

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian Hartman

Re: Regulatory Initiatives

Date: July 3, 2008

I am providing my analysis of eight (8) regulatory initiatives published in the July issue of the Delaware Register of Regulations. Given the small number of proposed standards, I understand that the SCPD Executive Committee will approve commentary and that the July 10 P&L Committee meeting will be canceled. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DOE Final Unsafe School Choice Option Regulations [12 DE Reg. 62 (July 1 2008)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in May, 2008. The amendments effected two (2) changes. First, suspension and expulsion data would be considered in identifying “persistently dangerous schools”. Second, districts and charter schools would be required to submit electronic versions of their policies and procedures allowing students to “choice” to a safe school.

The Councils endorsed the standards. The DOE acknowledged the GACEC endorsement and inadvertently omitted an acknowledgment of the SCPD endorsement. The DOE apologized for the oversight. The DOE adopted the regulations with no other changes. No further SCPD action is needed.

2. DMMA Final Third Party Data Exchange Regulations [12 DE Reg. 65 (July 1, 2008)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in May, 2008. In a nutshell, the DRA requires states to have laws to ensure that health insurers share information with the state Medicaid agency so states can identify beneficiaries with third party coverage. Delaware enacted such legislation (H.B. No. 101) in February, 2008. The DMMA regulations merely attested to the enactment of the bill.

The Councils endorsed the regulations which have now been adopted with no further changes.

3. DMV Final Use of Translators Regulations [12 DE Reg. 77 (July 1, 2008)]

The SCPD, GACEC, and Council on Deaf and Hard of Hearing commented on the proposed version of these regulations in May, 2008.

First, the Councils objected to the standards as applied to the Deaf. The DMV responded by adding a sentence indicating that it would continue its practice of offering interpreter services to Deaf applicants or allowing them to bring their own interpreters. Parenthetically, DMV suggests that the Councils were “confused” in interpreting the regulations as applicable to the Deaf:

The Division has no intention of applying the proposed Administrative Code 2221 to individuals who are deaf or hard of hearing and for whom, when requested, the Division supplies a sign language interpreter. The proposed regulation concerns translators for persons who cannot read or speak English. The comments indicated there was some confusion concerning who is covered under this regulation.

At 77. I infer that the DMV may be under the misconception that ASL is English. Persons who communicate in ASL are not speaking English and the regulations apply disjunctively to anyone who does not either read or speak English.

Second, the Councils also suggested that the DMV consider offering versions of assessment materials in high incidence languages (e.g. Spanish) consistent with the practice in other states. DMV notes that it currently has a driver license written test in Spanish and is developing versions in three (3) other languages. DMV also indicates that it is updating a Spanish driver manual.

Given the provision exempting the Deaf and persons with hearing impairments from the regulations, I recommend no further action.

4. DSS Prop. Food Stamp Newly-Certified Household Regulation [12 DE Reg. 22 (July 1, 2008)]

The Division of Social Services proposes to amend its standards applicable to newly certified households. Consistent with federal law, the current standards contemplate applicants physically obtaining their “paper” benefits at a State Service Center or through the mail. Since DSS has converted to a debit card system in which benefits are electronically posted to an account, DSS has changed the references to require posting no later than thirty (30) days after the filing of the application.

I did not identify any shortcomings with the proposed standards. I recommend endorsement since the new standards conform to current practice.

5. DOE Proposed Gun Free Schools Act Compliance Regulations [12 DE Reg. 9 (July 1, 2008)]

The Department of Education proposes to adopt some discrete amendments to its standards implementing the federal Gun Free Schools Act and the related State law, Title 11 Del.C. §1457.

First, the federal law [20 U.S.C. 4141(b)] authorizes the “chief administering officer of a local educational agency” to modify the minimum penalty of a not less than a 1 year expulsion. In contrast, the Delaware statute [Title 11 Del.C. 1457(j)(4)] authorizes the “local School Board or charter school board of directors” to modify the minimum penalty of not less than a 180-day expulsion.¹ The proposed DOE regulation clarifies that the “chief school officer” (a/k/a superintendent) exercises this authority. This is ostensibly the correct approach since it comports with the federal law and the State law includes a caveat that the board is vested with the authority “unless otherwise provided for in federal or state law”.

Second, the DOE amends the citation to the Gun Free Schools Act. However, I recommend two (2) corrections, i.e. deletion of the word “Zone” and symbol “§”.

The Gun Free Schools Zone Act of 1990 was the predecessor to the Gun Free Schools Act. Consistent with the attached article, that Act was declared unconstitutional by the Supreme Court. The current reference is to the “Gun-Free Schools Act”. See attached 20 U.S.C. 4141(a).

Citations to the United States Code do not include a “§” reference. Indeed, for consistency, the DOE should amend all references to the U.S. Code in this regulation to delete the “§” reference.

Third, the DOE is adding a requirement that districts and charter schools submit an electronic version of their policies (and any subsequent amendments) implementing the above federal and State laws to the DOE. I did not identify any concerns in this context.

I recommend endorsement of the regulation subject to the corrections noted in the “Second” paragraph above.

6. DOE Prop. Student Teacher Criminal Background Check Reg. [12 DE Reg. 17 (July 1, 2008)]

The SCPD and GACEC commented on earlier proposed versions of this regulation in December, 2007 and February and May of 2008. As reflected in the attached May 12 GACEC letter, the Department did include some amendments in the May version based on Council commentary. However, the Councils still identified concerns with appeals and omission of some language from Section 3.1.5.1.

The Department is now proposing a new set of regulations which would become effective July 1, 2009. I identified several concerns with the latest proposal.

First, the regulations only cover situations in which a district or charter school is obtaining student teachers from a Delaware college or university. See Section 1.0 definition of “Higher Education Institution”. The regulations do cover out-of-state students enrolled in Delaware

¹I assume that the DOE interprets the 180 school day provision to comport with the “1 year expulsion” standard in the federal law.

colleges who may have criminal background checks from other states accepted. See Section 3.4. However, it is unclear whether any regulations would apply to situations in which a district or charter school wished to obtain student teachers from non-Delaware colleges (e.g. West Chester University; Salisbury State; University of Phoenix on-line degree program). I could not identify any statute or regulation that would preclude such an arrangement. Moreover, a specialized charter school (e.g. culinary arts; military-based) might seek student teachers enrolled in specialized programs outside of Delaware. The DOE may wish to consider whether regulatory guidance in this context would be appropriate.

Second, in Section 2.1, I recommend substituting “candidate for” for “person in”. The regulations do not retroactively apply to existing student teachers and otherwise refer to “candidates”. See, e.g., Sections 2.2, 2.3, 3.1, and 3.3.

Third, the references to “he/she”, “him/herself” and “his/her” in Sections 2.3.1 and 2.3.2 are disfavored. The DOE may wish to consider options discussed in the attached excerpt from a writing handbook, C. Edward Good, Mightier than the Sword”.

Fourth, the DOE may wish to hyphenate “on site” in Section 2.3.1.

Fifth, Section 2.3.3. contains the following directive: “An original of all information sent to the higher education institution shall be sent by the State Bureau of Identification to the candidate.” The DOE has no authority to “direct” the State Bureau of Identification to take any action. The DOE could consider the following substitute for both sentences in Section 2.3.3: “The candidate shall request the State Bureau of Identification to send original versions of the criminal background check to both the candidate and higher education institution.”

Sixth, Section 3.1 directs the institution of higher education to make an initial determination of eligibility and authorizes the institution, in the institution’s discretion, to provide an appeal process. This merits endorsement. It is an improvement over the “May” version which did not contemplate a unilateral decision by the institution to disapprove a student teaching application. The “May” version established a “joint” decision-making process between the college and district which would have been problematic in instances of lack of consensus. A lack of consensus could easily occur since approval criteria of the college and district may be different. See Sections 3.1 and 3.3.2.

Seventh, consistent with the attached May 12 letter, the Councils objected to lack of an appeal process for adverse decisions by districts and charter schools and an exemption of further appeal to the State Board. This remains a problem with the new proposed regulation. There is no mention of an appeal to the district or charter school and no mention of an appeal to the State Board. Based on the analysis in the GACEC letter, such appeals are required by statute.

I recommend that the Council share the above observations with the DOE and SBE.

7. DOE Prop, Public School Criminal Background Check Regs. [12 DE Reg. 11 (July 1, 2008)]

As background, the Department of Education issued proposed regulations in December,

2007 and February and May of 2008 covering criminal background checks of prospective “workers” in public schools, including student teachers. The Department has now “split” the proposed regulation into two (2) sets of standards. Regulation 746 (analyzed above) only covers student teachers. Regulation 745 (analyzed here) covers all school workers, including student teachers.

I have the following observations.

First, the bifurcation of the regulations is confusing. One would expect Regulation 746, entitled “Criminal Background Check for Student Teaching”, to be inclusive of all related standards, including appeal rights. It is not inclusive. At the same time, one would expect Regulation 745 to exclude student teachers. This is not the case. Regulation 745 would include student teachers given its broad definition of “covered personnel” in Section 1.0. This coverage is reinforced through the amendment to the definition of “continuously employed” in Section 1.0 and definition of “Student Teaching Assignment” in Section 1.0. The following cross reference appears in the latter definition:

“Refer to 14 DE Admin. Code 746 Criminal Background Check for Student Teaching for requirements and procedures related to criminal background checks for Student Teaching Assignments”. This oblique reference suggests that Regulation 746 contains some supplemental standards but does not explicitly exclude application of Regulation 745 to student teacher candidates. If the DOE wishes to exclude student teacher candidates from Regulation 745, it would be preferable to include an explicit exclusion in the definition of “covered personnel” and to include “appeal process” standards in Regulation 746. .

Second, in Section 2.1.1, I believe the reference to “possess” should be “process”.

Third, Section 5.0 authorizes an appeal of an adverse decision to the chief executive (superintendent; director) of a district or charter school. However, Section 5.3.3. contains an explicit statement that an adverse district or charter school decision is not further appealable to the State Board or DOE. Consistent with the attached May 12 GACEC letter, the DOE lacks the authority to exempt a district decision from review under Title 14 Del.C. §1058. The letter recited as follows:

(T)he DOE’s authority to “exempt” a school district decision from review is (also) limited by Title 14 Del.C. §1058. That statute allows any person aggrieved by a district decision involving its rules and regulations to appeal to the State Board. The State Board is authorized to establish hearing procedures but is not authorized to exempt controversies from Board review.

Therefore, the last sentence in Section 5.3.3 should be stricken.

I recommend that the above observations be shared with the SBE and DOE.

8. Bd of Pharmacy Prop. Emergency Use & Oxygen Regulations [12 DE Reg. 48 (July 1, 2008)]

The Board of Pharmacy proposes to adopt two (2) sets of revised regulations. The first set

addresses “emergency use medications” in nursing homes. The second set covers “medical gases” and liquid oxygen.

Emergency Medication

The “emergency medication” standards require nursing homes to maintain a supply of emergency medications sufficient to meet anticipated demand. See Section 11.3.1. Such medications are limited to “injectable” drugs. Nursing homes would also be required to maintain a supply of “interim use” medications sufficient to meet anticipated demand. Such medications are “non-injectable”. In assessing the “stockpiling” of both sets of drugs, the pharmacist is required to consider whether the drugs are “not available from any other authorized source in sufficient time to prevent risk or harm to patients by delay”. See Sections 11.3.1-11.3.2. My only recommendation in this context is that the title to Section 11.3 should be revised from “Emergency Use Medications” to “Emergency and Interim Use Medications”.

Medical Gases

The Board notes that federal law makes oxygen a prescriptive item (at p. 48) and it is therefore proposing regulations in this context. The standards cover training, distribution, requirement of prescription orders, and licensing. I did not identify any concerns. The Board may wish to consider revising the reference to “there under” in Section 18.5.1. I recommend substituting “Personnel...Federal law and any implementing rules or regulations regarding storage...gas.”

The Council may wish to endorse the standards subject to consideration of the two (2) suggested amendments.

Attachments

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