

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: July 2, 2010

I am providing an analysis of eight (8) regulatory initiatives in anticipation of the July 8, 2010 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

### 1. DOE Final FERPA Regulation [14 DE Reg. 26 (July 1, 2010)]

The SCPD and GACEC commented on the original version of this proposed regulation in December, 2009. In May, 2010, the DOE issued a revised proposed regulation which incorporated changes prompted by the Councils' commentary. The Councils submitted only one suggested amendment to the May version of the regulation to clarify the application of an exception.

The Department of Education has now adopted a final regulation with no changes. The DOE acknowledged the Councils' suggestion but determined that "the language change was not necessary". At 27.

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

### 2. DOE Final K-12 School Counseling Program Regulation [14 DE Reg. 28 (July 1, 2010)]

The SCPD and GACEC endorsed the proposed version of this regulation in May, 2010 with no suggested amendments. The Department of Education has now acknowledged the endorsements and adopted the regulation with no changes.

I recommend no further action.

### 3. DSS Final Child Care Services Authorization Regulation [14 DE Reg. 39 (July 1, 2010)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2010. The Councils endorsed the standards subject to correcting two grammatical errors.

The Division of Social Services has now acknowledged the endorsements and adopted a final regulation which corrects the errors and includes additional, minor changes.

Since the regulation is final, and DSS incorporated amendments prompted by the Councils, I recommend no further action.

4. DOE Proposed Content Standards Regulation [14 DE Reg. 6 (July 1, 2010)]

The Department of Education proposes to adopt a single amendment to its content standards regulation. The synopsis recites that “common core standards” were developed in partnership with the National Governors Association (NGA) and Council of Chief State School Officers (CCSSO). The Delaware DOE is incorporating these “common core standards” for English language arts and math into its content standards effective with the 2010-2011 school year.

I did not identify any concerns with the proposed amendment which conforms to the above background. I recommend endorsement.

5. DSS Proposed Child Care Subsidy Program Income Regulation [14 DE Reg. 8 (July 1, 2010)]

The Division of Social Services proposes to adopt several revisions to its income eligibility standards for the Child Care Subsidy Program. The changes are generally clarifications of existing standards rather than substantive changes. I have only a few technical observations.

First, §11003.9.1A refers to “social security pensions” Section 11003.9.1 refers to (capitalized) “Social Security pensions”. DSS may wish to substitute “Social Security income” in both contexts similar to its reference to “Supplemental Security Income” in the latter section. Otherwise, the reference would appear to cover Social Security retirement benefits but not Title II SSDI benefits.

Second, §11003.9.1 lists “disregarded income which includes the following subpart:

*7. The value of USDA donated foods and Food Stamp Act of 1964 as amended;*

This provision remains unchanged from the current regulation. However, the reference to the Food Stamp Act literally makes no sense (e.g. the value of the Food Stamp Act of 1964 is disregarded). I suspect some words are missing.

I recommend sharing the above observations with the Division.

6. DSS Prop. Child Care Subsidy Interview & Service Authorization Reg. [14 DE Reg. 11 (7/1/10)]

The Division of Social Services proposes to revise its Child Care Subsidy Program standards in two contexts: 1) applicant interviews; and 2) service authorizations. Overall, the regulation is more condensed than the current version and omits illustrations. It also clarifies that parents cannot obtain the subsidy if they are caring for their own children in their own home or facility if the parent provides direct care to the child in that setting.

I have the following observations.

First, §11004.2.4 authorizes consideration of a “special need” conveyed through “correspondence submitted by a physician or medical professional”. The current regulation is more expansive in defining the scope of persons who can submit documentation of a special need. Section 11004.2.B.4.c authorizes the DSS worker to rely on “written documentation from a recognized professional (such as a doctor, social worker, nurse, school counselor, etc) of the special needs”. This is superior to the proposed regulation which requires an actual letter (in contrast to “written documentation”) and is limited to medical professionals. There are many circumstances in which a non-medical professional (e.g. DVR worker; social worker; psychologist) could logically provide the confirmation of a special need.

Second, in §11004.2.4, DSS may wish to consider amending the first line to read “any other information...such as documentation of travel time or a special need.” Travel time would be relevant to the need for child care in both the employment and school contexts. Merely referencing a “work schedule” or “class schedule” will understate the extent of need which should include travel time.

Third, §11004.2.4. limits DSS workers to consideration of a “protective need” only if based on a DFS referral: “For a protective need, a referral from Division of Family Services must be submitted.” This may be unduly narrow. I recognize that related regulations [ §§11003.7.6 and 11003.7.8] limit consideration of children with protective child care needs to those referred by DFS. The relevant federal regulation [45 CFR 98.20] refers to “an appropriate protective services worker” but does not define the term. As a practical matter, the DSCY&F often provides primary case management and other services through contractors (e.g. Child, Inc.; Delaware Guidance). Moreover, there are many victim protection organizations. For example, many police departments have victim advocates. I recommend expanding the scope of persons who can document a “protective need”. Consider the following substitute standard:

A protective need must be based on a referral from the Division of Family Services (“DFS”), authorized DFS contract agency, or victim services personnel employed by law enforcement or non-profit organization.

Fourth, §11004.9 includes the following recital: “These children may be able to get another type of child care”. This is somewhat cryptic. If DSS is aware of some other sources of child care

assistance in this context, it would be preferable to provide some guidance to workers through a cross reference or note. The Department of Education periodically includes non-regulatory notes in its regulations with cross references to other regulations or resources.

I recommend sharing the above observations with the Division.

7. DSS Prop. Child Care Subsidy Program Overpayment Regulation [14 DE Reg. 15 (July 1, 2010)]

The Division of Social Services proposes to amend its standards for identification and processing of overpayments in the Child Care Subsidy Program.

I have the following observations.

First, the introduction, last sentence, reads as follows: “Each in the adult child care household is liable for repayment of the overpayment.” There is ostensibly a word missing from the sentence. Alternatively, perhaps the sentence was intended to read as follows: “Each adult in the child care household is liable for overpayment.” Apart from the wording, I have multiple substantive concerns with the concept embodied in the sentence.

A. There is no definition of “child care household”. There are references to “a family” [§§11003.6, 111003.7.2, and 11003.9]. In particular, §11003.9.3 recites as follows:

The people whose needs and income are considered together comprise the definition of family size. Family size is the basis upon which DSS looks at income to determine a family’s financial eligibility and the child care parent fee.

Imposing liability on everyone in an undefined “household” will predictably result in confusion and fair hearings.

B. Section 11003.9.4 identifies minor parents as separate eligibility units under the program “even if they live with their legal guardian or parents”. There is some “tension” between the regulatory establishment of a separate eligibility unit for minor parents and the recital that “each in the ...household is liable for overpayment. The co-habiting legal guardian or grandparent of children served in the program should not be liable for overpayments. Moreover, the legal basis for imposing liability of other non-applicant co-habiting persons is also questionable.

C. There is a lack of due process if everyone in a “household” is liable for an overpayment while notice and opportunity for hearing is only offered to the parent/caretaker under §11005.4.2.

Second, in the last paragraph in the regulation, the term “over payments” should be “overpayments”.

Third, DSS is eliminating all examples from the regulation. I recommend encouraging the Division to reconsider the value or retaining the examples. Much of the State workforce is aging and retiring. New DSS employees would benefit from the examples which provide easily-understood guidance reflecting long-term practice.

8. DSAMH Prop. Substance Abuse Facility Licensing Standards [14 DE Reg. 18 (July 1, 2010)]

The Division of Substance Abuse & Mental Health has published a comprehensive (76 page) set of revised substance abuse facility licensing standards for comment. I have many observations. I have not limited comments to the sections earmarked for revision since there are some obvious errors and omissions throughout the document. Parenthetically, nonsubstantive changes to correct technical errors and amendments to conform to statute are exempt from pre-publication [Title 29 Del.C. §10113(b).

1. Section 3.0, definition of “clinical director”, recites that it is someone who meets the requirements of §6.1.2.1. However, the regulation also uses the term “clinical director” in the context of co-occurring treatment facilities (Part 16.0). The qualifications of a “clinical director” under §16.2.3 are inconsistent with the qualifications of a “clinical director” under §6.1.2.1. This inconsistency should be resolved.

2. Section 3.0, definition of “counseling”, categorically limits counseling to “face-to-face” interaction. There are both pros and cons to this approach. One disadvantage is that telephonic or videoconferencing communication is precluded. For example, as a practical matter, if a spouse is in treatment, it may only be possible to “tie in” the other spouse (who may live or work 80 miles away) through electronic communication. DSAMH may wish to consider some exceptions based on extenuating circumstances. Parenthetically, the definition conflicts with §11.5.1.2.1 which specifically allows counseling by phone.

3. Section 3.0, definition of “Nurse Practitioner”, could be improved by using the Delaware licensing terminology, “advanced practice nurse” (“APN”) consistent with Title 24 Del.C. §1902(b)(1). If amended, a conforming reference should also be added to the definition of “Qualified Psychiatric Practitioner” in §3.0.

4. Section 4.1 contemplates licensure under the regulations for “mixed” facilities (e.g. co-occurring substance abuse and mental health disorder programs). Both residential and non-residential entities are covered (§4.1.1.1). Unfortunately, there are major omissions throughout the regulations which ignore the application of statutory standards to such facilities. For example, the residential facilities may be subject to the patient bill of rights codified at Title 16 Del.C. §1121. See Title 16 Del.C. §1102(4). Moreover, the regulations omit any reference to the bill of rights codified in the Substance Abuse Treatment Act, Title 16 Del.C. §2220. The bill of rights was co-authored by

DSAMH. Moreover, with the June 29, 2010 enactment of H.B. No. 41, co-occurring substance abuse and mental health facilities are now subject to the Community Mental Health Treatment Act. The regulations should incorporate many of the statutory standards which apply to both residential and non-residential treatment facilities. Compare 16 DE Admin Code Part 3315, Appendix B (Family Care Homes) for illustration of incorporating bill of rights into regulatory appendix. I will include some specific recommendations below.

5. Section 4.3.3 reflects a \$15.00 application fee for a facility license. The Division may wish to consider whether the fee is unduly modest.

6. Sections 4.5.3 and 4.9 address the Division's access rights, cross referencing federal laws. The Division should consider including specific State law references such as Title 16 Del.C. §1107 (residential facilities).

7. Sections 4.6 and 4.7.1 could be problematic. By communicating "deficiencies" solely through "recommendations", the Division may be inviting facilities to consider such notices as hortatory and encouraging but not binding.

8. Section 4.12.1.6 authorizes suspension or revocation of a license for violations of Title 16 Del.C. Ch. 22. DSAMH should consider adding a reference to violations of Title 16 Del.C. Ch. 11 (for residential facilities) and Title 16 Del.C. §5191 (for co-occurring facilities). See, e.g., Title 16 Del.C. §1138.

9. The citation in §4.14.5 is incorrect. The citation should be to 29 Del.C. Chs. 100 and 101.

10. The Division proposes to delete the following sentence in §4.15.1:

The waiver request shall be posted in a prominent place in the facility and outline a process approved by the Division whereby clients can offer comments and feedback specific to the waiver request.

This provision had been inserted at the behest of the Councils based on past commentary. The deletion is highly objectionable and demeans the value of input from consumers. A facility can simply avoid the application of any regulation through an ex parte request to the Division. The consumers who are the protected class under the regulations would be "clueless" that their rights are being undermined through a waiver request. Consumer input on waiver requests is authorized in analogous regulations. See, e.g. 16 DE Admin Code 3301, §9.1.5 (group homes for persons with AIDS):

9.1.5. Prior to filing a request for a waiver, the facility shall provide written notice of the request to each resident, each court-appointed guardian of any resident, each person

appointed in the durable power of attorney of any resident, each person appointed to be any resident's health care agent under the Death with Dignity Act and each spouse and adult child of any resident. Prior to filing a request for a waiver, the facility shall also provide written notice of the request to the Office of the Long Term Care Ombudsman. The notice shall state that the recipient has the right to object to the waiver request in writing to the Division.

Consumer input on facility waiver applicants from residents of DDDS group homes is also authorized (16 DE Admin Code Part 3310, §17.1.4).

11. Section 5.1.1.1 contemplates each community-based agency including "representatives of the population it serves" on its "governing body and/or advisory council". This could be interpreted to mean 1 "token" representative or, since plural, 2 representatives (e.g. 1 on a governing board and 1 on advisory council). The Division may wish to clarify its expectation in this context.

12. Section 5.1.4.4.1.16 requires the facility policy and procedures manual to contain a protocol for making child abuse/neglect reports. The regulations contain no analogous requirement for a protocol to report adult abuse/neglect. There is a mandatory reporting duty for adults subjected to abuse/neglect. See Title 31 Del.C. §3910, Title 16 Del.C. §1132, Title 16 Del.C. §2224, and Title 16 Del.C. §5194 (created by newly enacted H.B. No. 41). PM 46 also requires "each Division that has, or contracts for the operation of, residential facilities" to have standardized reporting procedures. The only reporting references in the regulations pertain to licensing boards. See §§5.1.4.4.1.24 and 5.1.7.1.1.5.

13. Section 5.1.6 could be improved by requiring facilities to include a recital that there will be no retaliation against persons who report abuse, neglect, financial exploitation, or mistreatment and reminding employees that there are penalties for failure to report. See Title 16 Del.C. §§5194 and 5195, Title 16 Del.C. §§1132, 1135, and 1154, and Title 16 Del.C. §2224.

14. Section 5.1.7.1.1.2 requires staff training in reporting child abuse but not adult abuse. The training requirement should be expanded to cover reporting of adult abuse.

15. In §6.1.3.1.2, the Division is deleting a requirement that the 5 years experience for a "clinical supervisor" be "clinical" experience. This is odd since it would allow someone who had been a janitor in a facility for 5 years to meet the experience standards to be a "clinical supervisor".

16. In §7.1.1.1, the extraneous words "unless such disability makes" should be deleted. There

should be no exceptions.

17. In §7.1.1.3, a reference to the Equal Accommodations Act, Title 6 Del.C. Ch. 45, should be added.

18. Section 7.1, titled “Client Rights”, would be a logical place to insert information about the applicable bills of rights referenced above. Another option would be to include the bills of rights as an appendix to the regulation. This approach was adopted for the Rest Care Homes regulations, 16 DE Admin Code Part 3315.

19. Section 7.1.2.1.7 only provides an assurance that child abuse will be reported, not adult abuse.

20. The grammar in §8.1.1.1.5.15 should be corrected. Literally, it would read - “Results of the client’s diagnostic assessment, including the clients:...Indicates what issues and areas of clinical concern are to be...”

21. The grammar in §8.1.1.1.5.17 should be corrected. The references are to “signed”, “reviewed”, and “is completed”.

22. In §8.1.2.1.8.1, delete the extraneous “and” after the word “counselor”.

23. Section 8.1.4 requires a facility to maintain records for only 12 months which would be subject to review in a DHSS audit. DSAMH may wish to consider a longer time frame. Current records may reveal an on-going problem dating back more than a year and facilities could simply destroy or not produce older records.

24. The grammar in §11.2.1.1.3.2.6 should be corrected. It literally reads as follows: “A physical examination by qualified medical personnel that shall: ...Completed at admission.”

25. Substitute “advice” for “advise” in §11.4.1.2.1 and in §14.4.1.1.5..

26. In §11.6.1.6.2.3.1, substitute “rationale” for “rational”.

27. In §12.1.1.7, there is a typographical error - “eeach”.

28. Section 12.2.4 would disallow clinical supervision meetings being conducted by videoconferencing unless “face-to-face”. It is unclear if “face-to-face” is meant to include electronic “face-to-face” communication. DSAMH may wish to consider allowing videoconferencing.

29. The “therapeutically necessary” exception to visitation and phone usage in §12.4.2.2.1 is at odds with bills of rights, including Title 16 Del.C. §§1121(11) and 5192(10). It is also “odd” that a non-clinical administrator makes the “therapeutic” decision.

30. In §14.3.4.2, the word “individuals” should not be capitalized.

31. The hyphen in “take-home” is missing in §§14.8.1.8 and 14.8.1.10

32. If not referenced elsewhere, Section 16.0, titled “Co-Occurring Treatment”, would be a logical place to incorporate the new Community Mental Health Treatment Act provisions included in the recently enacted H.B. No. 41.

33. While §16.5.1.3 requires a Qualified Psychiatric Practitioner to meet with a consumer at least every 6 months, §16.5.4 contemplates the Qualified Psychiatric Practitioner conducting a record review only every 12 months. DSAMH may wish to change the latter standard to every 6 months to match the schedule for meeting with the consumer.

34. In §16.5.8, DSAMH lists a variety of supports for consumers, including step groups and faith-based organizations. DSAMH may wish to consider adding references to physical exercise which is also correlated with improved affect and recovery and less reliance on medications.

35. In §17.4.1, “DSMAH” should be “DSAMH”.

36. The regulations (§§17.0-19.0)authorize exemption from many of the standards for facilities with certain accreditations (e.g. JCAHO, CARF, COA). There is no State statutory authority to exempt covered facilities from the application of patient rights and prescriptive statutory licensing standards. For example, if a State statute directs abuse/neglect reporting conforming to a specific protocol, that would supersede any national certification standard. DSAMH may wish to review applicable State statutory patient rights compilations, including Title 16 Del.C. §§1121, 2220, and 5192, to ensure that the regulations do not inadvertently exempt facilities from compliance.

I recommend forwarding the above observations to DSAMH, including the Division Director, with a courtesy copy to the DHSS Secretary.

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