

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative & Regulatory Initiatives

Date: May 9, 2011

I am providing my analysis of sixteen (16) legislative and regulatory initiatives in anticipation of the May 12 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive. I was unable to critique some of the State legislation referred to me.

### 1. H.B. No. 91 (Disability References in Code & Publications)

This bill was introduced on April 13, 2011. It was released from the House Administration Committee on May 4, 2011. The attached Committee report indicates that there were no identified issues with the legislation.

I did not identify any “significant” concerns with the bill. There were two (2) matters which merited further consideration.

First, would the Deaf community have misgivings about lines 12-19 which require use of “people-first” language? The Deaf or Hard of Hearing Child’s Bill of Rights Act enacted in 2010 (H.B. No. 283) enjoyed broad support from the Deaf community. It generally referred to “a child who is deaf or hard of hearing” which may not, strictly speaking, qualify as “people-first”. The P&L Committee may wish to discuss this further.

Second, lines 27-28 recite as follows:

This section does not apply where a reference to a particular word or phrase is required by federal law or regulation or state statute.

There is some tension between this recital and lines 7 and 9. On the one hand, lines 7 and 9 contemplate an affirmative effort in any new State legislation amending the Code to adopt

“respectful” language. On the other hand, lines 27-28 suggest that nonconforming language in state statutes is categorically immune from the effect of the legislation. In other words, one section imposes a duty to adopt conforming language in proposed changes to the Code while another section exempts nonconforming language in the Code. It may be preferable to delete “or state statute” in line 28.

Assuming the first concern is determined minor by the Committee, I recommend a general endorsement of the bill while promptly sharing the second concern with the prime sponsors for their consideration of the merits of an amendment.

## 2. H.B. No. 66 (School & Work Zone Video Speed Monitoring System)

This bill was introduced on March 29, 2011. It was reported out of the Public Safety & Homeland Security Committee on April 6. I have the following observations.

First, this bill is similar to H.B. No. 197 from the 145<sup>th</sup> General Assembly which passed the House on July 1, 2009 by a vote of 22 yes, 12 no, 5 not voting, and 2 absent. It was not released from committee in the Senate. As amended, that bill would have authorized a 2-year pilot video speed monitoring system in the City of Wilmington and New Castle County with a \$50 civil assessment for persons driving at least 11 mph in excess of the posted speed in a school zone. I critiqued that bill as part of my January, 2010 LIFE Conference presentation. I do not believe the SCPD ever officially commented on the legislation.

Second, background on the legislation is contained in the attached April 7, 2011 News Journal article. The original H.B. No. 66 would authorize municipalities to deploy automated video radar within a quarter mile of work zones and schools. A speeding violation caught on camera would result in a \$75 fine but no points. A violation would be considered a civil offense (line 18) and not be part of a violator’s driving record (lines 18-19). However, non-payment of the fine could result in DMV declining to allow renewal of vehicle registration (line 66) and non-payment after an unsuccessful appeal could result in the owner’s license suspension (lines 67-69). The article indicates that DelDOT opposes the bill given the cost of conducting traffic-crash studies contemplated by the bill (line 6). The article also describes Rep. Mitchell’s desire to expand the bill to cover unincorporated areas in all counties. The attached April 8, 2011 News Journal editorial endorses expansion of the bill beyond use in municipalities as well as allowing imposition of points. The 5-page bill was somewhat difficult to analyze since there are several amendments placed with the bill by its prime sponsor, Rep. Brady, and by Rep. Mitchell.

H.A. No. 1 would delete the reference to “work zones”, limiting the bill’s application to “school zones”. H.A. No. 1 would also reduce the liability threshold from at least 11 miles above the posted speed limit to at least 5 miles above the posted speed limit. H.A. No. 2 would delete the requirement of DelDOT approval. H.A. No. 3 would expand the scope of the bill to unincorporated New Castle County. H.A. No. 4 would modify the scope of the bill to cover the City of Wilmington, City of Dover, and unincorporated New Castle County.

I recommend endorsing the concept of the bill since speeding in a school zone can result in

injuries to students and other pedestrians. However, I also recommend the sponsors' consideration of two (2) concerns.

A. Imposing liability for an automatic sensor's determination of traveling only 5 miles over the posted speed limit (H.A. No. 1, line 7) is ostensibly "overbroad". Any device has some margin of error and the 11 m.p.h. standard may be more reasonable.

B. Lines 46-47 indicate that failure to pay the civil assessment or contest liability in a timely manner is an admission of liability. The notice is sent my regular mail. Many factors could contribute to lack of timely receipt of a mailed notice, including a change in address, hospitalization, an out-of-state vacation, or misdirected mail. Lines 46-47 do not merely create a rebuttable presumption. Rather, they categorically characterize lack of payment or appeal as a legal admission of liability. Adopting a statute with such an irrebuttable finding merits reconsideration.

### 3. H.B. No. 76 (Prosthetic Insurance Coverage)

This bill was introduced on March 31, 2011. As of May 9, it remained in the House Economic Development, Banking, Insurance, and Commerce Committee. One technical amendment has been placed with the bill. The legislative Website earmarks the bill with an incomplete fiscal note.

The legislation is almost identical to H.B. No. 343 from the 145<sup>th</sup> General Assembly. Consistent with the attached April 21, 2010 memo and May 6, 2010 letter, the SCPD and GACEC endorsed the concept of that bill. The GACEC memo identified a few technical concerns.

In a nutshell, H.B. No. 76 would require State-regulated individual and group health insurance policies to provide coverage for orthotic and prosthetic devices at a reimbursement rate equal to a Federal fee schedule. The legislation is part of a national initiative of the Amputee Coalition of America (ACA). I am attaching some background information. The ACA Website may not be entirely up-to-date but the attachment indicates that at least nineteen (19) states have adopted some form of prosthetic parity legislation: New Jersey, Maryland, Virginia, Colorado, Maine, New Hampshire, Rhode Island, Massachusetts, California, Oregon, Indiana, Vermont, Louisiana, Arkansas, Iowa, Texas, Missouri, Illinois, and Utah. The attached June 1, 2010 Delmarva Daily Times article indicates that most insurance policies cover only the first \$2,500 of the costs for prosthetic devices since they are classified as durable medical equipment. In contrast, prosthetics can cost between \$5,000 and \$60,000. The attached November 22, 2010 ACA press release indicates that 2,000 babies are born annually with differential limbs, with an incidence rate of 1/ 2,869 for upper limbs and 1/5,949 for lower limbs. The materials also summarize study results showing low impact on insurance costs when prosthetic parity is implemented.

I recommend endorsement of the concept of the legislation subject to consideration of two (2) amendments.

First, there are some words missing at lines 28 and 89 of the bill, i.e., there are identical references to “as determined Secretary of the Department of Health and Social Services”. The GACEC identified the identical omission in the earlier legislation, H.B. No. 343.

Second, the bill covers a missing “limb, appendage, or other external human body part including an artificial limb, hand, or foot” (lines 39-40, 100-101). However, it excludes artificial eyes, ears, and noses” (lines 40-41, 101-102). The exclusion is not intuitive since other covered body parts are not exclusively “functional” and can be linked to restoration of “cosmesis” (lines 48 and 109). The sponsors may wish to consider deletion of the categorical exclusion.

#### 4. Draft DIAA Concussion Legislation (May, 2011)

My April 28 critique of draft legislation requiring the Delaware Interscholastic Athletic Association to issue regulations on sports-related concussions was reviewed by the BIC at its May 2, 2011 meeting. The SCPD then forwarded the attached May 9, 2011 letter to the prime sponsor. I understand that another draft has already been compiled and that Kyle may have additional information to share at the May 12 SCPD P&L Committee meeting.

#### 5. DOE Final School Nurse Regulation [14 DE Reg. 1228 (May 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2010. The November 18, 2010 GACEC letter is attached for facilitated reference. The DOE has now published a final regulation.

First, the Councils noted an ambiguity in the standards in the context of nurses with an out-of-state license and suggested consultation with the Board of Nursing. The DOE notes that it confirmed that the regulatory language is accurate.

Second, the Councils suggested inserting “R.N.” before the word “license” in §6.1.4 to conform to §4.1.2. The DOE determined that the change was not necessary.

Third, the Councils noted 3 grammatical errors within §6.1. The DOE responded as follows: “The Councils also suggested a grammatical change in 6.1 and the Standards Board has incorporated the suggested change.” However, no change is reflected in §6.1 of the final regulation. The GACEC and/or SCPD may wish to share the discrepancy with the DOE.

#### 6. DOE Final Resident Advisor Regulation [14 DE Reg. 1226 (May 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in March, 2011. The March 16, 2011 GACEC letter is attached for facilitated reference. The DOE has now published a final regulations with a few changes.

First, the Councils identified a “major deficiency” in the regulation, i.e., the absence of any

training/skills criteria to qualify for a permit. Anyone with a “Bachelor’s degree in any field from a regionally accredited college or university” (e.g. art/history; geology) qualifies for a permit. There is no requirement that resident advisors at Sterck have sign-language skills. Despite the prominence of the objection to this aspect of the regulation, the DOE does not address the commentary in the “Summary of the Evidence and Information Submitted” section. This ostensibly violates Title 29 Del.C. §10118(b)(1)(2).

Second, the Councils suggested some changes in the definition of “unfit”. The DOE responded as follows: “The definition within the regulation is consistent with the requirements of other public school licensure, certification, and permit regulations and laws.”

Third, the Councils identified inconsistencies in the capitalization of the word “permit”. The DOE corrected two (2) references to achieve consistency. However, it did not change one reference to “permit holder” in §7.1.

Fourth, the Councils recommended an amendment to clarify that revocation of a license or permit in another jurisdiction should preclude qualifying for a Delaware permit only if the revocation were for cause. No change was made.

Fifth, the Councils recommended substitution of a single reference to “unfit” for several references in §§6.1.4 and 7.1. The changes were effected. However, the grammar in §7.1 is infirm. The Section now reads as follows:

7.1. A Permit issued under the provisions of this regulation may be revoked upon a finding of meets the definition of “Unfit” in 2.0 of this regulation and must be revoked upon a finding that the permit holder made a materially false or misleading statement in his or her Permit application.

I recommend that the Council notify the DOE of the deficiencies described in “Third” and “Fifth”. I also recommend that the Councils solicit the rationale for ignoring the commentary on the meager credentials for resident advisors. In the absence of sufficient justification, options include a complaint or inquiry to OCR and/or OSEP or solicitation of input from the Legislature which adopted the Deaf or Hard of Hearing Child’s Bill of Rights in 2010.

#### 7. DOE Final Deaf & Hard of Hearing Interpreter/Tutor Reg. [14 DE Reg. 1222 (May 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in March, 2011. A copy of the GACEC’s March 16, 2011 letter is attached for facilitated reference.

First, the Councils recommended not limiting the authorizing statute to §1331(b). The DOE amended the reference to include Title 14 in its entirety.

Second, the Councils recommend insertion of a reference to the Deaf or Hard of Hearing

Child's Bill of Rights. The DOE declined to adopt the recommendation based on the following:

The Department did not incorporate changes related to including language that would broaden the scope of the regulation. The regulation is related to the credentialing of Interpreter/Tutors for the Deaf/Hard of Hearing and not the development of the Individual Education Program (IEP).

At 1222.

There are two (2) concerns with this approach: 1) it violates the agreement reached on January 5, 2011 by representatives of the DOE, Sterck, and the GACEC; and 2) it misconstrues the Deaf or Hard of Hearing Child's Bill of Rights as limited to IEP development.

Third, the Councils recommended transferring a permit renewal standard from a definition section to another section. The DOE agreed and effected amendments to §§2.0 and 4.2.

Fourth, the Councils recommended substitution of a single reference to "unfit" for several references in §§6.1.4 and 7.1. The changes were effected. However, the grammar in §7.1 is infirm. The Section now reads as follows:

7.1. A Permit issued under the provisions of this regulation may be revoked upon a finding of meets the definition of "Unfit" in 2.0 of this regulation and must be revoked upon a finding that the permit holder made a materially false or misleading statement in his or her permit application or upon finding that the permit holder failed to maintain the requirements for a Permit as designated in 3.0 herein.

Fifth, the Councils suggested some changes in the definition of "unfit". The DOE responded as follows: "The definition within the regulation is consistent with the requirements of other public school licensure, certification, and permit regulations and laws."

Sixth, the Councils recommended an amendment to §6.1.3 to clarify that revocation of a license or permit in another jurisdiction should preclude qualifying for a Delaware permit only if the revocation were for cause. No change was made.

Seventh, in the definition of "immorality", the Councils recommended substituting "interpreter/tutor" for "interpreter tutor" to conform to other references. No change was made.

Eighth, the Councils identified several inconsistencies in the capitalization of "permit". The DOE corrected some references [e.g. §§1.1; 1.2; and 7.1 (one reference)] while failing to correct other references [e.g. §§2.0 and 7.1 (two references)].

Ninth, the Councils recommended restructuring §3.0. The DOE added an amendment.

The Councils may wish to notify the DOE of the deficiencies noted in “Fourth” and “Eighth”.

8. DOE Prop. Unit Count Regulation [14 DE Reg. 1161 (May 1, 2011)]

The Department of Education proposes to adopt some discrete amendments to its unit count standards based enactment of H.B. No. 1 in February, 2011. It is also deleting a reference to a repealed regulation.

The changes appeared to conform to the new legislation and I did not identify any concerns. I recommend endorsement.

9. DOE Prop. Professional Development Standards [14 DE Reg. 1187 (May 1, 2011)]

The Professional Standards Board and Department of Education propose to adopt a new regulation (Part 1598) establishing professional development standards. The expressed rationale for adoption is twofold: 1) to establish State-wide expectations for professional development; and 2) to meet one of many Delaware Race To the Top pledges.

I have only two (2) concerns with the initiative.

First, it is unclear if the regulation is intended to cover charter schools. There are no explicit references to “charter schools” or “public schools” and references to “district” (§§2.1.1 and 2.1.2) could be construed as limiting. The Professional Standards Board enjoys statutory authority to apply its standards to charter schools. See Title 14 Del.C. §1202. Moreover, the analogous teaching standards regulation contains an explicit recital of its application to charter schools:

*1597 Delaware Professional Teaching Standards*

*1.0 Content*

*The Delaware Professional Teaching Standards establish a common set of knowledge, skills, and attributes expected of Delaware teachers. In accordance with 14 Del.C. §1205, this regulation shall be applied to all teachers employed within the public schools and charter schools of the State of Delaware.*

[emphasis supplied]

It would be preferable to include a comparable recital in the new Part 1598 regulation.

Second, there are multiple ostensibly “odd” references to “adult” and “adults”. See, e.g.,

§§2.1.1, 3.1.3 and 3.1.1. I recommend substituting “educator” and “educators” which is the term used in §§1.0, 3.1.3, 3.1.6, 4.1.1, 4.1.2, and 4.1.3.

I recommend endorsement subject to consideration of the above recommended amendments.

10. DOE Prop. High School Graduation & Diploma Regulation [14 DE Reg. 1155 (May 1, 2011)]

The Department of Education is proposes to adopt several amendments to its high school graduation and diploma standards. There are three (3) sets of standards, i.e. those covering the graduation classes of 2011-2014, those covering the graduation class of 2015, and those covering the graduation class of 2016. I have the following observations.

First, as a practical matter, §3.0 only covers the graduation class of 2015. Section 4.0 covers the graduation class of 2016 and beyond. Therefore, the DOE could consider deleting references to “beginning with” and substituting “for”. This would result in the following title: “Credit Requirements for the Graduation Class of 2015 (Freshman Class of 2011-2012)”. Section 3.1 would then read: “~~Beginning with~~For the graduating class of 2015 ...”. Compare the title to §2.0 which refers to “Credit Requirements for the Graduation Class of 2011...”

Second, for similar reasons, consider amending §2.1 to read: “~~Beginning with~~For the graduating class...”

Third, §§3.2.2 and 4.2.2 are problematic in the context of ASL. They refer to “the skill areas of speaking, reading and writing”. The reference to “speaking” may not be quite accurate in the context of ASL. Consider the following substitute: “oral or signed expressive and receptive communication, reading and writing”. Apart from more appropriately covering ASL, the advantage to the substitute language is that “speaking” does not literally “capture” understanding what others are saying (e.g. “incoming” speech). Alternatively, the DOE could consult Sterck Administration for technical advice in the context of this section.

I recommend sharing the above observations with the DOE and SBE with a courtesy copy forwarded to Sterck and CODE.

11. DMMA Prop. Estate Recovery Regulation [14 DE Reg. 1193 (May 1, 2011)]

The Division of Medicaid & Medical Assistance proposes to adopt some discrete revisions to the Medicaid State Plan and add a new estate recovery regulation.

In a nutshell, federal legislation (§115 of MIPPA) was enacted to exempt Medicare cost sharing benefits (paid with Medicaid funds) from estate recovery. The rationale is as follows:

The intent of this provision is to encourage dual eligible beneficiaries to more fully utilize

Medicare cost sharing benefits available through the MSPs and allay concerns that Medicaid estate recovery will, after their death, lay claim to recover the value of these cost sharing benefits from their estates.

At 1193. The attached February 18, 2010 guidance provides additional background.

I did not identify any concerns with the proposed language which appears to conform to the CMS guidance. I recommend endorsement.

12. DMMA Prop Medicaid Payment to Entities Outside U.S. Reg. [14 DE Reg. 1191 (May 1, 2011)]

The Division of Medicaid & Medical Assistance proposes to adopt an amendment to the Medicaid State Plan. Based on a change in federal law, federal Medicaid funds cannot be paid to institutions or entities outside the United States. This includes pharmacy providers. CMS is requiring states to submit a conforming plan amendment by June 30, 2011.

I did not identify any concerns with the required plan amendment. I recommend endorsement.

13. DLTCRP Prop. Assisted Living Facility Regulation [14 DE Reg. 1190 (May 1, 2011)]

The Division of Long Term Care Residents Protection proposes to adopt some discrete amendments to §§3.0, 6.6, 8.15, and 9.4 - 9.9 of its assisted living facility standards.

The proposed changes are generally minor and not objectionable. However, I have the following observations on §6.6.

First, I recommend substituting “the resident will be adversely affected ” for “residents will be adversely affected”. The focus of the waiver is on the status of the individual resident who temporarily requires care otherwise excluded by §5.9. See references to “a current resident” in §6.1 and to “the resident” in §§6.3.2 and 6.4.3. Use of the plural “residents” arguably changes the focus to the health or safety of other residents.

Second, I recommend substituting “transfer or discharge” for “discharge”. The statute referenced in the regulation [Title 16 Del.C. §1121(18)] addresses both discharge and transfer. If a resident needs temporary acute care, the assisted living facility should have the option of transferring the resident to a hospital, holding the resident’s bed, and accepting the resident back when the resident no longer needs acute care. The statute uses the term “transfer”, not “discharge”, in this context. It is in the interests of the resident and public to facilitate assisted living resident return from temporary treatment in an acute care setting.

I suggest endorsement of the regulation subject to incorporating the two (2) recommended

amendments.

14. DLTCRP Prop. Skilled & Int. Nursing Facility Regulation [14 DE Reg. 1189 (May 1, 2011)]

The Division of Long Term Care Residents Protection proposes to adopt some discrete amendments to §6.9.2 of its nursing home standards in the context of tuberculosis testing. The changes were relatively minor and I did not identify any concerns.

I recommend endorsement.

15. DPH Prop. Pre-Hospital Advanced Health Care Directive Reg [14 DE Reg. 1195 (May 1, 2011)]

The Division of Public Health is proposing to adopt many revisions to its standards covering pre-hospital advanced health care directives.

The Division plans to develop a protocol and Web-published form in conjunction with stakeholders. EMS and other providers could readily identify the form. Although EMS providers would be required to honor the form, other providers “may choose to honor this form”. At 1197. The form would include not only the patient’s directive but also a physician “order” which DPH indicates is necessary for EMS personnel implementation if the form addresses end of life instructions. At 1196-1197. Subject to a “grandfather” provision, DPH expects the new “MOLST” forms to replace the current “PACD” forms. See §10.0.

I have the following observations.

First, I recommend amending the title, definition in §1.0, and any other references to “advanced” by substituting “advance”. See., e.g., Title 16 Del.C. §2501(a).

Second, in §1.0, the definitions of “Emergency Medical Services (EMS) Provider” and “Emergency Medical Services (EMS) Provider Agency” are repeated on pp. 1197 and 1198. The duplicate definitions on p. 1198 should be deleted.

Third, in §1.0, definition of “Health Care Decision”, Par. 2, some words appear to have been omitted. It reads: “Acceptance or refusal of diagnostic tests, surgical procedures, program of medication resuscitation; ...”

Fourth, in §3.3.1., DPH may wish to add a §3.3.1.2 to read as follows:

3.3.1.2. Permanent unconsciousness.

See Title 16 Del.C. §2501(r ).

Fifth, in §1.0, definition of “permanent unconsciousness”, DPH may wish to consider whether it should explicitly incorporate a requirement that the diagnosis be from a neurologist or neurosurgeon. See Title 16 Del.C. §2501® ).

Sixth, in §3.2, I recommend substituting “e.g.” for “i.e.” since the parenthetical references are not exclusive but examples of communication.

I recommend sharing the above observations and recommendations with the Division.

16. DSS Prop. Child Care Subsidy Child Support Coop. Reg. [14 DE Reg. 1203 (May 1, 2011)]

The Division of Social Services proposes to revise and consolidate its Child Care Subsidy program standards in the context of cooperation with the DCSE in pursuing child support.

My main concern with the proposal is the anemic approach to exempting caretakers from cooperating with the DCSE to secure child support. The Councils previously addressed this issue in the context of Food Supplement Program child support cooperation standards. See attached January 30 and April 11, 2008 memos to DSS and final regulation published at 11 DE Reg. 1243 (March 1, 2008).

The current regulation contains the following standards which are being deleted:

11003.4.1 ...Exceptions can be made when the caretaker demonstrates that pursuit of child support would create a danger to the caretaker or the child(ren).

§11003.4.4. It is the responsibility of the Division of Child Support Enforcement (DCSE) to determine if there is an acceptable reason for refusing to cooperate. ...

It would be preferable to include an embellished “good cause” for failure to cooperate section akin to that adopted in the above 2008 Food Supplement Program regulation [subsequently repealed by 13 DE Reg. 1336 (April 1, 2010)]. See attachment. The proposed regulation does not even mention the possibility of good cause for refusing to cooperate. It limits consideration (albeit by DCSE) of whether there is “good faith effort” to cooperate.

Moreover, DSS should advise beneficiaries of the right to invoke the “good cause” exemption. The 2008 regulation contained the following salutary recital:

DSS will tell applicants and recipients, at application and recertification, of the right to good cause as an exception to the cooperation requirement. DSS will also tell applicants and recipients about the reasons they have to claim good cause.

Finally, consistent with the Councils’ 2008 recommendations, it would be preferable for DSS to retain the ultimate authority to determine if “good cause” for failure to cooperate exists.

Compare the revised 2008 standard:

When DSCE does not determine there is good cause for refusing to cooperate, DSS will review the case to ensure that good cause does not exist before sanctioning the individual.

I recommend sharing the above information with the Division. The SCPD should also consider sharing its concerns with the VRTF and DV (domestic violence) agencies.

#### Attachments

8g:legreg/511bils  
F:pub/bjh/legis/2011/p&l511