

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Legislative & Regulatory Initiatives

Date: June 5, 2008

I am providing my analysis of seventeen (17) legislative and regulatory initiatives in anticipation of the June 12 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

### 1. H.B. No. 242 (Child Victim Redress)

This bill was introduced on June 21, 2007. It passed the House with one amendment on June 26, 2007. It was placed with the Executive Committee in the Senate on June 26, 2007 where it remained as of June 2, 2008.

Background on the bill is compiled in the attached May 28, 2008 News Journal article. In 2007, legislation (S.B. No. 29) was enacted which removed the statute of limitations for child victims of sexual abuse by adults. The bill also established a 2 year window after date of enactment (July 20, 2007) for victims to sue perpetrators if the pre-existing statute of limitations had already expired. Employers of perpetrators could be held liable only upon a finding of gross negligence. I attach a copy of Title 10 Del.C. §8145 which represents the codification of S.B. No. 29.

H.B. No. 242 is designed to expand and clarify the availability of redress against public employees and agencies, including school districts. The bill would waive sovereign immunity and waive the protections of the State Tort Claims Act, allowing child victims of sex abuse to obtain redress from public employers. A finding of gross negligence would ostensibly still be required to impose any liability on public employers. See Title 10 Del.C. §8145(b) and H.A. No. 2 to H.B. No. 242 (amendment to eliminate gross negligence standard laid on table).

As the May 28 article indicates, it is anomalous for the Delaware Child Victim's Act to only apply to private entities since more (125,000+) children are subject to sex abuse within public settings. The article provides some examples of victimization within Delaware public school settings. Consistent with the attached June 10, 2002 News Journal article, sex abuse of children by public school employees has historically received "little attention beyond a few sensational cases" despite the scope of the problem. The article cites an Education Week national study which documented 244 cases of teacher-student sex abuse in a 6 month period.

I recommend endorsement. The bill would provide public employers with a legal incentive to be vigilant and responsive to evidence of sex abuse of students. Moreover, sex abuse within public settings appears to be a pervasive problem justifying redress if public agencies are determined to have been grossly negligent in protecting students.

## 2. S.B. No. 250 (DSTP Suspension)

This bill was introduced on May 6, 2008 and remained in the Senate Finance Committee as of June 2, 2008.

This bill would direct the DOE to petition the federal Department of Education to waive the testing/assessment requirements of the No Child Left Behind (“NCLB”) Act for FY 09. The rationale for the bill is reflected at lines 1-10 and includes the observation that Delaware could save \$10 million with a 1-year suspension, schools are struggling financially, students are performing well academically, and progress continues toward reduction of racial and socio-economic achievement gaps.

There are pros and cons to this initiative.

On the “plus” side, if successful, the State would save some money. Moreover, consistent with the attached articles, critics of the DSTP have stressed that the DSTP is weak in providing information on individual student instructional levels and discrete strengths and weaknesses. Finally, special education students have historically performed relatively poorly on the DSTP. Diploma eligibility would not be affected since H.S. No. 1 for H.B. No. 18, signed April 5, 2007, deferred the requirement of DSTP proficiency as a condition of qualifying for a diploma until 2011. See Title 14 Del.C. §152.

On the “negative” side, once suspended, it will be difficult to resurrect the infrastructure for testing in FY 10. Moreover, there are districts subject to incentives to improve DSTP scores which would be “let off the hook”, undermining accountability. See Title 14 Del.C. §155. Districts would also ostensibly no longer develop individual education improvement plans and no longer require summer school for students with deficient DSTP performance, undermining prospects for individual student improvement. See Title 14 Del.C. §155.

Balancing the competing interests, I recommend withholding endorsement of the bill. There should be some form of objective assessment and accountability within the public education system. Suspending the current system, without an alternative accountability system in place, may sacrifice the long-term integrity of the public educational system in exchange for achieving some expedient, short-term objectives.

## 3. HCR No. 55 (DSTP Cost Estimates)

This bill was introduced on May 14, 2008. It passed the House on the same day. As of June 2, there has been action on the bill in the Senate.

The bill would direct the DOE to develop cost estimates and an implementation timeline

to reduce DSTP costs for the 2009 and 2010 testing vendor contract years. The bill identifies several possibilities. Some are discrete (e.g. using the 2006 assessment forms or reducing development of new test items). Some are more systemic (e.g. elimination of summer testing in 2009 and 2010).

The bill may be moot. The resolution contemplated DOE submission of the information within 8 days, i.e., by May 22. Prior to commenting, the SCPD may wish to contact the prime sponsors to determine if the bill remains viable. If it is not moot, I recommend endorsement since the assessment may reveal cost saving alternatives that do not unduly undermine the accountability system and may offer alternatives to S.B. No. 250.

#### 4. H.B. No. 393 (Student-Instructor Ratio)

This bill was introduced on May 1, 2008. It remained in the House Education Committee as of June 2, 2008.

As background, the Delaware Code currently requires a maximum ratio of 22 students per instructor in K-3 core academic subjects of English/Language Arts, math, science, and social studies. See attached Title 14 Del.C. §1705A. Districts routinely obtain waivers of the standard as authorized by the Code.

H.B. No. 393 suggests that districts experience difficulty in reconciling the above standard with unit count formulas which also cover subjects such as music and art (lines 6-7). However, I infer that the main focus of the bill is to allow uniform data collection to facilitate assessment of conformity with Section 1705A. The bill contemplates reporting of data by school and classroom (lines 18-19). This level of precision is necessary to truly assess conformity with Section 1705A.

I recommend endorsement since the bill will promote objective assessment of implementation of the class size standard. The resulting DOE report may reveal that waivers are the norm and the class size standard is essentially illusory.

#### 5. S.B. No. 243 (Child Care Subsidy Reimbursement Rate)

This bill was introduced on May 14, 2008. It remained in the Finance Committee as of June 2, 2008. There is a fiscal note.

As background, the child care subsidy program is administered by the Division of Social Services. It essentially subsidizes day care expenses of financially eligible parents to facilitate employment. There are several DSS regulatory provisions which describe eligibility of children with disabilities as well as authorizing eligibility if a parent has a disability. See, e.g., 16 DE Admin Code 11002.4F, 11002.6.2D, 11003A5, 11003B, and 11003.7.8. Consistent with the attached April 16, 2007 and May 17, 2007 articles, reimbursement rates last year were relatively low, i.e., between 66 percent and 75 percent of the 2005 market rate. The 2007 market rate study revealed that reimbursement rates had dropped to 57 percent of market rates. The rates reflected in the current DSS regulation [16 DE Admin Code 11006.4 (attached)] have not been updated.

Last year the SCPD endorsed legislation (S.B. No. 65) which would have authorized higher reimbursement rates for providers meeting certain standards. See attached May 1, 2007 memorandum. That bill remained in the Senate Children, Youth & Families Committee as of June 2, 2008. The Council has generally supported adequate funding to promote access to quality child care by eligible parents.

S.B. No. 243 would disallow reduction in the minimum child care subsidy reimbursement rate. Under the bill, the rate would be “at least the same percentage of the current market rate as the percentage of the 2007 market rate.” Although not a paragon of clarity, I assume this would create a minimum subsidy “floor” of 57% of market rate.

I recommend endorsement of the bill since the low rate has an adverse impact on the number of providers willing to participate in the program and the availability of quality child care to disadvantaged persons.

#### 6. H.B. No. 400 (Volunteer Physician Immunity)

This bill was introduced on May 1, 2008. It remained in the House Judiciary Committee as of June 2, 2008.

As background, the Delaware Code already provides immunity to volunteer physicians, nurses, dentists, and dental hygienists serving without compensation in clinics. See attached Title 10 Del.C. §8135. Liability is limited to acts of gross negligence. If a covered person has malpractice insurance, liability is capped at the amount of the policy limit. Apart from §8135, persons providing free services to a non-profit or governmental entity are similarly immune from damages for simple negligence. See Title 10 Del.C. §8133. Cf. Title 16 Del.C. §9801 (limited liability for anyone providing emergency care).

H.B. No. 400 enhances the liability protections of §8135 to attract physicians to volunteer in health clinics. Consistent with the attached May 29, 2008 News Journal article, personal risk liability is a deterrent to physicians volunteering to provide health services. The bill essentially extends the protections applicable to public employees under the State Tort Claims Act to the physician volunteer. The extended protections will not apply to nurses, dentists, and dental hygienists. The physician would be eligible for indemnification for any liability as well as an attorney at State expense. There is no fiscal note based on the observation that claims against volunteer physicians are rare.

I recommend a restrained endorsement subject to the sponsors’ consideration of alternate models to achieve the bill’s objectives. The endorsement is “muted” by the observation that the existing statute already limits the redress available to injured patients and H.B. No. 400 may make it more difficult for injured patients to obtain redress. As an alternative to the approach adopted in H.B. No. 400, the sponsors could consider the following.

First, similar to common legislation (e.g. H.B. No. 355) requiring health insurers to cover certain services, legislation could be introduced requiring malpractice insurers to cover physician volunteers in clinics. If desired, the Insurance Commissioner could be consulted to assess

options for establishing premium limits. Compare H.B. No. 446 in 143<sup>rd</sup> General Assembly.

Second, the sponsors could consider legislation establishing a State indemnity co-insurance system. Compare S.B. No. 6 in 144<sup>th</sup> General Assembly which would provide a State reinsurance fund to foster insurer participation in a health insurance program.

I recommend sharing the above observations with policymakers.

#### 7. S.B. No. 257 (Medicaid Claims Against Estates)

Delaware law provides guidance to executors and administrators of estates in payment of claims against a decedent. The “order of preference” is compiled in the attached Title 12 Del.C. §2105.

S.B. No. 257 would establish as the fourth (4<sup>th</sup>) priority the following: “(p)ayments for medical care for the decedent made by the Department of Health and Social Services pursuant to the State Medicaid Plan.”

The legislation is problematic for several reasons. For background, I am attaching a Medicaid Estate Recovery Policy Brief developed in April, 2005 for HHS.

First, the Brief notes that recovery is only permitted for “deceased recipients who were 55 or older when they received Medicaid benefits or who, regardless of age, were permanently institutionalized.” At p.3 . See also p. 4.n.21: “Recoveries may not exceed the total amount spent by Medicaid on the individual’s behalf at or after age 55.” This limitation is consistent with Title 25 Del.C. §5002 [Medicaid liens applicable only to an “individual who is 55 years of age or older when the individual receives services in a long-term care facility”. S.B. No. 257 omits this limitation.

Second, “(s)ates are required to waive estate recoveries when undue hardship would result.” Brief, at p. 6. Compare Title 25 Del.C. §5005. Cf. Title 29 Del.C. §7940(g). S.B. No. 257 omits this limitation.

Third, states may limit estate recovery to long-term institutional services, HCBS, and hospital and prescription drug services provided while the individual was receiving nursing facility care or HCBS. Brief at p. 2. This approach would be preferable to the “broad sweep” of demanding recovery for all Medicaid services.

Fourth, establishing Medicaid as the fourth priority will ostensibly embarrass the State. For example, Medicaid reimbursement would precede burial expenses. This presents the specter of families being unable to bury the decedent. Establishing a higher priority for burial expenses is ostensibly common in other states:

The order of payment of debt is established under state law. Mortgages, unpaid tax or public utility bills, child support arrears, burial costs, or other debts may be paid before the Medicaid lien and reduce the amount actually recovered.

Brief, at p 3. At a minimum, the bill would benefit from an amendment making burial expenses a higher priority than Medicaid recovery.

Fifth, S.B. No. 257 provides a disincentive for medical providers to serve Medicaid beneficiaries and may particularly result in reduced or denied services to persons with terminal conditions. The bill “bumps” medical care related to “the last sickness of the decedent” below Medicaid. Medical providers will soon learn to defer services to terminal Medicaid beneficiaries based on the likelihood of receiving no compensation for care.

Sixth, there is some “tension” between the unlimited recovery authorized by S.B. No. 257 and Title 29 Del.C. §7940(a)(2). The latter statute limits spousal liability for inpatient care of a patient to 5 years. It is anomalous to limit spousal liability in this statute while requiring the estate to pay back costs of care with no limit to the detriment of the spouse, the most common estate heir. The sponsors could consider imposing a similar temporal limit on estate recovery.

Given the above considerations, I recommend opposition to S.B. No. 257. A copy of the Council’s commentary should be shared with the Estates and Trusts Section of the DSBA.

8. DSS Final Child Subsidy “Necessity of Child Care” Reg. [11 DE Reg. 1657 (June 1, 2008)]

The SCPD, DDC and GACEC commented on the proposed version of this regulation in April. The Councils endorsed the regulation. I attach the SCPD’s April 22, 2008 letter for facilitated reference.

The Division of Social Services has now summarized the Councils’ commentary, thanked the Councils for their endorsement, and adopted final regulations with no changes.

I recommend no further action.

9. DOE Final Education Profile Regulation [11 DE Reg. 1625 (June 1, 2008)]

The SCPD and GACEC commented on the proposed version of this regulation in April. I attach the SCPD’s April 22, 2008 letter for facilitated reference.

The Councils objected to the Department of Education’s proposal to only publish a brief summary (4 pages or less) of education profiles of schools. The Councils noted that the proposal was contrary to statute.

The DOE has now adopted final regulations which contain a compromise, i.e., “the school or district shall provide the full printed copy of the educational profile to a citizen upon request”. See Section 2.0. This approach arguably meets the minimum requirements of the statutory standard: “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.”

Since the regulation is final, and the DOE adopted an amendment in response to the Councils’ concern, I recommend no further action.

10. DOE Prop Federal Program Complaint Process Regulation [11 DE Reg. 1544 (June 1, 2008)]

The Department of Education proposes to amend its regulation covering complaints regarding some federally funded programs administered by the Department. I have the following observations.

First, in the IDEA “note” at the end of the regulation, the word “disabled” should be deleted. The word “disabled” was deleted in the last revision but somehow reappeared in the new regulation. See 7 DE Reg., 188, 189 (August 1, 2003).

Second, it is unclear why the “note” is included with the regulation. Section 1.0 defines the federally funded programs to which the regulation applies and does not mention the IDEA. I have no objection to the note. It simply does not seem “apt” to include it if the regulation does not cover the IDEA.

Third, the Department may wish to consider amending Section 1.0 to include Section 504 of the Rehabilitation Act. The availability of a grievance system is contemplated by 34 C.F.R. 104.36. The ADA could also be included since the ADA covers all IDEA and Section 504 eligible students. Cf. Region III OCR LOF to Fredericksburg City (VA) Public Schools, 20 IDELR 924, 926 (July 23, 1993). A violation of Section 504 is a per se violation of the ADA. OCR Policy Letter to Prof. P. Zirkel, 20 IDELR 134, 137-138 (August 23, 1993); OCR Policy Letter to Hon. R. Rahall II, 21 IDELR 575 (June 22, 1994).

I recommend sharing the above observations with the DOE.

11. DOE Proposed Accountability Regulation [11 DE Reg. 1536 (June 1, 2008)]

Under the NCLB Act, persistently low-performing schools are subject to remedial measures by the Department of Education. Schools that fail to make “adequate yearly progress” for 5 consecutive years must engage in restructuring to improve student learning. See attached excerpt from The Center for Comprehensive School Reform and Improvement, “School Restructuring Options Under the No Child Left Behind: What Works When?: Reopening as a Charter School”, published at [www.centerforcsri.org/pubs/restructuring/knowledgeissues2chartering.pdf](http://www.centerforcsri.org/pubs/restructuring/knowledgeissues2chartering.pdf). One restructuring option is to reopen the school as a public charter school.

The Delaware DOE is now proposing regulations to guide such a conversion. The standards essentially require the affected district or school to apply to the DOE and implement a DOE-approved restructuring plan. I did not identify any deficiencies in the DOE’s standards which would ostensibly rarely be invoked.

I recommend endorsement.

12. DOE Proposed Charter School Regulation [11 DE Reg. 1547 (June 1, 2008)]

Like the accountability regulation addressed above, the Department of Education proposes to revise its charter school standards to account for charter school restructuring pursuant to the NCLB Act. If a charter school were prompted to restructure based on failure to make “adequate yearly progress”, this would amount to a “major modification” under new Section 9.8.1.9. Any “major modification” triggers a review process under revised Section 3.10.

The Department also includes a few minor edits. For example, charter schools are required to have a staff teacher and parent of a current student on their boards §4.1.3.1). The revised regulation disallows a single individual filling both roles. The definition of the “DSTP” is also modified for flexibility.

I recommend endorsement subject to correct of one (1) technical error. The word “success” in §4.2.1.1 should be “successor”. Compare definition of “DSTP” in §2.1.

13. DOE Proposed Content Standards Alignment Regulation [11 DE Reg. 1553 (June 1, 2008)]

The Department of Education proposes to amend its standards covering alignment of district curricula with State content standards.

As background, an existing regulation [14 DE Admin Code 501] requires instructional programs offered in public schools to be aligned with State content standards. The attached Section 1.0 within that set of standards identifies several contexts for alignment.

The Department proposes revisions to its Section 502 regulations which define the process for evaluation of alignment. The changes are discrete. Section 6.1 allows evidence of alignment for some content areas (English Language Arts, Math, Social Studies, World Languages, Visual Performing Arts, Health, and PE) to be based on flexible standards outlined in Subsections 6.1.1 - 6.1.5. A regulatory revision requires evidence of alignment in other content areas (Agriscience, Business Finance and Marketing Education, Technology Education, Skilled and Technical Sciences, and Family and Consumer Sciences) to comply with Subsection 6.1.6 (which logically cross references career and technical education standards).

I recommend endorsement subject to DOE consideration of two (2) amendments. First, in §6.1.6, the reference to “Title 14, Section 525 for Career and Technical Education” could be improved. The citation should be to 14 DE Admin. Code 525. Second, in its next revision of the Section 501 regulation, the DOE may wish to revise §1.0. It omits a reference to “Skilled and Technical Sciences” which appears in the Section 502 regulation, §§3.1 and 6.1.

14. DOE Student Rights Regulation [11 DE Reg. 1556 (June 1, 2008)]

The Department of Education proposes to revise its regulation covering district and charter school policies on student rights. First, the DOE clarifies that the policies must be based

on the “most current version or reauthorization of the Delaware Code, Delaware Administrative Code, (and) federal legislation...” See Section 1.1. The DOE also requires the posting of the policies on the district or charter school website and distribution at the beginning of the school year. See Section 2.0. Finally, the DOE requires districts and charter schools to provide electronic copies of policies to the Department along with revisions within 90 days of amendment. See Section 3.

I recommend endorsement subject to consideration of two (2) amendments.

First, Section 1 could be amended to affirmatively include Section 504 of the Rehabilitation Act. This would complement DOE guidance on Section 504 published at <http://www.doe.k12.de.us/programs/specialed/resource.shtml>. The ADA could also be included since the ADA covers all IDEA and Section 504 eligible students. Cf. Region III OCR LOF to Fredericksburg City (VA) Public Schools, 20 IDELR 924, 926 (July 23, 1993). A violation of Section 504 is a per se violation of the ADA. OCR Policy Letter to Prof. P. Zirkel, 20 IDELR 134, 137-138 (August 23, 1993); OCR Policy Letter to Hon. R. Rahall II, 21 IDELR 575 (June 22, 1994).

Second, in Section 1, the reference to “the Code of Federal Regulations Title IX” is a rather imprecise reference. The DOE could consider the following substitute: “the Patsy T. Mink Equal Opportunity in Education Act (Title IX)”. See attachment.

15. DSS Prop. Fair Hearing Practice & Procedure [11 DE Reg. 1583 (June 1, 2008)]

This regulation addresses two (2) matters: 1) nursing home discharge hearings; and 2) Medicaid waiver disputes.

Nursing Home Discharge Hearings

Earlier this year the SCPD and GACEC commented on DSS fair hearing regulations published at 11 DE Reg. 1193 (March 1, 2008)(proposed) and 11 DE Reg. 1482 (May 1, 2008)(final). The Councils noted that, although DSS regulations contemplated DSS processing of nursing home discharge hearings, the DLTCRP processed hearings involving discharges from other LTC facilities. DSS responded that the Attorney General’s Office was reviewing jurisdiction in this context. At 1484. DSS now proposes to repeal its regulation based on DLTCRP regulations under which the DLTCRP is arguably responsible for processing nursing home discharge hearing requests:

This rule is deleted from the Division of Social Services Manual as the Division of Long-Term Care Residents Protection (DLTCRP) now has jurisdiction over these types of hearings. Reference is made to DLTCRP’s Patient’s Bill of Rights, Appendix A of Regulation 3201, Nursing Home Regulation for Skilled Care and Regulation No. 3205, Nursing Home Regulations for Intermediate Care.

At 1584.

There are multiple problems with this approach. First, as the Councils noted in their

commentary, the DLTCRP has no hearing regulations akin to the DSS 5000 standards to define its hearing process. For this reason, the Councils recommended clarifying that the DSS 5000 series regulations applied to the hearings. Second, the attached DLTCRP regulations literally delegate the hearing authority to the Division of Public Health. The Division of Public Health was responsible for these hearings before the DLTCRP was established and this reference may no longer be viable. If it is viable, it is unclear if DPH has any regulations to guide hearing participants. It would be preferable for the Department of Social Services to either apply the 5000 series procedures to these hearings or issue regulations defining procedures for the hearings. Otherwise, it is impossible for participants to know who has the burden of proof, if subpoenas can be requested, if hearsay is admissible, etc.

### Medicaid Waiver Disputes

DSS adds a regulation clarifying that DSS has jurisdiction over disputes concerning Medicaid waivers. There are two (2) concerns with this standard. First, rather than refer to “waivers for the mentally retarded”, DSS should preferably use “people-first” language (e.g. waivers for persons with mental retardation). Second, since DPH is involved with the AIDS waiver, it should be listed with the other divisions in §5304.5. See DSS commentary at 11 DE Reg. 1483 (bottom).

I recommend sharing the above observations and recommendations with DSS.

#### 16. DMMA Proposed LTC Couples Regulation [11 DE Reg. 1580 (June 1, 2008)]

The Division of Medicaid and Medical Assistance proposes some amendments to its long-term care financial eligibility standards applicable to married couples.

As background, the current regulation allows couples cohabiting in a long-term care facility for at least 6 months to be budgeted as either a couple or two individuals, whichever is more beneficial to the spouses. The proposed regulation makes a few changes. The standards are not intuitive and are difficult to follow.

First, the Summary of Proposal section indicates that the new regulation addresses “how to treat the income and resources of the couple for the first six (6) months of institutionalization.” However, the actual standards are not very clear in this context. I infer that if both are institutionalized OR if 1 is institutionalized and the second has applied for admission to the same institution, the “couples” income and resource standards apply for 6 months. For example, if both had vehicles, 16 DE Admin. Code 20330.1 would exempt only one vehicle from the resources limit since the standard allows couples to exempt 1 vehicle. After 6 months, both could claim the exemption for separate vehicles since they could be budgeted as separate individuals.

Second, the “couples” standards are extended to couples receiving or applying for HCBS. However, the favorable option of being treated as a couple or separate individuals after 6 months does not apply. That option literally applies only to persons in “the same nursing facility”.

I have a few recommendations.

First, the regulation literally states that if 1 spouse is in a nursing home and the other spouse applies for residency at the nursing home, the income and resource standards for couples must apply. This means that the spousal impoverishment protections would not apply to the spouse living at home who has applied for nursing home care. This would ostensibly violate the spousal impoverishment regulations. The spouse in the home is a “community spouse” under 16 DE Admin Code 20910.2 entitled to favorable financial allowances.

Second, the “6-month” standard does not appear in the applicable federal regulation [42 C.F.R. 435.604] and DMMA could consider simply deleting the 6-month standard for ease of administration. If adopted, spouses would have the option of being budgeted as a couple or individuals and the spousal impoverishment issue would not be presented.

Third, the reference to “the same nursing facility” may be “underinclusive”. In other sections, the reference is to “an institution” or “a medical institution or nursing facility”. The superseded regulation applied to hospitals as well as nursing homes.

I recommend sharing the above observations with DMMA.

17. DMMA Prop. Medicaid Integrity Assurances Regulation [11 DE Reg. 1582 (June 1, 2008)]

This is a short regulation. In a nutshell, CMS requires all States to include assurances in their Medicaid plans that they are compliant with CMS “integrity program” standards. The “integrity program” standards cover audits, fraud, abuse, etc.

I did not identify any concerns with the assurance. I recommend either endorsement or no comment.

Attachments

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