

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Legislative & Regulatory Initiatives

Date: February 9, 2009

I am providing my analysis of nineteen (19) legislative and regulatory initiatives in anticipation of the February 12 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

### 1. DSS Final Food Stamp Resources Regulation [12 DE Reg. 1090 (February 1, 2009)]

The SCPD commented on the proposed version of this regulation in December, 2008. The commentary is summarized in the final regulation. In a nutshell, DSS proposed to exclude retirement savings, pension plans, and educational savings plans from countable resources for the Food Supplement Program (formerly the Food Stamp Program). The Council identified only one (1) concern, an inconsistency in treatment of the equity value of a funeral agreement. The Council recommended that DSS clarify that the exclusion of \$1,500 in a prepaid funeral agreement is “per person” and not “per household”.

The Division of Social Services has now adopted a final regulation. DSS agreed with the Council’s concern and amended the regulation to clarify that the funeral agreement exclusion is “per household member”. Since the regulation is final, and DSS adopted the only amendment recommended by the Council, no further action is warranted.

### 2. DSS Final Court Appointed Special Advocate Regulation [12 DE Reg. 1095 (February 1, 2009)]

The SCPD commented on the proposed version of this regulation in December, 2008. The Council did not object to deletion of a sentence requiring DSS to notify a CASA of staffing, investigations or proceedings involving a child to permit CASA representation. The Council observed that the provision was ostensibly an anachronism dating back to the period when DSS, and not DFS, conducted child abuse/neglect investigations.

The Division of Social Services has now acknowledged the commentary and adopted a final regulation with no changes. No further action is warranted.

3. DMMA Final Attendant Services Waiver Regulation [12 DE Reg. 1088 (February 1, 2009)]

The SCPD commented on the proposed version of this regulation in December, 2008. The Council noted that a proposed Attendant Services Waiver initiative had been withdrawn in February, 2007 based on an agreement with SCPD and DDC representatives. The proposed December, 2008 regulation was essentially a “housekeeping” measure to repeal Waiver eligibility standards. The Council endorsed the repeal.

The Division of Medicaid & Medical Assistance has now acknowledged the endorsement and adopted a final regulation with no changes. No further action is warranted.

4. DOE Final “Twelve Month Program” Regulation [12 DE Reg. 1084 (February 1, 2009)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2008. The Councils strongly endorsed the initiative which establishes a regulatory requirement that IEP forms include a parental notice and acknowledgment section that both identifies students eligible for 12-month programs and documents the parental election to accept a 12-month program. The Councils had negotiated the text of the regulation with the DOE in advance.

The Department of Education has now adopted a final regulation which acknowledges the endorsements with no changes. No further action is warranted.

5. DOE Final Discipline Alternative Program Regulation [12 DE Reg. 1075 (February 1, 2009)]

The SCPD, DDC, and GACEC submitted extensive comments on the proposed version of this regulation in December, 2008. I attach a copy of the SCPD’s December 18 letter for facilitated reference. The Department of Education has now adopted final regulations which incorporate almost all recommendations.

First, the Councils observed that the new statute [codified at Title 14 Del.C. §1604(8)] prompting the regulation imposed the same standards on districts and charter schools. In contrast, the regulation contained only an obtuse authorization (“may refer”) applicable to charter schools. In response, the DOE identifies some “tension” between the new statute [§1604(8)] and the charter schools statute [Title 14 Del.C. §504A(8)]. The latter statute contemplates some financial coordination among a charter school and district of residence prior to student placement in an alternative program. The Department resolves the perceived tension by adopting a more affirmative standard applicable to charter schools which incorporates references to both statutes. See amended §12.0. This represents a significant improvement in the standards.

Second, the Councils recommended substituting “ineligible” for “eligible” in §1.2. The DOE agreed and effected the amendment.

Third, the Councils recommend restructuring §1.2 since it contained subparts with conjunctions which were both cumulative (“and”) and disjunctive (“or”) resulting in confusion. The DOE restructured the section to clarify intent and incorporate another Council recommended amendment.

Fourth, the Councils objected to a provision directing districts to place a student in an alternative school if “permitted”. This would effectively remove any discretion to adopt other strategies (e.g. counseling; medication; behavioral contract). The DOE agreed and amended new §1.2.1 to allow districts the option of pursuing student participation “in other options such as behavioral contracts or counseling”.

Fifth, the Councils observed that the statutory presumption of placement in an alternative setting for students “suspended pending expulsion” was not well addressed in §1.2. New §1.2.1 has been amended to refer to situations in which a district has “determined that the student has been suspended for engaging in conduct that could result in expulsion...”.

Sixth, the Councils recommended insertion of “Subject to Section 11.0” in §1.2 to clarify that placement in an alternative setting is subject to the special rights of IDEA and §504 identified students. The DOE effected the amendment.

Seventh, the Councils recommended expansion of “Section 11” to include §504 identified students and to include more affirmative references to procedural protections applicable to both IDEA and §504 identified students. The DOE expanded §11.0 to cover obligations imposed by the IDEA, §504, and the ADA. The revision represents a significant improvement.

Eighth, the Councils recommended that “submitted” be substituted for “reported” in §3.0 to ensure that the district’s actual decision be shared with the DOE as juxtaposed to simply a notice that a decision had been reached. The DOE effected the amendment.

Ninth, the Councils recommend that the district also send its decision to the student’s parents. The DOE agreed and added “with a copy to the student’s parent, guardian, or Relative Caregiver” to §3.0.

Tenth, the Councils recommended insertion of the following sentence in §13.0: “The Department of Education shall annually evaluate the decisions acquired pursuant to Section 3.0 to assess the reasons for non-placement of students in alternative programs, including lack of space and the number, age, race, and special education status of excluded students by district”. The DOE added a closely conforming sentence to §13.0.

Eleventh, the Councils recommended the addition of the following sentence to §13.0: “The Department of Education shall maintain data on the length of stay in alternative programs and the identity of placements of children after release from the alternative settings.” This recommendation was not adopted.

Since the Department adopted amendments consistent with almost all Council recommendations, a “thank-you” letter is warranted.

6. DSS Prop. Food Supplement Program Residency Reg. [12 DE Reg. 1048 (February 1, 2009)]

The Division of Social Services proposes to adopt a revised “residency” standard applicable to its Food Supplement Program (former “Food Stamp Program”). In general, the standards appear to conform to the attached federal regulation, 7 C.F.R. 273.3. However, I have two recommendations for amendments.

First, in pertinent part, the current regulation reads as follows:

Households will file applications for participation in specified office locations according to zip codes. However, an application filed at any office within the State will be considered filed the same day.

The proposed regulation reads as follows:

Individuals will file applications for benefits at local offices based on zip codes. Any office will accept an application and consider it filed the same day.

The proposed regulation could be interpreted as meaning only an application filed in the correct “zip code” office will be accepted and considered filed the same day. The use of the word “however” in the current regulation clarifies that the acceptance of an application in any office in the state is an exception to the first sentence. For clarity, it would be preferable to adopt the same approach in the new regulation. This would result in the following sentence: “However, any office will accept an application and consider it filed the same day.”

Second, the “Temporary Absences Out of State” section authorizes continued eligibility of benefits in multiple contexts. However, “hospitalizations that will exceed 30 days” are categorically disqualified from benefits continuation. This is objectionable. A household could take a 5+ week vacation, or a member could have a 5+ week absence to care of a sick family member without disqualification. It is anomalous to impose a more restrictive standard on an individual who requires out-of-state hospitalization (e.g. for rehabilitation at Bryn Mawr Hospital for a traumatic brain injury or for intensive burn treatment at Chester-Crozier). It may also conflict with the ADA and State Equal Accommodations Act to apply more constrictive eligibility standards to persons with disabilities. Apart from military deployment, someone can be temporarily absent from the State with no 30-day cap for any reason except hospitalization. I could not locate any such differentiation in the federal regulations.

I recommend sharing the above observations with the Division.

7. DSS Prop. Food Supp. Program Dependent Care Reg. [12 DE Reg. 1051 (February 1, 2009)]

The Division of Social Services proposes to revise its Food Supplement Program (formerly Food Stamps) standards related to the dependent care deduction.

Consistent with the attached WorkWorld summary, Congress amended federal law last year to modify the dependent care deduction for the Food Supplement program:

(S)ection 4103 contains a provision which eliminates the cap on the deduction for dependent care expenses (previously \$175 or \$200 per month, depending on the dependent's age) and allows families eligible for the deduction to deduct the entire amount of dependent care expenses when calculating eligibility and benefit levels. This provision takes effect October 1, 2008.

Before October 1, 2008, dependent care costs were deductible up to the following maximums:

- \$200 per dependent child if the dependent child was under age 2; or
- \$175 per dependent child or incapacitated/dependent adult if the dependent was age two or older.

As noted in the preface to the proposed DSS regulation, DSS wishes to remove “previously overlooked language related to the dependent care cap.” The revisions are essentially a “housekeeping” measure and repeal the references to the dependent care distinctions based on a child's age.

I recommend endorsement.

#### 8. DMMA Prop. Family Planning Medicaid Benefit [12 DE Reg. 1047 (February 1, 2009)]

The Division of Medicaid & Medical Assistance received CMS approval of its 1115 Demonstration Waiver in 1995 resulting in the Diamond State Health Plan. As part of the initial waiver, CMS approved a “Family Planning” benefit which extends Medicaid coverage for 24 months to women of child-bearing age who have otherwise become ineligible for Medicaid for non-fraudulent reasons. The intent of the extension is to promote reduction of unintended pregnancies, low birth weight infants, etc.

CMS has approved renewal of the waiver with two limitations. First, eligibility is limited to women without comprehensive health insurance. Second, for second year eligibility, the countable family income cap is reduced from 300% of the Federal Poverty level to 200% of the Federal Poverty level.

Since this is essentially a “housekeeping” measure prompted by CMS, I recommend that the

Council indicate that it reviewed the initiative and did not identify any concerns with the proposed regulation as published.

9. DMMA Prop. Medicaid Self-employment Income Reg. [12 DE Reg. 1044 (February 1, 2009)]

The Division of Medicaid & Medical Assistance proposes to amend its Medicaid standards for self-employment income. Unfortunately, the rationale for the regulation and actual regulatory text do not match.

The Summary of Proposal section (at p. 1044) recites that DMMA inadvertently omitted a CMS-approved provision in the regulation adopted on October, 2005. CMS had approved an exception to the general flat rate approach to self-employment expenses. Specifically, “actual expenses are used if application of the standard deduction results in a finding of ineligibility.” At 1044.

Consistent with the attached “Summary of Comments Received with Agency Response” from the October, 2005 regulation, the SCPD had unsuccessfully objected to a no-exceptions approach to the standard, percentage-based deduction. However, consistent with the attached excerpt from a DMMA regulation adopted in July, 2006, DMMA reconsidered and added an exception to allow actual expenses. Therefore, there is no need to correct the October, 2005 omission since it was fixed in July, 2006.

However, the text of the current proposed regulation defines what qualifies as “actual self-employment expenses”. The regulation contains a list of disallowed expenses which are generally allowed by the IRS, including: 1) purchase of capital equipment; 2) payments on the principal of loans for capital assets or durable goods; and 3) depreciation. Unless precluded by CMS regulation or policy, I recommend that IRS deductions be allowed. If DMMA is disinclined to allow all IRS deductions, I recommend that the above 3 expenses not be excluded. They are ostensibly common, legitimate expenses of a business and would include purchases of computers, printers, and other common necessities of a business.

In sum, I recommend sharing the above observations with the Division. Essentially, DMMA should be advised: 1) its summary does not match the text of the revisions; and 2) to the extent the underlined text in the Register accurately reflects the proposed revision, the Council recommends adoption of a less restrictive approach to self-employment deductions.

10. DOE Prop. Student Teacher Crim. Background Check Reg [12 DE Reg. 1025 (February 1, 2009)]

The Department of Education proposes to defer the effective date of a regulation establishing the procedure for conducting criminal background checks of student teacher candidates from July 1, 2009 to July 1, 2010. The DOE indicates that it must seek legislative action to implement the standards.

I recommend no action.

11. H.B. No. 40 [Cell Phone Use in Motor Vehicles]

This legislation was introduced on January 14, 2009. As of February 1, it remained in the House Public Safety & Homeland Security Committee. The bill is similar to H.B. No. 78 from the 144<sup>th</sup> General Assembly which was endorsed by the SCPD. I attach the May 1, 2007 memo for facilitated reference. H.B. No. 78 was defeated in the House as follows: 10 yes; 22 no; 6 not voting; 3 absent.

H.B. No. 40 would allow mobile telephones to be used while operating a moving motor vehicle only when equipped with built-in speakers or a hands-free accessory. Under current law, drivers with a Level 1 Learner's Permit may not operate a vehicle while using a cell phone. See Title 21 Del.C. §2710(c)(8). Likewise, school bus drivers are banned from using a cell phone unless communicating with a central dispatch or school transportation department when the bus is not equipped with a functioning 2-way radio. See Title 21 Del.C. §4176B. H.B. No. 40 would prohibit hand-held cell phone use by all drivers. Violation would be a "primary" offense for which a driver could be stopped by police. A violation would result in a \$50 civil penalty. This is also the model adopted for violations of Delaware's seat belt law and camera-based enforcement of traffic signals. See Title 21 Del.C. §§801, 4101(d), and 4808. No criminal fine or points would be assessed. Consistent with the attached Committee report on the prior bill, this type of legislation is supported by the Delaware State Police, AAA Mid Atlantic, the Office of Highway Safety, and Verizon. Consistent with the attached March 30, 2007 editorial, the News Journal endorsed the prior bill.

Bans on hand-held mobile phones while driving are now in place in 6 states (California; Connecticut; New Jersey; New York; Utah; Washington) and the District of Columbia. See attached compilation. Consistent with the attached article discussing "DWY" (driving while yakking), international studies have correlated cell phone use with accidents.

Given the Council's interest in disability prevention, I recommend endorsement. Although not absolutely necessary, the sponsors should also consider amending Title 21 Del.C. §801 to include an explicit reference to the new §4182B.

12. S.B. No. 18 [Delaware Healthy Children Program Premium]

This bill was introduced on January 27, 2009 and remained in the Senate Finance Committee as of February 1, 2009. There is a fiscal note.

As background, the bill is identical to S.B. No. 200 which was introduced in the 144<sup>th</sup> General Assembly and remained in the Senate Finance Committee as of the end of that legislative session. I attach a January 23, 2008 News Journal article, press release, and Fact Sheet on the predecessor bill. In a nutshell, only 45% of children in Delaware who qualify for the Delaware

Healthy Children Program are actually enrolled and Delaware returns \$3 million annually to the federal government because of low participation. The program offers comprehensive health insurance, including well-care visits, hospitalization, prescription coverage, and dental care to children whose families' income is between 100% and 200% of the federal poverty level. Consistent with the attached February 5, 2009 News Journal article, the federal enabling legislation for the Delaware program was reauthorized on February 4.

In order to stimulate greater participation, the bill would remove a mandatory monthly premium in favor of authorizing DHSS, in its discretion, to create minimum co-pays for services. The SCPD strongly endorsed the predecessor bill. See attached March 14, 2008 memo.

I recommend another strong endorsement.

13. S.B. No. 17 [Delaware Health Insurance Pool]

This bill was introduced on January 27, 2009 and remained in the Senate Health & Social Services Committee as of February 1, 2009. It has a fiscal note.

As background, the legislation is identical to S.B. No. 6 introduced on January 17, 2007 during the 144<sup>th</sup> General Assembly as amended by the Senate on April 5, 2007. There was widespread support for the predecessor bill. Consistent with the attached March 30, 2007 editorial, the News Journal characterized the bill as a "no brainer" which "has the full support of nonprofit and social service agencies". The News Journal also published the attached lengthy article entitled "Lobbyists' Influence Knows Few Bounds" which describes intense lobbying efforts by Blue Cross to defeat the legislation. The predecessor bill passed the Senate with the following vote tally: 17 yes; 1 no; 1 not voting; and 2 absent. The bill remained in the House Economic Development/Banking & Insurance Committee at the end of the legislative session on June 30, 2008. According to the attached March 19, 2008 Dover Post article, the bill lacked the support of the majority party in the House in 2007-2008.

The SCPD strongly endorsed the bill with the caveat that it would prefer deletion of the one year residency limit. I recommend another strong endorsement. The Council should assess whether to add its caveat or, in the interests of presentation of unequivocal support, omit the caveat.

14. H.B. No. 34 [Mental Health Death Review Committee]

This bill was introduced on January 14, 2009 and remained in the House Health & Human Development Committee as of February 4, 2009.

The text of this bill is identical to H.B. No. 407 which passed the House with an amendment by a vote of 40-0 with 1 absent in the 144<sup>th</sup> General Assembly. It did not receive a vote in the Senate. However, there was no fiscal note on the prior bill. A fiscal note has been added to the current bill. The SCPD endorsed the prior bill through the attached May 29, 2008 memo.

I recommend that the SCPD endorse the bill with comments conforming to its May 29 memo.

15. H.B. No. 38 [Critical Incident Reporting]

This bill was introduced on January 14, 2009 and remained in the House Health & Human Development Committee as of February 4, 2009.

The text of this bill is identical to H.B. No. 408 with H.A. No. 1 which passed the House with a technical amendment by a vote of 40-0 with 1 absent in the 144<sup>th</sup> General Assembly. It did not receive a vote in the Senate. However, there was no fiscal note on the prior bill. A fiscal note has been added to the current bill. The SCPD endorsed the prior bill through the attached May 29, 2008 memo.

I recommend that the SCPD endorse the bill with comments conforming to its May 29, memo.

16. H.B. No. 41 [Community Mental Health Treatment Act]

This bill was introduced on January 14, 2009 and remained in the House Health & Human Development Committee as of February 4, 2009.

The text of this bill is identical to H.B. No. 419 which passed the House by a vote of 40-0 with 1 absent in the 144<sup>th</sup> General Assembly. It did not receive a vote in the Senate. However, there was no fiscal note on the prior bill. A fiscal note has been added to the current bill. The SCPD endorsed the prior bill through the attached May 29, 2008 memo.

I recommend that the SCPD endorse the bill with comments conforming to its May 29, memo.

17. H.B. No. 36 [Protection of Long-term Care Facility Residents]

This bill was introduced on January 14, 2009 and remained in the House Health & Human Development Committee as of February 4, 2009.

The text of this bill is identical to H.B. No. 404 with a technical amendment (H.A. No. 1) which passed the House by a vote of 38-0 with 1 absent in the 144<sup>th</sup> General Assembly. It did not receive a vote in the Senate. However, there was no fiscal note on the prior bill. A fiscal note has been added to the current bill. The SCPD endorsed the prior bill through the attached May 29, 2008 memo.

I recommend that the SCPD endorse the bill with comments conforming to its May 29, memo.

18. H.B. No. 37 [Mental Health Patients Bill of Rights Revisions]

This bill was introduced on January 14, 2009 and remained in the House Health & Human Development Committee as of February 4, 2009.

The text of this bill is identical to H.B. No. 407 which passed the House with an amendment by a vote of 40-0 with 1 absent in the 144<sup>th</sup> General Assembly. It did not receive a vote in the Senate. However, there was no fiscal note on the prior bill. A fiscal note has been added to the current bill. The SCPD endorsed the prior bill through the attached May 29, 2008 memo.

I recommend endorsement of the bill consistent with the May 29, 2008 memo subject to deletion of Section 8 which represents the amendment added to the predecessor bill in the House. Section 8 recites as follows: “The provisions of Section 4 of this Act shall not apply to hospitals or residential centers that are licensed or registered by the Office of Child Care Licensing.”

This provision is ostensibly unnecessary and should be stricken based on the following rationale.

The entire Section 5161 only applies to the Delaware Psychiatric Center, the Stockley Center, and mental hospitals certified by DHSS or the DSCY&F to treat persons with mental illness, i.e. Rockford, Meadowood, and Dover Behavioral Health. See Title 16 Del.C. §§5001(4), 5101(2) and 5161(b). Rockford and Dover Behavioral Health accept adolescents.

In contrast, the DSCY&F website describes the scope of licensing by the Office of Child Care Licensing as follows:

The Office of Child Care Licensing is responsible for licensing Family Child Care, Large Family Child Care, Early Care and Education and School-Age Centers, Child Placing Agencies, Residential Child Care Facilities and Day Treatment Programs for children and youth.

See also 7 DE Admin Code Part 100. The Residential Child Care Facilities regulation, Part 105, Section 1.3, recites as follows: “A Psychiatric hospital or a foster home in which children have been placed by a licensed or authorized child placing agency are not residential child care facilities.”

The Office has no jurisdiction over hospitals and none of the facilities that it licenses is covered by Section 5161. Section 5161 only applies to mental hospitals and the Stockley Center [formerly known as the Hospital for the Mentally Retarded (“HMR”)].

Out of an abundance of caution, I emailed an inquiry to the Office of Child Care Licensing today requesting clarification of its licensing. I hope to have a response by the February 12 P&L Committee meeting.

19. H.B. No. 35 [DPC Director]

This bill was introduced on January 14 and remained in the House Health & Development Committee as of February 4, 2009. There is a fiscal note.

The bill is identical to H.B. No. 406 which remained in the House Appropriations Committee as of the end of the 144<sup>th</sup> General Assembly. The SCPD did not comment on H.B. No. 406.

In a nutshell, the bill requires the DPC director to “have administrative experience in behavioral health and hospital administration and be (I) a board-certified psychiatrist and/or (ii) a master’s level nurse administrator.” In contrast, the attached current statute [Title 16 Del.C. §5109©] contains the following standard:

© The Secretary shall appoint a Director for the Delaware Psychiatric Center. The Director shall be qualified in the field of mental health and have administrative experience. The Director shall be the chief administrative officer of the Center. The Director shall have all the powers, duties and functions heretofore vested in the Superintendent.

There are pros and cons to the initiative. On the one hand, it is advantageous to have a DPC director with medical background. On the other hand, there may be competent administrators with background in psychology, clinical social work, or other mental health fields. The P&L Committee should discuss pros and cons of this bill and, if there is no clear consensus, consider taking no position on the bill.

Attachments

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