

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: January 4, 2010

I am providing my analysis of nine (9) regulatory initiatives published in the January issue of the Registry of Regulations. Given time constraints, my commentary should be considered preliminary and non-exhaustive. Since I have been summoned to jury duty on January 14, the date of the scheduled P&L Committee meeting, and there are relatively few proposed regulations, the Council may wish to have the Executive Committee approve commentary.

### 1. Dept. Of Insurance Final Health Insurance Rate Regulation [13 DE Reg. 587 (1/1/10)]

The SCPD and GACEC submitted comments on the proposed version of this regulation in November, 2009. The Councils shared six (6) recommendations. The Department of Insurance has now adopted final regulations which effect only one (1) amendment based on the commentary. Parenthetically, the Department only mentions GACEC commentary and omits any reference to SCPD comments.

First, the Councils noted that the word “filing” should be retained in §5.1. The Department agreed and adopted a conforming amendment.

Second, the Councils noted an inconsistency insofar as insurers are required to conform their rate submissions to Departmental bulletins and circular letters. However, the Department omitted lack of compliance with a circular letter as a basis for disapproving a submission. The Department rejects any amendment based on the observation that “it no longer relies on the use of Circular letters.” At 940. If this is true, it makes no sense to maintain a regulation that requires insurer submissions to conform to circular letters.

Third, the Councils noted that the last sentence in §6.3 would literally disallow the Department from rejecting a rate filing based on several bases compiled in §6.5.2.1 or lack of complete submissions. The Department disagrees with the Councils’ interpretation of §6.3 and effected no amendment.

Fourth, the Councils suggested that the word “or” in the following sentence should be “at”:

With respect to rate filings and rate revision filings, benefits shall be deemed reasonable in relation to premiums provided the anticipated loss ratio or the end of the third year is at least as great as shown in the following table:

The Department responds that it “supports its use of the word “or”. This ostensibly makes no sense.

Fifth, the Councils suggested defining acronyms “OR”, “CR”, “GR” and “NC” in a table. The Department declined.

Sixth, the Councils observed that the new enabling statute authorizes the Department to notify a filer that it needs more time to review a filing resulting in an extension of the review period up to 90 days. This concept was absent from the regulation. The Department declined to include this concept in the regulation since “(l)anguage in the Statute supersedes that in Regulation and the insertion is not necessary.” To the contrary, the regulations (§§6.2 and 6.3) affirmatively recite that a filing is approved unless disapproved by the Commissioner within 30 days of receipt. In effect, the Department has rejected the statutory authorization to extend the review period by adopting regulations which do not permit extensions.

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

## 2. DSS Final Food Supp. Program Census Income Disregard Reg. [13 DE Reg. 937 (1/1/10)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2009. The regulation authorizes a “disregard” for temporary census worker wages. The Councils endorsed the proposal subject to one recommendation, i.e., extending the time period for the “disregard” if the census project is extended at the federal level. The Division agreed and added a conforming provision: “The disregard expires September 30, 2010, unless extended by Food and Nutrition Service.”

Since the regulation is final, and the DSS adopted the only amendment suggested by the Councils, I recommend no further action.

## 3. DOE Final Health Education Program Regulation [13 DE Reg. 935 (1/1/10)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2009. The Department of Education has now adopted a final regulation with one (1) amendment prompted by the commentary.

First, the Councils endorsed inclusion of a reference to “interpersonal violence prevention program” since students with disabilities are disproportionately subject to bullying and victimization. The DOE acknowledged the endorsement.

Second, the Councils identified an inconsistency in use of the term “family life education”. The Department added the term to §1.1.3.3.

Third, the Councils recommended adding the following provision: “Inclusion of research-based sports injury identification and prevention, including concussion and traumatic brain injury.” The DOE declined to add the provision based on the rationale that TBI education is “covered in the core concept of injury prevention and safety.”

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

4. DOE Final Standardized Financial Reporting Regulation [13 DE Reg. 572 (1/1/10)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2009. The Councils endorsed the proposal subject to a minor edit to §5.3, i.e., changing “Statistic” to “Statistics”. The Department of Education has now acknowledged the endorsement and adopted a final regulation. The Department “implicitly” effected the edit but this could not be verified since the regulation on the Registry of Regulations website on January 2 remained the 2008 version.

I recommend no further action.

5. DOE Prop. Citizen Budget Oversight Committee Regulation [13 DE Reg. 886 (1/1/10)]

The GACEC and SCPD submitted a rather negative critique of an earlier version of this regulation in November, 2009 which was widely disseminated to policymakers. I attach a copy of the November 19 GACEC letter for facilitated reference. The DOE has now published a revised proposed regulation based on input from the Councils, lawmakers, and citizens. The new version is a significant improvement.

First, the Councils characterized the training requirements as both weak (2 hours) and “late” (completion required within 1 year of appointment). In Section 5.0, the DOE changed the time period for completion to 3 months from appointment. This is preferable to 1 year but, if the training only takes 2 hours, the DOE could shorten the period further. The DOE compromised on the scope of training by maintaining the minimum 2 hour standard while adding a provision that “additional training may be required from time to time as determined by the Department.” I recommend that the Councils reiterate their view that 2 hours of training is insufficient for effective performance.

Second, the Councils identified multiple shortcomings with the selection process and membership criteria for the oversight committee. This aspect of the standards has been significantly improved as follows:

- A. School policies must include a provision for conflicts of interest (§§3.4.1.2 and 4.4.1.2).
- B. Term limits are imposed (§§3.4.1.4 and 4.4.1.4).
- C. The membership of the selection committee must include at least 2 parents who are not employees or board members (§§3.4.3 and 4.4.3).

D. The chairperson is selected and removed by majority vote of committee, not chief administrative officer of district or charter school (§§3.4.1.3 and 4.4.1.3).

E. Compensation is disallowed apart from mileage and training reimbursement (§§3.2 and 4.2).

F. Advertising for committee members will include posting on all school building main entrance doors (§§3.4.2 and 4.4.2).

Third, the DOE is no longer hamstrung in rejecting district or charter school plans. If disapproved by the DOE, Districts and charter schools are provided the reasons and may resubmit a conforming application. If the second application is rejected by the DOE, the district or charter school must follow the DOE model policy (§§3.3.1 and 4.3.1)

Fourth, the DOE rejects the Councils' suggestion that districts and charter schools provide insurance coverage or right to indemnification to members in the event of litigation based on the rationale that the committee "is an advisory board". At 886. Members of "advisory" boards are not immune from liability and the Councils may wish to reiterate a preference for encouraging districts and charter schools to offer insurance or indemnification protection.

In sum, I recommend that the Councils thank the DOE for effecting many improvements in the standards. The Councils should then share residual recommendations consistent with the "First" and "Fourth" paragraphs above.

#### 6. DOE Prop. Possession, Use or Distribution of Drugs & Alcohol Reg. [13 DE Reg. 882 (1/1/10)]

Consistent with the attached October 23, 2008 GACEC letter and January 26, 2009 DOE letter, the Council objected to a DOE regulation which: 1) required parents to sign a release of liability as a precondition of a student's possession of an epipen or inhaler; and 2) authorized a school nurse to unilaterally restrict access to an epipen or inhaler. The GACEC also shared an OCR letter of finding which disallowed a district requirement of a liability waiver as a precondition of administration of an epipen in school. Region III OCR LOF to Berlin Brothersvalley School District, 353 IDELR 124 (1988). The DOE declined to effect any change, characterizing "the use of inhalers and autoinjectable epinephrine" as a "privilege" subject to regulation.

The DLP then filed a class complaint with OCR which was favorably resolved through a Resolution Agreement. See attached November 18 OCR letter and attachment. The Department of Education is now issuing a proposed regulation which loosely conforms to the Resolution Agreement.

I have the only the following single recommendation to be shared with the Department.

I recommend deletion of the term "student's educational placement" in both §§3.11.1 and

3.11.2 and substitution of the word “student”. This would conform to the language in the Resolution Agreement, Par. 1.b. Otherwise, the standards appear to link possession of an epipen/inhaler to a level on the continuum of placements. Compare 14 DE Admin Code 925, Part 27.0, which notes that the IEP team determines placement after developing an IEP based on the following: 80+% of time in regular classroom; 40-79% of time in regular classroom; 0-40% of time in regular classroom, etc. Possession of an epipen has little relationship to “placement”. Indeed, it would be common for an epipen/inhaler to be used in non-academic settings (e.g. cafeteria based on allergic reaction to peanuts or wheat or sports field activity resulting in asthmatic reaction). If a licensed health care practitioner issues a prescription, the practitioner has medically determined the necessity of the device. The requirement that IEP teams determine necessity by reference to “educational placement” is odd and raises the somewhat dangerous prospect of IEP teams overriding a physician’s medical determination that a student needs an epipen/inhaler in the student’s possession.

I have completed some supplemental research which I would be happy to share informally with the Councils.

#### 7. DOE Proposed Tuberculosis Control Regulation [13 DE Reg. 890 (1/1/10)]

The SCPD and GACEC submitted comments on earlier versions of this regulation published at 7 DE Reg. 1394 (May 1, 2004)(proposed); 8 DE Reg. 38 (July 1, 2004)(proposed); and 8 DE Reg. 400 (September 1, 2004)(proposed) resulting in a final regulation published at 8 DE Reg. 1134 (February 1, 2005). The Department of Education is now proposing to adopt some discrete amendments after consultation with the Division of Public Health.

I have the following observations:

First, in §1.0, the definition of “School Staff and Extended Services Personnel” is expanded. The current version only covers persons who “work directly with students and staff”. This limitation is deleted. I have no objection to the amendment. However, the DOE may wish to consider whether it is too broad. For example, the definition of “volunteer” only covers persons “who share the same air space with public school students and staff on a regularly scheduled basis”. There may be school employees with little contact with students and staff (e.g. outside groundskeeper; bus mechanic; janitor in district administration building).

Second, in §2.1.2, the DOE may wish to consider whether to add “charter school to district” to the examples. Moreover, I assume the DOE intends the examples to only apply to Delaware districts and charter schools. This could be clarified through the following amendment: “School Staff...need not be retested if they move, *within Delaware*, from district to district,...”

Third, in §4.1, the word “show” should be deleted. The current sentence reads as follows: “New school enterers shall show provide tuberculosis screening results...”

Fourth, §5.2 recites that an individual may stay in school for up to 6 weeks pending completion of testing if the person is “an asymptomatic individual, as described by the Division of

Public Health”. I believe the DOE may intend to refer to “asymptomatic”. Moreover, if the DPH has guidelines or published criteria describing asymptomatic individuals with tuberculosis, it would be helpful to include a cross reference. The reference “as described by the Division of Public Health” is not very informative and may be difficult for public schools to locate and follow.

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

8. DSS Prop. Child Care Subsidy Program Provider Termination Reg. [13 DE Reg. 896 (1/1/10)]

The Division of Social Services proposes to adopt a new regulation establishing standards for termination of providers from continued participation in the Child Care Subsidy Program.

The reasons for termination appear to be fairly straightforward and reasonable. I recommend endorsement.

9. DSS Proposed Interim Assistance Reimbursement Regulation [13 DE Reg. 894 (1/1/10)]

Federal law authorizes states to be reimbursed for “assistance financed from State ...funds and furnished for meeting basic needs” from a subsequent SSI award to a beneficiary. See attached §1631(g) of the Social Security Act. Delaware DSS is now proposing to adopt standards to implement this authorization.

I have the following observations.

First, the DSS regulation only applies to “non-federally funded cash assistance recipients”. [§3033.1.1.] This would ostensibly include General Assistance since it is State-funded. See attached 16 DE Admin Code Part 3000, §3018. It may also include some Emergency Assistance. See attached 16 DE Admin Code Part 6000, §6001. TANF is federally funded and ostensibly not covered. For clarity, it would be helpful if DSS identified in the regulation or regulatory note which programs are included.

Second, it is common for employers and employer insurers to require employees placed on disability or a disability pension to sign an agreement to reimburse the employer/insurer from future SSDI and SSI funds. Such an individual who also receives State cash assistance could be beset by competing employer/insurer and DSS claims. If DSS has a legal basis for claiming priority to SSI benefits, it may wish to address this in the regulation or consider introducing legislation in this context. In a “worst case” scenario, the State would intercept benefits and an employer would reimbursement from the individual for the intercepted benefits based on a contract claim. Alternatively, the employer/insurer could suspend disability payments until the “shortfall” is repaid.

Third, the federal law only allows DSS to retain authorized amounts defined in §1631(g)(3) and to pay the individual the balance. This concept is absent from the regulation. It would be preferable to include a reference to the reimbursable amount the State is entitled to retain and an affirmative recital that any balance will be paid to the individual within 10 working days.

I recommend sharing the above observations with the Division.

## Attachments

4g:misc/110bils  
F:pub/bjh/legis/p&l2010