MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory Initiatives

Date: September 6, 2011

I am providing my analysis of fifteen (15) regulatory initiatives in anticipation of the 9- 8 meeting. Given time constraints, my commentary should be considered tentative and non-exhaustive. I understand that the Committee will also be reviewing my previously-submitted 9- 2 critique of the proposed DSHP+ program at the 9- 8 meeting.

1. DOE Final General Duties & Eligibility Regulation [15 DE Reg. 351 (9-1-11)]

The SCPD and GACEC commented on the proposed version of this regulation in June, 2011. A copy of the June 29 SCPD letter is attached for facilitated reference. The Councils endorsed the proposed regulation which conformed to Council commentary submitted to the DOE in connection with a comprehensive set of proposed regulations in January, 2011. The Department of Education has now acknowledged the endorsements and adopted a final regulation which is identical to the proposed version.

I recommend no further action.

2. DOE Final Procedural Safeguards Regulation [15 DE Reg. 354 (9-1-11)]

The SCPD and GACEC commented on the proposed version of this regulation in June, 2011. A copy of the June 29 SCPD letter is attached for facilitated reference.

In a nutshell, the Councils objected to adoption of a very short notice period to advise parents of a proposed disciplinary removal of a student in commenting on a comprehensive set of proposed regulations in March. The DOE was somewhat persuaded by the commentary, deferred action on this particular regulation in May, and issued a revised proposed regulation in June. The Councils expressed a preference for an even longer notice period but otherwise supported the revision as a significant improvement. The DOE has now acknowledged the commentary and adopted a final regulation which is identical to the proposed version.

I recommend no further action.

3. DOE Final Records Access Regulation [15 DE Reg. 355 (9-1-11)]

The SCPD and GACEC commented on the proposed version of this regulation in June. A copy of the June 29 SCPD letter is attached for facilitated reference.

In a nutshell, in commenting on a comprehensive proposed regulation in January, the Councils recommended adoption of a revised standard addressing fees for provision of records to parents. In adopting final regulations in March, the DOE noted that it agreed with the concern and then issued a revised proposed regulation in June. The revised language was very close to that suggested by the Councils which prompted endorsement. The DOE has now adopted a final regulation identical to the proposed version.

I recommend no further changes.

4. DOE Final Evaluation, Eligibility & IEP Regulation [15 DE Reg. 352 (9-1-11)]

The SCPD and GACEC recommended several amendments to the proposed version of this regulation in June, 2011. A copy of the June 29 SCPD letter is attached for facilitated reference.

First, the Councils suggested substituting "intellectual disability" for "mental retardation" in three (3) sections. The DOE agreed and effected the revisions.

Second, the Council identified a conflict between the proposed regulation and the Delaware Code in the eligibility cut-off date for special education students. The DOE agreed and effected the revisions.

Third, the Councils endorsed a previously-negotiated standard clarifying that an IEP may contain more than one (1) disability classification. The DOE adopted the new standard in the final regulation.

Fourth, the Councils endorsed a minor corrective amendment which the DOE has now incorporated in the final regulation.

Fifth, the Councils endorsed a revision to transition standards prompted by Council commentary on a January, 2011 DOE proposed regulation. The DOE has now incorporated the endorsed standard in the final regulation.

Since the DOE adopted a final regulation which conforms to all Council commentary, I recommend no further action.

5. DOE Final Use & Administration of Funds Regulation [15 DE Reg. 356 (9-1-11)]

The SCPD and GACEC commented on the proposed version of this regulation in June. The Department of Education has now adopted a final regulation incorporating two (2) amendments prompted by the commentary. An August 15 DOE letter which summarizes the comments and the DOE's response is attached.

First, the Councils suggested that the DOE consider whether sole reliance on the IEP to determine funding level might be problematic in the context of newly identified students lacking an IEP. The DOE declined to effect an amendment.

Second, the Councils noted a conflict among DOE regulations with a recital that all paraprofessionals work under the supervision of teachers. The DOE declined to address the concern based on the rationale that the problematic section had not been earmarked for revision.

Third, the Councils recommended revision of the list of professional staff. The DOE effected no revision.

Fourth, the Council objected to the omission of a requirement that funds earned from preschool units be used to provide services to the children counted in the units. The DOE responded that the omission was an error which has been corrected.

Fifth, the Councils objected to omission of the following statutory requirement in the regulation: "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." The Councils provided a recommended 2-sentence standard which included incorporation of the identification of funding level and assurance statement in the IEP itself. In response, the DOE adopted a "minimalist" approach by simply parroting the statutory sentence with no further regulatory guidance. The DOE did include the following recital: "The DOE has provided technical assistance to districts and charter schools at state leadership meetings and regional county meetings concerning 14 Del.C. 1703(d)(8) and its specific requirements."

I recommend that the GACEC obtain the technical assistance and training materials used by the DOE in the latter context to assess the substance of the guidance. If it is anemic, or if the guidance reflects a grudging, minimalist view of the statutory requirement, the Councils may wish to consider legislative options. If each district adopts a different approach to the identification and assurance documents, it may be difficult to monitor and audit compliance.

6 <u>DOE Final Purposes & Definitions Regulation [15 DE Reg. 339 (9-1-11)]</u>

The SCPD and GACEC commented on the proposed version of this regulation in June. The DOE was essentially issuing a regulation with some discrete provisions prompted by Council commentary on a comprehensive regulatory initiative in January, 2011. The Council commentary and DOE response is summarized in the attached August 15, 2011 DOE letter to the SCPD.

The Councils essentially issued two (2) recommendations.

First, the Councils suggested inserting a comment in the definition of "hearing impairment". The DOE agreed and incorporated the comment in the proposed regulation which has now been finalized.

Second, the Councils suggested substitution of the term "intellectual disability" for "mental retardation" along with an explanatory note. The DOE agreed, effected the substitution, and inserted the explanatory note.

Since the final regulation conforms to the Councils' commentary, I recommend no further action.

7. DOE Final New Teacher Hiring Date Reporting Reg. [15 De Reg. 337 (9-1-11)]

The SCPD and GACEC commented on the proposed version of this regulation in July. The July 25 GACEC letter is attached for facilitated reference. The Councils endorsed the proposed standards which implemented a recent statutory change promoting the hiring of new teachers earlier in the calendar year.

The DOE has now acknowledged the endorsements and adopted a conforming final regulation. I recommend no further action.

8. DMMA Final State Residency Regulation [15 DE Reg. 362 (9-1-11)]

The SCPD and GACEC commented on the proposed version of this regulation in July, 2011. The Division of Medicaid & Medical Assistance has now adopted a final regulation with one (1) amendment and some clarifying guidance.

First, the Councils described three (3) contexts in which a DMMA residency standard would be inconsistent with federal law. In response, DMMA amended the standard and issued some clarifying guidance that the standard would not apply to an individual with a guardian, an I.Q. of 49 or less, or temporarily absent from the State. Unfortunately, the amendment literally makes no sense since the "capability" of indicating intent to return or not return to an out-of-state residence is not the equivalent of indicating an intent to return.

Second, the Councils objected to a new standard characterizing an out-of-state residence as a countable resource regardless of an individual's intent, appointment of a guardian, or other circumstances. DMMA declined to specifically address the illustrations proffered by the Councils and effected no change.

I continue to believe that the DMMA approach is "suspect" under federal law. Solicitation of an expert opinion from NHeLP or other source might be helpful in assessing "next steps".

9. DMMA Prop. Hospice Care Services for Children Under 21 Reg. [15 DE Reg. 272 (9-1-11)]

As background, there was an historical anomaly in provision of hospice care to individuals under age 21 under both the Medicaid and CHIP programs. If parents elected to obtain hospice services for a child, the child became categorically ineligible for "cure-directed" treatment. The federal Patient Protection and Affordable Health Care Act removed this "one or the other" approach so that a parent does not have to forego all curative treatment as a condition of a child receiving hospice services. See attached NHPCO press release, "Guidance on New Hospice Benefits for Terminally Ill Children Hailed by Hospice and Palliative Care Community (9/13/10); Healthwatch article, "Medicaid Agency Issues Guidance on New Hospice Benefits for Terminally Ill Children (9/9/10); and CMS Guidance, "Hospice Care for Children in Medicaid and CHIP" (9/9/10).

DMMA is now implementing the new law through a Medicaid State Plan amendment. DMMA has also agreed to implement the new law in the CHIP program.

I recommend endorsement.

10. DLTCRP Prop. CNA Alzheimer's & Dementia Training [15 DE Reg. 269 (9- 1, 2011)]

H.B. No. 159, signed by the Governor on April 27, 2010, requires DHSS to adopt regulations which require dementia specific training each year for persons "certified" or partially funded by the State to provide healthcare services to persons with Alzheimer's or dementia. The Division of Long-term Care Residents Protection is issuing implementing regulations.

The standards will require CNAs to receive 6 hours of dementia training. The Division is also adding a provision not required by H.B. No. 159 requiring CNAs to receive 2 hours of patient abuse prevention training annually.

The proposed standards are succinct and appropriate. I recommend endorsement.

11. DMMA Prop. Provider Preventable Conditions Non-payment Reg. [15 DE Reg. 276 (9-1-11)]

As background, CMS issued the attached final regulation in June, 2011 implementing Section 2702 of the federal Patient Protection and Affordable Care Act. The CMS regulation bars Medicaid payments to hospitals for services rendered related to provider-preventable conditions. Such conditions include foreign objects retained after surgery, blood transfusions with incompatible blood, falls and trauma occurring in the hospital, etc. See attached 76 Fed Reg. 32816, 32817 (June 6, 2011). The bar on payment does not apply to services related to pre-existing conditions, i.e., "present on admission" ("POA"). Id. Moreover, covered hospitals must report all provider preventable conditions. Finally, States have some discretion to apply the regulation to non-hospital providers. At 32823.

DMMA is now proposing to implement the new CMS regulation through a Medicaid State Plan amendment. The brief amendment essentially adopts the CMS requirements. Hospitals will be required to report provider preventable conditions to DMMA and be barred from submitting claims for services related to such conditions.

I have two (2) observations on the proposed DMMA Plan amendment.

First, the CMS regulation (§447.26 (c)(5), reproduced at 76 Fed. Reg. 32837), contains the following provision:

> A State plan must ensure that non-payment for provider-preventable conditions does not prevent access to services for Medicaid beneficiaries.

One concern addressed by this provision is that hospitals anticipating Medicaid non-payment to remediate a provider-preventable condition may opt to decline to treat the condition. This could be very harmful to Medicaid beneficiaries who have developed a provider-preventable condition. A related concern would be imposing the costs of treatment of the provider-preventable condition
on the Medicaid beneficiary through direct billing. It would be preferable for DMMA to include the following clarification in the regulation:

> Providers identifying a provider-preventable condition whose costs of treatment are barred under this section shall not deny medically necessary treatment to the affected patient nor attempt to impose financial liability on the affected patient.

Second, CMS expects states to include "provider-preventable condition" payment and reporting standards in MCO contracts. At 32828-32829. DMMA may wish to review the DSHP and DSHP Plus proposed contract provisions to ensure incorporation of the reporting and billing standards.

I recommend sharing the above observations with DMMA.

12. <u>DMMA Prop. Tobacco Cessation Services Regulation [15 DE Reg. 278 (9-1-11)]</u>

As background, CMS recently issued the attached June 24, 2011 guidance implementing Section 4107 of the Patient Protection and Affordable Care Act. States are now required to provide for Medicaid coverage of comprehensive tobacco cessation services to pregnant women which includes the prenatal period through the postpartum period. The new standards are based on the attached recommendations included in a 2008 Public Health Service (PHS) Guideline.

DMMA proposes to implement this requirement through Medicaid Plan amendments. DHSS already offers a "Delaware Tobacco Quitline" through the Division of Public Health. Delaware will now be able to claim a 50% Federal Medicaid match for this service. Otherwise, the Plan amendments authorize Medicaid coverage of tobacco dependence assessment, face-to-face counseling, and pharmacotherapy such as nicotine patches.

I have the following observations.

First, DMMA interprets the CMA guidance as requiring coverage of tobacco cessation services for children. At 279. The Plan amendments do not address children. It would be preferable for DMMA to clarify whether tobacco cessation services for children is already covered

in the State Plan or to develop a conforming State Plan amendment.

Second, the Plan amendments require reimbursable counseling to be "face-to-face". I suspect that "in-person" counseling is generally more effective than telephone-based counseling. Cf. the attached 2008 Guideline at 166. However, the Guideline also describes a study involving an initial in-person counseling session followed by 12 telephone counseling sessions. DMMA may wish to assess whether covering telephone counseling sessions may be appropriate. For example, there may be pregnant women who would prefer telephone-based counseling since it obviates transportation time and inconvenience (e.g. finding babysitter for existing children). Perhaps DMMA could consider a lower reimbursement rate for telephone-based counseling to provide an incentive for "in-person" counseling while not precluding reimbursement for telephone-based counseling altogether.

I recommend sharing the above observations with DMMA.

13. DOE Proposed School Bus Regulation [15 DE Reg. 268 (9-1-11)]

The Department of Education maintains different regulatory standards for school buses based on the date when placed in service. See attachment. The last set of regulations covered buses placed in service after January 1, 2007. The DOE is now proposing standards applicable to buses placed in service on or after January 1, 2012.

The new standards are generally based on the National School Transportation Specifications and Procedures (NSTSP) adopted in May, 2010. The proposed regulatory standards are generally, but not always, equivalent to the 2007 regulatory standards.

I have the following observations.

First, while DelDOT has made all of its fixed route buses wheelchair accessible, the DOE approach is different. Lifts are only required on buses to be used for transportation of children who use a wheelchair or other mobile positioning device. See Section 2.0. This may result in a fleet of vehicles which is predominantly inaccessible to students with mobility impairments and undermine prospects for "mainstreaming" of such students in the transportation context. The GACEC may wish to solicit information on the percentage of buses in the public school system with wheelchair lifts. Since the State pays 90% of the costs of new buses (Regulatory Impact Criteria, Par. 10), it should have information on the percentage of buses purchased with lifts.

Second, the standard bus criteria (§1.17.8.2) include a provision requiring an emergency release switch to operate the 24"-wide entrance door (§1.17.3) in the absence of power. This would allow ambulatory students to exit the bus via 3 steps (§1.58.1) if the bus lost power (e.g. during an emergency). There are also some provisions contemplating the installation of an emergency roof hatch, emergency door, and removable emergency window on standard buses (§1.21; §2.2). I could not locate any provision addressing whether the wheelchair lift on a specially equipped bus could be lowered without power in the event of an emergency. In a related context, the 2007 standards (§3.7) allowed installation of a ramp as follows: "A readily accessible ramp may be installed for

emergency exit use." In contrast, the 2012 standards generally bar ramps: "Buses shall not be equipped with vehicle ramps (§2.1.7). The GACEC may wish to inquire whether a lift can be lowered if there is an absence of power to facilitate evacuation of the bus equivalent to that available to ambulatory students. The Councils may also wish to question the new bar on installation of a ramp to facilitate emergency evacuation.

Third, some provisions merit endorsement, including a requirement of a communication device (§1.13); installation of handrails (§1.30); absence of unnecessary projections to minimize the potential for injury (§1.39.1); and an electrical child reminder system to assist the driver in checking for students left on board the bus (§1.54.1.11).

Fourth, I was somewhat surprised that the air conditioning system in the bus under the 2012 and 2007 standards only requires cooling of the bus to 80 degrees (§1.32.2). This is ostensibly a somewhat weak standard especially since the compliance test is conducted on an empty bus without the heat produced by the passengers. This could prove problematic for students with respiratory conditions or asthma.

I recommend submission of commentary consistent with the above observations.

14. DMV Prop. Driver License & Identification Card Regulation [15 DE Reg. 323 (9/1/11)]

The Division of Motor Vehicles is proposing to adopt a regulation covering driver licenses and identification cards. The regulation replaces an interim set of standards.

The DMV standards contain stricter standards for procurement of a Delaware compliant license or identification card based on citizenship/immigration status and acceptable proof of identity and residency. A Delaware "compliant" license or identification card meets federal standards and bears a security marker reflecting the card's level of compliance. In contrast, a "non-compliant" license allows an individual to drive a vehicle but contains a recital that it is not acceptable for official purposes. At §3.0. Temporary licenses and identification cards may be issued if there is conflicting documentation or some question of qualifications.

I did not identify any concerns with the standards. There is some potential for future concern if Delaware follows other states in enacting voter-identification legislation. Adopting stricter standards for "official" licenses could then have the effect of reducing the number of "qualified" voters. See attached articles. In the meantime, I recommend endorsement since the standards appear to relatively straightforward and have already been implemented.

15. DOE Prepublication Teacher of Students with Autism or Severe Disabilities Reg. (9/1/11)

The Department of Education's Professional Standards Board recently submitted the attached "prepublication" draft regulation to the GACEC for review and comment.

I have the following observations.

First, in §4.1.3.1.4 the word "and" should not be deleted.
Second, §1.0 recites as follows:

> This certification is required for all teachers whose primary assignment is providing services to students with autism or severe disabilities within the Delaware public school system.

In turn, the definition of "severe disabilities" is as follows:

> "Severe Developmental Disabilities" means a cognitive or physical impairment that impacts multiple domains of functioning, such as learning, independent living, receptive language, expressive language, self-care, self-direction, or mobility.

There are multiple problems with this approach.

A. Although I suspect that the authors intend to only require this certification for teachers of students with autism spectrum disorders, pervasive developmental disorders, and intellectual disabilities, the definition of "severe developmental disabilities" has much wider application. For example, it would ostensibly cover most Deaf students since they have a "physical impairment that impacts...learning, receptive language and expressive language." It would ostensibly cover a bright student with quadriplegia or paraplegia since the student has a physical impairment impacting learning, self-care, and mobility. Many students qualifying under the "other health impairment", "traumatic brain injury" and other categories "fit" the definition of "severe developmental disabilities" requiring their teachers to meet this certification as juxtaposed to the general special education teacher certification, 14 DE Admin Code Part 1571.

B. The courses listed within the regulation (§§4.1.3.1 and 4.2) focus on autism, autism spectrum disorders, and functional communication. These courses would be of limited value in teaching many students covered by the definition of "severe developmental disabilities". For example, they would be little assistance in instructing a bright student with quadriplegia or a bright student with an LD classification based on an expressive and receptive language processing disorder. Moreover, none of the courses address "mobility", one of the identified limitations in the definition of "severe developmental disabilities".

In sum, the definition of "severe developmental disabilities" merits revision.

Third, the proposed regulation would "dilute" the current standard a bit by "counting" undergraduate courses in the identified contexts rather than only graduate level courses. See §4.1.3.1. Reasonable persons may differ on merits of this change. I view the change as relatively benign.

I did not identify any other concerns. I recommend sharing the above observations with the DOE.

Attachments

8g:legreg/911bils
F:pub/bjh/legis/2011p&l/911bils