

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative & Regulatory Initiatives

Date: June 13, 2011

I am providing my analysis of twenty-two (22) legislative and regulatory initiatives in anticipation of the June 16 meeting. Given time constraints, my commentary should be considered tentative and non-exhaustive. The SCPD may wish to secure advance approval of commentary on legislation since some bills are moving quickly through the legislative process.

1. DLTCRP Final Protection and Advocacy (P&A) Coop. Reg. [14 DE Reg. 1360 (June, 2011)]

The SCPD, GACEC, and DDC submitted comments on the proposed version of this regulation in April, 2011. The April 28, 2011 GACEC letter is attached for facilitated reference. The three councils strongly endorsed the regulation which requires licensed long-term care facilities to cooperate with DLP monitoring and complaint resolution activities in conformity with recently enacted Title 16 Del.C. §1119C.

The Division of Long Term Care Residents Protection has now acknowledged the endorsements and adopted the regulation with no further changes. I recommend no further action.

2. DSS Final Medicaid Alien Eligibility Regulation [14 DE Reg. 1361 (June 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2011. The Councils essentially noted that there were “pros and cons” to curtailing State funded benefits for legally residing non-citizens. The Councils observed that the proposal would limit such qualifying non-citizens to emergency services and labor and delivery only. The Councils recommended preservation of prenatal care.

The Division of Social Services has now adopted a final regulation with no changes. Consistent with the attached May 25, 2011 memo, DSS indicates that Medicaid coverage will be maintained for pregnant women lawfully residing in the United States pursuant to an option adopted by Delaware in 2010.

I recommend no further action.

3. DSS Final Medicaid LTC Resource Exclusion Regulation [14 DE Reg. 1364 (June 1, 2011)]

The SCPD and GACEC endorsed the proposed version of this regulation in April. The Division of Social Services has now acknowledged the endorsements and adopted a final regulation with no further changes.

I recommend no further action.

4. DSS Final TANF & RCA Resource Exclusion Regulation [14 DE Reg. 1366 (June 1, 2011)]

The SCPD and GACEC endorsed the proposed version of this regulation in April. The Division of Social Services has now acknowledged the endorsements and adopted a final regulation with no further changes.

I recommend no further action.

5. DSS Final Child Subsidy Program Special Needs Child Reg. [14 DE Reg. 1375 (June 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2011. Prior to finalization of commentary, the DSS Director accepted the SCPD's invitation to share additional perspective on the regulation at the Council's April 18 meeting. The SCPD's April 25, 2011 commentary is attached for facilitated reference. The Division of Social Services has now adopted a final regulation with some amendments.

First, the Councils noted that the regulatory text literally recited that special needs child eligibility was being eliminated. DSS clarified that this is not the intent of the regulation:

DSS is not eliminating the standards allowing children with special needs to be eligible for the Child Care Subsidy Program. The Division is revising its eligibility criteria so that a child with a special need must have a parent or caretaker with a DSS qualifying need before services will be approved. Children with special needs between the ages of 13 through 18 will continue to receive Special Needs services as long as their parent/caretaker has a DSS qualifying need. In addition, children with special needs under the age of 13 may be eligible if the parent/caretaker meets the financial and technical criteria.

At 1376. DSS then added a new "Children with Special Needs" section (at 1378) comprised of four (4) sentences to clarify the continued eligibility of such children for the Child Subsidy Program.

Second, the Councils observed that DSS was narrowing the "necessity of child care" standards for two-parent households. DSS acknowledged that intended result: "The policy is revised to clarify that, for two-parent families, both parents must have a need before child care will be approved." At 1376.

Third, the Council noted that the proposed regulation conflicted with several provisions in other DSS regulations. DSS responded that it would prospectively amend the conflicting regulations:

Thank you for your observation concerning the inconsistencies in the policy. We will make the appropriate changes to bring consistency to all cited policy sections as expeditiously as possible.

At 1376.

Fourth, the Councils noted that the proposed changes could conflict with block grant assurances. DSS responded as follows:

It is true the policy is partially funded by a federal block grant. However, the CCDF plan may be amended at any time with approval from the Administration of Children and Families. A general practice is to amend the plan within 90 days after policy has been approved.

At 1376.

Since the regulation is final, and DSS added a section confirming the continuing eligibility of special needs children for the Child Subsidy Program, I recommend either no further action or sending a “thank you” communication to DSS for considering the Councils’ comments.

6. DOE Final School Social Worker Regulation [14 DE Reg. 1357 (June 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2011. The SCPD endorsed the initiative. The GACEC endorsed the regulation while expressing a preference for elimination of a requirement of a one year internship in a school setting.

The Department of Education has now adopted a final regulation with no further changes. In response to the GACEC comment, the DOE responded as follows: “As this language has been within the regulation and the Department has not identified this as a concern, the Board chose to maintain the language.” I recommend no further action.

7. DOE Final Student Testing Program Regulation [14 DE Reg. 1340 (June 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2011. A copy of the GACEC’s April 20 letter is attached. The Department of Education has now adopted a final regulation with a few amendments.

First, the Councils observed that reasonable persons could differ on the merits of deleting readily-understandable performance level descriptions (very good; good; deficient; very deficient). The DOE effected no change based on the following rationale: “The Department believes the subjective nature of the descriptions proposed for deletion is better suited to other information documents provided to the public and parents/guardian.” At 1341.

Second, the Councils encouraged the DOE to pursue development of a writing assessment. The Department acknowledged the comment but did not share its intention to develop a writing assessment.

Third, the Councils questioned ambiguity in “cut points” for proficient levels of performance. The DOE responded that the Register or Regulations had not published some of the proposed amendments and noted that the “Council identified one of the areas that the Department had proposed but was not published.” At 1341. Section 2.5 was then amended in the final regulation to add the following sentence: “The cut points for Well Below the Performance Standard shall be determined by the Department of Education, with the consent of the State Board of Education.”

Fourth, the Councils questioned deletion of a requirement that parents be notified of performance results and consequences within 30 days of results. The DOE effected no change based on the following rationale:

There was a comment related to the deletion of the requirement that within 30 days of receiving student performance levels and diploma indices that the school district or charter school provide this information to the parent, guardian, or Relative Caregiver. This specific requirement was removed primarily because of the longer assessment windows and because the assessment is administered multiple times during the school year. Parents, guardians, and Relative Caregivers continue to be provided written reports on student performance. The student consequences for the 2010-2011 school year are suspended through the FY11 Budget Bill Epilogue.

At 1341.

Fifth, the Councils recommended inserting “or charter school” in §7.4.2.3. The DOE inserted the reference.

Sixth, the Councils questioned provisions related to special exemptions. The DOE effected no change based on the following rationale:

A comment was also received regarding special exemptions and student consequences. The provision was not changed since the 10th grade consequences as written are tied to receiving a diploma rather than summer school.

At 1341.

Since the regulation is final, and the DOE responded to all Council comments, I recommend no further action.

8. DOE Final School to Work Transition Teacher Regulation [14 DE Reg. 1355 (June 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in April, 2011. A copy of the GACEC's April 20 letter is attached for facilitated reference. The Councils endorsed the proposed standards subject to correcting two (2) minor grammatical and formatting errors. The Department has now adopted a final regulation with both corrections.

I recommend no further action.

9. DOE Prop. Procedural Safeguards (Discipline Notice) Reg. [14 DE Reg. 1295 (June 1, 2011)]

As background, the SCPD and GACEC commented on a set of Department of Education special education procedural safeguards regulations in January, 2011. The DOE issued final regulations in March while deferring an amendment on disciplinary notices pending further study [14 DE Reg. 1065 (March 1, 2011)(final)]. The Department is now issuing a regulation which addresses the Councils' concern about the time frame for parental notice of a disciplinary removal. The Councils' original commentary and DOE response are contained in the attached March 10, 2011 DOE letter to the GACEC, page 2. The Council shared the following perspective:

Section 3.1.3 shortens the time period for providing notice to a parent of a disciplinary removal constituting a change in placement from 3 school days before the public agency proposes to change the child's placement to 3 school days before the change in placement. The relevant federal regulation [34 C.F.R. 300.530(h)] contemplates provision of notice to the parent when the decision is made to make a removal. This equates more closely to the "proposal" date. Moreover, both the existing and proposed timeframes are ostensibly inconsistent with the "reasonable time" benchmark in 34 C.F.R. 300.503 and Title 14 Del.C. §3133. As a practical matter, if a school mails a notice to a parent, it could easily take a few days simply to reach the parent. In computing time, the court systems anticipate that mailing takes at least 3 days:

Additional time after service by mail. - Whenever a party has the right to or is required to do some act or take some proceeding within a prescribed period after being served and service is by mail, 3 days shall be added to the prescribed period.

Superior Court Civil Rule 6(e). If a child is to be excluded from his home school, the parent needs time to react (e.g. provide employer notice of need for vacation; consult attorney).

The current proposal would extend the time period for parental notice of a disciplinary removal from a minimum of 3 school days before actual change in placement to 5 school days before proposing the change in placement:

3.1.3. In cases involving a change in placement for a disciplinary removal, written notice shall be provided no less than ~~three (3)~~ five (5) school days before the public agency proposes to change the child's placement.

This represents a significant improvement in the timetable. I recommend that the Council(s)

share a preference for application of the standard ten (10) school day notice in all contexts, including discipline. See attached 14 DE Admin Code Part 926, §3.1. I recommend following this recital with the following: To the extent the DOE opts to adopt a different timeframe, the Council(s) support the proposed regulation which represents a significant improvement over the current standard.

10. DOE Prop. General Duties & Eligibility (Eligibility Age) Reg. [14 DE Reg. 1292 (June 1, 2011)]

As background, the SCPD and GACEC commented on a set of Department of Education special education “General Duties & Eligibility of Agencies” regulations in January, 2011. The Department of Education incorporated all of the Councils’ recommendations into the final regulation with the exception of recommended amendments to “age of eligibility” standards [14 DE Reg. 1057 (March 1, 2011)]. Consistent with the attached March 10, 2011 DOE letter, the DOE deferred the “age of eligibility” amendments until later:

GACEC Comment

This regulation does not address children served prior to age three consistent with Title 14 Del.C. §3101(1)(2). See, e.g., §§1.2 and 24.1. There are multiple categories of children who are eligible for a FAPE at birth. See, e.g., Title 14 Del.C. §§1703(l) and 14 DE Admin Code 925, §6.6.3 (autism); Title 14 Del.C. §1703(m) and 14 DE Admin Code 925, §6.8.4 (deaf-blind); and Title 31 Del.C. §2501 and 14 DE Admin Code 925, §6.17 (blind/visual impairment). The DOE may wish to revise references to include children eligible at birth.

DOE Response

The Department has taken the Council’s comments into consideration, and agrees revision to the regulation is warranted. However, the definition regarding age of eligibility in §1.2 and 24.1 were not identified for revision by the Department in the January 1st Register of Regulations. The Department agrees to pursue an amendment to the regulation in conjunction with the upcoming regulatory revisions for the needs based funding system.

The DOE is now publishing a proposed regulation which addresses students eligible prior to age 3. I did not identify any deficiencies in the proposed revisions to §§1.2 and 24.2. I recommend endorsement.

11. DOE Prop. Purposes & Def. (Mental Ret.; Hearing Imp.) Reg. [14 DE Reg. 1280 (June 1, 2011)]

As background, the SCPD and GACEC commented on a set of Department of Education special education “Purposes and Definitions” regulations in January, 2011. The DOE adopted a set of final regulations in March incorporating most of the Councils’ suggestions. However, it deferred action on references to “hearing impairment” and “mental retardation”. See attached March 10, 2011 DOE letter. The letter recites as follows:

GACEC Comment

In §3.0, there are references to “mental retardation” in the definition of “Child with a Disability”, definition of “Mental Retardation”, definition of “Multiple Disabilities”, and definition of “Specific Learning Disability”. The corresponding federal regulation [34 C.F.R. 300.8] still uses the term “mental retardation”. The pending “needs-based funding legislation (H.B. No. 1) uses the term “mental disability” in lieu of the term “mental retardation” at Section 41. Moreover, other DOE regulations use the term “mental disability”. See, e.g., 14 DE Admin Code 928, §3.2.3 and 3.3.1; and 14 DE Admin Code 925, §6.12. At a minimum, the DOE may wish to consider adding an italicized sentence or note to the end of the definition of “mental retardation” as follows: “The terms ‘mental disability’ or ‘intellectual disability’ are sometimes used as substitutes for the term “mental retardation” and shall be considered equivalent terms for purposes of this regulation.” Given the use of the term “mental disability” in the 925 and 928 regulations, the DOE could also consider inserting a discrete definition of the term.

DOE Response

The Department has taken the Council’s comments into consideration and declines to revise the regulation as suggested. The Department agrees to reconsider the Council’s comments concerning §922.3.0 with the upcoming regulatory revisions for the needs based funding system. The definition of “Child with a Disability” in 14 DE Admin Code §922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. As noted, the state regulation currently mirrors the federal regulation at 34 C.F.R. §300.8.

GACEC Comment

In §3.0, there are definitions of “Deafness” and Hearing Impairment”. However, the term “hard of hearing” is used in §3.0, definition of “Interpreting Services”. It is also used in Title 14 Del.C. §§3112 and 1331(c) as well as 14 DE Admin Code 1574 (Teacher of Students Who Are Deaf or Hard of Hearing). At a January 5 meeting involving the DOE’s special education director and counsel, consensus was reached on using the term “hard of hearing” in the context of a proposed regulation covering interpreter/tutors. The DOE should therefore consider adding an italicized sentence or note to the end of the definition of “hearing impairment” as follows: “The term ‘hard of hearing’ is sometimes used as a substitute for the term ‘hearing impairment’ and shall be considered an equivalent term for purposes of this regulation.”

DOE Response

The Department has taken the Council’s comments into consideration and declines to revise the regulation as suggested. The Department agrees to reconsider the Council’s comments concerning §922.3.0 with the upcoming regulatory revisions for the needs based funding system. The definition of “Deafness” and “Hearing Impairment” in 14 DE Admin Code §922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. In addition, the state regulation mirrors the federal regulation at 34 C.F.R.

§§300.8 (c) (3) and (5).

Apart from correction of a citation in the definition of “Services Plan” and minor revision to definition of “multiple disabilities”, the DOE is now proposing to insert the clarifying sentences proffered by the Council(s) into the definitions of “hearing impairment” and “mental retardation”.

I recommend endorsement of the “hearing impairment” sentence but reconsideration of the approach to the definition of “mental retardation”. By the time the regulation is final in September, 2011, the attached H.B. No. 91 should be in effect. H.B. No. 91 has already passed the House and has been released from committee in the Senate. The legislation discourages use of the term “retarded” and adoption of regulations containing pejorative references to persons with disabilities. Moreover, with enactment of S.B. No. 1, State education law has substituted “mental disability” for “mental retardation”. See, e.g., Title 14 Del.C. §1703(e). Finally, the DOE proposes conversion of “mental retardation” to “intellectual disability” in other regulations published this month. See 14 DE Reg. 1294 (June 1, 2011), revising 14 DE Admin Code 923. Consistent with the attached May 16, 2011 DOE report to the GACEC, the DOE clearly intends to adopt “intellectual disability” as the preferred language. I therefore recommend that the DOE substitute “Intellectual Disability” for “Mental Retardation” and insert the following revised clarifying sentence: “The terms “mental retardation” or “mental disability” are sometimes used as substitutes for the term “intellectual disability” and shall be considered equivalent terms for purposes of these regulations. I also recommend that substitution of “intellectual disability” for “mental retardation” in the definition of “Child with a Disability”, second line.

12. DOE Prop. Evaluation, Eligibility & IEP Reg. [14 DE Reg. 1294 (June 1, 2011)]

The Department of Education proposes to adopt several amendments to its standards covering special education evaluations, eligibility determinations, and IEPs. I have the following observations.

A. Sections 6.4, 6.12, 9.1.4, 11.1.6, and 12.11

The DOE is proposing to substitute “intellectual disability” for “mental disability” throughout these regulations. However, the proposed references sometimes fail to adopt “people-first” language. This will contravene attached H.B. No. 91 standards (lines 9-19) if the legislation is in effect by the expected date of publication of a final regulation, September 1, 2011. I recommend the following revised versions be adopted:

6.4. If, prior to the effective date...in Delaware as a student with a learning disability or mild intellectual disability...as required by §3.0.

6.12.4. The age of eligibility for children identified under Moderate Intellectual Disability and Severe Intellectual Disability categories shall be from the third birthday Children identified under the Mild Intellectual Disability category shall be eligible from their fourth birthday

12.11. However, a child may be determined ineligible for services under the learning disability or mild intellectual disability categories where there is insufficient data...

Parenthetically, there is a recurring conflict among the regulations which should be resolved. The recently revised Title 14 Del.C. §3101(1) clarifies that a student may be eligible until the end of the school year in which the student attains age 21. This standard is reflected in DOE regulations proposed this month. See 14 DE Reg. 1292 (June 1, 2011), amending 14 DE Admin Code 923, §1.2. In contrast, the Part 925 regulation, Part 6.0, contains many references limiting eligibility to “20 years, inclusive”. The DOE should consider adopting amendments to these sections without further publication as authorized by Title 29 Del.C. §10113(b)(5).

B. Section 6.5

Based on a March 16, 2011 meeting involving DLP, GACEC, and DOE representatives, the Department agreed to clarify that IEPs may include more than 1 disability classification. The DOE is now proposing to adopt a conforming revision to §6.5. The revision is acceptable and merits endorsement.

C. Section 21.1.5

The DOE is proposing to adopt a minor corrective amendment. I recommend endorsement.

D. Sections 20.2 and 22.2.3

The SCPD and GACEC commented on proposed revisions to the same regulation in January, 2011. At that time, the Councils shared several recommendations to preserve or strengthen transition planning. In the attached March 10, 2011 letter the DOE agreed to issue revised standards at a later date. The DOE is now proposing to adopt transition standards which conform to the Council(s) recommendations. These revision are acceptable and merit endorsement.

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

13. DOE Prop. Records Access Regulation [14 DE Reg. 1297 (June 1, 2011)]

The SCPD and GACEC commented on a set of proposed special education “monitoring, enforcement, and confidentiality of information” regulations in January, 2011. The Department later adopted a final regulation incorporating some Council recommendations. However, consistent with the attached March 10, 2011 letter, the DOE deferred action on a parental access to records standard:

GACEC Comment

Fourth, §17.1 could be improved to more closely align with the enabling statute. Title 14 Del.C. §3130(b) recites as follows:

(b) The parents shall have the right to obtain copies of all records, except the actual evaluation or examination instrument, described in subsection (a) of this section

either without charge, or, at the discretion of the district or state agency, at a fee not to exceed actual cost. Under no circumstances shall a fee be assessed which effectively prevents parents from exercising their right to inspect, review and copy records.

This statute does not create a presumption or norm of charging parents a fee for records. In contrast, the regulation creates such a presumption or norm. The regulation literally does not authorize an agency to provide records at no charge unless the charge would effectively prevent parents from exercising their right to inspect, review and copy records:

17.1. Each participating agency may charge a fee for copies of records that are made for parents under these regulations if the fee does not exceed the actual cost of the records, or effectively prevent the parents from exercising their right to inspect, review, and copy the records.

I recommend that the following be substituted to conform to the statute:

17.1. Each participating agency may either provide copies of records without charge or subject to a fee not to exceed actual costs. Under no circumstances shall a fee be assessed which effectively prevents parents from exercising their right to inspect, review and copy records.

DOE Response

Section 17.1 was not identified for revision by the Department in the January 1st Register of Regulations. The state regulation also mirrors the federal regulation at 34 C.F.R. §300.617.

The Department agrees, however, to propose a revision to §17.1 in response to the Council's comments with the upcoming revisions to the needs based funding system.

The Department is now proposing to adopt a conforming regulation which is equivalent to the provision proffered by the Councils. The final regulation would read as follows:

Each participating agency may either provide copies of records to parents under these regulations at no charge or subject to a fee not to exceed the actual cost of the records. Under no circumstances shall a fee be assessed which effectively prevents the parents from exercising their right to inspect, review and copy the records.

I recommend endorsement.

14. DOE Career & Technical Education Program Regulation [14 DE Reg. 1276 (June 1, 2011)]

The Department of Education proposes to adopt some discrete amendments to its Career and Technical Education Program standards. The rationale for the proposed changes is not provided.

The current standard requires courses to be offered “for a minimum of two consecutive periods each day or the equivalent, five days a week for two or more years.” The proposed revision would have the following effects: 1) eliminate the requirement that courses be provided “five days a week”; 2) eliminate the requirement that courses be provided “for two or more years”; 3) explicitly authorize substitution of “block scheduled” periods; and 4) reduce the percentage of courses that must meet the “minimum 2 consecutive period” schedule.

Since the regulation omits any discussion of the rationale for the changes, and the merits of the proposed changes are not readily apparent, I recommend issuing no comments on the initiative.

15. DOE Prop. Use & Administration of Funds Regulation [14 DE Reg. 1299 (June 1, 2011)]

The Department of Education proposes to amend its regulations to conform to statutory adoption of the “needs-based” funding system pursuant to recently enacted S.B. No. 1.

I have the following observations.

A. Section 1.3 contemplates assessment of the proper funding level solely based on the IEP. Title 14 Del.C. §1703(d)(7) recites as follows: “Counting students in preschool, basic, intensive, or complex shall be based on the Individual Education Program (IEP) and according to rules and rubrics described in the Department of Education regulations.” In theory, a student could be identified as IDEA-eligible on September 30 pending development of an IEP within 30 days. 14 DE Admin Code 925, §23. The DOE may wish to consider whether §1.3 adequately addresses this situation.

B. Section 3.2.2 contains the following categorical requirement: “All paraprofessionals shall work under the supervision of teachers.” This is ostensibly “overbroad”. While instructional paraeducators must work under the supervision of teachers, “service paraeducators” are not required to work under the supervision of teachers. See 14 DE Admin Code 1517. I assume they could work under the supervision of a psychologist, nurse, or other personnel in the discretion of the district or charter school. Moreover, a “bus aide” is ostensibly a “paraprofessional” but not a “paraeducator” [14 DE Admin Code 1517, §2.0, Definition of “Service Paraeducator”. Bus aides do not report to teachers. See 14 DE Admin Code 1105, §7.0. The DOE may wish to amend the categorical

reference for accuracy.

C. Section 3.2.5 could benefit from revision of the list of professional staff. The reference to “class aides” is somewhat limiting. Consider substituting “paraeducators” to comport with 14 DE Admin Code 1517. Moreover, while speech language pathologists are listed, occupational and physical therapists are omitted. The term “specialist” is adopted in Title 14 Del.C. §1321(e)(10) to cover speech, occupational, and physical therapists. Including a reference to “nurses” would also be appropriate. See Title 14 Del.C. §1703(d)(5)a3 and 1703(d)(6)a3. See also §3.3 of the proposed regulation.

D. Section 3.2.5.1 omits any requirement that public schools submit documentation to the DOE certifying that preschool units earned are used to provide services to children counted in those units. This is not consistent with statutory law. For example, Title 14 Del.C. §1703(d)(1)b recites as follows: “Districts must use all funds generated by preschool unit to support services for the students counted in the preschool unit.” Title 14 Del.C. §1321(e)(13) is consistent: “All earned units generated by students receiving special education services shall be used to support these students.”

E. Title 14 Del.C. §1703(d)(8) recites as follows: “At the completion of the IEP meeting, the team will discuss and review the needs based funding unit and assure in writing that adequate resources are available to implement the IEP.” This concept is entirely omitted from DOE regulations. It should be explicitly included in this regulation and/or other DOE regulations (e.g. 14 DE Admin Code 925). The designation of funding level should appear in the IEP itself. However, there is no reference in any regulation contemplating inclusion of the funding level and “assurance in writing that adequate resources are available to implement the IEP.” The DOE could consider some variation of the following standard:

Each district and charter school IEP team shall, at the completion of the IEP meeting, discuss and identify the needs based funding level, and complete an assurance statement confirming the availability of adequate resources to implement the IEP. The identification of the needs based funding level and assurance statement will be prominently included in the IEP document or IEP addendum form approved by the Department.

I recommend sharing the above observations and recommendations with the Department and SBE.

16. DSS Prop. Child Care Subsidy Program In-Home Care Reg. [14 DE Reg. 1304 (June 1, 2011)]

The Division of Social Services proposes to adopt a discrete amendment to its definition of “In-Home Care” within the context of its Child Care Subsidy Program standards. The amendment

clarifies that in-home care is limited to children residing in the household, ostensibly to obviate circumvention of day care licensing standards. I recommend endorsement.

17. S.B. No. 94 (DPH Cardiovascular Disease & Stroke Prevention Program)

This bill was introduced on May 31, 2011. As of June 11, it remained in the Senate Health & Social Services Committee. The bill is earmarked with an incomplete fiscal note.

The bill would establish a “Heart Disease and Stroke Prevention Program” within the Division of Public Health. The synopsis notes that cardiovascular disease is the leading cause of death and stroke is the third leading cause of death in Delaware. The “purposes” section (lines 10-34) is broad. The Division would engage in education activities, serve as a resource, facilitate access to prevention treatment, and seek public and private funding to implement the program. The Division would be mandated to compile statewide stroke data and include the data on its website (lines 35-45). The Department of Health and Social Services would be required to publish data on both heart disease and stroke incidence, morbidity, and mortality by census tract (lines 48-52). The Department would publish detailed maps on an annual basis incorporating such data (lines 53-56). The legislation would not be effective until the General Assembly appropriates sufficient funds for implementation (lines 63-64).

I have the following observations.

First, since heart disease and stroke are the first and third leading causes of death in the State, it makes sense to prioritize prevention and data collection in these contexts. Moreover, the legislation could serve as a template for similar legislation to address prevention and data collection for traumatic brain injury.

Second, since incidence rates for heart disease and stroke may not vary significantly every 12-month period, and the bill includes an incomplete fiscal note, I recommend reconsideration of the requirement that the “maps shall be created annually and will be updated every year” (lines 55-56). The bill does not otherwise require data collection and publication on an annual basis (lines 35-55). The analogous statute requiring publication of cancer data maps by census tract does not require annual updating. See attached Title 16 Del.C. §2005. See also the attached DPH “Analysis of Census Tracts with 2002-2006 Elevated All-Site Cancer Rates (August 25, 2010)”. The report compiles results over a 5-year period. See also Title 16 Del.C. §2003(b) which authorizes “periodic” compilation and dissemination of health reports. It may be possible to reduce the fiscal note by deleting the requirement of annual updating.

Third, there is a possible “oversight” in the bill. Although lines 47-56 require the annual publication of data for both heart disease and strokes, lines 35-45 only require DHSS to compile

data on strokes. It is possible that DHSS already compiles heart disease data but it is “odd” to establish a “Heart Disease and Stroke Prevention Program” (line 3) whose “purposes” section contemplates serving as a resource for information on both heart disease and stroke data (line 16), but which omits a substantive section covering compilation of heart disease data. The sponsors and/or DHSS may wish to assess whether this is an oversight.

I recommend endorsement subject to consideration of the above observations.

18. S.B. No. 102 (Long-term Care Ombudsman)

This bill was introduced on June 2, 2011. As of June 11, it remained in the Senate Health & Social Services Committee.

As background, the federal Older Americans Act provides funding to states to establish a long-term care ombudsman program either through a public or private agency. Many years ago, Delaware’s long-term care ombudsman program was operated as a non-profit, rather than a State agency. The current enabling statute establishes the program within the Division of Aging and Services for Persons with Physical Disabilities. See Title 16 Del.C. §1150. The legislation would establish the program within the Department of Health & Social Services rather than any particular division. According to the synopsis, the rationale is as follows: “This change is required by the Federal Administration on Aging to keep the Ombudsman program in a separate Division from the long term care facilities.”

This change is ostensibly prompted by the placement of State long-term care facilities under DSAAPD rather than DPH. Consistent with the attached March 3, 2011 DSAAPD presentation to the JFC, the DSAAPD assumed responsibility for State long-term care facilities effective January 1, 2011. Eighty-nine percent (89%) of DSAAPD staff are now employed in the State nursing homes. It is understandable that the federal Administration on Aging would identify a conflict of interest for the Ombudsman who is expected to independently monitor such facilities. The relevant federal statute (attached) prohibits or discourages conflicts of interest. See also the attached NCCNHR resource paper entitled “Conflict of Interest and the Long-term Care Ombudsman Program (July, 2009). According the attached DSAAPD JFC presentation, the Department plans to place the Ombudsman within the Office of the Secretary, reporting to Kathi Weiss, the DHSS Director of Constituent Relations.

The transfer of the Ombudsman from DSAAPD to the Office of the Secretary is an improvement. However, there is obviously potential for conflicts with placement in any part of DHSS. Moreover, the attached federal law requires the provision of “adequate legal counsel...without conflict of interest.” At a minimum, it would be preferable for DHSS to prepare an MOU or other document assuring the independence of the Ombudsman. A better alternative would be to amend the enabling statute by adding the following sentences to §1150:

The Department shall serve as the administering agency for the Office while ensuring its independence and freedom from conflicts of interest through regulation, interagency agreement, or other written assurances which shall include, without limitation, the availability of legal counsel without conflict of interest.

The latter provision could be addressed through an interagency agreement with the Attorney General's Office.

Alternatively, the Legislature could consider placement of the Ombudsman with a different State agency. For example, to obviate conflicts of interest, the Developmental Disabilities Council and State Council for Persons with Disabilities are placed administratively with the Department of Homeland Security. Cf. Title 29 Del.C. §8210.

I recommend sharing the above observations and alternatives with policymakers.

19. S.B. No. 78 (State Student Testing Program)

This bill was introduced on May 5, 2011. The 6-page bill amends many provisions in the Code to reflect the transition from the Delaware Student Testing Program ("DSTP") to the Delaware Comprehensive Assessment System ("DCAS"). The legislation passed the Senate on June 1. It passed the House on June 9. Given enactment of the bill, commentary is essentially moot. I recommend no action.

20. H.B. No. 107 (Educator Licensure)

This bill was introduced on May 10, 2011. As of June 11, it had been released from the House Education Committee and awaited further action in the House.

The synopsis provides the following overview of the intent:

The Act requires that all applicants for educator licensure in Delaware achieve a passing score on an examination of general knowledge such as PRAXIS I, before being issued a general license. The current law allows a grace period for the applicant to pass the examination after being issued an initial license. At present, all Delaware Teacher Preparation Programs require that prior to graduation students must pass PRAXIS I and, where applicable and available, pass PRAXIS II. This Act requires the ARTC ("alternative routes to certification") must fulfill the PRAXIS I testing requirements prior to Program participation. This Act does not impact licensure requirements for applicants in a vocational

trade and industry area (also referred to as Skilled and Technical Sciences teachers). This Act also permits recognition of alternative supervised practical experience in the licensure requirements for educator specialists whose preparation programs do not include the traditional student teaching component.

The House Education Committee report shares the following information:

Purpose of the Bill: This bill was brought forward by the Professional Standards Board and was written to improve children's education by having the best teachers possible. The act ends a grace period for applicants applying for an educator license by requiring that all applicants for educator licensure in Delaware achieve a passing score on the PRAXIS 1 before being issued an initial license. Currently, a teacher can wait until the second fiscal year of being hired to take the test.

Committee Findings: The committee found that only about 60 people would be affected by the component of the bill that mandates the PRAXIS 1 be taken before an initial license can be issued. The committee also found that 22 other states currently have these laws.

I have the following observations.

First, the definition of "specialist" at lines 3-6 could be confusing. Title 14 Del.C. §1321(e) defines "specialists" as including visiting teachers, driver education teachers, and speech, occupational, and physical therapists. Moreover, the exclusion of "administrator" (line 3) could be interpreted broadly or narrowly. The Professional Standards Board has a single standard for "administrator" which is neither a licensing or certification regulation (14 DE Admin Code 1590). Query whether a "special education director (14 DE Admin Code 1594) is an "administrator" and whether a "paraeducator" (14 DE Admin Code 1517) is a "specialist"?

Second, the bill does not appear to achieve what the synopsis indicates. For example, the synopsis recites as follows: "This Act also permits recognition of alternative supervised practical experience in the licensure requirements for educator specialists whose preparation programs do not include the traditional student teaching component." In contrast, the statute being amended ostensibly only applies to "teachers" who are excluded from the definition of "specialist" (line 3). For example, Title 14 Del.C. §1210(a) requires the DOE to issue a license based on receipt of a bachelor's degree, passing the Praxis 1, and completing a student teaching program. These provisions would not apply to a school social worker who must have a Master's degree but no teaching experience (14 DE Admin Code 1584); a school library media specialist who must have a Master's degree but no teaching experience (14 DE Admin Code 1580); or a school psychologist who must have a Master's degree but no teaching experience. The Councils would predictably be supportive of the concept of allowing "specialists" to demonstrate competency through completion

of “supervised practical experience.”

Third, reasonable persons could differ on the pros and cons of requiring applicants to pass the PRAXIS to qualify for a license versus passing the PRAXIS within 1 fiscal year [current Title 14 Del.C. §1210(b)]. The Code (Title 14 Del.C. §1201) currently contemplates operation of a “rigorous system” of educator licensure and certification. “Tightening” qualifications for educators would serve to implement that standard.

I recommend sharing the above observations with at least the sponsors and DOE.

21. SS No. 1 for S.B. No. 56 (CHIP Buy-in Program)

The original bill was introduced on April 12, 2011. The substitute was introduced on May 4. It passed the Senate on May 10 and was released by the assigned House committee on June 8. It awaits a vote in the House.

Delaware law authorizes the establishment of a CHIP Buy-in program to permit families with income in excess of 200% of the federal poverty level to purchase health care coverage for eligible children. This bill is designed to require insurers administering CHIP Buy-in programs in other states to offer similar programs in Delaware if they engage in specified transactions or affiliations with Delaware health service corporations. The June 8 House Committee report recites as follows:

The committee found that the bill will help cover children whose parents earn too much to get free health coverage for their children but otherwise cannot afford such coverage. The children would receive coverage through the buy-in programs that are already administered in other states by companies who also serve Delawareans.

The Insurance Commissioner is directed to not approve any” change of control affiliation” without assurances that the insurer would continue offering a CHIP Buy-in program with no premium increase (lines 15-20). I assume this is prophylactic legislation motivated by the much-publicized proposed affiliation between Blue Cross/Blue Shield of Delaware and Highmark. Delaware law regulates such conversions and affiliations to ensure consumer protection. See Title 29 Del.C. Ch. 25 and lines 4-5 of bill.

Since the legislation is designed to maintain access to affordable health care, I recommend endorsement.

22. S.B. No. 81 (Chancery Court Realty Sale Standards)

This bill was introduced on May 31, 2011. As of June 11 it remained in the Senate Banking Committee.

As background, guardians must generally seek Chancery Court approval of the sale of real estate of a ward. The current standard [Title 12 Del.C. §3951(b)] is as follows:

(b) Whenever the application for such a sale is made by a guardian, the Court shall appoint a licensed and certified pursuant to Delaware law appraiser of real estate to perform an appraisal of the real property to be sold. The appraiser appointed shall be independent of the parties to the sale and disinterested in the transaction. The appraised value shall be used by the Court to establish the lowest price at which the property may be offered for sale, except in cases where the Court determines, based on good cause shown, that another sale price is appropriate.

[emphasis supplied]

In a nutshell, the bill would substitute the following for the above underlined sentence: “The appraised value shall be used by the Court as a guideline when considering an application for the sale of real estate by a guardian of a disabled person and the Court shall determine in its discretion, based on the appraisal and all other relevant circumstances, whether the requested sale is in the best interest of the disabled person.”

Based on an exchange of emails, the bill has the support of the Court of Chancery. Some members of the Bar are supportive since, in the current real estate market, it is difficult to sell real estate for the appraised value and producing an expert witness to support a sale for less than the appraised value can be expensive. However, DHSS expressed some misgivings about the impact of the bill on the Medicaid program. I suspect the concern is that Medicaid may have a lien on the real property for the costs of State -paid long-term care which could be undercut by sale of the real estate at a low price. See Title 25 Del.C. Ch. 50. I understand that DHSS would prefer a new appraisal if a sale is proposed for less than 2/3 of the original appraisal.

The latest draft being circulated would result in the following statute:

(b) Whenever application for such a sale is made by a guardian, the Court shall appoint an appraiser of real estate, licensed and certified pursuant to Delaware law, to perform an appraisal of the real property to be sold. The appraiser appointed shall be independent of the parties to the sale and disinterested in the transaction. The appraised value shall be used by

the Court as a guideline, in a manner set forth more fully in the Rules of the Court, when considering an application for the sale of real estate by a guardian of a disabled person and the Court shall determine in its discretion based on the appraisal and all other relevant circumstances, whether the requested sale is in the best interest of the disabled person.

[emphasis supplied] This approach would result in adoption of implementing standards by Court rule rather than statutory law which is more cumbersome to revise.

I recommend endorsement of the concept of authorizing greater Court discretion and adoption of a “best interest” standard by statute. Selling real estate in the current market is highly problematic and “overreliance” on a traditional appraisal approach is not realistic. Parenthetically, the Councils may wish to note that the reference to “disabled person”, which is based on the statutory definition [Title 12 Del.C. §3901(a)], should be reconsidered at some point based on standards reflected in H.B. No. 91.

Attachments

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