MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: October 5, 2011

I am providing my analysis of eleven (11) regulatory initiatives in anticipation of the October 14 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DOE Prop. Student Physical Exam & Screening Reg. [15 DE Reg. 432 (10/1/11)]

The Department of Education proposes to revise its regulation covering student physical examinations and screening.

The principal change is to require a second physical examination for high school students. In a nutshell, students would be required to have the first physical exam within 2 years prior to entry in school. Beginning with the 2012-13 school year, students would have to submit the results of a second physical exam conducted within 2 years when entering 9th grade. DOE and DIAA physical evaluation forms are deemed acceptable and districts have the discretion to accept other forms which include certain minimum components.

I did not identify any major deficiencies in the proposed regulation. However, I recommend that the SCPD recommend DOE consideration of the following:

First, substitute "health examination" or "medical examination" for "physical examination" throughout the regulation since the evaluations should preferably include mental health diagnoses (e.g. ADHD; depression). Moreover, § 2.1.3 requires the report to include medical diagnoses and prescribed medications and treatments. Obviously, schools would benefit from prescription information not only for "physical" conditions (e.g. an inhaler for asthma) but also "mental" conditions (e.g. Ritalin for ADHD or Prozac for depression).

Second, the DOE may wish to consider whether dental health examinations should be

required. Recent studies have highlighted the importance of dental health on overall health and a Surgeon General's report in 2000 noted that tooth decay is the most common chronic disease for children. See attachment. This has motivated the Legislature and DHSS to include dental coverage for children in the Medicaid and CHIP programs. See attached excerpt from DMMA Dental Provider Specific Policy Manual.

I recommend sharing the above observations with the DOE and SBE with a courtesy copy to Dr. Gregory McClure, the dental director of Delaware's Bureau fo Oral Health and Dental Services according to the attached June 10, 2011 article. He may wish to submit comments supporting inclusion of a dental component in the regulation.

Finally, I recommend that the GACEC and/or SCPD solicit a copy of the DOE and DIAA forms for review. For example, it would facilitate TBI special education identification if the standard DOE form included an inquiry or field for TBI. For similar reasons, the Councils may wish to review the extent to which inclusion of mental health diagnoses is prompted by the form.

2. DOE Prop. Teacher Appraisal Regulation [15 DE Reg. 409 (10/1/11)]

The Department of Education is revising its regulation covering appraisal of teachers. The DOE briefly lists the changes in the regulatory synopsis (p. 409).

I have the following observations.

First, the term "Highly Effective" in §6.2.1 should be in bold print to match the references to "Effective", "Needs Improvement", and "Ineffective". Alternatively, the bold print should be eliminated for the terms "Effective", "Needs Improvement", and "Ineffective" for consistency.

Second, the regulation is inconsistent in characterizing a "passing" score/rating in the student improvement component. Section 6.2.1 identifies an "Exceeds" rating as the official acceptable benchmark in contrast to inconsistent references to a "Satisfactory" rating in §§3.2 and 6.2.2.1 and "Unsatisfactory" rating in §§6.2.3.2, 6.2.4.2, 7.2.1, 7.2.2, 7.2.3, and 8.2.1. Section 2.0 includes a definition of "Satisfactory Component Rating" but no definition of an "Exceeds" rating. I suspect the isolated reference to an "Exceeds" rating is an oversight and the word "Satisfactory" should be substituted.

Third, DOE establishes 5 appraisal components in §5.0: 1) planning and preparation; 2) classroom environment; 3) instruction; 4) professional responsibilities; and 5) student improvement. The last component, student improvement, is new. Teachers are rated in these 5 contexts resulting in an overall classification of highly effective, effective, needs improvement, and ineffective. See §6.0. The classification system could be characterized as "overly generous" or "misleading" in some contexts. For example, a teacher scoring a satisfactory rating in only 3 of 5 components inclusive of student improvement (60%) is characterized as "effective". Reasonable persons might view such a characterization as a distortion of the plain meaning of "effective". Likewise, a teacher scoring a satisfactory rating in only 1 of 5 components inclusive of student improvement (20%) is euphemistically characterized as "needs improvement". DOE may wish to revisit the qualifications for "effective" and "needs improvement" to more closely align to the plain meaning of the terms.

Fourth, the current DOE regulation contains a chart defining the criteria for a finding of a "pattern of ineffective teaching" (§7.1). This pre-existing chart is "diluted" by a new §7.2 which directs a "disregard" of an unsatisfactory student improvement rating for the 2011-12 school year. The DOE ostensibly balanced competing considerations, i.e. fairness to teachers since "student improvement" was not included in the current regulation versus fairness to students who deserve effective teachers. Similarly, §8.2 categorically bars development of a teacher improvement plan for a teacher with an overall "needs improvement" rating if solely based on an unsatisfactory "student improvement" score. Rather than totally ignoring an unsatisfactory student performance rating, the DOE could at least encourage public schools to affirmatively offer additional training or mentoring to such teachers.

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

3. DOE Prop. Specialist Appraisal Regulation [15 DE Reg. 417 (10/1/11)]

The Department of Education is revising its regulation covering appraisal of specialists. The DOE briefly lists the changes in the regulatory synopsis (p. 417).

I have the following observations.

First, the regulation is inconsistent in characterizing a "passing" score/rating in the student improvement component. Section 6.2.1 identifies an "Exceeds" rating as the official acceptable benchmark in contrast to inconsistent references to a "Satisfactory" rating in §§3.2 and 6.2.2.1 and "Unsatisfactory" rating in §§6.2.3.2, 6.2.4.2, 7.2.1, 7.2.2, 7.2.3, and 8.2.1. Section 2.0 includes a definition of "Satisfactory Component Rating" but no definition of an "Exceeds" rating. I suspect the isolated reference to an "Exceeds" rating is an oversight and the word "Satisfactory" should be substituted.

Second, I recommend that DOE consider deletion of the many references to "client" in §5.0.

The word "student" is used throughout the regulation and the reference to "client" is ostensibly extraneous. Specialists will not be serving clients apart from students.

Third, DOE establishes 5 appraisal components in §5.0: 1) planning and preparation; 2) professional practice and delivery of services; 3) professional collaboration and consultation; 4) professional responsibilities; and 5) student improvement. Unlike the teacher appraisal regulation, these 5 components are included in the current regulation last revised in May of 2010. Specialists are rated in these 5 contexts resulting in an overall classification of highly effective, effective, needs improvement, and ineffective. See §6.0. The classification system could be characterized as "overly generous" or "misleading" in some contexts. For example, a specialist scoring a satisfactory rating in only 3 of 5 components inclusive of student improvement (60%) is characterized as "effective". Reasonable persons might view such a characterization as a distortion of the plain meaning of "effective". Likewise, a specialist scoring a satisfactory rating in only 1 of 5 components inclusive of student improvement (20%) is euphemistically characterized as "needs improvement". DOE may wish to revisit the qualifications for "effective" and "needs improvement" to more closely align to the plain meaning of the terms.

Fourth, the current DOE regulation contains a chart defining the criteria for a finding of a "pattern of ineffective practice" (§7.1). This pre-existing chart is "diluted" by a new §7.2 which directs a "disregard" of an unsatisfactory student improvement rating for the 2011-12 school year. The rationale for "disregard" is not provided. Since the student improvement standard has been included in the regulation since at least May of 2010, specialists have been on notice that student improvement would be part of their evaluation. Similarly, §8.2 categorically bars development of an improvement plan for a specialist with an overall "needs improvement" rating if solely based on an unsatisfactory "student improvement" score. I recommend deletion of §§7.2 and 8.2. Alternatively, rather than totally ignoring an unsatisfactory student performance rating, the DOE could at least encourage public schools to affirmatively offer additional training or mentoring to such specialists.

4. DOE Proposed Administrator Appraisal Regulation [15 DE Reg. 424 (10/1/11)]

The Department of Education is revising its regulation covering appraisal of administrators. The DOE briefly lists the changes in the regulatory synopsis (pp. 424-425).

I have the following observations.

First, the term "Highly Effective" in §6.2.1 should be in bold print to match the references to "Effective", "Needs Improvement", and "Ineffective". Alternatively, the bold print should be eliminated for the terms "Effective", "Needs Improvement", and "Ineffective" for consistency.

Second, the regulation is inconsistent in characterizing a "passing" score/rating in the student improvement component. Section 6.2.1 identifies an "Exceeds" rating as the official acceptable

benchmark in contrast to inconsistent references to a "Satisfactory" rating in §§3.2 and 6.2.2.1 and "Unsatisfactory" rating in §§6.2.3.2, 6.2.4.2, 7.2.1, 7.2.2, 7.2.3, and 8.2.1. Section 2.0 includes a definition of "Satisfactory Component Rating" but no definition of an "Exceeds" rating. I suspect the isolated reference to an "Exceeds" rating is an oversight and the word "Satisfactory" should be substituted.

Third, DOE maintains 5 appraisal components in §5.0: 1) vision and goals; 2) culture of learning; 3) management; 4) professional responsibilities; and 5) student improvement. Unlike the teacher appraisal regulation, these 5 components are included in the current regulation last revised in February of 2010. Administrators are rated in these 5 contexts resulting in an overall classification of highly effective, effective, needs improvement, and ineffective. See §6.0. The classification system could be characterized as "overly generous" or "misleading" in some contexts. For example, an administrator scoring a satisfactory rating in only 3 of 5 components inclusive of student improvement (60%) is characterized as "effective". Reasonable persons might view such a characterization as a distortion of the plain meaning of "effective". Likewise, an administrator scoring a satisfactory rating in only 1 of 5 components inclusive of student improvement (20%) is euphemistically characterized as "needs improvement". DOE may wish to revisit the qualifications for "effective" and "needs improvement" to more closely align to the plain meaning of the terms.

Fourth, the current DOE regulation contains a chart defining the criteria for a finding of a "pattern of ineffective practice" (§7.1). This pre-existing chart is "diluted" by a new §7.2 which directs a "disregard" of an unsatisfactory student improvement rating for the 2011-12 school year. The rationale for "disregard" is not provided. Since the student improvement standard has been included in the regulation since at least February of 2010, administrators have been on notice that student improvement would be part of their evaluation. Similarly, §8.2 categorically bars development of an improvement plan for an administrator with an overall "needs improvement" rating if solely based on an unsatisfactory "student improvement" score. I recommend deletion of §§7.2 and 8.2. Alternatively, rather than totally ignoring an unsatisfactory student performance rating, the DOE could at least encourage public schools to affirmatively offer additional training or mentoring to such administrators.

5. DSS Proposed Food Supp. Program Benefit Restoration Regulation [15 DE Reg. 450 (10/1/11)]

The Division of Social Services ("DSS") proposes to amend its Food Supplement Program standard covering restoration of benefits. The standard implements the attached federal regulation, 7 C.F.R. §273.17.

I have a single recommendation. The federal regulation (7 C.F.R. §273.17) contains the following provision:

> (g) *Changes in household composition*. Whenever lost benefits are due a household and the household's membership has changed, the State agency shall restore the lost benefits to the household containing a majority of the individuals who were household members at the time

the loss occurred. If the State agency cannot locate or determine the household which contains a majority of household members the State agency shall restore the lost benefits to the household containing the head of the household at the time the loss occurred.

This concept is not included in the State regulation. DSS may wish to consider its inclusion since household composition of Food Supplement Program participants may change on a relatively frequent basis.

6. DSS Prop. Food Supp Non-Household Member Income/Resource Reg [15 DE Reg. 451 (10/1/11)]

The Division of Social Services ("DSS") proposes to revise its regulations covering the treatment of income and resources of ineligible household members. I have the following observations.

First, the Governor signed the attached S.B. No. 12 on June 22, 2011. The bill removes the bar on Food Supplement Program eligibility of convicted drug felons. The DSS regulation implements the legislation by removing an ineligibility reference in §9076.1 based on a drug related felony conviction. However, the title to §9076.1 still contains a reference to "Felony Drug Conviction" which should be deleted.

Second, the attached 16 DE Admin Code 2027 still contains a bar on Food Supplement Program eligibility for convicted drug felons. DSS should consider proposing an amendment to this regulation to conform to S.B. No. 12.

Third, revised §9076.1 otherwise conforms to the attached corresponding federal regulation, 7 C.F.R. §273.11(c)(1).

I recommend that the Council share the above observations with the Division.

7. DSS Prop. Food Supp Program Electronic Benefit Transfer Reg. [15 DE Reg. 454 (10/1/11)]

The Division of Social Services proposes to adopt comprehensive revisions to its Food Supplement Program standards. I have the following observations.

First, there are many references to "store" or "stores". See, e.g., §§9093.2, 9093.3, and 9093.5. In other instances, DSS often refers to "retailer" or retailers". See, e.g., §§9093.3 and 9093.6. DSS describes eligible vendors as including a "farmers market" (§§9093.2 and 9093.6); "street or route vendor" (§9093.6); and providers such as soup kitchens, shelters, communal living arrangements, and home delivered meals (definition of "eligible foods" at p. 466). The term "retailer" would be preferable to "store" since it would cover farmers' markets and street vendors. However, the term would not "capture" soup kitchens, shelters, home delivered meal providers. DSS should consider adopting a uniform term (e.g. "supplier") with a definition which encompasses the expected provider network.

Second, in §9093.2, first line, substitute "farmers'" for "farmers". Compare reference in

§9093.6, second paragraph.

Third, in §9093.3, second paragraph, consider substituting "DSS will emphasize" for "Emphasize". Compare references at end of this section (e.g. "DSS must act..."; DSS will send a notice..."; "DSS will make a provisional credit...").

Fourth, in §9093.3, second last paragraph, the "notice" provision would benefit from embellishment since it does not indicate how households would be alerted to the 10-day deadline on requesting provisional credit. One option would be to amend the initial sentence as follows:

> DSS will send a notice to the household informing it of the account adjustment and appeal rights, including the timetable for requesting a provisional credit.

Alternatively, DSS could insert the following based on the definition of "adequate notice" at p. 463:

> DSS will send an adequate notice as defined in §9094 to the household informing it of the account adjustment.

Fifth, in §9093.7, first sentence, consider the following revision: "~~Regulations say we~~ DSS must provide..."

Sixth, in §9093.8, second sentence, substitute "it was" for "they were" since the antecedent ("household") is singular. Similarly, in §9094, definition of "Notice of Expiration", substitute "it needs" for "they need". Compare similar reference in §9093.3, second last paragraph.

Seventh, in §9094, definition of "Elderly or disabled member", the period is missing at the end of Par. "A".

Eight, in §9094, definition of "Eligible foods", Par. C, DSS may wish to consider substituting "benefits" for "coupons".

Ninth, the regulation contains pejorative and outdated references. See, e.g., the following: A. reference to "physically or mentally handicapped" in §9094, definition of "Meal Delivery Service"; B. reference to "Disabled member" in §9094, definition of "elderly or disabled member" and definition of "group living arrangement"; and C. inclusion of the following reference in §9094, definition of "homeless" - "a halfway house or similar institution that provides temporary accommodations for individuals intended to be institutionalized". The Governor signed H.B. No. 91 in August, 2011 which includes the following admonition:

> (b) From the effective date of this section, all new and revised statutes, administrative rules, local laws, ordinances, charters or regulations promulgated or any publications published by the state or any political subdivision that refers to persons with disabilities shall:

(1) Avoid language that:

(A) implies that a person as a whole is disabled, such as the "mentally ill", "retarded", or the "learning disabled", or

(B) equates persons with their conditions, such as "epileptics", "autistics", or quadriplegics", and

(2) Replace non-respectful language by referring to persons with disabilities as persons first; for example, persons with disabilities, persons with developmental disabilities, persons with mental illness, persons with autism, or person with cognitive disabilities.

DMMA implemented this law in August by issuing a comprehensive regulation amending many of its regulations to conform to the directive and spirit of H.B. No. 91. See 15 DE Reg. 202 (August 1, 2011). DSS should likewise consider reviewing this regulation to ensure conformity with H.B. No. 91.

I recommend sharing the above observations with the Division.

8. DSS Proposed TANF Renewal Regulation [15 DE Reg. 469 (10/1/11)]

The Division of Social Services is required to periodically submit a revised TANF plan to HHS. DSS is now publishing the revised plan to comply with a 45-day comment period requirement in anticipation of Plan submission to HHS by December 31, 2011. At p. 470. Given time constraints, my review of the 50+ page Plan and attachments was not "in-depth".

I have the following observations.

First, on p. 7, the section titled "Eligibility For Assistance Under the TANF Program", subsection "Conditions of Eligibility, Fugitive Felons, Individuals Convicted of Drug Related Felonies", recites as follows:

Fugitive felons and parole violators are ineligible for TANF assistance. In addition, as of August 22, 1996, individuals convicted of drug related felonies are permanently barred from the date of conviction.

The Plan does mention "food benefits" and "Food Supplement Program benefits" on the next page. Given enactment of S.B. No. 12, DSS may wish to add the following sentence: "Effective with enactment of S.B. No. 12 in June, 2011, individuals convicted of drug related felonies are not barred from receiving Food Supplement Program benefits."

Second, Attachment "C" refers to the "Department of Public Instruction"and the

"Department of Public Safety" and includes a copy of a 1996 MOU signed by these agencies. These agencies obviously no longer exist. Moreover, Attachment "D" includes an outdated copy of the Delaware Code which omits amendments adopted subsequent to 73 Delaware Laws, including revisions to Title 10 Del.C. §§1041, 1043, and 1045. It also omits Title 10 Del.C. §§1049A-1049F. It would be preferable both to secure an updated MOU with current State agencies and to provide a current version of the Delaware Code references.

I recommend sharing the above observations with the Division.

9. DMMA Prop. Medicaid Asset Verification System Regulation [15 DE Reg. 435 (10/1/11)]

The Division of Medicaid & Medical Assistance ("DMMA") proposes to adopt a Medicaid State Plan amendment to conform to federal law. Delaware has been scheduled by CMS to implement an electronic asset verification system in 2013. The proposed amendment suggests that DMMA plans to use a contractor to operate the asset verification system which includes interaction with local banks. However, DMMA indicates that "(t)he contractor is not known at this time." See amendment, Par. 3.

I have only one observation. In Section 2, it appears that DMMA should be checking off Par. "B" since it is adopting a contractor-based approach as juxtaposed to the other available options. However, Par. B contains no "check-off". DMMA should consider whether this is an oversight.

I recommend sharing the above commentary with the Division.

10. DMMA Prop. Payment Error Rate Measurement Regulation [15 DE Reg. 448 (10/1/11)]

The Division of Medicaid and Medical Assistance ("DMMA") proposes to adopt a federal option in the context of analysis of excess Medicaid and CHIP payments. As background, under a Medicaid Eligibility Quality Control ("MEQC") program, states generally review samples of Medicaid cases to assess excess payment error rates. CMS is authorized to withhold payments to states based on the amount of improper payments which exceed a 3% threshold. See attached 75 Fed Reg. 48816 (August 11, 2010). A second, overlapping payment error system is also operating pursuant to another federal law. The second system is the "Payment Error Rate Measurement (PERM) Program. States have been critical of the overlapping systems based on perceived duplication of effort. See discussion at 15 DE Reg. 449.

In 2010, CMS issued a 36-page regulation [75 Fed Reg. 48816 (August 11, 2010)] offering states some relief, i.e., states may opt to substitute PERM reviews for the MEQC reviews every 3 years (conforming to the 3-year review cycle). Delaware DMMA is now proposing a Medicaid State Plan Amendment electing this option consistent with the federal regulatory amendments reflected in the attached 75 Fed Reg. 48847.

I recommend endorsement of the concept underlying the DMMA regulation since it should

reduce administrative costs. My only concern is that the proposed revision to the State Plan is somewhat vague and does not explicitly mention acceptance of the option to substitute PERM reviews for the MEQC reviews during Delaware's PERM review cycle. Perhaps CMS has provided states with a somewhat vague template and DMMA is simply adopting that template.

11. DMMA Proposed PACE Regulation [15 DE Reg. 437 (10/1/11)]

The federal Balanced Budget Act of 1997 authorized states to adopt and implement an integrated Medicare/Medicaid program. The Division of Medicaid & Medical Assistance is now adding this new "Program of All Inclusive Care for the Elderly" (PACE) to the Medicaid State Plan. Individuals enrolled in PACE will be exempt from the proposed Diamond State Health Plan Plus program. PACE will have the following features:

> Eligibility: Individuals must be at least 55 years old. Applicant countable income cannot exceed 250% of the SSDI Federal Benefit (p. 441).
>
> Services: An approved provider will be paid a capitated amount which can be derived from both Medicare and Medicaid funds to essentially provide "wrap around" services. The financial risk is borne by the provider which is responsible for "all preventive, primary, acute, and long-term care services". At p. 439. Services would be identified in a plan developed in collaboration with an interdisciplinary team. At p. 438. Available services include "all Medicare and Medicaid covered services, and other services determined necessary by the multidisciplinary team to improve and maintain the care of the PACE participant." At p. 438.

The regulation does not provide details on the program. I could not determine if there is a categorical requirement that the applicant meet and maintain medical eligibility standards for long-term care. The SCPD may wish to invite DHSS to present an overview of the program at a Council meeting.

Since the new program benefits individuals with disabilities, I recommend endorsement.

Attachments

8g:legreg/1011bils
F:pub/bjh/legis/2011p&l/1011bils