MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative & Regulatory Initiatives

Date: April 3, 2011

I am providing my analysis of twenty-eight (28) legislative and regulatory initiatives in anticipation of the April 14 meeting. The SCPD may wish to secure advance approval of commentary on legislation since some bills are moving quickly through the legislative process. Given time constraints, my commentary should be considered tentative and non-exhaustive.

1. S.B. No. 21 (Delaware Healthy Children Program)

This legislation was introduced on March 15, 2011. It remained in the Senate Finance Committee on April 3, 2011.

The bill would eliminate the current monthly premium for enrollees while authorizing DHSS, in its discretion, to institute minimal co-payments for services. Consistent with lines 14-18, the current premium requirement may pose a barrier to enrollment for low income families. For example, if children are viewed as relatively healthy, a financially stressed parent may forego paying the monthly premium to cover the competing costs of housing, utilities, transportation, child care, and food. As a result, if a child then becomes ill, there is no DHCP coverage. Adopting a co-pay system in lieu of the monthly premium approach should reduce the prospects for enrollment and disenrollment from month to month.

The legislation is identical to S.B. No. 18 introduced in the 145th General Assembly and S.B. No. 200 introduced in the 144th General Assembly. The SCPD and GACEC endorsed predecessor bills. See, e.g., attached March 9, 2009 SCPD memo and February 28, 2008 GACEC letter. For background, I am also attaching an August 15, 2009 News Journal article which contains some additional information on DHCP enrollment, funding, and premium amounts.

I recommend forwarding a general endorsement of the legislation to the prime sponsors with the following caveats.

First, the recital at line 5 that enrollments are declining may no longer be accurate. See

attached excerpt from DMMA FY 10 JFC presentation (March, 2010) and the attached excerpt from DMMA presentation to the SCPD (October 25, 2010).

Second, the attached January 28, 2010 News Journal article provides some "food for thought" on the viability of co-pays in the DHCP. The article describes a study of 900,000 individuals which concluded that even modest co-pays can result in deferral of needed care by patients of modest means.

2. H.B. No. 51 (Gold Alert Program)

This bill was introduced on March 17, 2011. It passed the House with one amendment by a 37-0 vote on March 24. It remained in the Senate Highways and Transportation Committee on April 3, 2011.

As background, the Gold Alert Program was established by S.B. No. 227 enacted in 2008. The resulting law contemplates implementation of certain procedures to facilitate location of missing senior citizens, missing persons with disabilities, and missing suicidal persons. See Title 11 Del.C. §§8580-8583. Law enforcement agencies enter descriptive information of the missing person in multiple data bases, including the Delaware Criminal Justice Information System ("DELJIS"), and issue an alert to designated media outlets in Delaware.

H.B. No. 51, as amended, would direct the Department of Transportation to issue regulations establishing procedures for display of qualifying missing person information on variable message signs located along highways. A brief summary of the legislation is contained in the attached March 25, 2011 News Journal article. Consistent with the attached House Committee Report, this initiative is designed "to increase the number of people who are alerted to the situation, thereby increasing the chance of quickly locating the missing person." The amendment to the legislation enhances flexibility since DelDOT could ensure that its system conforms to federal standards. Parenthetically, another advantage to authorizing DelDOT to issue implementing regulations is that the regulations can address which message signs would be activated. The current law indicates that an alert can be "local" rather than "statewide" [Title 11 Del.C. §8580(2)]. It may be appropriate in some cases to only post an alert in one county or a certain area of the State.

I recommend a strong endorsement. A copy of commentary should be shared with DelDOT and the Victim Rights Task Force.

3. S.B. No. 22 (Autism Spectrum Disorders Insurance Coverage)

This bill was introduced on March 17, 2011. As of April 3, it remained in the Senate Finance Committee. The legislative website indicates that there is an incomplete fiscal note associated with the bill.

The bill is part of a national initiative of Autism Speaks. Consistent with the attachments, twenty-four (24) states have adopted autism insurance reform legislation.

The bill would require health insurers regulated by the Delaware Insurance Commissioner to cover costs of screening, diagnosis, and treatment of individuals less than 21 years old with autism spectrum disorders. Insurer outlays would be subject to a $36,000 annual cap. The current bill is similar to legislation (S.B. No. 204) introduced in the 145th General Assembly. The SCPD's April 5, 2010 endorsement of the predecessor legislation is attached. I am also attaching an April 6, 2010 News Journal article which provides background on the predecessor bill. Finally, I am attaching multiple articles describing advances in diagnosis and treatment of children with autism spectrum disorders.

The current bill differs from its predecessor in several respects. The most prominent difference is that the proposed annual cap of insurer outlays is reduced from $50,000 to $36,000. A related change is automatic indexing of the cap based on the Consumer Price Index (lines15-19, 112-116). The bill also covers "screening and diagnosis" instead of just "diagnosis" of autism spectrum disorders (lines 4, 41, 101, and 138).

I recommend endorsement of the legislation. I also recommend sharing the following observations solely with the prime sponsors and Autism Delaware:

1. The legislation directs DHSS to issue regulations establishing standards for certifying qualified autism services providers (lines 79-80; lines 176-177) subject to the following:

> If an autism services provider meets recognized national certification as a Board Certified Behavior Analyst, such autism services provider shall be deemed to have met the standards to be established under this section, as will those working under the supervision of such providers to provide applied behavioral analysis services. (Lines 80-83 and 177-180)

Literally, this categorically makes anyone working under the supervision of a Board Certified Behavior Analyst a qualified provider regardless of credentials, training, experience, or age. The sponsors may wish to consider whether this standard merits deletion or amendment. There are statutory standards applicable to therapy aides/assistants. See, e.g., Title 24 Del.C. §2008 (OT assistant); §2606 (PT assistant); and §3706(a)(4) (ST aide). Psychological assistants must also meet certain statutory standards. See Title 24 Del.C. §3509. Characterizing anyone working under the supervision of a Board Certified Behavioral Analyst as a qualified provider may invite insurer objection as "overbroad".

2. Since the definition of "therapeutic care" at lines 60-61 and 157-158 includes services provided by an aide or assistant acting under the supervision of an ST, PT or OT, a similar authorization could be inserted in the definition of "psychological care" at lines 58-59 and 155-156. Consider the following revision:

> (9) 'Psychological care' means direct or consultative services provided by a psychologist licensed in the state in which the psychologist practices or by a psychological assistant acting under the supervision of a psychologist.

4. S.B. No. 24 (Public Guardian)

This bill was introduced on March 17, 2011. As of April 3, it remained in the Senate Children, Youth & Families Committee.

The legislation would repeal the existing enabling legislation for the Office of the Public Guardian. It would also establish a "Delaware Guardianship Commission" to serve in an advisory capacity to the Public Guardian. The key changes are listed in the synopsis. The legislative website indicates there is an incomplete fiscal note.

Overall, the legislation is straightforward and provides more detail than the existing enabling legislation. However, I have the following observations and recommendations.

First, the Chancellor currently appoints the Public Guardian who serves at the pleasure of the Chancellor. See Title 12 Del.C. §3991. The legislation envisions appointment by the Governor (lines 18 and 155-157). There is potential for the position becoming a "patronage job". Appointment is not subject to Senate confirmation. In contrast, personnel such as the Election Commissioner (Title 15 Del.C. §301), Director of the State Housing Authority (Title 29 Del.C. §8603), and OMB Director (Title 29 Del.C. §6302A) are appointed with the consent of the Senate. Moreover, the rationale for removing the appointment authority from the Chancellor is not compelling. The synopsis recites as follows:

> It changes the appointing authority from the Chancellor to the Governor to remove the conflict of the Public Guardian appearing in the Court of Chancery while being supervised by the Chancellor.

The Family Court has multiple contracts with attorneys to provide representation in dependency/neglect and other proceedings. Such attorneys could appear before the Chief Judge who approves the contracts. I am unaware of any ethical concerns raised by this practice.

Second, it is clear that the Governor could remove the incumbent Public Guardian immediately upon the effective date of the legislation (lines 155-157). However, it is not clear if the Governor could remove the Public Guardian (for cause or otherwise) once appointed to a 6 year term (lines 17-18).

Third, line 9 appears to allow the Public Guardian to only serve Delaware citizens. Thus, appointment of the Public Guardian for noncitizens legally residing in the State as well as Stockley or DPC residents incapable of establishing Delaware citizenship would be categorically foreclosed. Moreover, historically, the Chancery Court exercised guardianship jurisdiction over nonresidents. For example, the former enabling legislation, Title 12 Del.C. §3901, authorized the Court to appoint a "guardian of the Delaware property of any nonresident disabled person owning property located in this State, and a guardian of the person of any nonresident disabled person brought into this State for care". The current version of §3901 is less specific but does not limit the Court's jurisdiction to

Delaware citizens or residents. A "Delaware citizen" limitation on appointment of the Public Guardian is ostensibly unduly constrictive and merits reconsideration.

Fourth, the composition of the newly created Delaware Guardianship Commission is small (9 members) and overwhelmingly comprised of State officials, 44% of whom are representatives of one agency, DHSS. It would be preferable to include some consumer of non-profit representation for balance. For example, it would be appropriate to include a designee of the State Council for Persons with Disabilities [Title 29 Del.C. §8210] or the Community Legal Aid Society, Inc. [Title 16 Del.C. §§1102(7); 5161(a)(2); 5162(a)(4); 5181(7) and Title 31 Del.C. §3903].

I recommend sharing the above commentary with policymakers, the Public Guardian, and the Chancellor.

5. H.B. No. 42 (DOE Uniform School Discipline Regulations)

This bill was introduced on March 10, 2011. Consistent with the attached Committee Report, it was reported out of the House Education Committee on March 30.

As background, the Department of Education published a Standardized School Code of Conduct Policies Report in May, 2010. The bill implements recommendations contained in that report. In a nutshell, the DOE would be authorized to issue regulations applicable to public schools to establish uniformity in definitions of conduct which may result in alternate placements or expulsion, uniformity in due process procedures, and uniformity in processing Attorney General reports.

In general, the bill would facilitate accurate aggregation and analysis of data based on uniform definitions and standards. It may also facilitate publication of informative handbooks and brochures for students, parents, and public school personnel since a single publication could cover standards for all public schools. Finally, it may result in fewer appeals to the DOE/SBE based on procedural violations at the district/charter school level since uniform standards will be better understood and conform to DOE regulations.

I recommend endorsement.

6. DOE Final World Language Teacher Certification Regulation [14 DE Reg. 1071 (4/1/11)]

The SCPD and GACEC commented on the proposed version of this regulation in February, 2011. The Department and Professional Standards Board have now adopted a final regulation with no changes. I attach the March 25 letter from the Board which reiterates the Councils' comments followed by the Board's response.

First, the Councils expressed concern that the regulation ostensibly only covered standards for persons holding a certificate prior to August 31, 2003. The Board interpreted the regulation to be more inclusive.

Second, the Councils characterized issuance of a World Language certificate based on only 15 credits in a World Language as "somewhat anemic". The Board responded that it anticipates infrequent qualification under this criterion. Most applicants will have to demonstrate proficiency on a World Language proficiency test.

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

7. DOE Final Children w/Disabilities Part 927 Monit/Enforce/Confid Reg. [14 DE Reg. 1067 (4/1/11)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. The Department has now adopted a final regulation incorporating a few changes prompted by the commentary. Details are provided in the attached March 10, 2011 DOE letter which includes the Councils' commentary and the Department's response.

First, the GACEC requested clarification if a particular meeting would be open to the public. The DOE responded that a district has never requested such a meeting. It did not indicate whether such a meeting would be open to the public.

Second, the Councils recommended correcting three references to "subgrant" and "subgrants". The DOE agreed and effected the revisions.

Third, the Councils recommended insertion of a cross reference to Title 14 Del.C. §3130 in a section covering access to records. The Department agreed and inserted a cross reference.

Fourth, the Councils recommended revision of a regulation covering fees for records. The Department responded that this section was not earmarked for revision but promised to "propose a revision to §17.1 in response to the Council's comments with the upcoming regulatory revisions for the needs based funding system."

Fifth, the Councils recommended inclusion of a reference to a FERPA regulation in §22.0. The DOE declined to effect an amendment.

Sixth, the Councils identified omission of some FERPA procedural safeguards in the DOE regulation. The DOE declined to effect an amendment.

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

8. DOE Final Children with Disabilities Part 923 General Duties Reg. [14 DE Reg. 1057 (4/1/11)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. The Department of Education has now adopted a final regulation incorporating some revisions prompted by the commentary. Details are provided in the attached March 10, 2011 DOE letter which includes the Councils' commentary and the Department's response.

First, the Councils noted that the regulation did not address eligibility of children eligible at birth under certain classifications. The DOE responded that revision is warranted but the relevant sections of the regulation had not been identified for revision. The DOE agreed to "pursue an amendment to the regulation in conjunction with the upcoming regulatory revisions for the needs based funding system."

Second, the Councils recommended correcting two references to "subgrant" and "subgrants". The DOE agreed and effected the revisions.

Third, the Councils recommended substituting "sixty" for "Sixty" in §52.1. The DOE agreed and effected the revision.

Fourth, the Councils recommended substituting "Department of Correction" for "Department of Corrections". The DOE agreed and effected the revision.

Since the regulation is final, and the Department agreed with all of the Councils' suggestions, I recommend no further action.

9. DOE Final Children with Dis. Part 922 Purposes & Definitions Reg [14 DE Reg. 1053 (4/1/11)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. The Department of Education has now adopted a final regulation incorporating a few amendments prompted by the commentary. Details are provided in the attached March 10, 2011 DOE letter which includes the Councils' commentary and the Department's response.

First, the Councils recommended substituting "Department of Correction" for "Department of Corrections". The DOE agreed and effected the revision.

Second, the Councils noted inconsistent references among DOE statutes and regulations to "mental retardation" and "mental disability" and recommended insertion of a clarifying note. The Department responded that this section was not earmarked for revision but agreed to "reconsider the Council's comments ...with the upcoming regulatory revisions for the needs based funding system."

Third, the Councils noted inconsistent references among DOE statutes and regulations to "hearing impairment" and "hard of hearing" and recommended insertion of a clarifying note. The Department responded that this section was not earmarked for revision but agreed to "reconsider the Council's comments ...with the upcoming regulatory revisions for the needs based funding system."

Fourth, the Councils suggested reconsideration of the definition of "autism". The DOE effected no revision.

Fifth, the Councils recommended substituting "world language" for "foreign language" in the definition of "core academic subjects". The DOE agreed and substituted "world language" for

"foreign language".

Sixth, the Councils characterized omission of statutory changes to the regulatory definition of a "FAPE" as a "major omission". The DOE agreed to inserted revised language to conform to statutory amendments.

Seventh, the Councils suggested that the definition of "Services Plan" was difficult to follow. The DOE effected no revision.

Eighth, the Councils noted that the definition of "consent" omitted a FERPA requirement for dating and recitation of disclosure of purpose for consent to disclosure of records. The DOE effected no revision.

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

10. DOE Final Children w/Disabilities Part 924 Eval/Elig/IEP Reg. [14 DE Reg. 1060 (4/1/11)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. The Department of Education has now adopted a final regulation with some changes. Details are provided in the attached March 10, 2011 DOE letter which includes the Councils' commentary and the Department's response.

First, the Councils expressed concern with proposed deletion of transition planning standards and emphasized that students must complete applications for Vo-Tech applications by December 12 of 8th grade. The DOE agreed to defer the proposed revision of the transition regulation in anticipation of proposing amendments "with the upcoming regulatory revisions for the needs based funding system."

Second, the Councils recommended another amendment to the transition planning regulation. The DOE agreed to defer the proposed revision of the transition regulation in anticipation of proposing amendments "with the upcoming regulatory revisions for the needs based funding system."

Third, the Councils recommended inserting "advanced practice nurse's" after the term "physician's". The DOE declined to effect any revision based on the rationale that the relevant section was not earmarked for revision.

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

11. DOE Final Children w/Dis. Part 928 Funds Use & Admin. Reg. [14 DE Reg. 1069 (4/1/11)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. The Councils endorsed the proposed regulation with no suggested edits. The Department of Education has now adopted a final regulation conforming to the proposed version.

I recommend no further action.

12. DOE Final Children w/Disabilities Part 926 Procedural Safeguards Reg. [14 DE Reg. 1065 (4/1/11)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. The Department of Education has now adopted a final regulation with some changes. Details are provided in the attached March 10, 2011 DOE letter which includes the Councils' commentary and the Department's response.

First, the Councils recommended substituting "attempts" for "attempt" to clarify that districts are required to engage in more than a single effort to promote parental involvement in IEP meetings. The DOE notes that its regulations require agencies to make multiple attempts to ensure parental participation . However, this regulation was not earmarked for revision and no amendment was adopted.

Second, the Councils objected to shortening of the notice period in the context of disciplinary removals. The DOE commented that it would "defer a revision to §3.1.3 and will research the Council's comments further."

Third, the Councils recommended incorporating references to new statutory requirements concerning appeals, including a requirement that a district secure an affirmative vote of its school board prior to filing a civil action (appeal) of a special education administrative hearing decision. The DOE declined to effect any amendment based on the rationale that such requirements are contained in other regulations.

Fourth, the Councils recommended clarification of the regulation referencing representation by non-attorneys in special education administrative hearings. The DOE declined to effect any revision while noting that guidance on use of non-attorneys is contained in its "Due Process Hearing Procedures" manual.

Fifth, the Councils noted the omission of several words at the end of §30.2. The DOE agreed and inserted the missing words.

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

13. DOE Final LEA Eligibility Regulation [14 DE Reg. 1059 (April 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2011. A copy of the GACEC's January 20, 2011 letter is attached for facilitated reference. The Councils noted that the published version of the regulation failed to highlight some of the proposed changes. However, the Councils obtained clarification of proposed amendments from the Department of Education. Since the changes were brief and benign, the Councils endorsed the proposed regulation.

The Department of Education has now adopted a final regulation which conforms to the proposed regulation. I recommend no further action.

14. DOE Final Notice to School Bds. of Due Process Proceedings Reg. [14 DE Reg. 1050 (4/1/11)]

The SCPD and GACEC commented on a pre-publication version of this regulation in January, 2011. The Department of Education then published a proposed regulation in February incorporating most edits recommended by the Councils. The Council endorsed the published proposed regulation subject to two (2) suggested edits. A copy of the SCPD's February 24, 2011 letter is attached for facilitated reference.

First, the Councils noted that the DOE omitted deletion of the word "panel" at the end of §5.2. The DOE responded that it "made a wording change as recommended." At 1051. However, the text remains unchanged in both the "print" and electronic version of the Register. At 1052.

Second, the Councils reiterated a recommendation that notice be provided "at or before the next scheduled school board meeting". The DOE declined to effect the revision, opting to adopt statutory language verbatim.

I recommend that the Councils informally notify the DOE of the discrepancy described in "First".

15. DOE Final School Bd. Member Special Education Hearing Training [14 DE Reg. 1048 (4/1/11)]

The SCPD and GACEC commented on a pre-publication version of this regulation in January, 2011. The Department of Education then published a proposed regulation in February incorporating the four (4) edits recommended by the Councils. The Council endorsed the published proposed regulation. The Department of Education has now adopted a final regulation with no further changes.

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

16. DOJ Final VCAP Payment of Mental Health Claims Regulation [14 DE Reg. 1082 (4/1/11)]

The SCPD and GACEC endorsed the proposed version of this regulation in February. A copy of the SCPD's February 24, 2011 memo is attached for facilitated reference.

The Department of Justice has now acknowledged the endorsements and adopted a final regulation with no further changes. I recommend no further action.

17. DSS Final TANF Eligibility Regulation [14 DE Reg. 1073 (4/1/11)]

The SCPD and GACEC commented on the proposed version of the regulation in February, 2011. A copy of the SCPD's February 24 memo is attached for facilitated reference.

First, the Councils recommended deletion of a comma. DSS agreed and effected the revision.

Second, the Councils suggested that a reference to "age 19 or older" should be "age 18 or older." DSS agreed and effected the revision.

Third, the Councils suggested substituting "(c)aretakers who fail" for "(c)aretakers that fail" in §3006.1.1, Par. 6. DSS responded as follows: "The suggested change is already incorporated in the policy." However, this is not accurate. Both the proposed and final versions of the regulation refer to "caretakers that fail".

Fourth, the SCPD noted that there are "pros and cons" to the substantive effect of the regulation. The Division acknowledged the comment.

I recommend informally notifying the Division of the concern identified under "Third".

18. DSS Final ("Withdrawn") Child Care Subsidy Prog. Fee Waiver Reg. [14 DE Reg. 1078 (4/1/11)]

The SCPD and GACEC commented on the proposed version of this regulation in December, 2010. A copy of the GACEC's December 28, 2010 letter is attached for facilitated reference.

The Councils declined to endorse the regulation. The Councils noted that the effect of limiting fee waivers would be to deter participation in the Child Subsidy program while increasing provider compensation. The Councils observed that deterring program participation would undermine the DHSS priority of encouraging employment. Finally, if adopted, the Councils recommended authorizing waivers for homeless families and families caring for 13-18 year old children unable to care for themselves due to disability.

The Division received approximately thirteen (13) comments expressing concern with the initiative. At 1079. DSS summarized three sets of representative comments, including those from the Councils, in its commentary. At 1079-1080.

The Division was persuaded by the commentary to withdraw the regulation in its entirety. The existing scope of fee waivers will be maintained.

I recommend sharing a "thank-you" communication with the Division for considering the Councils' commentary.

19. DMMA Proposed Medicaid LTC Resource Exclusions [14 DE Reg. 1001 (4/1/11)]

The Division of Medicaid & Medical Assistance proposes to amend its Medicaid long-term care resource exclusion standards to conform to federal law. There are two (2) changes.

First, the unspent portion of a retroactive SSI, SSDI, or Social Security retirement benefit is currently disregarded for six (6) months following the month of receipt. The proposed amendment would extend that time period to nine (9) months following the month of receipt.

Second, federal income tax refunds received between January 1, 2010 and December 31, 2012 will be excluded from countable resources for a period of twelve (12) months following the month of receipt.

Since both changes would benefit Medicaid beneficiaries, I recommend endorsement.

20. DMMA Prop. TANF & RCA Income & Resource Exclusion Reg. [14 DE Reg. 1011 (4/1/11)]

Based on changes in federal law, the Division of Medicaid & Medical Assistance proposes to amend its financial eligibility standards for TANF and Refugee Cash Assistance (RCA) programs. The amendments would result in the disregard of federal income tax refunds from countable income and resources for a period of twelve (12) months following the month of receipt.

Since the changes would benefit participants in the TANF and RCA programs, I recommend endorsement.

21. DMMA Proposed Medicaid & DHCP Alien Eligibility Regulation [14 DE Reg. 998 (4/1/11)]

The Division of Medicaid & Medical Assistance proposes to amend its Medicaid program eligibility standards. As background, the Division notes that Delaware has historically provided State funding to provide Medicaid coverage to some non-citizens. However, given competing priorities, the Delaware Health Fund Advisory Committee (HFAC) did not approve continued State funding in its FY12 recommendations. The funding is also omitted from the Governor's proposed FY 12 budget.

Given the projected lack of State funding for coverage of non-citizens, the Division is modifying its regulations to limit Medicaid services eligibility of qualifying legally residing noncitizens to "emergency services and labor and delivery only". At 1000. The Division is also adopting a minor amendment to its Delaware Healthy Children Program regulation. The DHCP regulation already excluded coverage of noncitizens.

There are obvious "pros and cons" to the initiative. On the one hand, it will eliminate access to a broad range of medical services, including prenatal care, to noncitizens. On the other hand, Delaware faces a budget deficit which is prompting consideration of curtailment of a number of safety-net programs, including General Assistance. Given the Council's interest in ensuring access to health care, I recommend withholding endorsement of the regulation while suggesting that the Division consider whether prenatal care could be offered as a State-funded benefit.

22. DSS Prop. Child Subsidy Program Special Needs Child Regulation [14 DE Reg. 1009 (4/1/11)]

This is an important initiative. The Division of Social Services proposes to amend its Child Care Subsidy Program regulation. In this month's Register, the Division withdrew a regulation in which it proposed to narrow the scope of waivers of caretaker fees in this program. See 14 DE Reg. 1078 (4/1/11). It is inferable that DSS is now seeking alternate means of reducing program costs through this regulation.

The main thrust of this initiative is to completely eliminate standards allowing special needs children to be eligible for the Child Care Subsidy Program. For example, the following authorization is being stricken:

Children with Special Needs:

A child that is 13 through 18 years of age may be eligible for Special Needs Child Care if the child's physical medical or emotional condition is such that he is unable to care for himself. Children under age 13 may qualify for Special Needs Child Care if they have a need that cannot be met in a regular daycare setting. Children 13 years of age and older are only eligible for Special Needs Childcare.

Consistent with the attached 45 C.F.R. §98.20, DSS has the discretion to cover or not cover such children:

(a) In order to be eligible for services under §98.50, a child shall:

(I) Be udner 13 years of age; or
(ii) At the option of the Lead Agency, be under age 19 and physically or mentally incapable of caring for himself of herself, or under court supervision; ...

Secondarily, the Division is narrowing the "necessity of child care" standards for two-parent households. See proposed changes to §11003.8.

The rationale for the proposed revisions is not provided.

I recommend that the Council oppose the initiative, alert other advocacy agencies (e.g. ARC; Autism Delaware), and invite a DSS presentation on the proposal to obtain further information and facilitate dialog. The Council may also wish to alert the Lt. Governor, "Kids Caucus", and other legislative policymakers

23. DPH Prop. Alzheimer's Disease & Dementia Training Regulation [14 DE Reg. 1002 (4/1/11)]

As background, the attached engrossed H.B. 159 was enacted in April, 2010. It requires DHSS to issue regulations requiring certain annual training to certified, licensed, registered or State-funded persons providing healthcare services directly to persons diagnosed with Alzheimer's or dementia. Physicians are excluded.

The Division of Public Health is now issuing a proposed regulation to implement the new

law in four (4) contexts: 1) adult day care facilities; 2) home health agencies (aide only); 3) skilled home health agencies; and 4) personal assistance services agencies.

The proposed regulation is relatively straightforward and generally conforms to the statutory language. However, I identified two (2) concerns.

First, the law requires the training to be provided "each year". The proposed §13.17, which is applicable to adult day care facilities, does not specifically require that the training be provided on an annual basis. Section 13.14.3 contemplates annual training but §13.17 is a "stand-alone" provision which omits any frequency of training standard.

Second, proposed §5.8.12 is ostensibly misplaced, incomplete, and lacking an annual training reference. Each preceding section (§§5.8.1 through 5.8.11) is a complete sentence. Section 5.8.12 is a clause. There is no reference to the frequency of training. These deficits could be easily resolved by incorporating the text of proposed §5.8.12 into a bullet under §5.8.6.

I recommend sharing the above observations with the Office of the Secretary.

24. DLTCRP Prop. Alzheimer's Disease & Dementia Training Regulation [14 DE Reg. 989 (4/1/11)]

As background, the attached engrossed H.B. 159 was enacted in April, 2010. It requires DHSS to issue regulations requiring certain annual training to certified, licensed, registered or State-funded persons providing healthcare services directly to persons diagnosed with Alzheimer's or dementia. Physicians are excluded.

The Division of Long Term Care Residents Protection is now issuing a proposed regulation to implement the new law in six (6) contexts: 1) skilled and intermediate care nursing facilities regulations;
2) nursing assistants and certified nursing assistants regulations; 3) assisted living facilities regulations;
4) rest (residential) home regulations; 5) group home facilities for persons with AIDS regulations; and
6) rest (family) care homes regulations.

I have the following observations.

First, in the nursing facility regulation, §5.6.1 omits any requirement that covered providers participate in the training "each year".

Second, in the assisted living facility regulation, §5.11 omits any requirement that covered providers participate in training "each year".

Third, in the group home for persons with AIDS regulation, §7.11 omits any requirement that covered providers participate in training "each year".

Fourth, it is unclear why the regulation does not address training in the following contexts: 1) group home facilities for persons with mental illness (Part 3305); and 2) group home facilities for persons with developmental disabilities (Part 3310). Both types of facilities could house individuals with dementia, including persons with TBI, i.e., dementia due to head trauma (DSM IV, §294.1). The Department may wish to consider whether amendments to these regulations should also be proposed.

I recommend sharing the above observations with the Office of the Secretary.

25. DLTCRP Prop. P&A Cooperation Regulation [14 DE Reg. 983 (4/1/11)]

Legislation (H.B. No. 36) was enacted in 2009 to enhance the authority of the Community Legal Aid Society, as Delaware's P&A System, to monitor and address complaints of abuse/neglect in licensed long-term care facilities. The legislation included the following requirement codified at Title 16 Del.C. §1119C: "The Department shall include in its regulations for all facilities licensed under this chapter a requirement of full cooperation with the protection and advocacy agency in fulfilling functions authorized by this chapter."

The Division of Long-term Care Residents Protection is now issuing the regulation contemplated by the legislation signed by the Governor on August 24, 2009. The regulation essentially adds a sentence requiring full licensee cooperation with the P&A in fulfilling functions authorized by Chapter 11 within the following sets of regulations:

- 3201 Skilled and Intermediate Care Nursing Facilities;
- 3225 Assisted Living Facilities
- 3230 Rest (Residential) Home Regulations
- 3301 Group Home Facilities for Persons with AIDS
- 3305 Group Homes for Persons with Mental Illness
- 3310 Neighborhood Homes for Persons with Developmental Disabilities
- 3315 Rest (Family) Care Homes

I recommend a strong endorsement.

26. DOE Prop. School Social Worker Regulation [14 DE Reg. 980 (4/1/11)]

The Department of Education and Professional Standards Board are proposing to adopt a new school social worker regulation "to follow current formatting trends and to include references to 1505 Standard Certificate". At 980.

The new regulation does not change the existing substantive standards applicable to school

social workers. It does cross reference the 1505 Standard Certificate standards.

I did not identify any concerns with the proposed regulation and I recommend endorsement.

27. DOE Proposed School to Work Transition Teacher Regulation [14 DE Reg. 978 (4/1/11)]

The Department of Education and Professional Standards Board propose to amend the standards for qualifying for a certificate as a school to work transition teacher.

Overall, the regulation is straightforward. It incorporates the standards for a standard certificate (§§2.1 and 3.1.2), adds coursework requirements (4.1.1), and adds a 2-year experience requirement (§4.2.1).

I recommend endorsement subject to consideration of the following amendments: 1) correcting a minor error in §3.1 which reads "...an applicant who who has met the following:"; and 2) incorporating §4.2.1 into §4.2 since there is no §4.2.2.

28. DOE Proposed Student Testing Program Regulation [14 DE Reg. 947 (4/1/11)]

The Department of Education is proposing significant revisions to its student testing program regulation to reflect the transition from the DSTP to the DCAS.

I have the following observations.

First, the former benchmarks for performance levels (very good; good; deficient; very deficient) in §§2.2-2.5 are being stricken. Reasonable persons might differ on whether such readily understandable descriptions should be retained.

Second, the DCAS lacks a writing assessment. See, e.g., §§1.2 and 6.1.2. Given the importance of writing proficiency, the Council may wish to encourage the DOE to pursue development of a writing assessment.

Third, §6.1 refers to "proficient" levels of performance. However, this term is not used in §2.0. I infer this approach provides the Department with more flexibility in defining "cut points" for the four levels of achievement (§2.1) and the "cut point" for qualifying for a diploma. However, in theory, the DOE could adopt a "proficiency" standard allowing graduation for students who score at a performance level 1 or 2 previously characterized as "deficient" and "very deficient".

Fourth, the DOE is deleting the following provision:

> 6.6. Parent, Guardian or Relative Caregiver Notification: Within 30 days of receiving student performance levels and diploma indices, school districts and charter schools shall provide written notice of the same and the consequences thereof to the student's parent,

guardian or Relative Caregiver.

Parental notification of a student's performance and consequences is important and the DOE may wish to reconsider the deletion.

Fifth, in §7.4.2.3, first sentence, the words "or charter school" should be inserted between "district" and "personnel".

Sixth, §9.2.3.3 indicates that a student granted a special exemption will not be subject to any student testing consequences for students in grades 2-8. The rationale for restricting the effect of the exemption to these grades is not clear. Exemptions are available to students in grade 10. See §9.2. The DOE may wish to reconsider whether the reference to grades 2-8 is unduly narrow.

I recommend sharing the above observations with the DOE.

Attachments

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