

MEMORANDUM

To: SCPD Policy & Law Committee
From: Brian J. Hartman
Re: Recent Legislative & Regulatory Initiatives
Date: February 8, 2010

I am providing my analysis of twenty-three (23) legislative and regulatory initiatives in anticipation of the February 11 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. H.B. No. 229 (Hand-held Cell Phone Ban)

This bill was introduced in June, 2009 and awaits a House vote. Consistent with the attached House Committee report, it “squeaked” through Committee on a 5-4 vote. Based on a January 7, 2010 amendment, the bill would ban hand-held cell phone use while operating a vehicle in motion. Law enforcement, emergency personnel, and school bus drivers would be exempt. The exemption for school bus drivers is appropriate since Title 21 Del.C. §4176B already bans school bus operators using cell phones in a non-emergency and imposes fines for violations. A first offense would result in a \$50-\$100 fine. A subsequent offense would result in a \$100-\$200 fine. A driver could avoid the fine by proving that use was based on an emergency.

I have the following observations.

First, this bill differs from similar legislation in a few respects:

A. Given the fines, a two thirds vote is necessary for enactment. Bills which adopt a “civil penalty” approach [e.g. H.S. No. 1 for H.B. No. 40 (banning texting)] only require a majority vote.

B. This bill would not affirmatively preempt municipal or county ordinances. Contrast H.S. No. 1 for H.B. No. 40 [preempting local ordinances]. Consistent with the attached articles, a uniform state law in this context would be preferable. Wilmington and Elsmere have already adopted hand-held cell phone bans and a “patchwork” approach in which different exemptions and penalties would apply across the State is undesirable.

Second, consistent with the attached articles, hand-held cell phone bans appear to be gaining momentum across the Nation given studies demonstrating the incidence of accidents linked to cell phone use. Such bans therefore merit support to reduce the number of traffic accidents which often result in spinal cord and traumatic brain injuries.

In sum, I recommend endorsement of the concept of banning hand-held cell phone use while suggesting that the bill could be improved by adding a preemption provision.

2. H.B. No. 298 (Hand-held Cell Phone Ban)

This bill was introduced on January 7 and remained in Committee as of February 1, 2010.

The bill prohibits operation of a motor vehicle while using a hand-held cell phone. There is an exemption for law enforcement personnel. There is also an exemption for school bus operators who are subject to the attached Title 21 Del.C. §4176B. A violation results in a civil penalty of up to \$50.00. Subsequent violations subject the driver to a \$100 civil penalty.

I have the following observations.

First, this bill is similar to H.S. No. 1 for H.B. No. 40 (barring texting) insofar as it adopts a civil penalty approach rather than authorizing a criminal fine. H.B. No. 229 (barring hand-held cell phone use) adopts a criminal fine approach to enforcement. Using the civil penalty approach would permit enactment by a majority vote rather than a 2/3 vote. Reasonable persons could differ on the merits of a civil versus criminal approach to enforcement.

Second, the word “and” should be inserted in line 7 between the words “enforcement” and “emergency”. Compare H.B. No. 229 at line 4.

Third, the exemption for school bus drivers is appropriate since 12 Del.C. §4176B already bans school bus operators using cell phones in a non-emergency and imposes fines for violations.

Fourth, consistent with the attached articles, hand-held cell phone bans appear to be gaining momentum across the Nation given studies demonstrating the incidence of accidents linked to cell phone use. Such bans therefore merit support to reduce the number of traffic accidents which often result in spinal cord and traumatic brain injuries.

Fifth, this bill would not affirmatively preempt municipal or county ordinances. Contrast H.S. No. 1 for H.B. No. 40 [preempting local ordinances]. Consistent with the attached articles, a uniform state law in this context would be preferable. Wilmington and Elsmere have already adopted hand-held cell phone bans and a “patchwork” approach in which different exemptions and penalties would apply across the State is undesirable.

In sum, I recommend endorsement of the concept of banning hand-held cell phone use while

suggesting that the bill could be improved by adding a preemption provision. Moreover, the word “and” should be inserted in line 7 between the words “enforcement” and “emergency”.

3. H.B. No. 281 (DUI Offender Ankle Bracelets)

This bill was introduced on June, 29, 2009 and was approved by the House Public Safety and Homeland Security Committee on January 27, 2010.

Background on the bill is compiled in the attached January 28, 2010 News Journal article. The intent of the bill is to require persons convicted of 3 or more DUI offenses (which have mandatory jail sentences) to wear an electronic alcohol monitoring device for 6 months after release from incarceration. The article describes a “SCRAM” device which is a bracelet which detects, via sweat glands, consumption of alcohol. When combined with a modem and GPS unit, authorities could receive data on alcohol use and offender location. The article and attached House report suggest that offenders would be required to submit to the system as part of probation or parole. Offenders would be expected to pay for the cost of the monitoring at an expected cost of \$10 - \$12 daily.

The bill would appear to be a reasonable deterrent to repeat offenders during the 6 months following release. I recommend endorsement subject to correction of an ostensible technical error as follows: The bill is intended to cover persons convicted of a third, fourth, or subsequent offense. See line 4, article, and House report. However, the bill only cross references sections of the DUI law applicable to third and fourth offenses, omitting reference to fifth, sixth, seventh, and subsequent offenses. See Title 21 Del.C. §4177(d)(3) through (8). At a minimum, the sponsors should consider amending line 3 by deleting the term “and (4)” and substituting the term “through (8)”.

4. S.B. No. 14 (VCAP Coverage of Property Crimes)

This bill was introduced in January, 2009 and passed the Senate with S.A. No. 2 in June, 2009. It was approved by the House Judiciary Committee on January 13, 2010.

The bill, as amended, is intended to expand the availability of awards by the Victim’s Compensation Assistance Program (VCAP) to non-violent property crimes. Such awards could not exceed \$2,500 per individual and would require proof of pecuniary or economic loss (line 69). Consumers would be precluded from filing claims for losses of entertainment equipment, clothing, art objects, and jewelry (lines 14-17). The VCAP would be precluded from expending an aggregate of \$500,000 in any fiscal year on property claims.

I have the following observations.

First, the bill raises fiscal issues. The Delaware Victims’ Rights Task Force sent the attached January 27, 2010 letter to Senator McBride, the prime sponsor, outlining financial

concerns with the bill. The VRTF notes that the rate of payouts for violent crimes has increased by 40% in the latest 6-month period. Moreover, it is predictable that the Sussex pediatrician case may prospectively generate many claims against the fund. Finally, the VRTF observes that only 3 other states compensate property crime victims under very limited circumstances. See attached summary for specifics. The attached fiscal note (Par. 4) recites that the normal 60% federal reimbursement for violent crime victim awards would not be available for property crime victim awards. The VRTF's fiscal concerns are reinforced by the attached financial overview corroborating a 49% increase in VCAP claim expenditures between FY 09 and FY 10.

Second, the attached House Committee report identifies other concerns. For example, the bill's pilot program would require a report by March 1, 2010 and sunset on June 30, 2010. The Committee recommended an amendment to establish the pilot project in FY 11. Moreover, the Committee noted that amendments would be necessary to refer to the VCAP as juxtaposed to the Violent Crimes Compensation Board. Indeed, the legislation is ostensibly based on the 2008 version of the statute which was overhauled by H.B. No. 133 (signed by the Governor on August 24, 2009) and H.B. No. 253 (signed by Governor on July 31, 2009).

Third, given the recent overhaul of the enabling legislation, the VCAP is still working on regulations and systems. Moreover, the Victim's Compensation Assistance Program Advisory Council, charged with issuing new regulations pursuant to Title 11 Del.C. §9004, has only met twice as of February 2, 2010. Adding a pilot project to the recently overhauled system may unduly tax the ability of the VCAP to effectively transition to the system contemplated by the new enabling legislation.

In sum, the SCPD may wish to recommend deferral of the pilot project given the fiscal concerns identified in Par. 1 above and the prospect for overtaxing the ability of the VCAP to effectively transition to the system envisioned by the new enabling legislation.

If the sponsors nevertheless wish to promote enactment, the bill should be amended to establish an FY 11 pilot period and conform to the current Code as amended by H.B. No 133 and H.B. No. 253. Alternatively, it would be preferable to simply establish the pilot project through budget epilog to obviate the bill's 4 pages of statutory amendments effective for a one year period. For example, the budget epilog could include a provision authorizing the VCAP, notwithstanding any contrary law, to initiate a pilot project and issue awards of up to \$2,500 for non-violent property crimes not to exceed an aggregate of \$500,000 in FY11. A copy of any SCPD correspondence should be shared with the VCAP and VRTF.

5. S.B. No. 162 (Pharmacy Fee)

This bill was introduced on January 12, 2010 and remained in the Senate Finance Committee as of February 1, 2010.

The bill is ostensibly an attempt to provide an incentive for pharmacies to participate in the

Medicaid prescription drug program. In the past, some pharmacies threatened to discontinue participation in the Medicaid program based on low profit margins. See, e.g., attached press release and articles. This bill would impose an additional gross receipt license fee for a pharmacy refusing to fill Medicaid prescriptions. The additional fee is substantial, i.e., 2% of the aggregate sales of all products sold by the pharmacy. For comparison, the standard license fee for a retailer is 0.720% of the aggregate gross receipts subject to authorized deductions. See Title 30 Del.C. §2905.

Given the Council's interest in promoting the participation of pharmacies in the Medicaid drug program, I recommend at least endorsement of the concept underlying the bill. It would provide an incentive for pharmacy participation in the program.

6. H.B. No. 304 (Rape by Persons in Position of Trust, Authority or Supervision)

This bill was introduced on January 12, 2010. It was approved by the House Judiciary Committee with H.A. No. 1 on January 27, 2010.

As background, there have been a number of highly-publicized cases in Delaware of sexual assaults on students by teachers and school employees in recent years. See attached June 10, 2009 and August 26, 2009 News Journal articles. This bill would enhance the authorized penalties for such assaults.

The Code [Title 11 Del.C. §770] currently characterizes the following conduct as a class C felony:

A person is guilty of rape in the fourth degree when the person:

...(4) Intentionally engages in sexual intercourse or sexual penetration with another person, and the victim reached that victim's sixteenth birthday but has not yet reached that victim's eighteenth birthday and the defendant stands in a position of trust, authority, or supervision over the child, or is an invitee or designee to a person who stands in a position of trust, authority or supervision over the child.

The bill, as amended, would not affect the elements of the above crime. Instead, it amends the Code [Title 11 Del.C. §771] to characterize the same conduct, if there is at least a 4 year age difference between perpetrator and victim, as a Class B felony:

A person is guilty of rape in the third degree when the person:

...(3) Intentionally engages in sexual intercourse or sexual penetration with another person, and the victim reached that victim's sixteenth birthday but has not yet reached that victim's eighteenth birthday and the defendant is at least 4 years older than the victim and the defendant stands in a position of trust, authority, or supervision over the child, or is an invitee or designee to a person who stands in a position of trust, authority or supervision over the child.

The difference in authorized penalty is significant. The term of incarceration for a Class C felony is up to 15 years with no minimum. The term of incarceration for a Class B felony is 2-25

years. See Title 11 Del.C. §4205(b).

Persons with disabilities are disproportionately victims of violent crimes, including sexual assaults. See attached October 1, 2009 DOJ Press Release. Since the bill would increase the authorized penalty for sexual assaults by persons in a position of trust, authority, or supervision of 16-17 year old teens, I recommend endorsement. A copy of the Council's letter should be shared with the VRTF and Delaware Department of Justice.

7. H.B. No. 237 (Automatic Doors in Places of Public Accommodation)

This bill was introduced on June 18, 2009. As of February 1, 2010, it remained in the House Economic Development, Banking, Insurance, and Commerce Committee. There is a fiscal note.

The bill would amend the Equal Accommodations statute to require covered buildings constructed after January 1, 2011 to be "equipped with automatic doors at each entrance that is intended to be a main entrance and is accessible to the general public." A "place of public accommodation" is defined in the Code to include both public and private entities which offer goods or services or facilities to the public or which solicit patronage from the public. See Title 6 Del.C. §4502(12).

DLP inquiries about analogous requirements in other states resulted in the following responses from an attorney and an architect:

Response 1.

I have not heard of any building codes or ordinances specifically requiring auto openers on any doors but **California**'s requirement effectively does it because there's no other way to limit exterior door force to a maximum of 5 pounds:

1133B.2.5 Door Opening Force. The maximum force required to push or pull open a door shall comply with this section. Push or pull force for a hinged door shall be measured perpendicular to the door face at the door opening hardware of 30 inches (762mm) from the hinged side, whichever is farther from the hinge. Push or pull force for a sliding or folding door shall be measured parallel to the door at the door pull or latch. Compensating devices or automatic door openers complying with Section 1133B.2.3.2 may be used to meet the maximum force limits.

1. Required fire doors shall have the minimum opening force allowable by the appropriate administrative authority, not to exceed 15lbf (66.7 N).
2. Other than required fire doors, interior doors shall have a maximum opening force of 5lbf (22.2 N).
3. Other than required fire doors, exterior doors shall have a maximum opening force of 5lbf (22.2 N).

Response 2.

Oregon requires power-operated doors on accessible routes where environmental conditions

require an opening force greater than that required by the Oregon state code. See #4 in code text below.

OR1109.9.9 Opening force. The opening force of doors along an accessible route shall be as follows:

1. Exterior doors: 8 ½ pounds-force (lbf) (37.8 N).
2. Interior doors: 5 pounds-force (lbf) (22.2 N).
3. Stairway doors at pressurized stair enclosures: 15 pounds (6.8 kg) at exterior doors.
4. Where environmental conditions require greater closing pressure, power-operated doors shall be used within the accessible route.
5. Fire doors shall have the minimum force necessary to close and latch the door.

Also, Massachusetts has a similar, but optional, requirement:

MA26.8.1 Doors: These forces apply only to opening the door, not to the effort required to retract latch bolts or disengage other devices that may hold the door in a closed position.

- a. exterior hinged doors: 15 lbs
- b. interior hinged doors: five lbs.
- c. sliding or folding doors: five lbs.

Exception: Fire doors shall have the minimum opening force allowable by the appropriate administrative authority.

MA26.8.2. Compensating devices: Doors requiring greater force shall be equipped with compensating devices to reduce the operating force, or shall be equipped with automatic operating devices.

Based on the above provisions in other states, it would appear to be preferable to adopt a “door force” approach which secondarily authorizes use of compensating devices or automatic door openers to achieve compliance. The SCPD may wish to share the above information with the sponsors and promptly solicit input from the AAB’s representative on the Council as well as the Fire Marshall to refine recommendations. For example, the above standards vary on external door force (5, 8 ½, and 15 lbs.) and the approach to fire doors.

8. H.B. No. 302 (Financial Exploitation Reporting)

This bill was introduced on January 7, 2010. It remained in the House Judiciary Committee as of February 1, 2010. The bill is intended to establish civil and criminal immunity for persons reporting financial exploitation of the elderly and “infirm”.

I have the following observations.

First, the bill only covers financial exploitation of adults and not children. Children are also subject to financial exploitation. However, it appears that immunity for reporting exploitation of children is already available under Title 16 Del.C. §§903 and 908 and Title 10 Del.C. §901(1) and

901(11). Therefore, with the possible exception of pediatric nursing home residents [Title 16 Del.C. §1119B], the bill should not result in any major gap in reporting immunity.

Second, in lines 17-18, the sponsors should consider deleting the following words: “with respect to any act, omission, failure to act or failure to report pursuant to such reporting program”. Otherwise, the bill literally provides immunity to persons who fail to comply with a reporting duty or fail to take steps to protect a victim!

Third, the definition of “person” in lines 10-11 only explicitly refers to private entities and omits any reference to public bodies. As a result, government-required reporting policies would not be covered by the bill since the definition of a “reporting program” is limited to one adopted by a “person” (line 6). Thus, reporting pursuant to the attached DHSS PM 46 policy would not be covered by the bill. Parenthetically, it appears that there are gaps in immunity protections for persons reporting pursuant to statute. For example, persons reporting long-term care financial exploitation pursuant to Title 16 Del.C. §1132 are civilly and criminally immune pursuant Title 16 Del.C. §1135. Likewise, persons generally reporting to APS enjoy both civil and criminal immunity pursuant to Title 31 Del.C. §3910. However, persons reporting to the DHSS long-term care Ombudsman pursuant to Title 16 Del.C. §1152(5) are only given civil but not criminal immunity pursuant to Title 16 Del.C. §1154. Moreover, persons reporting financial exploitation to DHSS pursuant to Title 16 Del.C. §2224 are given no immunity at all. The sponsors may wish to amend the bill to resolve these gaps.

Fourth, the sponsors may wish to consider adding a second sentence to the definition of “financial exploitation” at lines 12-14 to read as follows: Without limitation, the term “financial exploitation” includes acts encompassed by Title 16 Del.C. §§1131(5) and Title 31 Del.C. §3902(5).” This would obviate any argument that the definition of “financial exploitation” created by the new Section 8146 is narrower than these other statutes and therefore immunity only applies to a subset of reporters of “financial exploitation” under these statutes.

Fifth, the term “infirm adult” in line 9 is an outdated reference which could be construed as pejorative. It is also unduly limiting. Consider that the bill covers all “elderly” persons irrespective of capacity. Thus, reporting financial exploitation of an astute 62 year old stockbroker would be covered by the bill while reporting financial exploitation of persons with disabilities would only be covered if the person were “substantially impaired in the ability to provide adequately for the person’s own care and custody.” The sponsors may wish to consider adopting a more inclusive term.

Sixth, lines 24-25 could be problematic. Literally, any “person” could adopt an “internal policy” for reporting financial exploitation which would eviscerate even the attorney-client privilege for consultation on actions occurring in the past. See e.g., Delaware Lawyers’ Rules of Professional Conduct, Rule 1.6, Comments 8 and 12.

Seventh, line 27 should be deleted or amended. There are existing statutes and regulations which require agencies to have policies on reporting financial exploitation. To avoid a conflict with

such statutes and regulations, line 27 could be amended to read as follows: “Nothing in this section shall be construed to require any person to adopt a reporting program.”

I recommend sharing the above observations with policymakers, including the DLTCRP, Secretary Landgraf, and Deborah Gottschalk.

9. DOE Final Accountability Regulation [13 DE Reg. 1065 (February 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in December, 2009. I attach a copy of the GACEC’s December 9 letter for facilitated reference. The Councils recommended seven (7) edits. The Department of Education has now adopted a final regulation incorporating some amendments prompted by the commentary.

First, the Councils recommended adopting consistent references to vocational technical school districts. The DOE amended §1.1 to achieve consistency.

Second, the Councils noted that, while the regulations referred to “middle schools”, the definition of “LEA” only referred to elementary and high schools. The DOE did not amend the “LEA” definition but did add a definition of “middle school”.

Third, the Councils strongly objected to deletion of a sentence in §3.1.1 originally adopted in 2006 to deter “dumping” of low achieving special education students. The DOE agreed to retain the provision.

Fourth, the Councils expressed a preference for retaining an authorization to count the higher DSTP student score if the test is taken more than once. The DOE responded that the “authorization was removed because summer school retests were eliminated by action of the General Assembly.” At 1066. Therefore, the authorization is deleted in the final regulation.

Fifth, the Councils noted a grammatical concern in §7.1.3. The DOE amended the reference.

Sixth, the Councils suggested adding the word “new” in §7.6.2.3.1.1. No change was made.

Seventh, the Councils objected to the short notice for schools “under improvement” to advise parents of their right to enroll their children in a different school. The Councils suggested a

“July 15” date. The DOE changed the period from essentially 1 day before the first day of school to 14 days prior to the start of school. See final §10.2. While this is an improvement, it still gives parents only a short time to react.

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

10. DSS Final Child Care Subsidy Program Regulation [13 DE Reg. 1088 (February 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in December, 2009. The Division of Social Services has now adopted a final regulation incorporating amendments prompted by the Councils’ comments.

First, the Councils endorsed an increase in the period of extended child care for the purpose of job search from one month to three months. DSS thanked the Councils for the endorsement.

Second, the Councils recommended retention of a sentence differentiating a “family care home” from a “large family care plan home”. DSS agreed and incorporated a conforming amendment.

Third, the Councils noted the anomaly of authorizing a family child care home to provide care in excess of 24 hours if necessitated by the parent’s work while not including the equivalent authorization for a large family child care home. DSS agreed with the concern and deleted hourly caps from the definitions altogether.

Since the regulation is final, and DSS adopted amendments prompted by the Councils’ commentary, a “thank-you” communication may be in order.

11. DSS Final Food Supp. Program Certification Period Reg. [13 DE Reg. 1086 (February 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in December, 2010. The Division of Social Services has now adopted a final regulation incorporating 1 amendment.

First, the Councils recommended correction of an outdated reference to “food stamp” in

§9085. DSS agreed and modified the final regulation.

Second, while noting that federal regulations refer to “elderly or disabled”, the Councils encouraged consideration of whether DSS could adopt conforming standards while using “people-first” language. DSS considered the comment but determined that it is preferable to retain the federal terminology.

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

12. DOT Final Street & Highway Access Regulation [13 DE Reg. 1101 (February 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in December, 2009. The Councils did not recommend any amendments. Rather, they endorsed the inclusion of a requirement of 5 foot landings at the top and bottom of curb ramps. The Department of Transportation has now adopted a final regulation which acknowledged the endorsements. At 1113.

I recommend no further action.

13. DOE Final Goals for Instruction-related Expenditures Reg. [13 DE Reg. 1082 (2/1/10)]

The SCPD and GACEC commented on the proposed version of this regulation in December, 2009. The Department of Education has now adopted a final regulation incorporating some amendments prompted by the commentary.

First, the Councils expressed concern with an undefined exemption of “agency transaction”. The DOE checked with NCES and learned that NCES is deleting the exemption from its standards. The DOE therefore deleted the exemption from the final regulation.

Second, the Councils recommended incorporating the term “middle school” in the definition of LEA which otherwise only refers to elementary and secondary schools. The DOE effected no amendment based on its conclusion that “middle school” is included in the reference to “elementary school”. At 1082. This is not “intuitive”. Indeed, in another regulation adopted this month, the DOE included separate definitions of elementary and middle schools. Compare DOE Accountability Regulation, 13 DE Reg. 1065, §1.2].

Third, the Councils suggested adding “following the end of the school year” to §3.3. The DOE agreed and incorporated the reference in the final regulation.

Fourth, the Councils recommended inclusion of some references to charter schools. The DOE declined to add references based on the rationale that NCES data contains information from districts and charter schools.

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

14. DOE Final Education Records Regulation [13 DE Reg. 1075 (February 1, 2010)]

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

First, the Councils recommended inclusion of a requirement that the cumulative record file include records related to the identification, evaluation, placement, and provision of FAPE to students identified under Section 504. The DOE agreed and added a conforming amendment to §2.1.3.

Second, the Councils noted a possible inconsistency in records transfer standards for children placed in out-of-state private placements pursuant to Title 14 Del.C. §3124. The DOE effected no amendment based on its conclusion that an inconsistency does not exist.

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

15. DOE Prop. School Based Intervention Services Reg. [13 DE Reg. 985 (February 1, 2010)]

The SCPD and GACEC commented on an earlier proposed version of this regulation in November. I attach the SCPD's November 20, 2009 letter for facilitated reference. The Department of Education is now issuing a revised proposed regulation which incorporates some language recommended by the Councils.

In a nutshell, the Councils shared 4 recommendations. The revised regulation accurately incorporates edits suggested by the Councils in one of the four contexts. Specifically, conforming references to Section 504-identified students are added to Sections 3.0 and 4.3. The balance of the Councils' recommendations have not been addressed.

I recommend thanking the DOE for incorporating the Section 504 references while reiterating the balance of commentary included in the November, 2009 correspondence.

16. Dept. Of Insurance Prop. Health Claim Settlement Reg. [13 DE Reg. 1051 (February 1, 2010)]

As background, the Department of Insurance maintains a regulation [18 DE Admin Code Part 1310] which includes procedural standards for health insurer processing of claims. The existing regulation contains an exemption for claims submitted under Medicare supplement and long term care policies. The Department is now proposing to delete the exemption so that Medicare supplement and long term care policies would be subject to the regulation.

Since the Part 1310 regulations promote fair and prompt processing of claims, extending coverage to Medicare supplement and long term care policies merits endorsement.

I recommend sharing an endorsement of the regulation with the Department of Insurance.

17. DSS Prop. Child Care Subsidy Program Special Need Reg. [13 DE Reg. 1049 (2/1/10)]

The Division of Social Services proposes to revise its Child Care Subsidy Program regulation to authorize participation by families referred by the Transitional Work Program (TWP). Such families are deemed to have met the otherwise applicable “need criteria” and are not required to provide medical certification of a child’s or parent’s special needs. Applicants would be required to have income below 200% of the FPL

Since the regulation expands eligibility for child care for persons with special needs, I recommend endorsement subject to one recommendation. DSS may wish to consider inserting “gross” between the words “have” and “household” in Par. 2 of the new section. Compare 16 DE Admin Code 11003.6.

18. DSS Prop. Child Care Subsidy Sanction Regulation [13 DE Reg. 1048 (February 1, 2010)]

The Division of Social Services proposes to amend its TANF regulation to clarify that recipients who fail to comply with employment or training requirements lose their eligibility for TANF child care. I recommend sharing only 1 recommendation, i.e., inserting “without good cause” in the second sentence between the words “fail” and “to”. This would conform with the first sentence.

19. DLTCRP Prop. Assisted Living Regulation [13 DE Reg. 1018 (February 1, 2010)]

The Division of Long-term Care Residents Protection proposes to adopt some discrete amendments to its Assisted Living regulation summarized at p. 1019. I have the following observations.

First, the requirement that the “prescribing practitioner and phone number” be included in the medication log is deleted from the definition in §3.0. The resulting protocol is roughly equivalent to that of nursing facilities. See 16 DE Admin Code 3201, §10.1.7. However, I could not locate a standard in the Assisted Living regulation equivalent to §10.1.4 of the nursing facility regulation in which records of physician orders are maintained by the facility. In the absence of a standard requiring the assisted living provider to maintain a record of physician orders, it may be preferable to at least retain the requirement that the medication log identify the prescribing practitioner and phone number.

Second, the requirement that a facility provide clear reasons for rejection of an applicant in §5.1 merits endorsement.

Third, in §8.4, the Division may wish to consider amending the first sentence to read “...lockable container or cabinet” to allow a facility to meet the requirement by offering a lockable medicine cabinet. Medications are less likely to be misplaced if kept in the medicine cabinet. Moreover, the Division may wish to consider adding exceptions to the “locked container” or “locked room” expectation for emergency medications such as epipens and inhalers which residents may prefer to keep in a purse or near their person. Finally, the Division may wish to consider an exception to the “locked container” or “locked room” expectation for non-prescription medications. Compare 16 DE Admin Code 3201, §6.11.2.1 which suggests that non-prescription medications such as antacids and aspirin need not be locked in nursing facilities.

Fourth, the Division is deleting a requirement of at least semi-annual resident satisfaction surveys. I recommend retention of the requirement.

Fifth, the Division should consider adding a regulation as required by recently-amended Title 16 Del.C. §1131C(b) which recites as follows:

(b) The Department shall include in its regulations for all facilities licensed under this chapter a requirement of full cooperation with the protection and advocacy agency in fulfilling functions authorized by this chapter. Without limiting the protection and advocacy agency’s pursuit of other legal remedies, the Department shall enforce violations of such regulations consistent with §§1109 and 1113 of this title.

I recommend sharing the above observations and recommendations with the DLTCRP.

20. DLTCRP Prop. Adult Abuse Registry Regulation [13 DE Reg. 1002 (February 1, 2010)]

The Division of Long-term Care Residents Protection proposes to adopt some discrete amendments to its adult abuse registry standards prompted by enactment of H.B. No. 165 in 2009.

In general, the amendments appear to be reasonable and consistent with the recently revised enabling legislation codified at Title 11 Del.C. §8564. However, I have a few observations.

First, the Code still contains an authorization to hire an applicant pending receipt of results of a registry check. See Title 11 Del.C. §8564(d). Although the drafters of H.B. No. 165 envisioned that instant access to the on-line registry would obviate any invocation of this statutory provision, it could conceivably be invoked if the website “crashed” or became unavailable. Out of an abundance of caution, the Division could consider retaining some variation of the existing §2.1.2.

Second, the enabling legislation does not explicitly require that an employment applicant or contractor be given notice or consent to the background check. Reasonable persons could differ on the prudence of at least requiring notice. The statute [§8564(e)] recites that the records maintained in the registry are not public records. This is reinforced by §7.0 of the regulation being amended. Therefore, there may be some expectation of privacy. Query whether an employer who does not disclose an intent to check the registry, and then uses a Social Security number to check the data base, and then discloses the results to others may violate a right of privacy. In the analogous context of criminal background checks, the DLTCRP regulations include several confidentiality safeguards. See, e.g., 13 DE Reg. 1009, 1012 (February 1, 2010). The Division may wish to consider whether it is preferable to retain some variation of current §2.1.4 which requires the applicant to sign a specific release statement or form. As a practical matter, if the applicant declined to sign a release, the provider could not hire him. Finally, the Division may wish to consider whether to include a provision, consistent with §7.0, reciting that the employer may use the results solely for the purpose of determining the suitability of the applicant for employment and shall not disseminate the results further. Cf. 16 DE Admin Code 3110, §3.6.

I recommend sharing the above observations with the Division.

21. DLTCRP Prop. Home Health Criminal Background. Check Reg. [13 DE Reg. 1009 (2/1/10)]

The Division of Long-term Care Residents Protection proposes to adopt a single amendment to its standards covering home health agency criminal background checks. The amendment would authorize the Division to require home health agencies to submit a list of applicants hired on a quarterly basis. The Division notes that it could then “cross-check our records to ensure compliance”. At 1009.

I have only one concern. It may be difficult to “cross-check” based on names alone. Employees may use initials, surnames, etc. which could undermine cross-checking. Submission of Social Security numbers could facilitate the process. Submission in a uniform format could also be helpful. Therefore, the Division may wish to consider the following amendment to §3.3.9:

The Department reserves the right to obtain data from employers on the employment status of applicants covered under these regulations, including but not limited to the requirement that agencies submit on a quarterly basis a list of applicants hired *which shall conform in format and content to Division standards.*

I recommend sharing the above observations with the Division.

22. DLTCRP Prop. LTC Facility Criminal Background Check Reg.. [13 DE Reg. 1007 (2/1/10)]

The Division of Long-term Care Residents Protection proposes to adopt a single amendment to its standards covering licensed long-term care facility criminal background checks. The amendment would authorize the Division to require covered facilities to submit a list of applicants hired on a quarterly basis. The Division notes that it could then “cross-check our records to ensure compliance”. At 1007.

I have only one concern. It may be difficult to “cross-check” based on names alone. Employees may use initials, surnames, etc. which could undermine cross-checking. Submission of Social Security numbers could facilitate the process. Submission in a uniform format could also be helpful. Therefore, the Division may wish to consider the following amendment to §10.16:

The Department reserves the right to obtain data from employers on the employment status of applicants covered under these regulations, including but not limited to the requirement that agencies submit on a quarterly basis a list of applicants hired *which shall conform in format and content to Division standards.*

I recommend sharing the above observations with the Division.

23. DLTCRP Skilled & Intermediate Care Facility Reg. [13 DE Reg. 1013 (February 1, 2010)]

The Division of Long-term Care Residents Protection proposes to adopt amendments to its regulations covering skilled and intermediate care facilities.

Given competing priorities, I was unable to devote much time to a critique of the standards. I am therefore sharing only the following observations.

First, the notice recites that comments are due by February 28, 2010. At 1013. This violates the APA which requires a minimum 30-day comment period. See Title 29 Del.C. 10118.

Second, the Division proposes to delete many regulations which benefit residents. For example, it proposes to delete the following requirement:

6.1.1. The nursing facility shall provide to all residents the care necessary for their comfort, safety and general well being, and shall meet their medical, nursing, nutritional, and psychosocial needs.

Likewise, it proposes to delete the following:

- standards protecting resident funds (§6.2);
- a requirement that facilities comply with physician orders for specialized services (§6.4);
- a requirement that facilities schedule activities which enhance quality of life and promote choice (§6.6);
- a requirement of 3 meals/day (§6.85);
- a requirement that resident areas be maintained in a range of 71 to 81 degrees (§7.3.2);
- a maximum cap of 4 residents per bedroom (§7.4.2); and
- a requirement that each facility maintain a quality assessment and assurance committee (§9.0).

I infer that some of these deletions may be based on the belief that 42 C.F.R. Part 483, which is incorporated by reference, may provide equivalent standards. See §1.2. I lack the time to corroborate this inference.

Third, the Councils submitted a set of 23 comments to the DLTCRP on the same regulations approximately 16 months ago. See attached November 26, 2008 SCPD memo. In Par. 10, the Council objected to a standard authorizing facilities to operate with no nurse whatsoever on the third shift. The current proposal weakens patient well-being further by deleting the following standard:

5.4.2.7. At a minimum, in the absence of a nurse on the third shift, at least one certified nursing assistant shall be qualified to assist with self administration of medication (AWSAM) and to provide basic first aid.

The Council may wish to share its concern in this context.

Fourth, the Division proposes the following amendment to existing §6.5.9:

6.5.9. The facility shall ensure that each nursing and ancillary staff member providing care to a resident under 16 8 years of age meets the standards as defined in regulations for nursing facilities admitting pediatric residents.

This is an ostensibly odd amendment since the pediatric nursing home standards apply to residents under age 18. See 16 DE Admin Code 3210, §2.1. Indeed, §§5.4 and 5.4 of the pediatric nursing home regulations require nursing staff with specialized pediatric expertise to be present

with no cap of age 8 or age 16.

Fifth, the Division should consider adding a regulation as required by recently-amended Title 16 Del.C. §1131C(b) which recites as follows:

(b) The Department shall include in its regulations for all facilities licensed under this chapter a requirement of full cooperation with the protection and advocacy agency in fulfilling functions authorized by this chapter. Without limiting the protection and advocacy agency's pursuit of other legal remedies, the Department shall enforce violations of such regulations consistent with §§1109 and 1113 of this title.

Subject to the Council undertaking a definitive review of 42 C.F.R. Part 483, I recommend sharing the above observations and recommendations with the DLTCRP. The Council may also wish to share a courtesy copy of comments with the DHSS Secretary.

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