

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian Hartman

Re: Regulatory & Policy Initiatives

Date: September 4, 2008

I am providing my analysis of eight (8) regulatory and policy initiatives in anticipation of the September 11 meeting or, given the small number of proposed standards, review by the SCPD Executive Committee. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DSS Final Food Stamp Newly- Certified Household Reg. [12 DE Reg. 344 (September 1, 2008)]

This is an information item.

The SCPD commented on the proposed version of this regulation in July, 2008. The Division of Social Services was essentially proposing to adopt a “housekeeping” standard which requires the “posting” of benefits to a claimant’s electronic account within thirty (30) days following the date of application. The SCPD endorsed the initiative.

DSS has now acknowledged the endorsement and adopted the regulation with no amendments. I recommend no further action.

2. DOE Final Gun Free Schools Act Compliance Reg. [12 DE Reg. 325 (September 1, 2008)]

The SCPD and GACEC commented on the proposed version of this regulation in July, 2008. I attach a copy of the July 10 GACEC letter for facilitated reference. The Department of Education has now adopted a final regulation with some amendments prompted by the commentary.

The Councils endorsed the substance of the regulation subject to correction of some references, i.e., deleting “Zone” in a reference to the “Gun Free Schools Zone Act” and deletion of the symbol “§” in references to the U.S. Code.

The DOE “botched” the edits.

First, it retained the word “Zone” in Section 1.3 which maintains the incorrect reference to

a superseded law declared unconstitutional by the U.S. Supreme Court. References in Sections 4.1 and 4.2 cite to the correct law, the “Gun-Free Schools Act”.

Second, in Sections 4.1 and 4.2, the DOE deleted the “§” symbol in some U.S. Code citations (references to 20 U.S.C. 7151) while retaining it in other citations (references to 20 U.S.C. 4141).

The SCPD could either take no action or informally notify the DOE of the continuing technical errors.

3. DOE Final Student Teacher Crim. Background Check Reg [12 DE Reg 329 (September 1, 2008)]

The SCPD and GACEC commented on earlier versions of this regulation in December, 2007 and February and May of 2008. The Councils commented on the latest draft in July, 2008. I attach the GACEC’s July 10 letter for facilitated reference. The Department of Education has now adopted a final regulation with only minor changes.

First, the Councils observed that the application of the regulation to students enrolled in out-of-state colleges was not covered. The DOE responded that it may consider a “future revision” of the standards.

Second, the Councils recommended substituting “candidate for” for “person in” in Section 2.1. The DOE agreed and effected the amendment.

Third, the Councils recommended revision of references to “he/she”, “him/herself”, and “his/her”. The DOE made no change.

Fourth, the Councils recommended insertion of a hyphen between “on” and “site” in Section 2.3.1. The DOE made no change.

Fifth, the Councils observed, in the context of Section 2.3.3, that the DOE has no authority to direct the State Bureau of Identification to take action. The Councils proffered an alternate sentence. The DOE adopted a slight variation of the suggested sentence.

Sixth, the Councils supported an authorization for colleges to offer appeals to disapproved candidates. However, the Councils also objected to lack of an appeal process from district and charter school disapprovals. The DOE effected no change.

Since the regulation is final, and the DOE adopted some amendments prompted by the Councils’ commentary, I recommend no further action.

4. DOE Final Public School Crim. Background Check Reg. [12 DE Reg. 327 (September 1, 2008)]

The SCPD and GACEC commented on the proposed version of this regulation in July, 2008.

I attach a copy of the GACEC's July 10 letter for facilitated reference. The Department of Education has now adopted a final regulation with some revisions prompted by the Councils' commentary.

First, the Councils noted that the regulatory standards literally overlapped with the "student teacher" standards. In response, the DOE added the following introductory regulatory note:

This regulation shall apply to all individuals seeking public school employment in a Delaware public school. Refer to 14 Admin. Code 746 Criminal Background Check for Student Teaching for the requirements and procedures related to criminal background checks for a Student Teaching Assignments (sic "Assignment") in a Delaware public school.

The DOE also deleted a 3-sentence definition of "student teaching assignment". Finally, the DOE added some student teaching references to Section 1.0.

Second, the Councils recommended substituting "process" for "possess" in Section 2.1.1. No change was effected. The regulation retains the incorrect reference.

Third, the Councils noted that Section 5.0 authorizes an appeal by a disapproved applicant to the chief executive officer of a district or charter school. However, the Councils observed that any further appeal to the DOE or SBE was proscribed. The Councils commented that the DOE lacks the authority to limit appeals from a district to the SBE. The DOE effected no change, suggesting that a disapproval would not be issued by a local board of education. This ignores Section 5.3.2.1 which mandates that "(l)ocal school districts and charter schools shall develop procedures for appeals for reconsideration." Logically, an appeal from a chief school officer would be to the local board.

Since the regulation is final, I recommend no further action.

5. DOE Proposed Driver Education Regulation [12 DE Reg. 281 (September 1, 2008)]

The Department of Education proposes to amend its driver education regulation to conform to recent legislative changes. I attach an August 25, 2008 article authored by Rep. Miro, a September 3, 2008 article authored by Sen. Sokola, and four (4) letters to the editor which provide background. In a nutshell, the FY 09 budget for non-public school driver education was reduced to \$565,600, representing 53.8% of the amount in the FY 08 budget. This will result in non-public school students paying approximately \$363 per student for the driver education course in FY 09. I also attach a copy of the relevant provision from the budget bill (Section 402 of S.B. No. 300) which authorizes the DOE to adopt a fee schedule for non-public school students enrolling in driver education classes.

The DOE regulation essentially implements the legislative change. I identified only one (1) concern, i.e., in Section 1.1 the word "nonpolitical" should be "nonpublic".

I recommend endorsement subject to effecting the above amendment.

6. DMMA Emergency/Prop. Medicaid Transition Program Reg [12 DE Reg 270 and 284 (9/1/08)]

The Division of Medicaid and Medical Assistance proposes to revise the Medicaid State Plan and Medicaid regulations to incorporate standards for its Medical Assistance During Transition to Medicaid (MAT) Program. The standards are being issued as both emergency and proposed regulations.

As background, some SSI beneficiaries who became SSDI-eligible historically lost Medicaid eligibility since the SSDI income put them over the SSI income limit. At the same time, there is a 2 year waiting period for new SSDI beneficiaries to qualify for Medicare. This created a Catch-22 since such beneficiaries could be left without medical coverage. In 2001, DMMA adopted the MAT program. See attached DMMA Notice A-02-2001 (February 22, 2001) for specifics. It authorized Medicaid eligibility for “individuals who lose SSI eligibility for Medicaid due to receipt of Social Security Disability Income and are not yet eligible for Medicare.” At 287.

I have the following observations.

First, the proposed amendments broaden eligibility for this program. Literally, it will be available to individuals who lose Medicaid eligibility due to receipt of SSDI even if the basis for Medicaid eligibility is not SSI. See Section 17801 and chart on top of p. 287. This merits endorsement.

Second, there is a “typo” at Par (9) on p. 286. The reference to “Medical” should be to “Medicare”.

Third, the standards are inconsistent in one respect. The State Plan [Par (9) on p. 287 and chart at top of p. 287] extends eligibility only to persons “not yet eligible for Medicare”. In contrast, Section 17801 extends eligibility to anyone who “does not have Medicare coverage”. The latter standard is broader since SSDI beneficiaries can opt to not enroll in Medicare. The latter standard would allow an SSDI beneficiary eligible for Medicare to continue Medicaid eligibility indefinitely by not enrolling in Medicare. If the “Medicare coverage” standard is retained, DMMA may wish to clarify whether it refers to Medicare A, B or D. For example, if an SSDI beneficiary enrolls in Medicare A and B, but not D, does the beneficiary “have Medicare coverage” within the scope of Section 17801?

Fourth, there is some “tension” among Sections 17802, 17804, and 17805. While all income is excluded for eligibility purposes under Section 17802, Sections 17804 and 17805 contain income and countable income criteria. It appears anomalous to make income immaterial under one section while establishing income standards under other standards. The \$5.00 referenced in Section 17804 is actually a payment to the beneficiary but could be interpreted as a countable income cap. These sections may merit revisions for clarity.

I recommend sharing the above observations with the Division.

7. DSS Prop. TANF Employment & Training Program Reg. [12 DE Reg. 288 (September 1, 2008)]

The Division of Social Services proposes to adopt revisions to its TANF employment and

training program standards prompted by federal regulations adopted earlier this year [73 Fed Reg. 6771 (February 5, 2008)].

There are three (3) important federal provisions applicable to persons with disabilities.

First, the federal regulations [attached 73 Fed Reg. at 6775] stress that persons with disabilities exempt from employment and training requirements can still voluntarily opt to take advantage of vocational programs. Under such circumstances, the State must provide reasonable accommodations. Id. In the related context of parents caring for a child with a disability, the State is also obligated to assist with provision of child care if the parent wishes to work:

We would like to stress that this exclusion for a parent caring for a disabled family member does not absolve the State of its responsibility to help TANF recipients find appropriate child care, including care for children with disabilities. ...A State may not exclude a child who has a disability from available child care, if doing so would prevent the parent from gaining needed skills, finding work, and moving the family out of dependency.

73 Fed. Reg. at 6801 (attached). DSS implements this federal mandate through the last two sentences in proposed Section 3006.1:

Individuals who are exempt from Employment and Training requirements can volunteer to participate in the Employment and Training Program. Individuals with Disabilities will be afforded the same access and opportunities, including reasonable accommodations, to participate in the Employment and Training programs.

I recommend the following amendments:

Individuals who are exempt from Employment and Training requirements can volunteer to participate in the Employment and Training Program. Individuals with Disabilities will be afforded the same access, *supports* and opportunities, including reasonable accommodations, to *ensure effective participation* ~~participate~~ in the Employment and Training programs.

The amendments would cover supports such as child care for children with disabilities and conform more closely to regulatory commentary compiled at 73 Fed. Reg at 6775 (attached).

Second, the federal regulation provides states with the option of exempting both SSI and SSDI beneficiaries from mandatory participation in Employment and Training related activities. See attached 73 Fed Reg at 6798 and 6822. This is based on recognition that the SSA has determined that such individuals are incapable of engaging in substantial gainful activity. DSS may wish to consider incorporating the exemption in its regulation.

Third, consistent with attached 45 C.F.R. 261.2(n), HHS exempts “ a parent providing care for a disabled family member living in the home, provided there is medical documentation to support the need for the parent to remain in the home to care for the disabled family member.”

Background is provided in the attached 73 Fed. Reg. at 6796 and 6800-6801. DSS implements this provision through proposed Section 3006.1 which appears to conform to the federal regulation.

I recommend sharing the above observations with DSS.

8. DDDS 7/28/08 Draft Human Rights Committee (HRC) Policy

The Division of Developmental Disabilities Services (DDDS) proposes to revise its Human Rights Committee policy. A copy of the July 28, 2008 draft is attached.

I have the following observations.

First, Sections II and IV. Definitions, Advisory Capacity, relegate the HRC to simply an advisory panel “which does not have the authority...to take definitive actions or render decisions.” At least in the context of the Stockley HRC, federal ICF/MR, federal regulations require the establishment of an HRC with the authority to “review, approve, and monitor” restrictive programs and “insure” that such programs are conducted only with proper consent. See attached 42 C.F.R. 483.440(f). DDDS cannot reduce the Stockley Center HRC to a mere advisory body without violating the federal regulation.

Second, Sections II, V.C, and V.K limit the HRC to an advisory role to the Stockley director and directors of community services/adult special populations. This is inconsistent with the attached DDDS Rights Complaint policy (rev. March, 2005), Section VI, which contemplates the HRC submission of comments for the Division Director’s review. Since the HRCs may be making statewide or systemic recommendations, it makes sense to allow them to advise the Division Director, Deputy Director, and other administrators within the agency.

Third, in Section IV., Definitions, Level II Behavior Interventions, the definition of a behavioral intervention subject to HRC review literally excludes medications in the absence of a psychiatric diagnosis. As a practical matter, physicians do not prescribe a psychotropic drug without a psychiatric diagnosis. Indeed, the NCC HRC reviews the administration of drugs to hundreds of DDDS clients annually and a psychiatric diagnosis is almost always present. The ICR/MR regulation requires the Stockley HRC to review “drug usage” irrespective of the presence or absence of a psychiatric diagnosis. See attached 42 C.F.R. 440(f)(3)(iii).

Fourth, in Section IV, the standards related to a “surrogate” are problematic in several respects.

A. The reference to HIPAA is odd. HIPAA addresses access to medical records, not authority to consent to treatment. The only reason a surrogate is material to the HRC policy is in the context of authority to consent to behavioral interventions and rights restrictions. Inserting criteria related to access to records is misleading.

B. Par. 2 should be amended to require written documentation of oral consent. See Title 16 Del.C. §2507(b).

C. In Par. 3, the reference “for the purpose of requesting and receiving protected health

information” “muddies the waters”. The HRC is interested in authority to consent, not access to records. Consistent with Title 16 Del.C. §2507, the surrogate may consent to treat or withhold treatment. This is the material reference for inclusion in the policy.

D. Par. 4 should be deleted as surplusage. If someone has a guardian, this is covered by Par. 1. For the same reason, the last sentence in Par III in Exhibit B should be deleted.

E. For DDDS clients in licensed long-term care facilities, including group homes, the surrogate section should include a reference to Title 16 Del.C. §§1121(33) and 1122. Compare Section VI.

Fifth, Section V.A.4 contains an incomplete internal note related to the individual rights policy. Consistent with the “Third” paragraph above, note that the ICF/MR regulation does not exclude HRC review of drugs approved in a Behavior/Mental Health Support Plan.

Sixth, in Section V, Pars. 3 and 4 are repeated verbatim on pp. 2 and 3.

Seventh, Section V.G requires each HRC to have at least 5 members. The NCC HRC has not had 5 members in recent memory.

Eighth, Section V.H and V.P require the presence of 51% of the HRC membership to constitute a quorum. I recommend establishing a quorum of 1/3 of the members. Otherwise, the current NCC HRC, with 4 members, must have 3 members present. It is common for the HRC to operate with only 2 members.

Ninth, Section V.D., V.E, and V.N prohibit disclosure of all information shared within the context of the HRC. Tthe Division Director has historically authorized the DLP representative to include the following caveat in signing the Confidentiality Statement: “Exception: Non-personally identifiable summary information/statistics can be included in DLP reports to the federal government”. This permits the DLP to include brief information in its program performance reports to the Administration on Developmental Disabilities and SAMHSA. This authorization should be incorporated into Sections V.D, V.E, and/or V.N.

Tenth, Exhibit C, Par. 6, requires the provider to identify the mechanism “to ensure that the decision-maker...will be periodically advised of progress, problems, etc. relative to the support approach.” I do not recall such information being included in plans presented to the NCC HRC. DDDS may wish to review whether such information is solicited and memorialized in standard forms used by the Division.

I recommend sharing the above observations with DDDS and the DDDS Human Rights Committees.

Attachments

F:pub/bjh/2008p&l/908bils