

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative & Regulatory Initiatives

Date: March 7, 2011

I am providing my analysis of eleven (11) legislative and regulatory initiatives in anticipation of the March 10 meeting. Given time constraints, the commentary should be considered preliminary and non-exhaustive.

### 1. DMMA Final PASRR Regulation [14 DE Reg. 615 (March 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. The January 31 GACEC letter is attached for facilitated reference.

First, the Councils recommended including a reference to “related conditions” or its acronym (“RC”) in several sections. DMMA agreed and added at least six (6) conforming references throughout the regulation.

Second, the Councils recommended adding language to clarify that DDDS will assess for not only mental retardation but related conditions as well. DMMA agreed and added a sentence to both Subsection 6 and Subsection 7.

Third, the Councils noted an ostensible inconsistency between the recital in Subsection 10 that DMMA issues the final determination letter versus a DSS regulation indicating that the PASRR determinations are issued by DSAMH and DDDS. The Councils also recommended clarification that the determination letters include appeal rights. DMMA responded that appeal rights are included in the denial notice. DMMA also clarified that, while other divisions may make non-final findings, DMMA makes the final decision from which an applicant can appeal. DMMA added the following “reinforcing” sentence to Subsection 10: “Final PASRR determinations will be issued by DMMA.”

Parentetically, the Delaware Health Care Facilities Association (DHCFA) submitted

comments which: 1) accuse DHSS and its providers, including “psych group homes”, of foisting applicants with identified short-term rehabilitation needs on LTC facilities who actually have long-term needs; and 2) accuse the State of placing residents with identified need for MI/MR specialized services on waiting lists; and 3) lament the protections in the LTC Bill of Rights which make it difficult for LTC facilities to precipitously discharge residents. Similar sentiments were shared in a January 10, 2011 meeting among DHSS, DHCFA, and Council representatives. DMMA responded that the comments were outside the scope of the regulation.

I recommend sending a “thank you” communication to DMMA for favorably considering our comments. I also recommend sharing a copy of the final regulation with the DDDS and DSAMH Division Directors so they are aware of the DHCFA’s allegations.

## 2. DSS Final Food Supplement Program Verification Reg. [14 DE Reg. 900 (March 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. A copy of the GACEC’s January 31, 2011 letter is attached for facilitated reference.

First, the Councils endorsed inclusion of consumer-oriented provisions. The Division of Social Services acknowledged the endorsement.

Second, the Councils expressed concern with a recital that a qualifying “disability must be one considered permanent under the Social Security Act.” The Councils recommended adoption of a more discriminating reference to SSA standards which authorize disability for conditions expected to last 12 months or result in death. DSS declined to effect any change based on the following rationale:

No change is being made to this section. Title 7 CFR §271.2 establishes the standard which is contained in this section of the manual. It requires a food benefit applicant to meet disability requirements as defined under Section 221( i) of the Social Security Act.

At 901. It’s unclear if this conclusion is accurate.

A. The attached 7 C.F.R. §271.2, definition of “elderly or disabled member”, includes anyone receiving SSI or SSDI (Title II) benefits. There is no requirement that the SSI or SSDI be based on a “permanent” disability. See also attached 7 C.F.R. §271.3.2(f) (excerpt). I suspect that the subsection upon which DSS relies is Par. (5) which recites as follows:

(5) Receives disability retirement benefits from a governmental agency because of a disability considered permanent under section 221(i ) of the Social Security Act.

Obviously, this paragraph does not apply to SSI or SSDI [covered by Par. (2)]. It applies to other governmental pensions and retirement benefits.

B. Likewise, the attached Section 221(i ) of the Social Security Act does not require SSI or SSDI benefit eligibility to be based on a “permanent” disability.

In conclusion, the DSS regulation (§1H1) which limits “disability” to only individuals (including SSI/SSDI beneficiaries) with a permanent disability under the Social Security Act may be unduly constrictive.

Third, the Councils suggested alternative language. The Division rejects the recommendation based on its view that federal law requires the disability to be permanent.

Fourth, the Councils suggested including “advanced practice nurse” among the professionals eligible to issue a statement that the applicant is unable to purchase or prepare meals independently due to disability. The Division rejects the recommendation since the corresponding federal regulation (7 C.F.R. §273.2) only authorizes a physician or psychologist to issue the statement. This appears to be accurate.

Since the regulation is final, the Councils could consider either taking no further action, requesting reconsideration of the absolute requirement that disability be permanent even for SSI/SSDI beneficiaries, conducting further research, or requesting a USDA opinion.

### 3. Office of Highway Safety Final DUI Fee Regulation [14 DE Reg. 907 (March 1, 2011)]

The SCPD commented on the proposed version of this regulation in November, 2010. A copy of the Council’s November 30, 2010 memo is attached for facilitated reference.

First, the Council recommended substituting “DSAMH” for “DADAMH” in 2 sections. The OHS agreed and corrected the references.

Second, the Council identified multiple inconsistencies between the fee schedules in Regulation 1201 and Regulation 1204. The OHS acknowledged the inconsistencies which it corrected by amending references in Regulation 1204. Since the amended regulation was not reproduced in the Register, I conducted a quick review of the new Administrative Code. Conforming edits were included.

Third, the Councils expressed concern that the scope of “good cause” to avoid a “no show” fee was narrow. The OHS effected no change based on the rationale that counselors would exercise discretion based on individual circumstances.

Since the regulation is final, and the OHS adopted revisions in response to two of the three Council concerns, I recommend no further action.

4. DOE Prop. Interpreter/Tutor for Deaf & Hard of Hearing Reg. [14 DE Reg. 848 (March 1, 2011)]

Representatives of SCPD, GACEC, CODE, Sterck School, and the DLP met on January 5, 2011 and reconciled competing drafts of a prepublication version of this regulation. General consensus was reached on most, if not all, aspects of the regulation. The Department of Education has now formally published a proposed regulation. I have the following observations.

First, consistent with the consensus reached on January 5, the following subsection should be included as "1.3":

1.3. This regulation shall be interpreted in conformity with Title 14 Del.C. §3112.

Title 14 Del.C. §3112 is the recently enacted Deaf or Hard of Hearing Child's Bill of Rights. In pertinent part, it contemplates IEPs being developed consistent with the following standard: "(t)he provision of optimal, direct, and ongoing language access to ...interpreters...and other special education personnel who are knowledgeable due to specific training and who are proficient in the child's primary communication mode or language." The interpreter/tutor regulation implements this and other aspects of the Bill of Rights. The statutory reference also reinforces application of the regulation to all public schools.

Second, in §2.0, definition of "permit", the DOE may wish to review the following sentence: "Interpreter/Tutors shall renew permits every five years by meeting the minimum standards required by the RID Certification Maintenance Program." There are two concerns:

A. Literally, the sentence indicates that simply meeting the maintenance program standards constitutes automatic permit renewal. At a minimum, it would be preferable to amend the sentence to read as follows: "Interpreter/Tutors shall apply for permit renewal every five years by submission of documentation satisfactory to the Department of fulfillment of the minimum standards required by the RID Certification Maintenance Program."

B. It is somewhat odd to insert renewal standards in the definition of "permit". The DOE could consider adding a "Permit Renewal" section which would cover "requirements" and "application procedures". Compare Sections 3.0 and 4.0.

Third, in §6.1.4, consider substituting "unfitness" for "immorality...credentials" since the definition of "unfit" in §2.0 incorporates the listed bases. The same substitution could be used in §7.1.

Fourth, I recommend deletion of "disloyalty" as a type of unfitness in the definition of "unfit" and §§6.1.4 and 7.1. Someone is not "unfit" to serve as an interpreter/tutor simply because he/she is applying for a job with another employer, is a union representative, or is a "whistleblower".

Fifth, §6.1.3 is overbroad. It literally requires denial of a permit if an individual has "had a

Permit, certificate or license revoked in another jurisdiction”. There is no requirement that the revocation to be based on “cause”. For example, a permit could have simply been revoked because an individual let it lapse, did not submit renewal materials, etc. Compare the deleted version of this provision which required the revocation to be based on “cause”:

6.2.2 The applicant has had an educator Permit, certificate or license revoked in another jurisdiction for immorality, misconduct in office, incompetence, willful neglect of duty, disloyalty of falsification of credentials.

The DOE could simply consider the following amendment:

6.1.3. Had a permit, certificate or license revoked in another jurisdiction based on a determination that the applicant was unfit.

Sixth, in §2.0, definition of “immorality”, the term “interpreter tutor” should be “interpreter/tutor”.

Seventh, the regulation is inconsistent in its capitalization of “permit”. Compare, e.g. §§1.1, 1.2, 2.0 (definition of “permit”), and 7.1 (not capitalized) with §§3.1, 4.1, 6.1, 6.13, and 7.1 (capitalized).

Seventh, in §3.0, the structure, conjunctions and punctuation are problematic. The section could be interpreted in different ways. Consider the following substitute:

3.0 Requirements of a Permit.

Subject to the provisions in 6.0 below, the Department shall issue a Permit as an Interpreter/Tutor for the Deaf/Hard of Hearing to an individual who has a minimum of a Bachelor’s degree in any field from a regionally accredited college or university and either:

- 3.1. Holds national certification as a Generalist by RID; or
- 3.2. Is a certified member of RID as an EIPA credentialed interpreter who achieved a level 4.0 or higher on the Elementary or Secondary American Sign Language video stimulus tapes evaluation.

If this approach were adopted, §4.1.2 could then be amended to read as follows:

4.1.2. Evidence that the applicant has met either of the certification requirements defined in Section 3.1 or 3.2.

I recommend sharing the above observations with the DOE and other stakeholders.

5. DOE Prop. Resident Advisor Regulation [14 DE Reg. 851 (March 1, 2011)]

The Department of Education proposes to amend its regulations covering the credentials for resident advisors in the Delaware Autistic Program (DAP) and Sterck School. I have the following observations.

I have the following observations.

First, the regulation authorizes issuance of a permit to serve as a resident advisor in the Statewide Program for the Deaf/Hard of Hearing to persons with no ASL capability or special communication skills. The Deaf or Hard of Hearing Child's Bill of Rights Act contemplates the "provision of optimal, direct, and ongoing language access to ...interpreters...and other special education personnel who are knowledgeable due to specific training and who are proficient in the child's primary communication mode or language." See Title 14 Del.C. §3112(c)(4). The Act also envisions the provision of "adult models of the child's communication mode or language." See Title 14 Del.C. §3112(c)(3). This is ostensibly a major deficiency in the regulation. Section 504 contemplates the provision of qualified personnel. See, e.g., Region IX LOF to Montebello (CA) School District, 20 IDELR 388, 390-391 (May 28, 1993 [prevalent use of substitute teachers without special education training violates §504 and ADA]. Likewise, the IDEA requires the DOE to adopt standards requiring personnel with appropriate training and skills:

The SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that these personnel have the content knowledge and skills to serve children with disabilities.

34 C.F.R. §300.156. Parenthetically, the absence of any training or skill standard for residential DAP staff should also be reassessed. See, e.g., the attached August 16 and August 23, 2010 News Journal articles which document concerns with the operation of the DAP homes. DAP home residents present very complex and challenging behaviors requiring highly trained staff.

Second, I recommend deletion of "disloyalty" as a type of unfitness in the definition of "unfit" and §§6.1.4 and 7.1. Someone is not "unfit" to serve as an interpreter/tutor simply because he/she is applying for a job with another employer, is a union representative, or is a "whistleblower".

Third, the regulation is inconsistent in its capitalization of "permit". Compare, e.g. §§6.1, 7.1, 7.2 (not capitalized) with §§5.0, 6.1.3, and 7.1 (capitalized). Indeed, in §7.1, the word is capitalized once and "uncapitalized" twice.

Fourth, §6.1.3 is overbroad. It literally requires denial of a permit if an individual has "had a Permit, certificate or license revoked in another jurisdiction". There is no requirement that the revocation to be based on "cause". For example, a permit could have simply been revoked because an individual let it lapse, did not submit renewal materials, etc. Compare the deleted version of this provision which required the revocation to be based on "cause":

6.2.2 The applicant has had an educator Permit, certificate or license revoked in another jurisdiction for immorality, misconduct in office, incompetence, willful neglect of duty, disloyalty of falsification of credentials.

Fifth, in §6.1.4, consider substituting “unfitness” for “immorality...credentials” since the definition of “unfit” in §2.0 incorporates the listed bases. The same substitution could be used in §7.1.

Finally, §5.0 requires disclosure of criminal conviction history. This merits endorsement. Consistent with the attached January 31, 2001 article, residential Sterck students are at risk if staff are not adequately screened.

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

#### 6. H.B No. 26 (Recording of SBE Meetings)

This bill was introduced on January 25, 2011. As of March 6, it remained in the House Education Committee.

The synopsis notes that the RCCSD posts a digital recording of each board of education meeting on its website for public access and that the Christina School District has adopted a similar policy. I checked the recording on the RCCSD site and it was easily accessible and clear. See <http://www.redclay.k12.de.us/boardaudio/20101215.shtml>.

The bill would require the State Board of Education to post a digital recording of its meetings on its website effective September 1, 2011.

I have the following observations.

First, the bill is earmarked with an incomplete fiscal note. It should be relatively simple to generate a cost estimate based on Red Clay’s experience.

Second, the bill does not literally address recording when the board enters confidential executive session to address personnel or legal matters.

Third, it is unclear if the SBE would be required to digitally post recordings of committee meetings or simply full board meetings.

I recommend endorsement of the concept of the bill subject to the sponsors’ consideration of clarifying the application of the bill to committee meetings and executive sessions.

#### 7. S.B. No. 16 (Biannual Unit Count)

This bill was introduced on January 25, 2011. As of March 6, it remained in the House Education Committee.

As background, the Legislature established a “Teacher Hiring Task Force” through S.R. No. 18 in 2010. The resulting Task Force issued a report which included the findings reflected in the bill: 1) more than 60% of new teachers hired in Delaware’s 19 districts are hired in August or later; 2) late hiring undermines receipt of proper training and orientation; and 3) late hiring reduces prospects for hiring the best candidates since the best candidates will already have offers from private schools or schools in other states.

The bill would result in an estimated unit count to be completed by March 30 of each year. Districts would then be guaranteed funding of at least 98% of the final September 30 unit count. The guarantee would not apply if a district engaged in inaccurate reporting. Districts would then be in a position to make earlier hiring decisions. The bill would sunset in 2012.

The News Journal published the attached editorial opinion on December 6, 2010 endorsing this initiative. The editorial estimated cost of implementation as \$100,000. Parenthetically, biannual unit count legislation has been introduced in the past. See, e.g., S.B. No. 302 (138th General Assembly); and H.B. No. 70 (139<sup>th</sup> General Assembly).

I recommend strong endorsement.

#### 8. H.B. No. 17 (State Procurement)

This bill was introduced on January 19, 2011. It remained in the House Administration Committee as of March 7, 2011. The bill establishes a goal of awarding not less than 3% of the State’s total expenditures for material, public works contracts, and services to veteran-owned small businesses. A “veteran-owned small business” is one at least 51% owned and controlled by one or more individuals who are veterans.

I have the following observations and reservations.

First, there is no definition of “small business”. This may result in difficulty in implementation.

Second, the definition of “veteran” would include persons who served in the military of foreign nations. I suspect this is not the sponsors’ intent.

Third, the accuracy of the synopsis could be improved. It refers to establishing a goal for “disabled veteran-owned and veteran-owned businesses”. In contrast, the bill has no provisions addressing “disabled veteran owned” businesses. The bill contains no provisions addressing



disability whatsoever.

Fourth, reasonable persons could question whether establishing a preference for businesses with a majority owner who is a veteran (irrespective of the wealth of the veteran) is justifiable. Perhaps the public interest could be better served by targeting State procurement to non-profit agencies which contract with DHSS to provide vocational opportunities to persons with disabilities (e.g. Elwyn; Goodwill; Chimes).

I recommend sharing the above observations and reservations with policymakers.

#### 9. H.B. No. 12 (Child Sex Abuse Statute of Limitation)

As background, in 2007 legislation (S.B. No. 29) was enacted which removed the statute of limitations for child victims of sexual abuse by adults. The bill also established a 2 year window for victims to sue perpetrators if the pre-existing statute of limitations had already expired. Employers of perpetrators could only be held liable upon a finding of gross negligence.

One drawback of that legislation was its limited effect on public employees. Legislation has been introduced on multiple occasions to replicate the effect of S.B. No. 29 for victims of public-sector employees. For background on these bills, see the attached excerpts from Rep. Lavelle's web site. I am also attaching a June 16, 2008 SCPD memo endorsing one of the predecessor bills. The remedial legislation twice passed the House but not the Senate.

H.B. No. 12 is the latest attempt to replicate the effect of S.B. No. 29 for victims of public-sector employees. It was introduced on January 19, 2011. It is similar to H.B. No. 155, as amended, from the 145<sup>th</sup> General Assembly, which was approved by the House Judiciary Committee in 2009 but never received action by the full House. The attached Committee findings were as follows: "The committee expressed concern regarding the fiscal impact of the legislation, but found that it was necessary to put the public sector under the same standards as the private sector."

I recommend endorsement for the reasons summarized in the SCPD's June 16, 2008 memo as supplemented by the observations in the excerpts from Rep. Lavelle's web site.

#### 10. S.B. No. 17 (Medical Marijuana Act)

This bill was introduced on January 25, 2011. As of March 7, it remained in the Senate Health & Social Services Committee. For background, I am attaching a February 11, 2011 News Journal article authored by Rep. Manolacos as well as a February 13, 2011 News Journal article.

Currently, 15 states and D.C. have enacted laws authorizing limited access to marijuana for medical purposes. S.B. No. 17 would authorize physicians to issue a written certification (lines 113-

120) essentially prescribing marijuana for a “debilitating medical condition” (lines 43-54) which includes glaucoma, cancer, HIV, and PTSD. The patient then forwards the authorization to DHSS. DHSS then confirms the information and issues an identification card to the patient and registered caregiver. The patient or caregiver can then obtain marijuana from one of three non-profit distribution centers. A qualifying patient could possess up to 6 ounces of marijuana under this system per month. A physician could authorize less.

The system appears to include many safeguards against misuse. At the same time, the value of marijuana for medicinal purposes appears has been validated in many studies and recognized by the American Academy of Physicians, the American Nurses Association, and the American Public Health Association (lines 8-23). I recommend endorsement since it would offer a mode of treatment currently unavailable to persons with certain debilitating conditions.

#### 11. H.B. No. 19 (Drug Involved Offenses)

This bill was introduced on January 20 2011. It was reported out of the House Judiciary Committee on January 26, 2011. It is a very lengthy bill with a 5 page synopsis.

As background, there has been widespread sentiment in recent years that Delaware’s criminal drug offense laws need to be overhauled. For example, in 2005 legislation (H.B. No. 181) was introduced to repeal mandatory minimum drug sentences. Although the bill had 23 House sponsors, it failed to pass. Consistent with the attached July 17, 2005 SCPD memo, the Council supported that initiative.

The current bill is much broader in scope. It is consensus legislation crafted by the Drug Law Revisions Committee which included representatives from the Attorney General’s Office, Public Defender, law enforcement, and Stand Up for What’s Right and Just (“SURJ”). It is similar to legislation (H.B. No. 443) which passed the House but not the Senate in 2010.

Excellent summaries are contained in the attached January 20, 24, and 27, 2011 News Journal articles. The bill would revise drug offense penalties, eliminate some minimum-mandatory sentences, and effect other common-sense changes. Some of the salutary changes include repeal of the law (Title 16 Del. C. §4758; lines 491-492) making it a crime to not keep a prescription drug in its original container. The SCPD has previously criticized the statute which makes the elderly and persons with disabilities guilty of a Class A Misdemeanor for simply using daily-dose weekly pill containers. A second common-sense change is to reduce the length of a driver license suspension from 2-3 years to 6 months for drug convictions. According to Section 70 of the synopsis, Delaware’s law is the harshest in the Nation and the lack of a license undermines attempts to obtain and retain employment.

I recommend a strong endorsement.

Attachments

8g:legregs/311bils  
F:pub/bjh/legis/2011/311bils