

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative & Regulatory Initiatives

Date: June 8, 2010

I am providing my analysis of thirteen (13) legislative and regulatory initiatives in anticipation of the June 10 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DMMA Final Citizenship, Alienage & Deemed Newborn Reg [13 DE Reg. 1540 (June 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2010. The Councils endorsed the regulation subject to one minor change, i.e., substituting “individuals with a disability” for “disabled individuals” in §1440G. DSS has now adopted a final regulation acknowledging the endorsement and adopting the recommended amendment.

Since the regulation is final, and DMMA adopted the Council’s only suggestion, I recommend no further action.

2. DMMA Final Medicaid Final Prior Authorization Reg. [13 DE Reg. 1547 (June 1, 2010)]

The GACEC and SCPD commented on the proposed version of this regulation in March, 2010. A copy of the March 30, 2010 GACEC letter is attached for facilitated reference.

First, the Councils noted that it was difficult to determine if the standards were regulations or policies and further noted that the standards did not appear in the Administrative Code. DMMA responded that it publishes changes to its provider manuals in the Register of Regulations without clarifying whether they are regulations. At 1548-1549. Moreover, DMMA counsels that the provider manuals are “not to be viewed as a sole source stand-alone resource” and are “best used in combination with other resources, including provider informational bulletins, provider alerts, and other DMMA manuals and other types of communication.” At 1549. Unfortunately, this “hodgepodge” approach to standards makes it difficult identify applicable guidance and whether they have the force of law.

Second, the Councils objected to a cross reference to 16 contexts in which prior authorization is required followed by a recital that the list is “not all-inclusive” and directing the reader to 21 manuals for more information. At 1549. DMMA responded that the prior authorization “rule” is not meant to encompass all possible services. DMMA did suggest that it may consider effecting some changes to its website to facilitate accessing information.

Since the standards are final, and DMMA effected no amendments based on the Councils’ commentary, I recommend no further action.

3. DSS Final Child Care Subsidy Review/Redetermination Reg. [13 DE Reg. 1552 (6/1/10)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2010. The Councils proffered a single recommendation, i.e., to reinstate a provision clarifying that case closure should not occur without advance notice to the parents/caretakers. DSS agreed with the recommendation and reinstated the advance notice provision.

Since the regulation is final, and DSS adopted the Council’s only suggestion, I recommend no further action.

4. DSS Final Food Supp. Program Income Deduction Reg. [13 DE Reg. 1550 (June 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2010. The Councils proffered a single recommendation, i.e., to highlight the identity of the primary victim compensation program in Delaware to provide guidance to DSS employees. The Division opted to make no change since it did not wish to suggest that only victim compensation payments from the Delaware program are exempt.

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

5. DMMA Prop. Medicaid Non-emergency Transportation Reg. [13 DE Reg. 1504 (June 1, 2010)]

The Division of Medicaid and Medical Assistance proposes to change its approach to non-emergency Medicaid transportation.

As background, DMMA adopted a transportation broker system in 2002 utilizing Logisticare. It replaced a fee for service transportation system. This general model will continue under the new regulation. However, states have an option to fund transportation broker systems either as an “administrative” expense or a “medical” expense. DMMA is proposing to change transportation from an “administrative” expense to a “medical” expense with two (2) positive results: 1) elimination of the beneficiary co-pay; and 2) State qualification for a higher federal reimbursement rate.

I did not identify any specific concerns with the regulatory changes. Since the amendments will eliminate beneficiary copays and increase the federal reimbursement rate, I recommend endorsement.

6. DOE Prop. Education Program for ELL Student Reg. [13 DE Reg. 1501 (June 1, 2010)]

The Department of Education proposes to adopt a single, discrete amendment to its regulation covering the education of English Language Learners (“ELLs”) a/k/a limited English Proficient (“ELP”) students. The current regulation contemplates ELL student participation in the DSTP. Since the DSTP is being replaced with the Delaware Comprehensive Assessment System (“DCAS”), the DOE is simply substituting a reference to the DCAS for a reference to the DSTP.

Since the only regulatory change is minor and appears appropriate, I recommend endorsement.

7. Exec. Order 19: Council on Health Promotion & Disease Prevention [13 DE Reg. 1584 (6/1/10)]

The Governor approved this executive order on May 20, 2010.

As background, the order recites that 64% of Delawareans are overweight or obese; 75% of health care costs are attributable to chronic conditions; and the State would benefit from a comprehensive, multi-faceted approach to promotion of health of its citizens.

The order establishes a Council on Health Promotion & Disease Prevention to encourage healthy lifestyles. Membership is outlined in §1. The specific duties of the Council are outlined in §§4-5. The Council will “sunset” in 2015 in the absence of a new executive order (§2). The Division of Public Health will provide administrative support (§3).

To promote coordination, the SCPD may wish to consider the following options: 1) exchanging meeting minutes; 2) inviting the new Council to nominate a member to serve on the SCPD; and/or 3) assessing the new Council’s membership to determine if there are any common members who could serve as a liaison between the councils.

8. S.B. No. 254 (State Civil Penalty Trust Fund)

This bill was introduced on May 11, 2010. It passed the Senate on June 1 with one technical amendment. As of June 7, it remained in the House Health & Human Development Committee.

For background, I am attaching a May 27 email from the DLTCRP Director which should preferably be considered an internal document. I am also attaching the official “talking points” submitted by DHSS to the General Assembly. In a nutshell, funds collected by the DLTCRP from civil penalties imposed on long-term care facilities are currently deposited in a “Long-term Care Residents’ Trust Fund” which currently enjoys a balance of \$460,000. When the amount in the Fund reaches \$500,000, money in excess of \$500,000 reverts to the General Fund. Federal law requires the establishment of the Trust Fund for nursing homes to “be applied to the protection of the health or property of residents of facilities that the State or CMS finds noncompliant”. The bill would establish a separate trust fund for collection of civil penalties from non-nursing homes (e.g. group homes; assisted living facilities). Money in the new trust fund would be available to more flexibly benefit the residents of the 300 non-nursing homes licensed by the DLTCRP as well as benefitting persons living in the community (e.g. workshops on fraud prevention and advertising DHSS services).

I recommend endorsement. Although reasonable persons might differ on the value of

limiting use of civil penalty funds to benefit residents of the noncompliant facility, it appears that the existing fund is underutilized. Moreover, enhanced flexibility in use of funds should result in supporting valuable discretionary initiatives.

9. S.B. No. 255 (Removal of Bar on Food Supp. Program Eligibility Based on Drug Conviction)

This bill was introduced on May 11, 2010. It passed the Senate on June 1. It remained in the House Health & Human Development Committee as of June 7.

As background, the attached statute (Title 31 Del.C. §605) currently bars Food Supplement Program (a/k/a Food Stamps) eligibility for persons convicted of drug felonies subject to some exceptions. This bill would result in the following simplified §605:

Pursuant to the option granted the State by 21 U.S.C. §862a(d)(1), an individual convicted under federal or state law of a felony involving possession, distribution or use of a controlled substance shall be exempt from the prohibition contained in 21 U.S.C. §862a(a) against eligibility for food stamp program benefits for such convictions.

Given the common co-occurrence of substance abuse with mental health and other disorders, the bill would ostensibly enhance flexibility in State “safety-net” programs. On a practical level, if a person lacks access to basic sustenance for self and family, the prospect for recidivism may increase. Consistent with the attached DHSS memo, at least nineteen (19) states have already lifted the lifetime drug felony conviction ban altogether. The attached December 17, 2009 article notes that enforcement of the ban seriously undermines the successful reintegration of persons released from prison into the community and has a disproportionate effect on women.

I recommend endorsement.

10. S.B. No. 242 (Delaware Transit Corporation Schedules & Routes)

This bill was introduced on May 4, 2010. It passed the Senate on June 1. It remained in the House Transportation Committee as of June 7.

For background, I attach a set of materials describing a national initiative to prompt transit agencies to publish routes and schedules in “open data” format. A national campaign has resulted in approximately 102 out of the 767 transit agencies in the United States opting to publish routes and schedules in such format, including SEPTA in Philadelphia, the CTA in Chicago, and the MTA in New York. It allows consumers to combine schedule data and Google maps to create step-by-step directions using public transportation. Data can also be downloaded to cell phones to allow users to determine the closest stop to a user’s location, quickest route to a destination, and time the next bus will depart.

S.B. No. 242 would require the Delaware Transit Authority to publish its route, schedule, and fare information in open data format on the Web. Information could be accessed without charge.

I recommend endorsement. In particular, persons with mobility impairments would benefit from facilitated access to readily-available information on schedules and connections. Conceptually, the bill could be improved by incorporating a requirement that “accessibility” information also be included in the data base. For example, whether a bus stop is accessible via curb cuts and the availability of a lift on buses on a fixed route would be useful information. The Councils may wish to highlight the advantages of an amendment to add accessibility information to the bill.

11. S.B. No. 243 (Dram Shop Liability)

This bill was introduced on May 4, 2010. As of June 7, it remained in the Senate Judiciary Committee.

This legislation has been introduced on multiple occasions over the years. It is identical to S.B. No. 173 introduced in 2007 and SS 1 for S.B. No. 51 introduced in 2003.

The effect of the legislation is summarized in the synopsis. As it recites, Delaware courts have consistently recognized that a bar owner cannot be found liable for selling alcohol to intoxicated persons who then injure third parties in the absence of an authorizing statute. This bill would create such a statute. Liability would be capped at \$250,000, be limited to sales for “on premises” consumption, and only apply if the bar acted intentionally or recklessly. Simple negligence would be insufficient to trigger liability.

The SCPD has previously endorsed such legislation in the interests of disability prevention. Serving obviously intoxicated patrons who then injure others (e.g. through DUI) merits discouragement. The bill would not allow the inebriated patron to recover any damages, only third parties.

The majority of states have adopted some form of dram shop liability by statute. See attached table. Delaware’s sister states of Pennsylvania and New Jersey have adopted such laws. The standards in such statutes vary considerably. For example, the attached article notes that the Missouri law requires proof that the patron demonstrated “significantly uncoordinated physical action or significant physical dysfunction.”

I recommend endorsement.

12. S.B. No. 261 (Parent-School Compact)

This bill was introduced on May 11, 2010. It passed the Senate on June 3. As of June 7, it awaited action in the House.

As background, the SCPD endorsed a similar House bill in May. See attached May 6, 2010 SCPD memo. Most of the commentary in that letter remains apt. However, there are a few substantive differences between S.B. No. 261 and H.B. No. 350.

First, the sponsors added an amendment at lines 17-18 recommended in the SCPD’s May 6

memo. The relevant sentence now reads as follows: “Such Declaration shall identify responsibilities of parents for parents and families, as well as the commitment of the public schools to actively collaborate in promoting student success.”

Second, lines 19-20 offer some additional flexibility. H.B. No. 350 contemplated adoption of a district-wide declaration policy. S.B. No. 261 ostensibly allows a district to have different declarations by school. I assume this would permit use of a different declaration template for elementary schools versus high schools as long as the overall content meets the criteria in lines 13-18.

Third, line 28 is designed to provide more precise information about use of federal funds for parental involvement than H.B. No. 350. Districts would be expected to publish the “uses of such funds by individual schools” rather than simply an aggregate district-based summary.

Fourth, lines 30-31 limit the use of information required by the new law in the context of accountability.

I recommend endorsement of the legislation which incorporates some improvements to the analogous H.B. No. 350.

13. S.B. No. 264 (Disposition of Juveniles Pending Delinquency Adjudication)

This bill was introduced on May 11, 2010. As of June 7, it had been approved by the Senate Judiciary Committee and awaited action by the full Senate.

As background, current law (Title 10 Del.C. §1007) addresses the status of children charged with delinquency pending adjudication. The Family Court is deterred from placing such children in a DSCY&F secure detention setting unless the Court lacks confidence that the child will appear for the adjudicatory hearing and other factors support secure detention. According to the synopsis, this legislation was prepared by a set of agencies comprising the “Juvenile Justice Collaborative”. In general, the bill expands the scope of justification for placement of children in secure settings.

I have the following observations.

First, lines 16-18 create a new “justification” for secure detention for first offenders or children who have no history of failure to appear for adjudicatory hearings. The following standard would support secure detention: “circumstances demonstrate a substantial probability that the child will fail to appear at a subsequent hearing”. The term “substantial probability” is difficult to interpret. Is a “substantial probability” more than a “probability”? Is it 51%, 61%, 71%? It would be preferable to adopt a more understandable benchmark which establishes a somewhat elevated standard justifying secure detention of an unadjudicated child. Consider substituting “circumstances demonstrate a high probability that the child will fail to appear at a subsequent hearing.” Cf. Title 11 Del.C. §255; Title 16 Del.C. §212(3)b; and Title 20 Del.C. §3131(11)b for examples of use of “high probability” in the Code.

Second, lines 19-20 add a new justification supporting secure detention if a child is simply

alleged to be unlawfully interfering with the administration of justice.” This is manifestly too sweeping and vague a standard to justify locking up a child. For comparison, minor transgressions (less than Class A Misdemeanors) and non-violent offenses are generally correlated with non-secure placement of a child (lines 12-14). “Interfering with the administration of justice” is an amorphous concept which would encompass even non-criminal or non-delinquent activity (e.g. failing to appear at a school suspension hearing).

Third, line 29 is problematic. I assume the drafters intended the word “changes” to be “charges”. However, query how a person can “commit a charge”? This literally makes no sense. I recommend deletion of lines 28-30 altogether since new charges could simply be considered under the standards compiled in lines 12-14. Otherwise, an allegation of any offense justifies secure placement.

Fourth, in line 41, it would be preferable to substitute “based” for “base”.

Fifth, in line 63, the sponsors may wish to consider inserting “without good cause” between “refuses” and “to”. Conceptually, a parent who justifiably declines to accept a juvenile back into a home (e.g. charged juvenile threatens arson or harm to co-habiting infant), could face thousands of dollars in liability based on the per diem costs of institutional placement.

I recommend sharing the above observations with policymakers.

Attachments

F:pub/bjh/2010p&1/610bils
O: 610bils