

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative & Regulatory Initiatives

Date: May 11, 2010

I am providing my analysis of fifteen (15) legislative and regulatory initiatives in anticipation of the May 13 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DDDS Final Agency Appeal Process Regulation [13 DE Reg. 1458 (May 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in March, 2010. The Division of Developmental Disabilities Services has now adopted a final regulation incorporating several amendments prompted by the commentary.

First, the Councils applauded the Division for issuing an appeal “regulation” as juxtaposed to a “policy”. DDDS acknowledged the endorsement.

Second, the Councils suggested adding a provision clarifying that resort to the DDDS appeal process does not supplant access to other grievance systems available under law. DDDS agreed with the suggestion and incorporated a variation of the Councils’ proposed language.

Third, the Councils suggested an amendment to encourage, but not require, exhaustion of informal resolution options prior to appealing to DDDS. The Division agreed and inserted conforming language.

Fourth, the Councils suggested correction of a reference to “an appeal DDDS”. The Division corrected the reference.

Fifth, the Councils suggested deletion of an extraneous comma. The amendment was made.

Sixth, the Councils suggested deletion of another extraneous comma. The amendment was made.

Seventh, the Councils suggested the addition of an authorization to restore the status quo

pending appeal based on consensus reached between DDDS and the client. DDDS agreed and added some conforming language.

Eighth, the Councils recommended that the 90 day period to request a Medicaid hearing be tolled during the pendency of the DDDS appeal. DDDS responded that the suggestion “is currently under review with the applicable agencies”.

Ninth, the Councils recommended insertion of “limitation” in §2.4. No change was effected.

Tenth, the Councils recommended explicitly allowing appeals of disagreements over ELP content or implementation. The Division rejected the suggestion based on the following rationale:

DDDS does not want to get into the practice of the Division Director, via the Appeals Committee (who don’t ordinarily even know the person receiving services), overturning an ELP. If a right is being violated and cannot be addressed at the team level, the appellant should address it via the DDDS Client Rights Complaint Process (reference second comment).

At 1460.

Eleventh, the Councils recommended authorizing an appeal to contest “other adverse DDDS action or refusal to act with significant impact on appellant”. DDDS declined to adopt the suggestion.

Since the regulation is final, and DDDS adopted several amendments prompted by the Councils’ commentary, I recommend sending a “thank-you” letter or email to the Division.

2. DOE Final Unit Count Regulation [13 DE Reg. 1452 (May 1, 2010)]

The GACEC and SCPD commented on the proposed version of this regulation in March, 2010. The Department of Education has now adopted a final regulation incorporating some amendments prompted by the commentary. The Department also sent the Councils the attached April 19, 2010 letter.

First, the Councils noted that newly identified special education students awaiting development of an IEP on September 30 would not be included in the unit count. No change was effected. The April 19 letter indicates that identified special education students must be served irrespective of whether they are included in the September 30 unit count and that IDEA funds are passed through to districts based on a formula not tied to the unit count. This still “sidesteps” the practical effect of not counting identified students awaiting development of IEPs on September 30 since districts would receive less State funds when these students are essentially treated as non-special education students.

Second, the Councils recommended substituting “primary” for “major” in §2.2. The

substitution was made.

Third, the Councils noted an inconsistency in §§1.3 and 2.4 insofar as the former section repealed a requirement of documentation of student grade level while the latter section retained a grade-level standard. No change was effected. In its April 19 letter, the DOE indicates that the grade level data is required for unit count information but not general record-keeping. It still seems “odd” to delete record-keeping based on grade level when it is required for unit count purposes.

Fourth, the Councils observed that the “good cause” standard for enrolling intra-state transfer students was narrower than the enabling statutes. The DOE agreed and cross referenced the statutes in §3.1.3.

Fifth, the Councils noted that §4.1.6.2 literally made no sense. In its April 19 letter, the DOE indicates that the published version was incorrect. The final version has been amended..

Sixth, the Councils observed that the word “and” was duplicated in §4.1.11 which read “(s)tudents who have been properly identified; and have an IEP...”. No corrective change was made. . In its April 19 letter, the DOE indicates that the published version was incorrect. However, the final version remains incorrect. The section reads as follows:

4.1.11 Special Education Services, special education services include students who have been properly identified , and and have an IEP in effect during the last week of school in September.

Seventh, the Councils identified some concerns with §6.2.1. Specifically, the Councils suggested that a reference to “indefinite suspension” was odd and noted that students could enroll in alternative placement programs without being suspended or expelled. No change was effected. In its April 19 letter, the DOE does not address the concern with “indefinite” suspensions.

Eighth, the Councils observed that §6.2.3 was convoluted and difficult to understand. In its April 19 letter, the DOE indicates that the published version was incorrect. The final regulation reflects deletion of some language from the end of the section.

The GACEC may wish to consult the DSCY&F and some special education directors on the regulation disallowing the inclusion of identified students awaiting development of an IEP in the unit count. See “First” item. If they confirm that this could have a significant impact on funding, the GACEC may wish to collaborate to prompt remedial action (e.g. revised regulation or budget epilog provision).

3. DSS Final Cash Asst. Overpayments & FSP Claims Reg. [13 DE Reg. 1462 (May 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in March, 2010. The March 30 GACEC letter is attached for facilitated reference. DSS has now adopted a final regulation with no changes.

First, the Councils shared 5 comments addressing changes in the cash assistance aspects of the regulation. DSS responded that the focus of the changes was on the Food Supplement standards

rather than the cash assistance standards. DSS therefore deferred consideration of the 5 comments to a later date:

DSS decided to re-write the food benefit portion while making the policy separation. The cash assistance portion will be re-written at a later time. Your five comments regarding Section 7000 will be considered when that section is re-written.

At 1663.

Second, the Councils observed that, although technically compliant with a federal regulation, a single notice of overpayment to a household which would be binding on all adults in the household could violate due process. Although DSS acknowledged that sending notices to each adult in the household had merit, it would require a major systems change and current DSS policy had not been criticized by the federal monitors. DSS indicated that no change would be made to the regulation now but changes would be considered in the future:

DHSS will look for opportunities to make the necessary changes to the ARMS noticing process and, when feasible, will separately notice all adult members of the household.

At 1463.

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

4. DSS Final FSP Income Deduction Regulation [13 DE Reg. 1464 (May 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in March, 2010. DSS has now adopted a final regulation with no changes.

In a nutshell, the Councils endorsed the regulation with one recommendation, i.e., to clarify that the reference to “income” referred to “gross” income and not “net” income. DSS interpreted the comments as asking DSS to informally issue a clarification rather than amend the regulation. In its comments, DSS issued an interpretation that the reference to “income” would be interpreted as “gross” income without any explicit change in the regulation itself.

I recommend no further action.

5. Dept. of Insurance Final LTC Insurance Claim Processing Reg. [13 DE Reg 1465 (May 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in March, 2010. The March 30 SCPD letter is attached for facilitated reference. The Department has now adopted a final regulation with no changes.

First, the Councils identified a grammatical error in §4.5. The error remains.

Second, the Councils noted the anomaly of listing several definitions of terms in the “definition” section when the terms do not appear anywhere in the regulatory text. The Department did not address the comment or effect any change.

Third, the Councils observed that the regulation was “weaker” in consumer protection than the analogous health care services regulation. The Department responded as follow:

While the comments of the two councils are valid, the proposed regulation, based on the NAIC Model, is more than adequate to, for the first time, establish reasonable requirements for the payment of claims for long-term care insurance.

Reasonable persons might characterize this as a somewhat “minimalist” approach to consumer protection.

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

6. DOE Revised Proposed FERPA Regulation [13 DE Reg. 1380 (May 1, 2010)]

The SCPD and GACEC submitted two (2) comments on an earlier proposed version of this regulation in December, 2009. I attach the December 9 GACEC letter for facilitated reference. The Department of Education has now issued a revised proposed regulation incorporating amendments prompted by the commentary.

First, the Councils noted that the DOE exemption from FERPA notice and hearing standards was overbroad, particularly in the context of students served within the Department of Correction system. The DOE regulation now applies FERPA notice and hearing standards to the DOE in the context of DOC students.

Second, the Councils recommended inclusion of a cross reference to another set of regulations addressing records of special education students. The DOE agreed with the recommendation and added a nonregulatory note.

I recommend endorsement of the proposed regulation with one recommendation. The references in §§3.2 and 3.3 to “notwithstanding section 3.1, and except as noted herein” are somewhat difficult to follow. The DOE could consider the following substitute provisions which provide a more specific reference to exceptions than the more obtuse “except as noted herein”:

3.2. Notwithstanding Section 3.1, the Department shall not be required to annually notify parents or eligible students of their rights under FERPA or this regulation except for persons covered by Section 3.2.1 of this regulation.

3.3. Notwithstanding Section 3.1, the Department shall not be required to provide a hearing to a parent or eligible student seeking to amend their educational records as provided in Subpart C of the FERPA regulation except for persons covered by Section 3.3.1 of this regulation.

7. DOE Gifted Student Early Admission to Kindergarten Reg. [13 DE Reg. 1384 (May 1, 2010)]

The Department of Education proposes to revise its regulation addressing early admission to kindergarten for gifted students. In general, the DOE is continuing a requirement that an applicant

achieve a score of at least 1.5 standard deviations above the mean on an assessment instrument for the 2010-11 school year. For the 2011-2012 school year, the DOE is requiring public schools to use more than 1 assessment instrument.

I have the following observations.

First, the reference to “14 Del.C. §3101(3)(a) or (b)” in Section 1.1 is incorrect. The definition of “gifted or talented person” appears at Title 14 Del.C. §3101(4).

Second, it is unclear whether an applicant for early admission for the 2011-2012 school year needs to score 1.5 standard deviations above the mean on only 1 instrument, multiple instruments, or all instruments. While Section 1.1.3 requires the public school to use multiple assessment instruments, Section 1.1.3.1 refers to achievement of a score of 1.5 standard deviations above the mean on a single instrument - “the assessment instrument”. DOE intent should be clarified.

Third, the overall regulation is “at odds” with the enabling statute. The enabling statute [14 Del.C. §3101(4)] contemplates that a student can qualify as gifted and talented in as few as 1 context:

A person capable of high performance as herein defined includes one with demonstrated achievement and/or potential ability in any of the following areas, singularly or in combination:

- a. General intellectual ability;
- b. Specific academic aptitude;
- c. Creative or productive thinking;
- d. Leadership ability;
- e. Visual and performing arts ability;
- f. Psychomotor ability.

A student does not have to be globally endowed in several contexts to qualify as gifted and talented. Moreover, academic aptitude is not the sole means of qualifying. Rather, “leadership ability”, “visual and performing arts ability”, “psychomotor ability”, etc can qualify an applicant as gifted and talented regardless of academic aptitude. In contrast, the regulation (§§1.1.2 and 1.1.3.1) requires the score of 1.5 deviations above the mean be achieved solely on a test of “mental and cognitive abilities”. In the context of charter schools, the sole emphasis on “mental and cognitive abilities” makes even less sense. If a performing arts charter schools is presented with a “Shirley Temple” child with extraordinary singing and dancing ability, but who may only score at 1.25 deviations above the mean on a test of mental/cognitive ability, it makes no sense to categorically bar her early admission to the specialized school.

Fourth, the requirement of a score of 1.5 standard deviations above the mean on a test of mental and cognitive abilities may result in discrimination against students protected by Section 504 or the ADA. Some children with disabilities may not “test” well but could nonetheless qualify as “gifted” if properly assessed.

Fifth, public schools are statutorily authorized to grant early admission to kindergarten to any child “if they determine that such exception is in the best interest of the child.” Title 14 Del.C. §2702(b). There is some “tension” between this broad grant of discretion to public schools and this narrow regulation’s mandate that “school districts and charter schools shall comply with the following requirements” followed by very prescriptive testing standards. If the Legislature grants public schools the discretion to approve early admission to kindergarten based on “best interests”, query whether the DOE can limit that discretion by categorically banning early admission unless a child scores at least 1.5 deviations above the mean on a mental/cognitive ability test.

I recommend sharing the above observations with the DOE. The GACEC may also wish to share a courtesy copy of comments with the House and Senate Education committees.

8. DOE Proposed K-12 School Counseling Program Regulation [13 DE Reg. 1382 (May 1, 2010)]

The Department of Education proposes to amend its standards for school counseling programs. The changes are accurately summarized in the synopsis at p. 1382.

I have the following observations.

The amendments represent an improvement over the current standards. For example, instead of each district having a district-wide counseling plan, the new standards require each school to have an individual counseling plan. Moreover, while the current standards required updating of each plan every 3 years, the new standards require updating each year. For accountability, each plan must be on file with the DOE to facilitate review. Finally, the plan must meet national standards of the American School Counselors Association.

I did not observe any substantive deficiencies in the proposed standards. Since they represent an improvement over the current standards, I recommend endorsement.

9. DSS Child Care Services Authorization Regulation [13 DE Reg. 1387 (May 1, 2010)]

The Division of Social Services proposes to revise its regulation covering the authorization process for subsidized child care services.

I have the following observations.

First, the revisions represent an improvement over the current version since they use specific subparts which provide greater clarity and guidance to providers.

Second, I did not identify any substantive deficiencies. I recommend endorsement subject to 2 grammatical revisions. First, in Par. 4, I recommend substituting “initiating services” for “with your services”. The regulation is written in the third person, not the second person. Second, in Par. 3, since there is a plural pronoun (their) with a singular antecedent (client), DSS could consider substituting “his/her” for “their” or substituting “DSS” for “their DSS worker”.

10. H.B. No. 386 (School Board Member Special Education Hearing Training)

This “fast-track” bill was introduced on April 29. It was approved by the House Education Committee on May 5 and passed the House on May 6. It is companion legislation to H.B. No. 387 which is analyzed below. It is a relatively simple bill which requires all local school board members to receive training covering special education hearings consistent with standards to be promulgated by the Department of Education.

Since the bill would result in more informed school board members in the context of special education hearings, I recommend endorsement while sharing a potential “non-critical” amendment with the prime sponsors which would clarify the training timetable. The bill only recites that the training would be scheduled “during his/her term” (line 4). Obviously, it would be preferable for the training to occur early in a board member’s term rather than at the end of a board member’s term. The sponsors could consider the following options.

Option 1: The word and punctuation “timetable,” could be inserted in line 6 between “criteria,” and “material”. The DOE would then be guided to establish the training timetable via regulation.

Option 2: If the sponsors wished to provide more guidance in the statute, the following clause could be added after the word “program” in line 6: “which shall include a timetable which encourages completion of training within twelve months of adoption of regulations or within twelve months of initial appointment as a board member, whichever is later.” This would result in existing board members being trained within 12 months of adoption of regulations. New board members beginning terms after adoption of the regulations would similarly be expected to complete training within the first twelve months of their initial term.

Parenthetically, the SCPD or GACEC may wish to share a courtesy copy of its commentary with the Lt. Governor.

11. H.B. No. 387 (Notice of Special Education Hearings & Appeals to Local School Boards)

This “fast-track” bill was introduced on April 29, 2010. It was approved by the House Education Committee on May 5 and passed the House on May 6. .

The bill would require the Department of Education to issue regulations with the following effects: 1) ensuring that local school board members are provided notice whenever a parent requests a special education hearing; 2) ensuring that local school board members receive a copy of any special education hearing decision; 3) ensuring that local board members are notified of any parental judicial appeal of a special education administrative hearing decision; and 4) requiring any district appeal of a special education hearing decision to be preceded by a majority vote of the local school board authorizing the appeal.

The Delaware School Boards Association compiled some concerns with the legislation in the

attached document entitled “Concerns Regarding HB 387. In a nutshell, the DSBA believes most districts already engage in the communication envisioned in the bill, believes that there is no need to legislate the protocols established in the bill, and believes it may “stimulate more due process cases”. The obvious response is that, if most districts are already following some variation on the protocol established by the bill, the legislation should not be viewed as burdensome. Moreover, the protocols should result in fewer due process cases, rather than more, since there would be another layer of review prior to a district’s appeal of an administrative hearing to the courts.

I recommend endorsement of the bill. I also recommend that the following potential amendments be shared with the prime sponsors who can exercise their discretion in assessing whether to let the bill pass in its present form. The proposed amendments do not address “critical” defects but would improve the bill somewhat.

First, the term “or guardian” should be deleted in lines 3, 7, and 11. The term “parent” is broadly defined in Title 14 Del.C. §3101(7) to include guardians, students over 18, stepparents, custodians, etc. The reference to “or guardians” is therefore both unnecessary and potentially limiting. Moreover, other parts of the bill (lines 10 and 14) refer solely to “parents”.

Second, since the hearing decision and related documentation are not “public records”, it would be preferable to require the DOE regulations to address confidentiality of the records shared with local boards. The sponsors could consider, in line 15, deletion of the word “Lastly”, capitalization of the word “the” prior to “regulation”, and insertion of the following final sentence in line 17:

Finally, the regulations shall include provisions preserving the confidentiality of records related to hearing and appellate proceedings shared with school boards consistent with applicable federal and State law.

The DOE regulation could then provide guidance that personally identifiable student information should not be discussed in open sessions and board member redisclosure of special education records should not occur.

Parenthetically, the SCPD or GACEC may wish to share a courtesy copy of its commentary with the Lt. Governor.

12. H.B. No. 367 (Health Insurer Claim Denials)

This bill was introduced on April 15, 2010. As of May 10, it remained in the House Economic Development, Banking, Insurance & Commerce Committee.

The impetus behind the legislation was a series of News Journal articles in March reporting denials by health insurers in Delaware of diagnostic imaging tests, particularly cardiac imaging tests. Since then, both the Delaware Insurance Commissioner and U.S. Senate Committee on Commerce, Science and Transportation have initiated assessments of Delaware insurer practices. See attached April 24 and May 10, 2010 News Journal articles and April 19, 2010 IFA Webnews

article, “Sen. Rockefeller wants CEOs to explain stress test denials in Delaware”.

H.B. No. 367 is described in the May 10 article. As it indicates, an insurer would be barred from unreasonably denying coverage for a medical procedure or test that the insurer decides is not medically necessary. If a patient paid out-of-pocket for a procedure or test denied by an insurer, and the procedure or test corroborated its medical necessity based on results, the patient could recover 100% of out-of-pocket costs from the insurer and any damages sustained by the delay in obtaining the procedure or test. According to the May 10 article, some advocates believe the bill may be too narrow insofar as tests are sometimes used to “rule out” a condition and such use is not well addressed in the bill.

I recommend endorsement of the bill since it would deter unreasonable denials of coverage by health insurers. However, the sponsors may wish to consider an amendment to modify Title 18 Del.C. §2301(b) by substituting “§2319” for “§2316” to clarify, consistent with the synopsis, that the bill is intended to characterize an unreasonable denial of coverage within the scope of the bill as an unfair practice.

13. S.B. No. 122 (DPC Employee Criminal Background Checks & Mandatory Drug Testing)

This bill was introduced on June 4, 2009. It was approved by the Senate Finance Committee on May 5, 2010.. A short amendment was placed with the bill on May 6.

The bill would have several effects.

First, it would require an applicant for employment at DPC to undergo a criminal background check (lines 19-22) and 48-57). DHSS would establish, by regulation, the types of criminal convictions resulting in automatic disqualification from employment and, for other criminal convictions, the criteria for determining whether an applicant is unsuitable for employment at DPC (lines 25-28). Conditional hiring is authorized whenever exigent circumstances exist (lines 29-39). If DHSS believes an existing employee has been convicted of a disqualifying crime, a criminal background check would also be implemented (lines 64-66).

Second, the bill would require an applicant for employment at DPC to undergo drug screening.(lines 68-69). Existing employees would also be subject to drug testing if DHSS has reasonable suspicion that an employee is impaired by an illegal drug (lines 70-71). An existing employee who fails a drug test could be suspended or terminated (lines 94-98).

I recommend endorsement of the legislation which should result in an improved workforce at DPC. However, the sponsors should consider a few amendments.

First, although the synopsis suggests that the bill would only apply to persons “providing direct care to patients”, the text of the bill would apply to all DPC employees, even those not involved in direct care to patients (e.g. groundskeepers, maintenance staff, accountants). This discrepancy should be reconciled.

Second, in line 40, the word “of” is missing between the words “employment” and “any”.

Third, the reference to “disqualifying crime” on line 65 may be narrower than the sponsors intend. Only some crimes are defined as “automatically disqualifying” in line 26. Convictions of other crimes may or may not be grounds for termination (lines 27-28). The sponsors may wish to amend line 65 by deleting “disqualifying crime” and substituting “crime within the scope of subsection ©) of this section.”

14. S.B. No. 225 (Absentee Voting)

This bill was introduced on April 1, 2010. It was approved by the Senate Administrative Services/Elections Committee on May 5 and passed the Senate on May 6.

As background, the Federal Voting Assistance Program (FVAP) sends legislative proposals to states to promote absentee voting primarily by military and overseas voters. See attached FVAP overview. The FVAP is currently supporting uniform state laws which direct the mailing of absentee ballots at least 45 days prior to an election and authorize use of email to transmit registration forms, ballot requests, and absentee ballots. Consistent with the attached November 9, 2009 letter to Delaware’s Election Commissioner, there are 2,986 Uniformed Service members, 3,324 family members of voting age, and 10,500 overseas citizens who claim Delaware as their voting residence.

S.B. No. 225 is designed to implement some of the FVAP’s recommendations, including lengthening the time between forwarding of absentee ballots and election dates (lines 7-8) and expanding use of email for transmission of information and forms (lines 14-16). The bill also authorizes some voters, including those characterized as “sick or physically disabled” (lines 27 to 28) to apply for “permanent absentee status”.

Since the bill would facilitate voting by persons with disabilities, as well as overseas voters, I recommend endorsement subject to identifying one technical error in the bill, i.e., in line 13 the reference to “(5)” should be to “(e)”.

15. H.B. No. 237 (Automatic Doors)

This bill was introduced on June 18, 2009. On March 17 2010 it was released by the House Economic Development, Banking, Insurance & Commerce Committee by a vote of 7 favorable, 2 on the merits, and 0 unfavorable. There is a fiscal note. The SCPD P&L Committee reviewed my critique of the bill in February and information on standards in other states was shared with the prime sponsor.

The prime sponsor is now proposing the attached draft amendment which would offer an alternative to the automatic door requirement, i.e., a signaling device which alerts the place of public accommodation that someone needs assistance with the door. Covered entities could opt to

either have an automatic door or the calling device.

I recommend that the SCPD promptly suggest the following changes to the prime sponsor to improve the proposed amendment.

First, delete the duplicate reference to “a person” in lines 5-6.

Second, consider substituting “entry” for “the entrance door” since it is conceivable that a site may only offer an accessible alternative entry through a different door.

Third, in Par. (2), consider substituting “limb” for “hand”. Some persons with a disability may lack a “hand”.

Fourth, consider substituting “January 1, 2012” for “January 1, 2011” in lines 11 and 14 of the underlying bill. This may obviate or reduce the size of the fiscal note.

Fifth, consider renumbering Section 3 of the underlying bill as Section 4 and inserting a new Section 3 to read as follows:

Section 3. Amend §4504, Title 6 of the Delaware Code by inserting a new paragraph (e) into said Section to read as follows:

“(e) The requirements described in paragraph (d) of this section are in addition to, and not in derogation of, requirements imposed by otherwise applicable federal or State law.”

Attachments

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