

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: October 3, 2010

I am providing my analysis of eight (8) regulatory initiatives in anticipation of the October 14 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. Dept. of Insurance Final Rescission of LTC Insurance Policy Reg. [14 DE Reg. 316 (10/1/10)]

The SCPD submitted extensive comments on this regulation in August, 2010. The Department of Insurance has now adopted a final regulation. Based on the Council's commentary, the Department corrected one "typo" in Section 8.2.5.1. Otherwise, the Department observed that the Council's comments extended beyond the discrete amendments being proposed. Therefore, the Department did not effect any further amendments in response to the SCPD analysis. This has the effect of retention of even obvious grammatical errors in the regulation (e.g. "(f)or purposed of a tax-qualified long-term care insurance contract" - §4.2) which could have been corrected pursuant to Title 29 Del.C. §10113(b)(4).

It appears that the Department will consider the commentary in future changes to the regulation:

SCPD directed its comments to suggested changes in the original Regulation 1404, not the proposed amendments. While the comments are well reasoned and valid, they are directed to updating, modernizing the substantial part of the existing regulation not being amended. What the Department of Insurance advertised as proposed amendments to the regulation is the only subject open for comment. SCPD's observations are well taken and will be considered for future changes to the regulation.

At 316.

Since the Council shared several substantive concerns with the regulation affecting both DHSS and persons with disabilities, the Council may wish to informally ask for an estimated

timeframe for the Department's next revision of the regulation.

## 2. DSS Final Children Eligibility for GA & TANF Regulation [14 DE Reg. 304 (10/1/10)]

The SCPD commented on the proposed version of this regulation in August, 2010. The Division of Social Services has now adopted a final regulation incorporating some amendments prompted by the commentary.

First, the Council recommended adding an introduction to §3004. DSS agreed and inserted "(s)pecified relative is defined as:".

Second, the Council recommended expanding the definition of "relative" to include an "adult relative caregiver" as defined in Title 14 Del.C. §202. No change was effected.

Third, the Council identified multiple concerns with the definition of "guardian". DSS adopted a significantly revised definition.

Fourth, the Council recommended deletion of a reference to "parent" in §3004.1. DSS retained the reference.

Fifth, the Council recommended offering covered caregivers the option of applying for TANF or GA benefits. DSS declined to offer an option.

Since the regulation is final, and DSS considered each of the Council's comments, I recommend no further action.

## 3. DPH Prop. Child Lead-Based Screening Regulation [14 DE Reg. 246 (10/1/10)]

The Governor signed the attached S.B. No. 300 into law on July 15, 2010. This bill requires the Division of Public Health to issue regulations covering lead screening of 24 month old children based on CDC model standards. The legislation notes that Delaware's practice of screening children only at 12 months of age is inadequate. The Division of Public Health is now implementing that directive by proposing to adopt a conforming lead poisoning screening regulation.

In a nutshell, the regulation requires health care providers to complete a risk assessment questionnaire for 22 to 26 month old children. Questionnaires must be retained for 3 years and DPH will conduct audits to monitor compliance. If the questionnaire results indicate that the child meets "high risk" criteria (defined in §2.0), a blood lead test must be obtained. Testing labs or health care providers performing the blood test must submit a copy of results to DPH (§7.1). Penalties for non-compliance are "stiff", i.e., DHSS is authorized to impose a civil penalty of \$10,000 per violation. See Title 16 Del.C. §107.

I did not identify any deficiencies with the proposed regulation. I recommend endorsement.

4. DMMA Prop. Medicaid Durable Medical Equipment Ownership Reg [14 DE Reg. 244 (10/1/10)]

As background, other states have implemented assistive technology/durable medical equipment “reuse” programs. I attach a Powerpoint outline describing the Kansas program. It notes that there is a high national rate of abandonment of AT/DME, legislators were concerned that Medicaid-purchased AT/DME was being sold at yard sales, and considerable cost savings resulted from adopting a system of recycling Medicaid-supplied AT/DME.

Delaware’s Center for Disabilities Studies (“CDS”) and DMMA are now developing a similar system in Delaware. The regulation provides the following information:

Current DMMA policy assigns ownership of equipment purchased by DMMA to the client. The proposed revision would assign ownership of certain specified DME to DMMA. When the equipment is no longer needed, it will be recovered by CDS. CDS will assess and refurbish, if appropriate. A new customer service component will also be established to periodically evaluate the effectiveness of equipment in meeting the needs of the beneficiary. DMMA customers will also have the option of accepting refurbished equipment, when available, at a reduced cost to the state.

At 244.

Consistent with the attached August 13, 2010 notice, CDS is soliciting providers to support this new initiative.

In response to my inquiry, CDS informally shared supplemental information on September 30. The following is a summary of the supplemental information:

A. The CDS/DMMA project is supported by an RSA model demonstration project grant. A stakeholder group comprised of state agencies, DME vendors, service providers and individuals with disabilities has been meeting for a few years to reach consensus on the model. The plan is to contract with one or more qualified vendors to conduct the reclamation, sanitization, refurbishment, and repair.

B. Health and safety is a key concern. Individuals could be hurt by “mismatched” DME or malfunctioning DME. Therefore, if a prescription is generally needed to obtain a particular piece of equipment, a prescription will be required to obtain equipment through this project to ensure the features match the individual’s needs. Only lightly-used equipment will be processed and restored to “like-new” condition. Some types of equipment will not be processed due to hygiene issues.

C. DMMA is not restricting access to reclaimed equipment to Medicaid beneficiaries, but Medicaid will have the option of procuring equipment at costs far less than retail from the reuse inventory. CDS plans, under DMMA contract, to adopt a customer-service role in which Medicaid beneficiaries provided with DME will be contacted to assess whether the equipment is meeting their needs. If the equipment is no longer needed, or the beneficiary has passed away, the equipment will be retrieved and, if appropriate, refurbished for use by others.

D. The program is viewed as a means of leveraging resources. The CDS is aware of Medicaid beneficiaries or their families selling DMMA-purchased DME on Craig's List or DATI's AT Exchange soon after delivery. This project should reduce the incidence of such sales and facilitate access to DME by uninsured and underinsured persons.

E. As part of the project, Paul Solano, a University of Delaware economist, will conduct a cost/benefit analysis to provide comprehensive data about the return on the reuse investment. This analysis would be of use both locally and nationally.

The regulation represents a "first step" towards DMMA implementation of the reuse program. The current regulation grants ownership of DME purchased through Medicaid to the beneficiary. The new regulation "carves out" certain forms of Medicaid-purchased DME which will be "owned" by DMMA. It would then be subject to retrieval and recycling when the beneficiary no longer needs the device.

From a consumer perspective, there are pros and cons to the initiative.

On the negative side, query whether beneficiaries will be subject to State claims if State-owned equipment is lost or damaged, even through no fault of the beneficiary. Some of the listed DME is also so inexpensive and/or subject to wear and tear (e.g. car seats) that sanitizing and refurbishing may be of questionable cost effectiveness.

On the positive side, the reuse program should ultimately save DHSS money, promote recycling, and facilitate trial access to equipment. The Kansas model included receiving donations of equipment from the public with positive results.

Balancing the competing interests, I recommend endorsement subject to DMMA considering the following.

First, since Medicaid is the payor of last resort, I assume there are situations in which a third party (e.g. insurer) has partially paid (e.g. 80%) for equipment and DMMA has paid a remaining balance (e.g. 20%). Under those circumstances, query whether it is equitable for DMMA to assume full ownership of the equipment.

Second, DMMA should consider the extent of the beneficiary's liability for lost or damaged equipment owned by the State. If the beneficiary exercises reasonable care, it would be inappropriate to penalize the beneficiary for loss or damage. The beneficiary should not be treated as an "insurer" of the equipment.

A copy of the Council's commentary should be shared with CDS.

5. DOE Prop. World Language Credit Regulation [14 DE Reg. 222 (10/1/10)]

The Department of Education proposes to amend its standards for high school graduation by increasing the number of required credits from 22 to 24 for the graduation class of 2015. This is achieved by requiring 2 credits in a World Language. I have the following observations.

First, consistent with the attached 2006 materials, the Councils previously submitted multiple concerns with the DOE when it proposed a requirement of World Language credits to graduate. At that time, the Councils shared a News Journal article reciting as follows:

The state teachers' union, while supportive of the majority of the proposal, questions requiring foreign language for all students. Those with disabilities or those not college-bound, the union suggests, might benefit more from an extra year of science, social studies, or career preparation.

This observation, as well as other concerns raised in the 2006 materials, remain apt.

Second, the inclusion of ASL in the definition of "World Language" merits endorsement. The Councils issued this recommendation to DOE in 2006 and supported legislation (H.B. No. 345) which now mandates inclusion of ASL as a World Language in Delaware's public schools. See attached April 21, 2010 GACEC memo and copy of enacted H.B. No. 345.

Third, in §1.0, definition of "World Languages", DOE should consider substituting "people" for "peoples". The term "people" is defined as "the body of persons that compose a community, tribe, nation, or race".

Fourth, §5.2 is problematic in the context of proficiency standards. Literally, Deaf students would be subject to an achievement test for "speaking". Moreover, all students would be required to meet a "Novice-high" proficiency level which is defined by the American Council for the Teaching of Foreign Languages (ACTFL). I suspect that the ACTFL does not have proficiency standards for ASL and may or may not have standards for Latin and Ancient Greek. The Department should consider including a distinct proficiency standard for ASL and, if not covered by ACTFL, Latin and Ancient Greek

I recommend sharing the above observations and concerns with the DOE with copies to CODE and the Sterck School.

6. DOE Prop. Prohibition Against Discrimination Regulation [14 DE Reg. 222 (10/1/10)]

As background, in 2005, the SCPD and GACEC recommended that the Department of Education add "genetic information" to the prohibited bases for discrimination in DOE funded or approved programs. The Councils noted that State employment discrimination law barred

discrimination on this basis. Consistent with the attached DOE final regulation [9 DE Reg. 1069-1070 (January 1, 2006)], the DOE declined to add “genetic information” since it was not included in a Governor’s Executive Order. The Councils then contacted Governor Minner who issued Executive Order 86 barring employment discrimination based on genetic information [9 DE Reg. 1994 (June 1, 2006)]. However, the DOE never amended its regulation. Governor Markell later issued Executive Order 8 on August 11, 2009. This Order continued the bar against employment discrimination based on genetic information.

The DOE is now issuing a proposed regulation adding “genetic information” to its list of prohibited bases for discrimination in DOE funded or approved programs.

Since discrimination on the basis of “genetic information” would have a disproportionate effect on persons with hereditary predispositions correlated with illness or disability, I recommend endorsement.

7. DOE Prop. Student Teacher Criminal Background Check Regulation [14 DE Reg. 227 (10/1/10)]

As background, the SCPD and GACEC commented on the last proposed revision of this regulation published at 13 DE Reg. 445 (October 1, 2009). At that time the Department was extending the effective date of the regulation requiring criminal background checks of student teachers to January 1, 2011 to provide time to secure enactment of enabling legislation. The necessary legislation (S.B. No. 245) was signed by the Governor on July 12, 2010 so the regulation will take effect on January 1, 2011.

The current DOE proposal would add one (1) sentence to §2.3:

2.3.3.1. Provided further a candidate attending a private Delaware Higher Education Institution shall provide a copy of his/her state and federal criminal history record, certified by the State Bureau of Identification, to the designated person at the placing private Delaware Higher Education Institution.

This provision supplements the requirement (§2.3.3) that all candidates request the State Bureau of Identification to send original versions of the criminal background check results to the higher education institution.

The rationale for the change is not provided and it is unclear why candidates from private colleges and universities have an independent duty to supply a certified copy of their record to the college or university. I suspect the amendment is based on a technical problem which has arisen.

I recommend that the GACEC informally solicit the rationale for the amendment and, if facially valid, the regulation should be endorsed.

8. DOE Prop. Supportive Instruction (Homebound) Regulation [14 DE Reg. 231 (10/1/10)]

The Department of Education proposes to effect a few discrete amendments to its supportive instruction (homebound) regulation as part of its 5 year review cycle.

I have the following observations and recommendations.

First, §§2.1.1, 2.1.3, and 2.1.3.2 limit certifications of medically-related absences to “physicians”. It would be preferable to change the references to “physician or advanced practice nurse”. As a practical matter, many individuals are now primarily treated by an advanced practice nurse rather than a traditional physician. Advanced practice nurses are authorized to perform independent acts of diagnosis and prescribe drugs. See Title 24 Del.C. §1902(b)(1). State law bars health insurers from denying benefits for eligible services when provided by an advanced practice nurse instead of a physician. See Title 18 Del.C. §2318. The DLP was recently involved in a case in which a district declined a request for homebound since the certification was provided by an advanced practice nurse rather than a physician. Therefore, inserting “advanced practice nurse” in the regulation would address a “real-life” concern.

Second, the homebound regulation is literally limited to “districts”. I recommend changing the references in §§1.2, 1.3, and 2.1 from “district” to “public school” to encompass charter schools. Otherwise, students in public educational programs could face both short and long-term exclusion from services due to illness, pregnancy, or disability. Cf. 14 DE Admin Code, Part 975, §4.3.3 [requiring charter school compliance with IDEA and §504].

Third, in §2.1.3.2, the word “remain” should be “remains”.

Fourth, § 1.2, second sentence, could be improved by recasting the standard in the affirmative. Rather than obliquely stating “(n)othing in this regulation shall prevent a district from providing supportive instruction to children with disabilities [consistent with IDEA]”, it would be preferable to simply substitute “(p)ublic schools shall provide supportive instruction to qualifying children with disabilities [consistent with the IDEA].” It is anomalous to have an affirmatively-worded first sentence requiring conformity with IDEA and a “weakly-worded” second sentence.

Fifth, §1.3 could likewise be improved with a more “affirmative” approach. DOE regulations affirmatively disallow public schools from discriminating based on disability [14 DE Admin Code Part 225, §1.0]. In other contexts, DOE has adopted affirmative standards guiding public school compliance with §504. See, e.g., 14 DE Admin Code, Part 609, §3.0; 14 DE Admin Code, Part 612, §§3.2 and 3.11. Thus, the following could be substituted for the second sentence in §1.3: A public school’s provision of supportive instruction to such students shall be in conformity with Section 504 and the Americans with Disabilities Act.”

Sixth, the DOE has not included §3.0 of the supportive instruction regulation in the current

proposal. That part of the regulation establishes 3 and 5 hour weekly minimums for supportive instruction. Unfortunately, these benchmarks are typically treated as “norms” or “caps” rather than “minimums”. Concomitantly, it is manifest that 3-5 hours of homebound instruction will predictably be inadequate to allow a student to “maintain pace” with peers receiving 30 hours of classroom instruction from specialized teachers. I recommend that the DOE incorporate more robust guidance in the regulation in this context.

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

## Attachments

F:\pub\bjh\legis\2010\1010bils  
2g: 1010bils