior citizens and persons with developmental disabilities. See attachments. S.B. No. 227 would establish a “gold alert program” for missing senior citizens, missing persons with disabilities, and missing suicidal persons. The alert would cover both children and adults with disabilities or suicidal profiles. When State or local law enforcement agencies are notified that a covered person is missing, further information would be solicited from the person’s family. The person’s description would then be entered into both State and national databases. The media is also alerted.

The bill is generally well written. It would also be a valuable safety-net system for persons disabilities, including those with TBI who are subject to memory loss and disorientation. I

recommend that the SCPD and other organizations strongly endorse the bill. I did identify one grammatical error, i.e., the word “who” should be “which” in line 62. However, the error is minor and does not merit a comment.

10. H.B. No. 345 (Sex Offender Community Notification)

This bill was introduced on March 20, 2008. As of March 31, it remained in the House Judiciary Committee.

I have the following observations.

First, this bill would amend attached Title 11 Del.C. §4336. This statute requires the DOC, DHSS and DSCY&F to notify the police and Attorney General of the pending release of some sex offenders from incarceration or forensic psychiatric hospitalization. Courts are also required to provide such notice for some sex offenders placed on probation or released. The police than provide community notice which complies with Title 11 Del.C. §4336(h). For Tier Two offenders, the current statute contemplates provision of the notice to “community organizations”:

In order to be a community organization entitled to tier Two notification, such organizations must register with the local law enforcement agency, or where the community has no local law enforcement agency, with the Superintendent of State Police. Organizations may only be included on the notification list if they operate an establishment where children gather under their care or where women are cared for.

Title 11 Del.C. §4336(h)(2). The State Board of Education provides a list of schools to facilitate implementation of the notice requirement. Id.

Second, the bill amends the above standard by adding the following italicized phrase:

In order to be a community organization entitled to tier Two notification, such organizations must register with the local law enforcement agency, or where the community has no local law enforcement agency, with the Superintendent of State Police. Organizations may only be included on the notification list if they operate an establishment where children gather under their care or where women are cared for *including commercial establishments offering classes for children and day care centers.*

Third, the effect of the bill is unclear. Consider the following:

A. Commercial establishments offering classes would ostensibly already be covered by the phrase “where children gather under their care”. Summer camps, commercial child care centers, commercial tutoring agencies, and libraries would logically be included under the existing standard.

B. The amendment could be read as limiting. Do the sponsors intend to cover 1) commercial establishments offering classes and 2) all day care centers OR do the sponsors intend to cover only commercial establishments and day care centers offering classes? The latter would

exclude day care centers serving only infants since they would not typically offer “classes”.

Fourth, the sponsors may wish to consider revising this bill to prompt consistency in two community notification statutes. Title 11 Del.C. §4121 overlaps §4336 but contains inconsistent notification standards. Section 4336(i)(1) authorizes, but does not require, community notification for Tier Two sex offenders. However, the scope of notice is broader and allows any establishment or person to request placement on the notification list:

“Community notification” means notice ...to schools, licensed day care facilities, public libraries, any other organization, company or individual upon request, and other accessible public facilities within the community.

Title 11 Del.C. §4121(a). Logically, it would make sense to amend §4336(h)(2) to achieve consistency with §4121(a). Both statutes define eligibility for inclusion on a community notification list for Tier Two sex offenders. Moreover, at a minimum, it may be preferable to use the same language to refer to child care centers. Section 4336 refers to “day care centers” while §4121 refers to “licensed day care facilities”.

Fifth, there is no fiscal note connected to this bill. Since expansion of the notification list may result in expanded notification costs, perhaps this bill should include a fiscal note. Consistent with the attached January 8, 2008 News Journal article, there are more than 3,300 sex offenders in Delaware, making implementation of notification laws increasingly expensive.

I recommend sharing the above observations with policymakers.

11. H.B. No. 355 (Health Insurer Coverage of Hearing Aids)

The attached draft legislation would require State-regulated individual and group health insurance carriers to cover hearing aids for children. Coverage would be capped at \$1,000 per hearing aid, per ear, every 3 years. The bill had not been introduced as of March 31, 2008.

I analyzed the draft bill on March 31, 2008 and prepared the attached alternate version. My rationale for revision includes the following.

First, by requiring insurers to “provide coverage of up to one thousand dollars” (line 9), the bill may literally disallow voluntary insurer coverage exceeding \$1,000. In other words, the mandatory language could be construed as a cap.

Second, I incrementally extended eligibility to young adults based on the recently amended Title 18 Del.C. §§3354 and 3570. This is a relatively modest extension of eligibility coverage. If the sponsors anticipate lots of insurer opposition, it could be dropped.

Third, I edited the description of health insurers to comport with similar bills [e.g. H.B. No. 290, lines 4-6 and 27-29] and statutes [Title 18 Del.C. §§3346 and 3347].

Fourth, based on a March 26 email from Linda Heller, I understand that a digital hearing aid costs approximately \$3,000. Moreover, the states of Kentucky, Louisiana, Maryland have statutes requiring \$1,400 in coverage for each hearing aid. I therefore inserted a relatively conservative automatic step increase to \$1,250 in 5 years. I suspect that the sponsors would prefer a modest bill with a higher probability of success to a bill with high coverage mandates.

Fifth, consistent with an email from Matt Denn, I deleted the first sentence at lines 10-11. Insurance contracts will vary in terms of “in-network” providers and authorized vendors for durable medical equipment and there is no need to insert an affirmatively limiting provision in the statute. There is no such limit in similar statutes.

Sixth, I deleted the “reimbursement” sentence in lines 12-13. In some cases the insurer may pre-approve and “front” costs or pay the provider directly. Not all insurance operates on a reimbursement model.

Seventh, I considered outright deletion of lines 17-20. Although there are some analogs in Title 18 Del.C. §§3343(a)(2) and 3554, the vast majority of “mandatory coverage” statutes do not contain explicit exemptions. I compromised by including the following provision:

This section does not apply to accident-only, hospital confinement indemnity, Medicare supplement, long-term care, or disability-income insurance.

I recommend avoiding the exclusionary term “limited benefit policy” (lines 19-20) since all policies are essentially “limited benefit policies”.

Eighth, I edited lines 15-16 to clarify that an insurer can apply its “standard” deductible based on “similar” benefits (e.g. DME). Otherwise, an insurer could simply adopt a \$1,000 special deductible for hearing aids and pay nothing or adopt the highest deductible under the policy for any class of benefits.

Ninth, I deleted Section 3 based on an email from Matt Denn indicating that State employee coverage already exceeds coverage in the bill.

Given the potential for consideration of my alternate bill prior to actual introduction, I emailed this analysis and alternate bill to Linda Heller and Kyle on March 31. In their discretion, this analysis and alternate bill could be shared with legislative counsel. I recommend that the Policy & Law Committee review any revised bill at its April 10 meeting.

12. SS 1 for S.B. No. 71 (Interstate Compact on Placement of Children)

The original S.B. No 71 was introduced on April 4, 2007. No action was taken on that version of the bill. Senate Substitute No. 1 to S.B. No., 71 was introduced on March 20, 2008. It remained in committee as of April 1, 2008.

As background, Delaware is a current participant in an interstate compact for placement of children codified at Title 31 Del.C. §§381-389. The existing compact requires a “sending state”

contemplating placement of a child out-of-state for foster care or adoption [§381] to notify the “receiving state”. The child cannot be transferred until the “receiving state” determines that the “proposed placement does not appear to be contrary to the interests of the child.” The “sending state” retains “fiscal responsibility for support and maintenance of the child during the period of placement.” Placements in the following types of facilities are exempt: institutions for the “mentally ill, mentally defective or epileptic or any institution primarily educational in character, or any hospital or other medical facility.” Id. Delinquent children can be transferred to an out-of-state institution only if a court hearing is convened with opportunity for parental input and the court finds that an equivalent in-state facility is not available and the placement is in the best interest of the child.

A new interstate compact has been developed. It will be effective only upon enactment by 35 states. Until then the current compact remains in effect. SS No. 1 for S.B. No. 71 would officially add Delaware to the list of approving states.

I have the following observations.

First, the new compact is longer (18 pages) and more comprehensive than the current compact. It adds many positive features, including uniform data collection (line 15); explicit requirement of a multi-focused assessment by the receiving state prior to placement by a public child placing agency (lines 27-30 and 198-201); an appeal process if the “receiving state “vetoes” the placement (lines 214-226); and establishment of an interstate commission to coordinate compact activities (lines 264-389).

Second, since the compact is a “uniform” document which must be approved by states in equivalent form, there is little room for amendment. However, policymakers may wish to assess whether a fiscal note should be included with this bill based on the following: a) deletion of a requirement (Title 31 Del.C. §385) that agreements between Delaware and other states which impose a financial obligation must be approved in writing by the State budget director; b) requirement that Delaware, when acting as a receiving state, complete an assessment within certain timeframes (lines 198-207, 235, and 246-247); c) requirement that Delaware, when acting as receiving state, “supervise” the placement based on terms agreed upon by the sending state (lines 236-237 and 248); d) requirement that Delaware, when acting as receiving state, issue “timely reports” on the placement (lines 248-249); and e) requirement that Delaware pay a levy (annual dues) to support the Interstate Commission (lines 482-486, 516-517, and 534-535).

I recommend a general endorsement of the updated compact subject to policymaker consideration of its potential fiscal impact.

Attachments