

MEMORANDUM

To: SCPD Policy & Law Committee  
From: Brian J. Hartman  
Re: Recent Legislative & Regulatory Initiatives  
Date: July 12, 2011

I am providing my analysis of fifteen (15) legislative and regulatory initiatives in anticipation of the July 14 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DLTCRP Final Skilled & Intermediate Nursing Facility Reg. [15 DE Reg. 79 (July 1, 2011)]

The SCPD and GACEC endorsed the proposed version of this regulation in May, 2011. The initiative modified standards related to TB testing for employees and newly admitted patients.

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

2. DLTCRP Final Assisted Living Facility Reg. [15 DE Reg. 81 (July 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2011. A copy of the May 25 GACEC letter is attached for facilitated reference.

First, the Councils recommended an amendment to a waiver standard to clarify the focus on the health and safety of the individual qualifying for the waiver as juxtaposed to the health and safety of other residents. The Division of Long Term Care Residents Protection agreed and substituted the proposed revision verbatim.

Second, the Councils recommended an amendment to clarify that residents in assisted living facilities can be “transferred” to acute care facilities without being “discharged”. The Division agreed and adopted a conforming amendment.

Since the Division adopted both of the Councils’ suggestions, I recommend either no action or sending a “thank you” email or letter.

3. DMMA Final Medicaid Payment to Entities Outside U.S. Reg. [15 DE Reg. 82 (July 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2011. The Councils endorsed the initiative prompted by a change in federal law barring Medicaid payments to entities located outside the United States.

The Division of Medicaid & Medical Assistance has now acknowledged the endorsements and adopted a final regulation conforming to the proposed version. No further action is warranted.

4. DMMA Final Estate Recovery Regulation [15 DE Reg. 84 (July 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2011. The Councils endorsed the initiative prompted by a change in federal law exempting Medicare cost sharing benefits (paid with Medicaid funds) from estate recovery.

The Division of Medicaid & Medical Assistance has now acknowledged the endorsements and adopted a final regulation conforming to the proposed version. I recommend no further action.

5. DSS Final Child Subsidy Program Child Support Coop. Reg. [15 DE Reg. 92 (July 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2011. The Councils encouraged the Division of Social Services to include explicit provisions to protect participants reluctant to cooperate with pursuit of child support based on fear of domestic violence/retribution. A copy of the May 25 GACEC letter is attached for facilitated reference.

The Division has now adopted a final regulation with no changes. In a nutshell, DSS defers to the Division of Child Support Enforcement to address lack of cooperation based on fear of domestic violence/retribution:

Since 2008, DSS and specifically the Division of Child Support Enforcement (DCSE) has taken into consideration that domestic violence is a major barrier to cooperating with child support and has taken into account the wider criteria which establishes valid reasons for exemptions from cooperation. DCSE is the division charged with making determinations of what criteria is adequate to determine whether a care taker or child may be in danger from the absent parent. They have certain rules that must be adhered to prior to letting DSS know if enough information or cooperation has been collected. No change to the regulation was made as a result of this comment.

At 94.

The “weaknesses” in this approach are twofold.

First, the DSS regulation imposes mandatory sanctions on beneficiaries who are “guilty”

of undefined DCSE cooperation requirements:

11003.4. Failure of a parent/caretaker to cooperate with and provide information to the DCSE will result in the case being sanctioned. This means the child care case will close until the applicant or recipient has complied with all DCSE requirements.

Second, the “DCSE requirements” are not regulatory and unknowable. The DHSS website contains zero DCSE regulations and the DCSE website contains no readily discoverable child support cooperation standards. This system is affirmatively misleading to applicants for the child subsidy program since the only published regulation mandates full cooperation with DCSE with no disclosure of exemption based on fear of domestic violence. Victims of domestic violence will be deterred from pursuing subsidized child care based on the belief that they will have to affirmatively pursue child support through DCSE with no disclosure of eligibility for exemption.

I recommend that the Councils share this concern with the DHSS Secretary with a courtesy copy to the Victim Rights Task Force.

#### 6. DSS Final Fair Hearing Practices & Procedures Reg. [15 DE Reg. 86 (July 1, 2011)]

The SCPD and GACEC submitted twenty-two (22) comments on the proposed version of this regulation in January, 2011. A copy of the Register except (pp. 87-92) with Council comments and DSS responses is attached for facilitated reference. The Division of Social Services has now adopted a final regulation incorporating some amendments prompted by the commentary. Of the twenty-two (22) comments, conforming amendments were effected based on the following eleven (11) comments: 3, 4, 5, 6, 7, 8, 15, 18, 19, 20, and 22. In addition DSS agreed to address the following three (3) comments through non-regulatory procedural documents and protocols: 11, 16, and 21.

I continue to question several results. The following are examples:

13. Beneficiaries will not be aware that they can access actual DSS or MCO case files as juxtaposed to documents submitted in advance constituting part of the actual hearing “record”.

14. It is confusing to explicitly recite that “(t)he State Agency” prepares the hearing summary when private managed care organizations (MCO’s) prepare the hearing summary in cases involving disputes with the MCOs.

22. There are still no published regulations defining the process for residents of licensed long-term care facilities to contest discharge or transfer.

Since the regulation is final, and DSS responded to each Council comment, I recommend

no further action with one exception, i.e., asking whether DHSS intends to publish DLTCRP regulations defining procedures to receive and process resident challenges to discharge/transfer from licensed long-term care facilities.

7. DOE Final Unit Count Regulation [15 DE Reg. 68 (July 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2011. The Councils endorsed the initiative with no suggested amendments.

The Department of Education has now acknowledged the endorsements and adopted a final regulation conforming to the proposed version. I recommend no further action.

8. DOE Final H.S. Graduation & Diploma Regulation [15 DE Reg. 62 (July 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2011. A copy of the May 18 GACEC letter is attached for facilitated reference. The Department of Education has now adopted a final regulation incorporating all revisions suggested by the Councils.

First, the Councils recommended a minor change to §3.1. The revision was adopted.

Second, the Councils recommended a similar minor change to §2.1. The revision was adopted.

Third, the Councils suggested amendments to §§3.2.2 and 4.2.2 to more accurately address ASL. The Department agreed and incorporated a slight variation of the substitute language recommended by the Councils.

Since the regulation is final, and the DOE adopted revisions conforming to the Councils' comments, I recommend either no further action or issuance of a "thank you" email or letter.

9. DOE Final Professional Development Standards [15 DE Reg. 77 (July 1, 2011)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2011. A copy of the May 18 GACEC letter is attached for facilitated reference. The Professional Standards Board and DOE only acknowledged receipt of the GACEC comments. At 77. The Board and DOE have now adopted a final regulation with no changes based on the following cryptic rationale:

Written comments were received from the Governor's Advisory Council for Exceptional Citizens who expressed concern about the lack of explicit charter school references and the use of the terms "adult" and "educator". The Professional Standards Board took notice of these concerns, but determined that a change was not necessary.

At 77.

The most significant concern shared by the Councils was the application of the regulation to charter schools. In pertinent part, the Councils shared the following information:

*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.*

Since the regulation remains unclear, and the DOE did not address the concern in its response to Council comments I recommend that the Councils send a letter requesting explicit clarification of whether the regulation applies to charter schools.

10. DOE Prop. New Teacher Hiring Date Reporting Reg. [15 DE Reg. 43 (July 1, 2011)]

This regulation is being proposed in implementation of S.B. No. 16 which was enacted in April, 2011. S.B. No. 16 was based on the unanimous recommendations of a Teacher Hiring Task Force which concluded that more than 60% of new teachers hired by districts were hired in August or later. This placed Delaware districts at a competitive disadvantage versus neighboring states and adversely affected opportunities for new teacher training and orientation. The legislation guarantees districts the equivalent of 98% of an estimated unit count conducted in April even if the actual September 30 unit count is lower. The new system is designed to encourage districts to issue offers of employment in the spring and early summer. The Department of Education was directed to issue regulations within 120 days of enactment “to ensure that hiring information collected and reported by school districts uses uniform terminology.”

The proposed regulation is relatively short and straightforward. Districts will be required to submit reports to the DOE by December 1 of each year in a DOE-approved format which

incorporates uniform terms. I did identify any concerns. I recommend endorsement.

11. DMMA Prop. Diamond State Health Plan Plus Waiver Amend. [15 DE Reg. 45 (July 1, 2011)]

The Division of Medicaid & Medical Assistance proposes to revamp the Diamond State Health Plan to integrate the current E&D Medicaid waiver into the existing managed care delivery system. A Powerpoint presentation and timeline are attached. DMMA plans to achieve implementation by April, 2012. The notice in the July Register of Regulations recites that the waiver amendment application will be available on its Website on July 15, 2011 with comments due by July 31. When I questioned the short timeframe, the Department responded with the attached June 30 email extending the deadline for comments to August 15, 2011. The waiver amendment had not appeared on the Website as of July 11 so review will have to be deferred until August.

12. DMMA Prop. State Residency Regulation [15 DE Reg. 46 (July 1, 2011)]

The Division of Medicaid and Medical Assistance proposes to amend its residency standards in three contexts.

First, in the general residency section, DMMA proposes to consider a person institutionalized in Delaware a non-resident under the following circumstances:

- e. Exception when an institutionalized individual intends to return home to their principal place of residence located in another state, the individual will not be considered a Delaware resident since their intent is not to remain in Delaware.

There are multiple problems with this approach.

A. If the institutionalized individual has a guardian or has an I.Q. of 49 or less, federal regulations render the individual's "intent" immaterial. See 42 C.F.R. §435.403( c).

B. Likewise, the "next of kin" arguably determines place of abode/residency for individuals residing in licensed long-term care facilities who are determined incompetent by the attending physician. See Title 16 Del.C. §§1121(34) and 1122.

C. If the individual intends to return to a former residence on a temporary basis, Delaware residency should be unaffected. See 42 C.F.R. §435.403(j)(3) which recites as follows:

- (3) The agency may not deny or terminate a resident's Medicaid eligibility because of that person's temporary absence from the State if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid.

For example, if an individual's elderly parent developed a terminal illness and the individual returns to the out-of-state family home to provide temporary care, the proposed DMMA standard

would compel a finding of non-Delaware residency contrary to federal law.

Second, in the context of long-term care, DMMA is narrowing the resource exclusion for a principal place of residence if the individual intends to return home. See proposed §§20310.1.1 and 20320.4.1. The current regulations would exclude the residence even if out-of-state. The proposed regulations would only permit a resource exclusion if the residence is in Delaware. I could not locate any federal law or regulation which requires Delaware to only exclude a Delaware principal place of residence. The analogous SSI resource regulation [20 C.F.R. §416.1212] excludes the value of the principal place of residence regardless of location. Moreover, it is anomalous to exclude an out-of-state principal residence if used by a spouse or dependent relative. See §20310.1.2. Finally, the following illustration would appear to undermine the validity of the proposed regulation:

A 20 year old with a principal place of residence in Elkton, Maryland suffers a traumatic brain injury in a motorcycle accident. He undergoes rehabilitation in Delaware with expectation of recovery and returning home in 1 year and is appointed a Delaware guardian prior to placement in an institution. The 20 year-old's state of residence is that of the guardian by operation of law pursuant to 42 C.F.R. §435.403(h)(4)(I). The 20 year old is a Delaware resident for Medicaid purposes but his Maryland principal place of residence should be an exempt resource.

I recommend sharing the above observations with the Division.

13. Delaware Board of Nursing Prop. Board of Nursing Regulation [15 E Reg. 53 (July 1, 2011)]

The Delaware Board of Nursing proposes to adopt extensive changes to its regulations in the following contexts: §1.0 General Provisions; §2.0 Nursing Education Programs; §3.0 Nursing Refresher Courses; §4.0 Alternative Supervised Practice Plans for Inactive Nurses; §6.0 Licensure Procedures and Requirements; §7.0 Standards of Nursing Practice; §9.0 Mandatory Continuing Education; §10.0 Disciplinary Proceedings; and §14.0 Compact Rules. Given the 80+ pages of proposed standards, I only skimmed the regulation.

I have the following observations.

First, the education standards for LPN and RN programs include clinical practice in both physical and mental health care, across the age spectrum, covering acute and chronic conditions, and in “diverse settings”. See §§2.4.1.7.1 and 2.4.1.7.2. This merits endorsement.

Second, clinical facilities in which a student can practice include inpatient, outpatient, home health, hospice, day care centers, schools, senior centers, and correctional settings. See 2.4.1.9.4.1.1.3. This merits endorsement.

Third, in contrast to the above flexibility in educational program settings, a supervised practice plan for inactive nurses if no refresher course is available is limited to “no less than a skilled nursing facility”. See §4.3.1. I recommend reconsideration of this narrow approach.

Fourth, the standards require nurses to practice without discrimination based on disability and to respect the dignity and rights of patients regardless of social or economic status, personal attributes or nature of health problems. See §§7.3.1.7 and 7.3.1.8. This merits endorsement.

Fifth, exclusions from the health care acts delegation statute remain unchanged from 2005. See §7.8. This is welcome.

Sixth, §10.4.2.4 defines unprofessional conduct as including falsification of an agency “document” rather than an agency “record”. It may be preferable to retain the term “record” since it would ostensibly include electronic or computer-based entries while a reference to “documents” appears limited to entries on a physical paper.

Seventh, the list of offenses deemed “substantially related to the practice of nursing” (§15.0) spans 8 pages and is manifestly overbroad. It includes many esoteric offenses and unrelated offenses such as environmental misdemeanors [e.g. hunting from farm machinery (§15.8.63)]; and minor violations with a maximum penalty of \$100 or less [e.g. licensee failure to post conspicuously a sign warning against drinking during pregnancy (§15.8.54)]. Consistent with the attached Philadelphia Inquirer article, one in four Americans has some criminal record and governments are taking remedial action to not “overreact” in undermining the employability of such individuals. In Delaware, the June 8 enactment of S.B. No. 59, authorizing the Board of Nursing to restore licenses of persons with criminal convictions after five years, sends a “similar message” discouraging sweeping, inflexible exclusions from licensure.

I recommend sharing most of the above observations with the Board.

#### 14. H.B. No. 202 (Special License Plates & Placards)

This bill was introduced on June 21, 2011. It passed the House on June 28 and awaits action in the Senate. The attached House Report recites as follows:

**Purpose of the Bill:** The purpose of the bill is to reduce the instances of people fraudulently using handicapped placards in their vehicles. The bill makes it a offense to use a handicapped placard issued to another person unless that person is also in the vehicle. The bill creates a mandatory \$100 fine for violators and \$200 fine for subsequent offenses.

**Committee Findings:** The committee found that the bill would face enforcement issues when passed, but these issues were not detrimental enough to the bill’s purpose to prevent it from moving forward. The members viewed the provisions favorably.

Under current law, an owner of a vehicle can obtain a special license plate if either the owner or a household member has a qualifying disability [Title 21 Del.C. §2134(a)]. This allows the vehicle with the special plate to park in accessible spaces if the person with the qualifying disability is either the driver or passenger:



(3) The person for whom a special license plate is issued under this section or under a similar statute of any other state or country must be the driver of or a passenger in the vehicle bearing the special plate whenever the vehicle parks in a parking space or zone restricted for use only by vehicles with a special license plate or placard for persons with disabilities which limit or impair their ability to walk.

Title 21 Del.C. §2134(f)(3).

Similarly, anyone can apply for a placard if the individual is 85 or older, has a qualifying disability, or there is a household member with a qualifying disability [Title 21 Del.C. §2135(a)]. Moreover, “an organization that regularly in its course of business transports persons with disabilities” may apply for a placard. Id. Individuals are issued a blue (permanent) or red (temporary) placard [Title 21 Del.C. §2135(e)]. Organizations are issued a green placard. Id. A vehicle with a blue or red placard may park in accessible spaces if the person with the qualifying disability is either the driver or passenger [Title 21 Del.C. §2135(f)(3)].

The bill amends the existing attached enforcement statute [Title 21 Del.C. §4183(d)] by characterizing the following as an offense subject to fine:

(5) Using a license plate or parking placard that has been issued to another person pursuant to §2134 or §2135 of this title, unless that person is present in the vehicle.

While well-intentioned, there are multiple problems with this approach.

First, a special license plate can be issued to the owner of a vehicle with a household member who has a qualifying disability. The license is issued to the owner, not the household member. However, under the bill, unless the owner is in the vehicle, anyone driving or parking the vehicle with the household member with qualifying disability is guilty of an offense. For example, the father of a child with quadriplegia is issued a special license plate. The father asks his adult son or daughter to drive the specially plated car with the child with quadriplegia to a doctor’s office where the car is parked in an accessible space. The adult son or daughter is guilty of an offense under the bill since the plate was issued to the father and he is not present in the vehicle.

Second, the term “using a license plate” is overbroad. The owner of a specially plated vehicle should be able to lend the vehicle to others, so long as they do not park in an accessible space. The bill ostensibly makes it illegal to drive the vehicle unless the owner issued the plate is in the vehicle. If a father (owner) is issued a special plate and lends the vehicle to an adult son or daughter to perform an errand, the son or daughter is guilty of an offense for simply driving the vehicle.

Third, the application of the bill to organizations with a green placard is unclear. Such placards are not person-specific. Suppose a driver of such a vehicle parks in an accessible space with no passenger for pick up or drop off. The driver is only authorized to park in an accessible

space if “a person who is entitled to obtain a permanent or temporary placard is a passenger” [Title 21 Del.C. §4183(a)(2)]. Common sense suggests that an organizational driver parking in an accessible space without any passenger has committed an offense. However, the bill would not literally cover this scenario.

Fourth, the placard statute [Title 21 Del.C. §2135] appears to authorize issuance of a permit to an “applicant” based on the disability of a household member [Title 21 Del.C. §2135(b)]. Thus, a father could apply for a placard based on the disability of a minor child with quadriplegia. If another person (e.g. adult son or daughter) drove the child with quadriplegia to a doctor’s office using the placard to park in an accessible space, an offense has been committed. The placard was issued to the father who is not in the vehicle.

I recommend sharing the above observations with DMV and the sponsors.

15. H.B. No. 211 (Vo-Tech Admission)

This bill was introduced on June 22, 2011. As of June 30, it remained in the House Education Committee.

The attached current enabling statute for Vo-Tech districts [Title 14 Del.C. §205] does not establish admission or eligibility standards. This bill would require Vo-Tech districts schools with more applicants than can be accommodated to determine admission by lottery:

The sole criteria for admission to vocational-technical schools shall be residency in the district and eligibility to attend public school. In the event that the number of students wishing to attend a vocational school exceeds the school’s capacity, admission shall be by lottery.

One benchmark for SCPD, GACEC, and DDC assessment of admission standards is the current and historical enrollment of students with disabilities. Based on the attached current statistics, there were 17,951 special education students and 111,452 regular education students in Delaware public schools in the 2010-2011 school year, i.e. special education students comprised 13.87% of overall public school enrollment. Enrollment in Vo-Tech districts was below this benchmark:

District	Regular Education Enrollment	Special Education Enrollment	Percentage of Special Education Enrollment
NCC Vo-Tech	4,199	524	11.09%
Kent (Polytech)	1,082	103	8.69%
Sussex Tech	1,180	115	8.88%

Historical enrollment statistics may also be instructive. Twenty years ago, NCC Vo-tech had a 15.15% special education enrollment, 4% higher than the current special education

enrollment. See attached June 11, 1991 GACEC minutes.

In 2005, the GACEC solicited Vo-Tech information and statistics through the attached March 22, 2005 correspondence. This resulted in receipt of the attached responses from NCC and Kent (Polytech). The acceptance rate for special education students was significantly less than the acceptance rate for regular education students:

District	Percentage of Regular Ed 8 <sup>th</sup> Grade Applicants Accepted	Percentage of Special Ed 8 <sup>th</sup> Grade Applicants Accepted
NCC -Vo-Tech	56% (848/1517)	42% (139/329)
Kent (Polytech)	82% (306/372)	60% (31/52)

I lack the current Vo-Tech admission standards. The 2005 NCC Vo-tech response contained the following description of admission criteria:

#### Admissions Criteria, NCC Vo-Tech High Schools

Criteria for student selection include attendance, grades, the application essay, and comments from school personnel. The capacity of various career programs and classroom size also determines the number of students accepted for enrollment. District staff attempt to place each student in the school and career area of first preference. However, if the number of applicants exceeds the available space, students may be provided their second or third preference. Students not initially enrolled may be given the opportunity to attend as openings occur.

Based on the above information, it would appear that a lottery approach to admission would likely result in higher special education enrollment in Vo-Tech schools. On an intuitive level, using attendance and an essay as tools to screen eligibility may “disadvantage” special education students.

Since the Legislature is out of session until January, 2012, I recommend that the GACEC solicit supplemental current information. At a minimum, the GACEC could solicit the admission criteria, percentage of 8<sup>th</sup> grade regular education applicants accepted, and percentage of special education applicants accepted for NCC, Kent (Polytech), and Sussex districts. The perspective of the Vo-Tech districts on H.B. No. 211 could also be solicited and the sponsors of the bill notified of the GACEC’s research. Finally, the GACEC should obtain clarification of whether students (at least in NCC) apply for district admission or school admission. The bill contemplates a lottery approach based on applications to a particular school but the NCC approach may be to apply for

district admission with preferences to attend particular schools (e.g. Hodgson; Delcastle). An amendment to the bill may be appropriate.

Parenthetically, a statutory lottery approach may be subject to undermining. For example, while the charter school enabling law [Title 14 Del.C. §506(a)(3)] contemplates a lottery approach in the event of “over-enrollment”, the Wilmington Charter School has ostensibly circumvented that expectation for years. See attached March 28, 2006 GACEC letter; March 19, 2006 Valerie Woodruff article; and April 10, 2006 Attorney General opinion. The attached current DOE statistics confirm the continued enrollment of zero (0) special education students in the Wilmington Charter School.

## Attachments

8g:legreg/711bils  
F:pub/bjh/legis/2011p&l/711bils