MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory & Policy Initiatives

Date: January 4, 2009

I am providing my analysis of twelve (12) regulatory and policy initiatives in anticipation of the January 8 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DOE Final Graduation & Diploma Regulation [12 DE Reg. 934 (January 1, 2009)]

The SCPD and GACEC commented on the original proposed version of this regulation in October, 2008. Based on republication in November, both Councils submitted formal comments at the end of November, 2008. I attach the SCPD's November 25, 2008 letter for facilitated reference. The Department of Education has now adopted a final regulation with only a minor amendment.

First, the Councils recommended a revised definition of "core course credit". No amendment was adopted.

Second, the Councils recommended that the review of whether a student is "on track" to graduate should be done with the student and family. This suggestion was rejected as too burdensome on districts:

> While the Department and State Board of Education acknowledge the value of the second recommendation; the change is not being adopted because at least one annual review of the Student Success Plan by the parent, guardian, or Relative Caregivers is required and any additional review requirement may be too burdensome to the school or district. This does not preclude a school from adopting the practice of additional reviews with parents, guardians, and Relative Caregivers and the Department will be recommending this practice as part of the training on the Student Success Plans.

At 935.

Third, the Councils recommended a grammatical correction. The DOE indicates that the amendment was made.

Fourth, the Councils recommended an amendment to account for the need to amass more credits to graduate by 2015. The DOE did not address the comment and effected no amendment.

Fifth, the Councils questioned the rationale for deletion of the "computer literacy" credit. The DOE did not address the comment and effected no amendment.

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

2. <u>DOE Final Tuition Billing for Special Schools/Programs Reg [12 DE Reg. 940 (January 1, 2009)]</u>

This is an information item.

The SCPD Policy & Law Committee reviewed the proposed version of this regulation at its November 13 meeting. Given the technical nature of the standards, the SCPD decided to defer commentary in the absence of further information. The GACEC Policy & Law Committee then obtained a presentation from the DOE at its November 18 meeting. Based on the presentation, the GACEC decided to submit no comments on the regulation. <u>See</u> attached November 24, 2008 memo.

The DOE has now adopted a final regulation with no changes. I recommend no further action.

3. <u>DOE Final Career Technical Education Program Regulation [12 DE Reg. 936 (January 1, 2009)]</u>

The SCPD and GACEC commented on the proposed version of this regulation in November. The Councils identified no concerns with the substance of the regulation but shared two (2) grammatical and formatting recommendations.

The Department of Education has now adopted a final regulation which incorporates both changes recommended by the Councils.

Since the regulation is final, and the DOE adopted both recommendations issued by the Councils, no further action is warranted.

4. <u>DOE Final Promotion Regulation [12 DE Reg. 932 (January 1, 2009)]</u>

The SCPD commented on the proposed version of this regulation in November, 2008. The Council did not identify any substantive concerns but shared one (1) formatting recommendation.

The Department of Education has now issued a final regulation which corrects the formatting error identified by the Councils.

Since the regulation is final, and the DOE corrected the error identified by the Councils, I recommend no further action.

5. DLTCRP Final Nursing Facility Regulation [12 DE Reg. 960 (January 1, 2009)]

The SCPD and GACEC commented on the proposed version of this regulation in November. I attach the SCPD's November 26 memo for facilitated reference. There were twenty-three (23) comments. The Division of Long-term Care Residents Protection has now adopted final regulations rejecting every Council suggestion.

The Division's rationale is often weak and anomalous. For example, the Councils suggested adoption of a more comprehensive definition of "restraint" to cover "deactivation or sequestration of mobility enabling assistive technology". The Division declines to adopt a broader definition since the federal definition is not as comprehensive. At 961, Par. 4. Later, the Division highlights its adoption of stricter medication review standards which exceed federal standards. At 961, Par. 7. Thus, the Division is obviously amenable to establishing standards stricter than federal regulations when it desires.

The result of rejection of all comments is unfortunate. No nurse is required on a third shift (Par. 9). Assistive technology is part of the medical assessment of new residents of assisted living facilities, but not nursing facilities (Par. 13). Food must be palatable in group homes and assisted living facilities, but not in nursing homes (Par. 15). ICFs are required to have a resident call system and handrails on both sides of the corridor unless residents are "developmentally disabled" residing in an ICF/MR (Par. 17). Warehousing of nursing home residents with four (4) residents per room is just fine (Par. 17). Commingling of laundry, even undergarments, is not prohibited (Par. 19).

Since the regulation is final, the Councils can either defer further action or consider sharing concerns with the incoming DHSS Secretary.

6. Del, Health Care Commission Final DHIN Regulation [12 DE Reg. 979 (January 1, 2009)]

The SCPD and DDC commented on the proposed version of this regulation in November, 2008. The GACEC may have submitted comments on December 2 , subsequent to the December 1 deadline. I attach the SCPD's November 26 memo for facilitated reference. The Delaware Health Care Commission has now adopted a final regulation with some amendments prompted by the commentary.

First, the Councils recommended a grammatical change in §1.1. Although not highlighted by bold in the final regulation, the change was effected.

Second, the Councils recommended some grammatical changes in §2.1. The changes were made.

Third, the Councils identified a concern with the last sentence in §2.1. The Commission amended the sentence although the amendment does not really address the identified concern.

Fourth, the Councils suggested adoption of alternative language in §2.2 for "to their satisfaction". No change was made.

Fifth, the Councils noted that a sentence in proposed §2.3 "made no sense". The sentence was revised.

Sixth, the Councils noted that §3.2.2 was a 107 word sentence and suggested dividing it into shorter provisions. No change was made. In the preface to the final regulation, the Commission notes that several sections, including §3.2.2, "are seemingly long and difficult to parse". However, the Commission justifies them in order to incorporate other regulatory and contract standards. This essentially represents poor drafting.

Seventh, the Councils identified a grammatical error in §3.2.3. No change was made.

Eighth, the Councils questioned references to "privacy officers". No change was made.

Ninth, the Councils viewed §3.2.9 as unintelligible. No change was made.

Tenth, the Councils viewed §4.1 as unintelligible. The section was amended but is still unintelligible. It recites as follows:

> Application for and participation in DHIN requires each participating entity and its agents and employees to the following [~~in addition to~~ **provisions of this section as well as**] <u>the obligations imposed elsewhere</u>.

Eleventh, the Councils suggested substituting "participants" for "participates" in §4.1.1. The substitution was made.

Twelfth, the Councils suggested substituting "effected" for "affected" in §4.1.4. The substitution was made.

Thirteenth, the Councils questioned the authority of a committee to award financial penalties. The Commission shares its belief that the authority exists. <u>See</u> discussion at 980.

Fourteenth, the Councils suggested substituting "which" for "who" in §5.3. No change was made.

Fifteenth, the Councils suggesting insertion of a comma after "DHIN" in §6.1. Although not highlighted, the comma was added in the final regulation.

Sixteenth, the Councils recommended an amendment to §8.1. The Commission adopted a variation of the suggested amendment.

Seventeenth, the Councils recommended deletion of §3.2.12. No change was made.

Eighteenth, the Councils viewed §7.2 as somewhat paternalistic. No change was made.

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

7. DMV Use of Translators/License Testing Procedures (December, 2008)

Last Spring, the SCPD and GACEC commented on a proposed DMV regulation covering the assessment of applicants using translators. In July, the DMV adopted a final regulation which clarified that the regulation would not apply to "individuals who are deaf or hard of hearing". [12 DE Reg. 77 (July 1, 2008) (final)].

On September 10, 2008 the DMV submitted draft procedures for testing license applicants who are Deaf or hard of hearing to the SCPD. I submitted a critique to the Council on September 22. The SCPD then issued the attached October 2, 2008 conforming comments to the DMV. On December 4, the DMV notified the Council that it had incorporated some Council suggestions and adopted a final set of procedures. See attached December 4 email. The email recites as follows:

> Thanks for the information you provided for our *interpreter for a deaf or hard of hearing driver license applicant policy*. I have attached our final policy which is effective December 15, 2008.
>
> You'll find we incorporated most of the Council's suggestions. So you are aware, one area we did not incorporate is allowing the interpreter to ride in the front seat; however for safety reasons, we will be allowing the interpreter to ride in the back seat during the road test. We are also going to be using actual directional signs to direct the applicant where to go during the test instead of hand signals or sign language. The signs we have developed are very clear and easy to understand, are approximately 5"x8" in size, and will be held in a way that does not take the applicant's eyes far from the road (no more than glancing at the radio). All instructions (sign use included) will be provided by the motor vehicle technician via the interpreter prior to the road test, in order to address any questions, concerns, or confusion.

I have the following observations which follow the sequence of the SCPD's October 2 comments.

First, the Council noted that the standards were silent on DMV provision of an interpreter at no cost. The final version corrects this oversight at p. 2:

> Interpretation services for a deaf or hard of hearing person shall be provided by the Division. All fees associated with division provided interpretation services for the deaf or hard of hearing driver license applicant shall be the responsibility of the division and paid for in full by the division.

Second, the Council recommended allowing the interpreter to travel in the vehicle during the road test. The DMV agreed and added a reference to p. 3:

> For safety purposes, the interpreter will be allowed to sit in the rear of the vehicle during the road test. When directed to do so by the division technician, the interpreter may relay instructions from the division technician to the applicant. If the applicant has a question during the road test and sign language is required by either the applicant or the interpreter for effective communication, the applicant must safely pull the vehicle off the road and

come to a complete stop.
The technician will sit in the front seat and may display hand-held signs for guidance.

Third, the Council recommended including a reference to Title VI in the "Purposes" section to highlight its application to non-English speaking applicants. No amendment was made.

Fourth, the Council recommended deletion of "and paid for in full by the applicant" from the following sentence: "All fees associated with the non-English driver license applicant using a translator shall be the responsibility of the applicant requesting the service and paid in full by the applicant." The DMV adopted the recommendation and deleted the provision.

Fifth, the Council recommended amending a categorical prohibition on translator assistance during testing of non-English speaking applicants by inserting "unless directed to do so by the Division technician." The DMV added "unless directed by the division technician" on p. 1.

Sixth, the Councils recommended inclusion of references to the availability of written tests in foreign languages. References to Spanish, Chinese, Korean, and Haitian (Creole) have been added to p. 1.

Seventh, the Councils noted that the script for the Deaf applicant referred to Georgetown. This was corrected.

Since the standards are final, and the DMV adopted most recommendations, I recommend issuing a "thank you" letter or email.

8. <u>DFS Final Child Care Home Regulations [12 DE Reg. 810 (December 1, 2008)]</u>

Based on my critique, the SCPD submitted fifty-six comments on the proposed version of this regulation in December of <u>2007</u>. The Office of Child Care Licensing of the Division of Family Services issued the 200-page final regulation last month. Given time constraints, I deferred an overview of the final regulation from December until January.

As background, the Division developed the standards after conducting focus groups and obtaining input from a large task force. In the preface to the proposed regulation, DFS noted that the current standards had been adopted in 1994 and merited comprehensive revision. There are two sets of regulations. Part 103 covers "family child care homes" in which care is provided for 1-6 children in the licensee's private home. Part 104 covers "large family child care homes" in which care is provided for 7-12 children in either a private home or non-residential setting. Public hearings were convened in January, 2008. In the preface to the final regulation, DFS reports receipt of comments from 261 agencies and individuals.

To facilitate assessment of the impact of SCPD comments, I am reproducing my comments below followed by the result in bold print.

<u>PART 103</u>

1. The IDEIA Part C infant and toddlers program is implemented through Title 16 <u>Del.C.</u> Ch. 2. The program is intended to provide instructional, therapy and other services in community settings,

including child care homes and facilities. Title 16 Del.C. §214 requires all State agencies to cooperate to ensure effective implementation. There is no mention of individual family service plans (IFSPs) in Part 103. In the past, some day care providers balked at allowing Part C-sponsored professionals to provide services within the day care. It would be helpful if the DFS regulations required or encouraged cooperation. For example, the following §46.1.2 could be added: :

> 46.1.2 For children with disabilities enrolled in the State Infant & Toddler Early Intervention Program [Title 16 Del.C. Ch. 2], the Licensee shall cooperate with Program representatives to facilitate implementation of a child's individual family service plan [IFSP]. Such cooperation shall include honoring reasonable requests to permit professionals to provide services in the family child care home.

Alternatively, the above sentences could be added to existing §46.3.

No change was made to the equivalent §53.3.

2. Although there are a few cryptic references to "nondiscrimination" (e.g. §29.1.2), the regulations do not mention or proscribe discrimination based on race, disability, or other protected classes. At a minimum, §7.2.3 could be renumbered §7.2.4 and the following new §7.2.3 inserted:

> 7.2.3 Commitment to comply with applicable non-discrimination laws, including the Americans with Disabilities Act [42 U.S.C. 12101] and Delaware Equal Accommodations Law [Title 6 Del.C. Ch. 45].

I attach a December 2, 1991 Delaware Attorney General's Opinion holding that day care centers are covered by both the ADA and Delaware Equal Accommodations law.

Section 7.4.5 was added which bars discrimination based on several bases, including disability.

3. In §4.0, definition of "Corrective Action Plan", delete the extraneous "the" after "specifies".

This was corrected.

4. In §4.0, definition of "Household Member(s)", DFS should consider whether "Licensee's" should be substituted for "child's" prior to "household".

The word "child's" was deleted.

5. In §4.0, definition of "Institutional Child Abuse or Neglect", insert "while" before "placed".

The word "while" was added along with other revisions to the definition.

6. In §4.0, definition of "Office of Child Care Licensing", the grammar at the end is problematic.

DFS could consider the following amendment: "...Subchapter III, to license and prescribe, by regulations or otherwise, any reasonable standards for the conduct of child care facilities, institutions, agencies, associations, or organizations."

The amendment was adopted.

7. In §4.0, definition of Pre-school-Age Child", consider substituting "whichever" for "which ever".

No change was made.

8. In §4.0, definition of "Substitute", insert "who" before "meets".

The word "who" was added along with other revisions to the definition.

9. In §4.0, definition of "Supervision", substitute "is" for "are" before "providing".

The substitution was made along with other revisions to the definition.

10. In §6.1, amend the last two lines as follows: "...purposes of determining compliance and/or investigating complaints of non-conformity with applicable provisions of these Rules, ~~and~~ or any other applicable codes, regulations, and laws."

Several lines were deleted from the definition which rendered the proposed amendment moot.

11. In §6.2, last line, effect two amendments: 1) substitute "of non-conformity" for "with" before "applicable"; and 2) substitute "or" for "and" before "any other applicable".

The amendments were adopted.

12. In §7.1, delete comma after "Licensure".

The comma was deleted as part of an overall revision to the new §7.3.

13. There are several references in which licensees are admonished to maintain "full or substantial compliance". See, e.g., §§7.2.2; 8.1; 8.2; 9.2.2; and 9.3. These references will prove problematic for the Division in suspension, revocation, and similar enforcement contexts. In effect, the reference to "full or substantial compliance" is equivalent to 100% or 80% fulfillment of the regulations. This disjunctive standard is an invitation to the attorney for a licensee arguing that only "substantial" conformity with standards is required. I recommend deleting "full or substantial" so the references simply require "compliance" without any inconsistent adjectives which "muddy the waters".
The references were amended in new §§7.4.2; 8.1; and 8.2. Sections 9.2.2 and 9.3 were deleted in their entirety.

14. Sections 7.11, 17.9 , and 17.10 require any adult in the household of a child care home to sign a release for all medical records and mental health treatment records. This could be perceived as

somewhat "overbroad". In particular, §17.10 reinforces a stereotype that persons "under treatment" for mental illness are likely to be dangerous. Moreover, why is the "vision and hearing" (§7.11.1.3) of a household member who is not involved in child care material to licensing? Confidentiality is also a concern in this context. Section 15.0 requires DFS to provide the reasons for adverse action on a license to the licensee. If DFS discloses medical or mental health information of a household member to the licensee as the basis for the adverse action, the household member's confidential information is compromised. Indeed, §17.8 requires the licensee to actually possess the health appraisal of the household members which may contain highly confidential information. DFS should consider revising these sections to reflect legitimate privacy interests.

Sections 17.9 and 17.10 were amended to adopt a more restrained standard in which individuals would provide documentation from a health care provider rather than a blanket authorization for release of information concerning the person's risk to children.

15. In §8.1, delete the comma after "Licensee".

The comma was deleted along with other revisions to this section.

16. Amend §9.1.3 as follows: ...Licensing ~~of~~ its intent to comply with the plan.

The amendment was not adopted.

17. In §11.2.1, substitute "impacts" for "impact".

The amendment was not adopted.

18. Section 13.1.1, first sentence, could be raised as a bar to a DFS complaint investigation if an allegation involves both a DFS standard and another agency's standard. DFS should preserve its discretion by substituting "may" for "shall" to obviate a licensee argument that DFS lacks the authority to investigate a complaint.

The amendment was adopted.

19. In §14.1.1, delete the extraneous "the" before "State".

The amendment was adopted.

20. In §14.1.4, insert "of" before "determining" and insert "of non-conformity" after "complaints". The comma after "Licensing " should also be deleted.

The three amendments were adopted.

21. In 14.1.5, delete the comma after "Licensing" and insert "of" after "purposes".

The comma was not deleted. The second suggestion was obviated by other revisions to the regulation.

22. In §16.0, there is no provision for notice to the parents of a variance request. Compare DPH regulations for Adult Day Care, 16 DE Admin Code 4402:

5.15 Waiver of Requirements

5.15.1 Waiver of a standard requires Department approval. Waiver requests must be made in writing, include the full justification behind the request and address issues of safety and infection control. They are an exception to established standards and will only be approved for compelling reason.

5.15.1.1 Waiver requests which could potentially impact the health, safety or welfare of the participants must be shared with the participants and their representatives prior to submission of the waiver request to the Department.

5.15.1.1.1 Participants must be informed that they may voice their objections to any waiver request by contacting the Department.

Compare also DLTCRP ICF regulations, 16 DE Admin Code 3205:

11.0 Waiver of Standards

11.1 Specific standards may be waived by the State Board of Health provided that each of the following conditions are met:

11.1.1 Strict enforcement of the standard would result in unreasonable hardship on the license.

11.1.2 The Waiver is in accordance with the particular needs of any client of the licensee.

11.1.3 A Waiver must not adversely affect the health, safety, welfare, or rights of any client of the licensee.

11.1.4 The request for a Waiver must be made to the State Board of Health in writing by the licensee with substantial detail justifying the request.

11.1.5 Prior to filing a request for a waiver, the facility shall provide written notice of the request to each resident, each court-appointed guardian of any resident, each person appointed in the durable power of attorney of any resident, each person appointed to be a resident's health care agent under the Death with Dignity Act and each spouse and adult child of any resident. Prior to filing a request for a waiver, the facility shall also provided written notice of the request to the Office of Long Term Care Ombudsman. The notice shall state that the recipient has the right to object to the waiver request orally at the State Board of Health meeting when the request is being considered or in writing to the Board of Health in advance of such meeting.

11.1.6 A Waiver granted by the State Board of Health is not transferable to another licensee in the event of a change of ownership.

11.1.7 A Waiver shall be granted for the term of the license.

Solicitation of parental input would be consistent with other regulations encouraging parental notice and involvement. See, e.g. §§25.7 and 29.1. At a minimum, the following sentence could be added to §16.1:

> The Division may require a Licensee to provide notice of a variance request to the parent(s)/guardian(s) of children which offers them the opportunity to provide input on the variance request to the Division.

A slight variation of the suggested sentence was added:

> **16.2 The Division may require a Licensee to provide notice of a variance request to the parent(s)/guardian(s) with children in the Family Child Care Home to offer them the opportunity to provide input on the variance request to the Division.**

23. Section 17.6 contains a categorical prohibition on issuance of a license to anyone who has relinquished custody of a child due to "dependency". This is "overbroad". Dependency is defined in Title 10 Del.C. §901. In contrast to abuse and neglect, dependency does not implicate fault. A child may be removed under the "dependency" statute simply because the parent lacks "the financial means to provide for the care of the child". Paradoxically, a parent may actually try to establish a child day care home to obtain income to facilitate family reunification and remove "dependency". Apart from lack of finances, dependency may occur based on extraordinary needs of a child which a parent cannot meet (e.g. child is medically involved and is placed in medical foster home). The DLP has also filed "reverse dependency" petitions in which a parent affirmatively requests a Family Court dependency finding as a basis for a court order directing State agencies to provide services. In sum, "dependency" should not be a categorical bar to a license.

The bar on issuance of a license based on a past dependency finding was removed.

24. In §27.1.3, substitute "each" for "any". Otherwise, a parent caring for a 1 one year old and a 12 year old would literally only need to be versed in first aid and CPR for the 12 year old.

The entire section on first aid and CPR was deleted.

25. Section 29.1.3 is grammatically awkward and merits revision.

The new §30.1.3 was revised.

26. Amend §29.1.7, substitute "sharing the record" for "share these".

The new §30.1.6 was revised.

27. In §30.1.7, DFS should consider substituting "prescription and non-prescription" for "prescribed" since the licensee would benefit from a parental statement regarding over-the-counter

medications too. The regulations contemplate use of "non-prescription medication" (§53.5).

A conforming amendment to new §31.1.7 was adopted.

28. In §33.5, substitute "is" for "are" before "maintained".

A conforming amendment to new §34.5 was adopted.

29. In §33.11, the reference to "nearest" is problematic. In New Castle County, the "nearest" police department may not have jurisdiction, i.e., the County police may have jurisdiction in a subdivision even though the State police troop is closer. Similarly, the nearest hospital may lack an emergency room or not be within the parent's insurance network. Poison control centers may also not be nearby. Consider deleting of "the nearest" and substitution of "appropriate".

A conforming amendment was adopted in new §34.11 to refer to entities "available in the area serving the location of the Family Child Care Home or as requested for use by the parent(s)/guardian(s) of the child enrolled".

30. There is some ostensible inconsistency between standards which require that children be "cared for in ground level space" (§§33.17 and 44.1) versus standards authorizing care in basements (§33.20) and other floors (§33.21).

Amendments were added for clarity. For example, a bathroom may be used for children which is not on the ground level "if that is the only bathroom in the house" [§34.23]. Care in basements is permitted contingent upon the availability of qualifying exits through stairs, windows, and doors [§34.19].

31. Section 34.1 is somewhat inane. It literally requires a certification from a licensed veterinarian that every guppy, goldfish, snail, or hermit crab is free of disease. This could be very expensive and of no real value in protecting children from disease.

New Section 40.1 was revised to only require vaccinations of pets when required by law.

32. Section 38.2 violates State law. There is no exemption for bike helmets based on wheel size. See Title 21 Del.C. §4198K. See also safety statistics in S.B. No. 174 introduced in September, 2007. A child can incur head trauma from a fall from a 16 inch wheel bike as well as from a 20 inch wheel bike.

New §38.3 was amended as follows: The Licensee shall ensure that all children wear approved safety helmets while riding outside on bicycles and tricycles that have foot pedals."

33. Since the regulations (Section 38) cover bikes and scooters, DFS may wish to address child use of motorized skateboards and scooters consistent with 21 Del.C. §4198N. For example, helmets are required. Moreover, minors under age 12 can only ride such devices on property owned by parents

so they should not be used by anyone under 12 at a child care site. Such devices are becoming increasingly commonplace.

A new §38.2 was added as follows: "A Licensee shall prohibit the use of motorized riding toys by children at the Family Child Care Home during hours of operation."

34. Section 38.2.2 categorically bars a child from wearing a helmet while using playground equipment. This is inane. Children may benefit from a helmet to reduce prospects of injury when negotiating a skateboard ramp, climbing apparatus, etc.

New §38.3.2 was amended as follows: Helmets shall be removed before allowing children to use playground equipment unless a helmet has been medically prescribed by a health care provider for the safety of a particular child."

35. In §39.6, delete the extraneous "all" before "during".

The deletion was made in new §49.6.

36. In §41.4.1, it is unclear if DFS intended to include the word "not" before "rinsed".

No amendment was adopted in new §48.5.1.

37. Section 44.5 literally requires all children (regardless of age) to sleep in a bed at night with a pillow and blanket. This is inconsistent with requirements that infants be placed in cribs or playpens (§43.1.5) without a pillow, quilt, etc. (§43.3.6).

New §§56.6 and 57.1.8 now differentiate between children under and over 12 months of age in terms of content of beds.

38. In §47.2, substitute "are" for "be" before "available".

The amendment was incorporated into new §54.2.

39. In §47.3, substitute "loose" for "lose".

The amendment was incorporated into new §54.3.

40. The "time-out" and "restraint" standards in §48 are detailed and merit endorsement. The ban on corporal punishment (§48.2.5) likewise merits endorsement.
The final regulation reflects the same ban on corporal punishment and stresses positive behavior management. See new §55. There is an additional ban on placing children "in an uncomfortable physical position" [§55.2.6].

41. In §48.2.4.1, substitute "Children" for "hildren"

The amendment was not adopted.

42. In §49.12, consider adding a reference to palatable temperatures. Compare DDDS Neighborhood Home Regulation, 16 DE Admin Code 3310:

> 7.7 Meals shall be served so that they are flavorful, attractive in appearance, at appropriate serving temperature, and have preserved their nutritional value.

New §50.7 reads as follows: "The Licensee shall ensure that all food served to children in the Family Child Care Home is clean, wholesome, flavorful, attractive in appearance, at the appropriate temperature, preserved for nutritional value, free from spoilage and adulteration, correctly labeled, safe for human consumption, and not subject to recall."

43. In §52.3.7.2, a word is missing (e.g. "develop" or "require") before "a written plan".

A conforming amendment was added to new §29.1.7.1 along with other revisions.

PART 104

44. In §3.0, Infant/Toddler Home definition, insert "seven (7) to" before "twelve".

New §4.0 modifies the reference to read "up to twelve (12) infants and/or toddlers".

45. In §3.0, Toddler definition, delete extraneous "and " before "months".

The amendment was effected in new §4.0.

46. The IDEIA Part C infant and toddlers program is implemented through Title 16 Del.C. Ch. 2. The program is intended to provide instructional, therapy and other services in community settings, including child care homes and facilities. Title 16 Del.C. §214 requires all State agencies to cooperate to ensure effective implementation. There are a few references to individual family service plans (IFSPs) in Part 104. See §§3.0 (definition of IFSP), 44.1.9, and 44.2.2. In the past, some day care providers balked at allowing Part C-sponsored professionals to provide services within the day care. It would be helpful if the DFS regulations required or encouraged cooperation. For example, the following §60.2.2 could be added:

> 60.2.2 For children with disabilities enrolled in the State Infant & Toddler Early Intervention Program [Title 16 Del.C. Ch. 2], the Licensee shall cooperate with Program representatives to facilitate implementation of a child's individual family service plan

[IFSP]. Such cooperation shall include honoring reasonable requests to permit professionals to provide services in the family child care home.

Alternatively, the above sentences could be added to existing §60.5.

No amendment was made to new §66.

47. Although there are a few cryptic references to “nondiscrimination” (e.g. §43.1.2), the regulations do not mention or proscribe discrimination based on race, disability, or other protected classes. At a minimum, §8.2.2 could be renumbered §8.2.4 and the following new §8.2.3 inserted:

> 8.2.3 Commitment to comply with applicable non-discrimination laws, including the Americans with Disabilities Act [42 U.S.C. 12101] and Delaware Equal Accommodations Law [Title 6 Del.C. Ch. 45].

I attach a December 2, 1991 Delaware Attorney General’s Opinion holding that day care centers are covered by both the ADA and Delaware Equal Accommodations law.

New §8.2.5 bars discrimination based on several bases, including disability.

48. There are several references in which licensees are admonished to maintain “full or substantial compliance”. See, e.g., §§8.2.2; 8.3; 9.1; 9.2; 10.2.2; and 10.3. These references will prove problematic for the Division in suspension, revocation, and similar enforcement contexts. In effect, the reference to “full or substantial compliance” is equivalent to 100% or 80% fulfillment of the regulations. This disjunctive standard is an invitation to the attorney for a licensee arguing that only “substantial” conformity with standards is required. I recommend simply deleting “full or substantial” so the references simply require “compliance” without any inconsistent adjectives which “muddy the waters”. Compare §14.1.

The term “full or substantial” was deleted from new §§8.4.2; 8.5; 9.1; and 9.2. Sections 10.1 and 10.3 were deleted in their entirety.

49. In §10.1, some words are missing after “issued to”.

The section was amended.

50. Consider amending §10.1.3 to read “...its intent to comply with the plan.”

The change was not made.

51. In §17.0, there is no provision for notice to the parents of a variance request. Compare DPH regulations for Adult Day Care, 16 DE Admin Code 4402:

5.15 Waiver of Requirements

5.15.1 Waiver of a standard requires Department approval. Waiver requests must be made in writing, include the full justification behind the request and address issues of safety and infection control. They are an exception to established standards and will only be approved for compelling reason.

5.15.1.1 Waiver requests which could potentially impact the health, safety or welfare of the participants must be shared with the participants and their representatives prior to submission of the waiver request to the Department.

5.15.1.1.1 Participants must be informed that they may voice their objections to any waiver request by contacting the Department.

Compare also DLTCRP ICF regulations, 16 DE Admin Code 3205:

11.0 Waiver of Standards

11.1 Specific standards may be waived by the State Board of Health provided that each of the following conditions are met:

11.1.1 Strict enforcement of the standard would result in unreasonable hardship on the license.

11.1.2 The Waiver is in accordance with the particular needs of any client of the licensee.

11.1.3 A Waiver must not adversely affect the health, safety, welfare, or rights of any client of the licensee.

11.1.4 The request for a Waiver must be made to the State Board of Health in writing by the licensee with substantial detail justifying the request.

11.1.5 Prior to filing a request for a waiver, the facility shall provide written notice of the request to each resident, each court-appointed guardian of any resident, each person appointed in the durable power of attorney of any resident, each person appointed to be a resident's health care agent under the Death with Dignity Act and each spouse and adult child of any resident. Prior to filing a request for a waiver, the facility shall also provided written notice of the request to the Office of Long Term Care Ombudsman. The notice shall state that the recipient has the right to object to the waiver request orally at the State Board of Health meeting when the request is being considered or in writing to the Board of Health in advance of such meeting.

11.1.6 A Waiver granted by the State Board of Health is not transferable to another licensee in the event of a change of ownership.

11.1.7 A Waiver shall be granted for the term of the license.

Solicitation of parental input would be consistent with other regulations encouraging parental notice and involvement. See, e.g. §§6.2, 38.7, 42.1, and 43.1. At a minimum, The following sentence could be added to §17.1:

> The Division may require a Licensee to provide notice of a variance request to the parent(s)/guardian(s) of children which offers them the opportunity to provide input on the variance request to the Division.

A slight variation of the suggested sentence was added:

> **17.2 The Division may require a Licensee to provide notice of a variance request to the parent(s)/guardian(s) with children in the Family Child Care Home to offer them the opportunity to provide input on the variance request to the Division.**

52. Section 18.8 requires any adult in the household of a child care home to sign a release for all medical records and mental health treatment records. This could be perceived as somewhat "overbroad". In particular, §18.8 reinforces a stereotype that persons "under treatment" for mental illness are likely to be dangerous. Confidentiality is also a concern in this context. Section 16.0 requires DFS to provide the reasons for adverse action on a license to the licensee. If DFS discloses medical or mental health information of a household member to the licensee as the basis for the adverse action, the household member's confidential information is compromised. Indeed, §18.6 requires the licensee to actually possess the health appraisal of the household members which may contain highly confidential information. DFS should consider revising these sections to reflect legitimate privacy interests.

Sections 18.6 and 18.7 were amended to adopt a more restrained standard in which individuals would provide documentation from a health care provider rather than a blanket authorization for release of information concerning the person's risk to children.

53. Section 22.1.3 should be deleted as redundant since the "diploma or equivalent" standard is included in §22.1.1.

A conforming amendment was adopted to eliminate the redundancy in new §§22.1.1 and 22.1.3.

54. Section 34.2 ostensibly bars interference with initially reporting suspected abuse or neglect. However, it is weak in proscribing retaliation after the report. Compare Title 16 Del.C. §§1135 and 1154. DFS should consider adding a subsection to §34.0:

> The Licensee shall not engage in retaliation or reprisals against any staff member, parent/guardian, or any other person for reporting abuse or neglect or cooperating with an investigation of abuse or neglect.

No change was made to new §36.

55. Section 58.5 literally requires all children (regardless of age) to sleep in a bed at night with a pillow and blanket. This is inconsistent with requirements that infants be placed in cribs or playpens (§57.1.5) without a pillow, quilt, etc. (§57.3.6).

New §§69.6 and 70.1.8 now differentiate between children under and over 12 months of age in terms of content of beds.

56. Section 61.8 prohibits "the use of walkers". This is ostensibly intended to prohibit use of the 4-wheeled "carts" by toddlers. However, an older child with mobility limitations might use a "walker" similar to those used by the elderly to assist with ambulation as a preferable alternative to a wheelchair. DFS should not categorically bar "walkers" in such situations.

New §67.6 was amended to read as follows: "The Licensee shall prohibit the use of walkers unless medically prescribed by a health care provider for the safety and mobility of a particular child.

All in all, the Division adopted approximately forty-six (46) revisions based on the Council's commentary. I recommend no further action.

9. Dept. Of Insurance Prop. Workers' Compensation Contracts [12 DE Reg. 920 (January 1, 2009)]

The Department of Insurance proposes to adopt a short regulation. The regulation requires contracts between employers/insurance carriers and health care providers covering Workers' Compensation services to be in writing and refer to the Workers' Compensation law. I did not identify any concerns with the standards.

I recommend either no action or issuance of a comment that the SCPD reviewed the proposed regulation and did not identify any concerns.

10. DPH Communicable & Other Disease Conditions Reg. [12 DE Reg. 913 (January 1, 2009)]

The Division of Public Health proposes to adopt standards for hospital and correctional setting reporting of infection information. The standards are fairly comprehensive and generally track the enabling legislation, Title 16 Del.C. Ch. 10A. I have two (2) observations.

First, the regulation sometimes refers to the codified version of the enabling legislation. See, e.g., §7.6 reference to 16 Del.C. Ch. 10A. Other sections refer to the statutes at large reference. See, e.g., §7.6.1 definition of "Public Report"; §7.6.2.2; and §7.6.6. It would be preferable to consistently use citations to the codified law which facilitates web-based access.

Second, in §7.61, definition of "Centers for Disease Control and Prevention", it would be preferable to substitute "which" for "who". The antecedent of the relative pronoun is "agency".

Third, in §7.6, definition of “National Healthcare Safety Network”, consider deletion of “voluntary”. It is not a necessary part of the definition and there is some tension between the representation that the system is voluntary when §7.6.2.1 and Title 16 Del.C. §1011A make enrollment mandatory.

Fourth, unless contained in another DPH regulation, the Division may wish to consider incorporation of a penalty provision for non-compliance to conform to Title 16 Del.C. §1007A. The Division could also consider incorporation of standards covering the annual report required by Title 16 Del.C. §1004A. Under the latter statute, the initial report must be published no later than June 30, 2009.

I recommend sharing the above observations with the Division of Public Health.

11. DSS Prop. Food Supp. Program Household Coop. Reg [12 DE Reg. 918 (January 1, 2009)]

The Division of Social Services proposes to amend its standards related to household cooperation in the Food Supplement Program.

DSS recites that the impetus behind the amendments is a USDA administrative notice indicating that “States cannot close client food supplement benefits due to non-cooperation with fraud investigators.” At 919. DSS was advised by the USDA that it must remove contrary language from State standards. Id. I located the attached USDA Notice which covers the topic of “Food Stamp Program Cooperation with Fraud Investigations”.

In general, the proposed standards appear to conform to USDA guidance. I have only the following observations.

First, since persons with disabilities may have difficulty fulfilling DSS standards due to cognitive or mental health limitations, standards which give the benefit of the doubt to the beneficiary merit endorsement. See, e.g., the following guidance: “If there is any question whether the household has merely failed to cooperate, as opposed to refused to cooperate, the DSS worker will not deny the household.”

Second, the following sentence is grammatically infirm: “After DSS a denial or termination for refusal to cooperate, ...cooperate. I believe it should read: “After a DSS denial or termination for refusal to cooperate, ...cooperate.

Third, it is somewhat difficult to follow the regulation since it has no numerical subparts. DSS may wish to consider inserting numerical subparts for ease of reference.

Fourth, the last two sentences read as follows:

> When a person, organization, or agency outside the household fails to cooperate with request for verification, DSS will not determine the household to be ineligible. The worker will document the case record.

For individuals identified as non-household members in DSSM 9013.2, DSS will not consider them as individuals outside the household.

I had difficulty understanding the rationale for the last sentence. DSSM 9013.2 generally identifies roomers and live-in attendants as non-household members. Under the above two sentences, if such roomers or live-in attendants fail to cooperate, the household could be determined ineligible. DSS may wish to consider whether it intends this result. DSS may also wish to consider whether use of the double negative "will not determine the household to be ineligible" facilitates clarity.

I recommend sharing the above observations with DSS.

12. Department Of Education Proposed Diversity Regulation [12 DE Reg. 894 (January 1, 2009)]

The Department of Education proposes to adopt some discrete amendments to its diversity regulation. I have two (2) comments.

First, in §1.0, definition of "Diversity", second sentence, there is a grammatical error. The word "and" prior to "gives" should be deleted and inserted prior to the word "affirms". This will result in the following sentence in which the 3 verbs are underlined for facilitated reference: The curriculum is inclusive of many racial, ethnic, regional, religious, linguistic, and socioeconomic groups, gives visibility to both women and men, to people of all ages, and to persons with disabilities, and affirms the richness of our pluralistic society.

Second, the DOE proposes deletion of the following sentence: "The Secretary of Education believes that students achieve their best in classrooms where diversity is commonplace." The rationale for deletion is unclear. The deletion could be construed as a repudiation of the concept that students learn better in diverse classrooms. For students with disabilities, LRE regulations promote education of such students with children who are "nondisabled". See attached 34 C.F.R. 300.114. The DOE may wish to retain the sentence.

I recommend sharing the above observations with the DOE and SBE.

Attachments

F:pub/bjh/legis/209p&l/109bils