

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Legislative, Regulatory, & Policy Initiatives

Date: January 9, 2012

I am providing my analysis of eighteen (18) legislative, regulatory, and policy initiatives in anticipation of the January 12, 2012 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DSS Final Food Supp. Non-Household Income/Resource Reg. [15 DE Reg. 1027 (1/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2011. A copy of the GACEC's October 28 letter is attached for facilitated reference. The Division of Social Services has now adopted a final regulation which favorably addresses the Councils' comments.

First, the Councils recommended a change in the title to the regulation. DSS agreed with the suggestion and deleted the reference to "Felony Drug Conviction or".

Second, the Councils noted that another DSS regulation will require amendment based on passage of S.B. No. 12. DSS agreed and noted that "(t)he correction will be made." At p. 1028.

Finally, the Councils observed that the balance of the regulation conformed to the corresponding federal regulation. DSS acknowledged the observation.

Since the regulation is final, and DSS agreed to implement both Council recommendations, no further action is warranted.

2. DSS Final Food Supp. Program Benefit Restoration Reg. [15 DE Reg. 1025 (1/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in October. A copy of the October 28, 2011 GACEC letter is attached for facilitated reference. The Division of Social Services has now adopted a final regulation incorporating an amendment prompted by the commentary.

In a nutshell, the Councils noted that the proposed regulation omitted a provision in the corresponding federal regulation covering “changes in household composition”. DSS agreed with the Council’s recommendation to incorporate a conforming standard in the State regulation resulting in a new Par. 4.

Since the regulation is final, and DSS adopted an amendment consistent with the Councils’ only recommendation, no further action is warranted.

3. DSS Final Food Supp. Program Electronic Benefit Transfer Reg. [15 DE Reg. 1030 (1/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2011. A copy of the GACEC’s October 28 letter is attached for facilitated reference. The Division of Social Services has now adopted a final regulation which incorporates several amendments prompted by the commentary.

First, the Councils recommended adoption of the term “supplier” to resolve the confusing use of inconsistent references to stores, retailers, farmers’ markets, soup kitchens, etc. DSS declined to effect an amendment.

Second, the Councils recommend substituting “farmer’s” for “farmers”. DSS corrected the reference.

Third, the Councils recommended substituting “DSS will emphasize” for “Emphasize”. DSS changed the reference to “DHSS will emphasize.” DSS also substituted “DHSS” for “DSS” in several other sections.

Fourth, the Councils recommended a change in a “notice” section to ensure that households would be alerted to a 10-day deadline to request provisional credit. DSS adopted suggested language verbatim.

Fifth, the Councils recommended substituting “DSS must provide” for “Regulations say we”. DSS changed the reference to “DHSS must provide”.

Sixth, the Councils recommended substituting “it was” for “they were”. DSS effected the correction.

Seventh, the Councils identified a missing period. DSS inserted the period.

Eighth, the Councils recommended substituting “benefits” for “coupons”. DSS agreed and inserted “EBT benefits”.

Ninth, the Councils identified multiple outdated or pejorative disability-related references. DSS agreed and adopted five (5) amendments. For example, it substituted “persons with physical or mental disabilities” for “physically or mentally handicapped”. The definition of “homeless” was amended to substitute “who would otherwise reside in an institution” for “intended to be institutionalized”.

Since the regulation is final, and DSS effected amendments based on nine of the ten Council recommendations, no further action is warranted.

4. DSS Final TANF Renewal Regulation [15 DE Reg. 1045 (1/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2011. A copy of the GACEC’s October 28 letter is attached for facilitated reference. The Division of Social Services has now adopted a final regulation which incorporates one (1) amendment prompted by the commentary.

First, the Councils recommended consideration of inclusion of a reference to the eligibility of felons for Food Supplement Program benefits. DSS declined to include the reference based on the belief that it could result in confusion.

Second, the Councils recommended updating references to the Department of Public Instruction and Department of Public Safety (which no longer exist) and securing an updated MOU. DSS responded that it will “explore securing a new MOU”.

Third, the Councils noted that Attachment “D” contained outdated and incomplete references to the Delaware Code. DSS agreed to correct the Attachment to include a current version of the Delaware Code.

Since the regulation is final, and DSS responded to each comment, I recommend no further action.

5. DMMA Final LTC Partnership Program Regulation [15 DE Reg. 1014 (1/1/12)]

The DDC, SCPD, and GACEC commented on the proposed version of this regulation in November, 2011. A copy of the November 18, 2011 SCPD letter (minus appendix) is included for facilitated reference.

In a nutshell, the Councils endorsed the concept underlying the regulation since it would benefit purchasers of long-term care insurance policies seeking secondary Medicaid coverage. However, the Councils outlined extensive concerns with the interaction of Medicaid and LTC

policies. Since LTC insurance policies typically have a higher threshold for qualifying deficits, the Councils stressed the need to disallow participation of insurers with policies with restrictive eligibility standards. Otherwise, DMMA will not realize expected cost savings and insurers will essentially “soak off” on Medicaid. Likewise, policies which provide only ½ benefits for home health services would discourage community-based care and impose disproportionate costs on Medicaid.

DMMA responded that it will continue its collaboration with the Department of Insurance and will consider the commentary when implementing the QLTCIP program.

I recommend no further action.

6. DMMA Final Medicaid Alien Emergency, Labor & Delivery Reg. [15 DE Reg. 1023 (1/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2011. A copy of the November 18, 2011 SCPD memo is attached for facilitated reference.

In a nutshell, the Councils observed that DMMA had adopted a regulation in June, 2011 limiting services eligibility of qualifying legally residing non-citizens to “emergency services and labor and delivery only”. In commenting on the November regulation, the Councils endorsed the concept of extending Medicaid “labor and delivery” coverage to include not only hospitals but birthing centers as well. However, the Councils also recommended that DMMA similarly extend “emergency services” to be provided not only in hospital emergency rooms but in free-standing sites (e.g. Newark Emergency Center) as well. DMMA declined to follow the recommendation. It differentiates between “emergency care” and “urgent care” and recites that the latter excludes “life threatening” conditions. The differentiation is not entirely accurate. For example, the regulatory definition of “emergency” includes more than life-threatening conditions. It covers conditions which threaten serious long lasting disability.

I recommend either no action or sending a follow-up letter to the DHSS Secretary noting that DHSS may be exclusively opting for high cost services by adopting a no-exceptions standard requiring “emergency” services to be provided in a hospital.

7. DMMA Final Payment Error Rate Measurement Regulation [15 DE Reg. 1020 (1/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in October. A copy of the October 28, 2011 SCPD memo is attached for facilitated reference.

The Councils endorsed the concept of the regulation while sharing a single concern, i.e., the revision was somewhat vague. The Councils noted that “perhaps CMS has provided states with a

somewhat vague template and DMMA is simply adopting that template.”

DMMA has now adopted a final regulation with no changes. It notes that the text is based on a CMS template.

I recommend no further action.

8. DLTCRP Final CNA Alzheimer’s & Dementia Training Reg. [15 DE Reg. 1010 (1/1/12)]

The SCPD and GACEC commented on the proposed version of this regulation in September. A copy of the September 28, 2011 GACEC letter is attached for facilitated reference.

The Councils endorsed the regulation with no suggested revisions. The Division of Long-term Care Residents Protection has now acknowledged the endorsements and adopted a final regulation with no additional changes.

No further action is warranted.

9. DMMA Prop. Medicaid Child Dental Services Reimbursement Reg. [15 DE Reg. 968 (1/1/12)]

The Division of Medicaid And Medical Assistance proposes to revise its reimbursement standards for dentists providing services to children under the Medicaid State Plan. I contacted DMMA and informally obtained some additional perspective on the rationale for the proposal.

As background, the Division’s current standard reimburses dentists for most treatment at 85% of billed charges. There are a few problems with this approach. First, CMS disfavors such payment methodology which is not based on a uniform fee schedule. Second, inequities arise when DMMA pays different amounts to providers for the same service. Third, DMMA is interested in cost containment which is better secured through use of a fee schedule than a percentage of dentists’ typical billing.

The new reimbursement standard would be the lower of: 1) the provider’s billed amount that represents their usual and customary charge; or 2) the Delaware maximum allowed amount based on a fee schedule. At p. 970. DMMA worked with representatives of the Dental Society to arrive at an approach to the fee schedule which is based on a National Dental Advisory Service (NDAS) survey. DMMA plans to use the latest survey results (not yet released) to create the final schedule which will be effective in April, 2012.

I have the following observations.

First, the current “85% of charges” approach is actually more generous than the State VCAP

dental reimbursement rate of “80% of U&C charges” adopted in November, 2011. [15 DE Reg. 176 (August 1, 2011) (proposed); 15 DE Reg. 678 (November 1, 2011) (final)].

Second, use of a uniform fee schedule is ostensibly a preferable approach to dental services than use of an individual provider’s usual and customary billing. The Councils previously endorsed a similar approach to renal services in which DMMA historically had a similar “85% of charges” standard. DMMA changed its approach and adopted a cap of “100% of the Medicare rate” for uniformity. See 13 DE Reg. 375 (September 1, 2009) (proposed); and 13 DE Reg. 658 (November 1, 2009) (final). DMMA’s rationale for that change was as follows:

Currently, DMMA pays providers based on their U&C charges for each procedure and different providers can charge different rates for the same service. The purpose of this methodology is to promote predictability of payments, equity and consistency of those payments among providers while maintaining access to quality care.

13 DE Reg. 375, 376 (September 1, 2009)

Third, based on a comparison of actual Medicaid dental expenditures versus expenditures that would have resulted from use of the 2011 NDAS survey results, the overall differences are not dramatic. The biggest reduction would be in the context of orthodontic care. In some cases (e.g. diagnostic and restorative services), the reimbursement rate would actually be somewhat higher.

Fourth, the prospect for the State not revising the rates on an annual basis is obviated by the inclusion of the following sentence in the standards: “Delaware will rebase its dental fee schedule rates each time the NDAS publishes a new survey.”

Fifth, the regulation does authorize DMMA to adjust the maximum allowable amount if “not appropriate for the service provided”. It would be preferable for DMMA to clarify that this could result in enhanced reimbursement for services rendered to particularly “involved” individuals. For example, providers such as Practice Without Pressure may need to conduct some acclimation sessions with individuals with severe disabilities which might not be fairly compensated through a standard fee schedule.

I recommend endorsement subject to requesting clarification consistent with the “Fifth” paragraph.

10. Prop. Fair Hearing Notice & Response to Fair Hearing Request Reg. [15 DE Reg. 971 (1/1/12)]

The Division of Social Services proposes to adopt some discrete amendments to its fair hearing regulations. It is interesting to note that the main changes are based on Council recommendations in January, 2011 which were rejected by DSS at that time.

I have the following observations.

First, in the “notice” context, the Councils’ recommendation and DSS response were as

follows:

Thirteenth, in §5311, Par. 3, it would be preferable to include a disclosure of right to access “case records” apart from the documents the agency or MCO has submitted as part of the Fair Hearing summary (the “record”). For example, an agency or MCO may not submit documents which undermine its position to the hearing officer but they may be in its case records. Access is a beneficiary’s right and should be disclosed in the hearing notice. See §5403, Par. 2.

Agency Response: The 6 items in §5311 make up the hearing notice. Item 6 currently reads: “Explain that the appellant or representative may examine the record prior to or during the hearing.” This statement encompasses your request.

15 DE Reg. 87, 89 (July 1, 2011) [emphasis supplied]

The new proposal mirrors the Councils’ view:

Text was modified to clarify that the word “record” refers to the “case record”. Case record is meant to include the totality of all files and records on the client. This clarification was made to ensure that clients can access their full case record and not just the materials that were submitted with the fair hearing summary.

15 DE Reg. 971, 972 (January 1, 2012) [emphasis supplied]

The change is an improvement. However, beneficiaries may still be confused by the term “case record” and believe that it only refers to documents submitted to the hearing officer. The federal regulation uses the term “case file” as distinct from “all documents and records to be used by the agency at the hearing”. See attached 45 C.F.R. §205.10(a)(13). The term “record” is a term of art which generally refers to materials actually submitted to a tribunal. Indeed, Section 5000 contains the following definition of “hearing record”:

Hearing Record - Is a verbatim transcript of all evidence and other material introduced at the hearing, the hearing decision, and all other correspondence and other documents which are admitted as evidence or otherwise included for the hearing record by the hearing officer.

At a minimum, I recommend that DSS use the federal term “case file” which would include both “paper” and “computer” records. See attached broad Wikipedia definition of “file”. DSS should then include a definition of “case file” in Section 5000. It could be as simple as the following:

Case File - Is comprised of the totality of all files and records on a client within the custody, control, or possession of an agency in electronic, paper, or other format.

Second, in the context of fair hearing summaries, the Councils’ recommendation and DSS response were as follows:

Fourteenth, in §5312, the introduction recites that the policy applies to decisions made by DSS or DMMA. There is no comparable provision covering MCOs which also issue appealable decisions. The regulation covers “Medicaid Managed Care Cases” [§5304, Par. 1B; §5401, Par. C.6]. We believe the superseded version of §5312 contained references such as “if completed by DSS” because it contemplated MCOs responding to hearing requests in addition to the State. The new version solely contemplates “State Agency” preparation of the hearing summary, etc. which has not been the historic practice for appeals from MCO decisions. MCOs have traditionally been required to prepare their own Fair Hearing Summaries.

Agency Response: We believe the revised language in §5312 more accurately captures the requirements for responding to Fair Hearing requests. In fact, the previous language, “If completed by DSS..” was specific to that Division. DMMA’s procedures were never specified. Because the MCOs are a contractual arm of DMMA for purposes of service delivery, we believe the reference to DMMA inherently includes the requirements for MCO Fair Hearing responsibilities.

15 DE Reg. 87, 89 (July 1, 2011) [emphasis supplied]

The new proposal mirrors the Councils’ view: “Within 5 working days of receipt of a fair hearing, the agency (or MCO or other Contractor) will prepare a hearing summary and submit the summary to the Hearing Office.” This is an improvement over the current regulation. My only recommendation would be to delete the word “State” from the heading to §5312, Par. 1. It would then read “(t)he ~~State~~-Agency Prepares a Hearing Summary”. The regulations contain many references to “agency” as juxtaposed to “State agency”. See, e.g., Section 5000, definition of State Presenter, as an “agency employee”; and definition of Hearing Summary” as document prepared by “an agency”

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

11. DOE Proposed Child Nutrition Regulation [15 DE Reg. 958 (1/1/12)]

The Department of Education proposes to repeal its child nutrition regulation in its entirety. Its rationale is as follows:

The rationale for repealing this regulation is as follows: 1) all districts and schools that participate in the U.S. Department of Agriculture food programs follow the federal requirements of those programs and are monitored based on those regulations; and 2) all schools and districts are required to follow any state laws related to the procurement and offering of foods and beverages. The Department provides technical assistance and training to schools and districts on the federal and state requirements as needed and/or as requested.

At p. 958.

I recommend strong opposition to the proposed regulation which represents a manifest abdication of responsibility for the health of public school students.

First, consistent with the attachments, Delaware received an “F” in the last School Food Report Card from the Center for Science in the Public Interest. According to the attached December 18, 2007 News Journal article, the reason for the “F” was that Delaware had no standards of its own. Instead of being embarrassed by the grade, the Department is now proposing to eliminate the few standards it had. The attached Report Card report contains summaries of standards adopted in many other states. I also attach a set of model school policies which go well beyond the USDA standards for school breakfast and lunch programs. For example, consider the value of the following policies:

Fundraising Activities. To support children’s health and school nutrition education efforts, school fundraising activities will not involve food or will use only foods that meet the above nutrition and portion size standards for foods and beverages sold individually. Schools will encourage fundraising activities that promote physical activity. The school district will make available a list of ideas for acceptable fundraising activities.

Snacks. Snacks served during the school day or in after-school care or enrichment programs will make a positive contribution to children’s diets and health, with an emphasis on serving fruits and vegetables as the primary snacks and water as the primary beverage. Schools will assess if and when to offer snacks based on the timing of school meals, children’s nutritional needs, children’s ages, and other considerations. The district will disseminate a list of healthful snack items to teachers, after-school personnel, and parents.

Second, elimination of all DOE standards on nutrition ignores the urgency of resolving the epidemic of childhood obesity. USDA proposed regulations share the following concerns:

(O)verweight and obesity are now major health concerns affecting children and adolescents. Studies indicate that excess food consumption, poor food choices, and decreased physical activity are contributing to childhood overweight and obesity, and related chronic health conditions. According to Centers for Disease Control ...almost 32 percent of children age 6-19 years of age are overweight or obese...Obese children and adolescents are at risk for health problems during their youth and as adults. They are more likely to have risk factors associated with cardiovascular disease (such as high blood pressure, high cholesterol, and Type 2 diabetes) than other children and adolescents.

76 Fed. Reg. 2493, 2495 (January 13, 2011)

Third, the repeal of all DOE nutrition standards is inconsistent with State public policy. In 2007, the Legislature adopted the attached Senate Concurrent Resolution No. 13 highlighting the “devastating long-term health risks for children” linked to obesity. The Resolution endorsed remedial action by Nemours and its statewide partners in promoting healthy eating and physical activities. Likewise, in 2011, the General Assembly enacted legislation (H.B. No. 3) with similar findings which limits trans fats and unhealthy beverages in schools.

Fourth, the USDA regulations (excerpts attached) contemplate State review and oversight of USDA food program standards. See, e.g., proposed 7 C.F.R. §§210.18 (“State agencies must

conduct administrative reviews of all school food authorities at least once during each 3-year review cycle...”). Since the DOE is repealing its only nutrition regulation which required compliance with USDA standards, there will be no State authority for such reviews or enforcement. If the DOE wished to eschew State standards in favor of federal standards, it could have incorporated federal standards in a State regulation. Instead, the DOE has opted to have no standards whatsoever.

I recommend sharing the above observations with the DOE, SBE, Nemours, the Division of Public Health, the Governor’s Office, and the Senate and House Education Committees.

12. DLTCRP Proposed Neighborhood Homes for Persons with DD Reg. [15 DE Reg. 968 (1/1/12)]

The Division of Long-term Care Residents Protection (DLTCRP), in conjunction with the Division of Developmental Disabilities Services (DDDS), proposes a comprehensive revision to the licensing regulation covering neighborhood homes for persons with developmental disabilities.

I have the following observations.

1. In Section 2.0, the definition of “advocate” would include an individual who is “knowledgeable” about a resident but is an abuser or not well intentioned. Consider the following alternative: An advocate includes a guardian, legal representative, or knowledgeable person who seeks to promote the resident’s best interests”. The term “legal representative” would encompass an attorney, agent through power of attorney, or next of kin authorized to exercise rights pursuant to Title 16 Del.C. §§1121(34), 1122, and 2507.

2. In Section 2.0, definition of “co-mingling of funds”, the term “contacted provider” should be corrected. Consider substituting “contractual provider”.

3. In Section 2.0, definition of “HRP”, substitute “device” for “devise”.

4. In Section 2.0, definition of “incident”, consider expansion to cover elopement, attempted suicide, event prompting law enforcement referral, and use of seclusion or restraint in excess of certain time frames. Compare 16 DE Admin Code 3225, § 19.7 See also Title 16 Del.C. §5162(a) by analogy.

5. In Section 2.0, definition of “individual”, substitute “identifies” for “identify”. On a conceptual level, the Division should also consider whether the definition is too narrow. In theory, there could be a licensed neighborhood home with individuals with developmental disabilities who do not receive services through DDDS. This comment would also apply to the definition of “service provider” which is limited to DDDS contractors.

6. In Section 2.0, definition of “neighborhood home”, first sentence, insert with “developmental disabilities” after the word “individuals”. Otherwise, the definition could literally encompass homes for individuals with mental illness or AIDS which are separately regulated by 16 DE Admin Code, Parts 3301 and 3305.

7. In Section 2.0, definition of “PROBIS”, it would be preferable to include a reference to psychotropic medications. Review of such medications is the primary activity of PROBIS which is

not apparent from the definition.

8. In Section 2.0, definition of “service provider”, consider substituting “under contract” for “contracted”.

9. In Section 3.0, it would be preferable to include a general requirement that the provider will comply with the Bill of Rights, Title 16 Del.C. §1121. See 16 DE Admin Code 3301, §4.9 (“All residents shall be afforded all protections and privileges contained in the Delaware Patients Bill of Rights”); and 16 DE Admin Code 3225, §14.1. The regulation requires “posting” of the Bill of Rights (§4.2.8.4), and compliance with DHSS policies (§4.7.3), but it lacks a section generally requiring compliance with the Bill of Rights.

10. Section 4.1.3.3 is inconsistent in referring to “services” and “service provider”. Since §4.1.3 solely addresses a change in service provider, substitute “service provider” for “services”.

11. Section 4.2.5 contains some “weak” and subjective references. Consider the following alternative: “Service providers are required to maintain and implement specific policies and procedures to facilitate individuals’ exercise of their rights and to protect the individual’s rights from either violation or restriction without due process.”

12. In Section 4.2.8.1, consider adding a reference to legal representative and advocate.

13. Section 4.2.8.4 could be improved by requiring the posting to be in a “conspicuous” location as required by Title 16 Del.C. §1123. Otherwise, it could be posted in a closet or corner of the basement.

14. Section 4.3.7.4 requires the residence to maintain only a three-day supply of medications. This is too short. A weather emergency could easily prevent access to a pharmacy for 3 days or a pharmacy could have exhausted its supply of a medication. A high percentage of DDDS residential clients have seizure disorders and other life-threatening conditions being controlled by medications.

15. Section 4.3.10 could be embellished. Compare 16 DE Admin Code 3225, §8.4. Parenthetically, the criminal statute requiring medications to be in the original container has been repealed. See H.B. No. 19, Section 55, enacted April 20, 2011. There is some “tension” between the regulatory requirement (§4.3.9.1) of medications being kept in original containers and the prevalent use of weekly dose containers.

16. In Section 4.5.1, the reference to the federal definition of assistive technology could be updated. See attached 29 U.S.C. §3002(3)(4)(5).

17. Section 4.5.4.3 could be improved. For example, it is common for DDDS clients to lose their eyeglasses or break them. Some clients are therefore provided with a set of glasses and a back-up set of glasses. It would therefore be preferable to substitute “periods of repair, replacement, cleaning or foreseeable loss.”

18. Section 4.6.4, second sentence, is a “weak” statement insofar as it states the Division’s “belief”. This is a regulation and it would be preferable to simply state the policy. The sentence could recite as follows: “Further, employment in the community should be the first service option considered for individuals.”

19. In Section 4.6.5.2, delete the comma after “goals” and insert “and”.

20. In Section 4.6.6, substitute “an” for “a” after “documents”.

21. The timetables in Sections 4.6.6.4 and 4.6.6.5 (60 days to convene POC meeting after initiation of services and 90 days to implement POC after initiation of services” are too long. If they are not shortened, it would be preferable to amend the latter section as follows: “The POC is implemented within the earlier of 30 days from POC meeting or 90 days from initiation of services.” If a POC meeting were to be convened within 30 days of initiation of services, it should not take another 60 days to implement it.

22. Section 4.6.8.2, which addresses AT, merits endorsement.

23. Section 4.6.10 is intended to promote community-based employment. However, it could be improved.

a. For example, §4.6.10.2 presumes that an individual is either working in the community or unemployed. It ignores sheltered workshop employment. Consider adding “in a community setting” after “work” and “employment”.

b. The requirement of a community based work assessment every 3 years (§4.6.10.3) could be improved by requiring such an assessment in connection with the initial POC. This could be addressed by adding a new subsection to 4.6.6. requiring a community-based work assessment as part of the overall assessment forming the basis for the initial POC.

c. It would be preferable to amend §4.6.10.3 to refer to “at least every three years”. Otherwise a provider could argue that the regulation literally disallows more frequent assessments. Likewise, it would be preferable to authorize assessment based on reasonable request of the individual or legal representative. This would result in the following substitute sentence: “If an individual is not working in a community setting, a community based work assessment should be completed upon the individual’s reasonable request and at least every three years to determine if employment within the community would be a viable option for the individual.”

24. In §4.7.6.7, the requirement of a 72-hour supply of non-perishable food is too short. A weather emergency or other event could occur rendering a 3-day supply inadequate.

25. In §4.8.10.4, it would be preferable to amend the reference to “adaptive equipment or assistive technology” since the latter term is used in §4.5 and is ostensibly more encompassing.

26. In Section 6.4, it would be preferable to at least “phase in” a requirement that dishwashers include a “sanitizing cycle or capacity” whenever replaced or by a certain date (e.g. January 1, 2015) or whichever comes first. Cf. 16 DE Admin Code 3225, §17.6.3 (assisted living facilities must have sanitizing capability for dishes and utensils). See also attached articles.

27. Section 8.2 requires each sleeping room to have an outside window. This is a favorable feature but not uniformly required in other regulated settings. It does not seem to be required in assisted living settings (16 DE Admin Code 3225, §17.5) but is required in group homes for persons with mental illness (16 DE Admin Code 3305, §12.2.1. The requirement is not inherently objectionable but could limit capacity of some homes in the absence of a waiver.

28. Section 8.4 allows 75 square feet per person in 2-person bedrooms. The standard in assisted living and group homes for persons with mental illness is 80 square feet. See 16 DE Admin Code 3225, §17.5; and 16 DE Admin Code 3305, §12.2.2. The latter regulations also clarify that the room measurements do not include closets, wardrobes, alcoves, etc. It would be preferable to adopt an 80 square foot standard and clarify that it excludes closets, wardrobes, alcoves, etc.

29. Section 9.5 uses the term “handicapped”. The reference should be modified.

I recommend sharing the above observations with the Division with a courtesy copy to DelARF, Easter Seals, Autism DE and the ARC.

13. DSS Proposed Fair Hearing Regulation [15 DE Reg. 973 (1/1/12)]

The Division of Social Services proposed a set of comprehensive revisions to its fair hearing regulation in January, 2011. The Councils submitted extensive comments resulting in a final regulation in July, 2011 which incorporated several amendments prompted by the commentary. [14 DE Reg. 618 (January 1, 2011) (proposed); 15 DE Reg. 86 (July 1, 2011) (final)] DSS is now issuing another set of proposed revisions.

I have the following observations and recommendations.

1. In §5000, definition of “abandonment”, delete the comma after “cause”.
2. In §5000, definitions of “advance notice period” and “timely notice period” are inaccurate since they categorically state that the period is ten days. A notice can be provided which gives more than a 10-day notice. The 10 days is a “minimum” which an agency or MCO may exceed. See, e.g., 42 C.F.R. 431.211 and 5300, Par. 2.B. (“timely notice is one mailed at least 10 days before the time of action”). If an MCO mailed out a notice with an effective date 15 days from notice date, the “timely” notice period would be 15 days, not 10 days. Reduction or termination of benefits would be barred within that 15 day period, not a 10 day period.

3. In §5000, definition of “fair hearing”, Par.5 refers to “(t)he opportunity to obtain counsel”. This is somewhat misleading. Compare 42 C.F.R. 431.206(b)(3), which requires DSS to publish hearing procedures which include notice that the appellant “may represent himself or use legal counsel, a relative, a friend, or other spokesman.” See also 7 C.F.R. 273.15(f). Finally, other sections (§5000, definition of “group hearing”; §5606, Par. 3) refer to “authorized representative” or “authorized agent”.

4. In §5000, it is redundant to have a separate definition of “fair hearing summary” and “hearing summary”. It would be preferable to combine the definitions and ensure that it encompasses the text from both of the current definitions and §5312 components, including a reference to the omitted persons expected to testify on behalf of the agency.

5. Section 5000 now defines an MCO as including “individual medical service providers of an MCO panel.” This may be “overbroad”. I am dubious that the federal regulations contemplate hearings involving a beneficiary and a doctor’s office or child’s dentist. The federal regulations contemplate “agencies” as parties, not individual providers.

6. Section 5000 includes a definition of “State Presenter”. DSS may wish to consider substituting “agency presenter” since MCOs involved as parties are not “State” presenters.

7. In §5501, the “note” is “overbroad”. It recites as follows: “Staff must always prepare a claim against the household for any over-issuance when the hearing decision upholds the agency’s action.” The Councils shared a similar concern in connection with the January, 2011 proposed regulation resulting in the following commentary and response:

Third, §5300, Par. 2.A.6 is not literally accurate. It categorically recites “(i)f the agency action is upheld, that such assistance must be repaid.” Repayment is discretionary and the State or MCO can decide to not pursue recovery. The analogous federal regulation [42 C.F.R. 431.230(b)] states that the agency “may institute recovery”. Moreover, a beneficiary can elect to not continue benefits during the pendency of appeal. See §5308, Par. 2.A and §5300, Par. 2.C. Finally, this section would literally impose a mandatory repayment duty for benefits received prior to issuance of the notice and during the minimum 10-day notice period.

Agency Response: DSS and DMMA thank you for your comment. The regulation is amended and indicated by [Bracketed Bold Text]. See §5300, Par. 2.A.6.

The proposed categorical requirement that “(s)taff must always prepare a claim” should be amended or deleted.

8. Section 5600.1, Par. 1.D contains a highly objectionable provision: “The hearing officer may make a negative assumption when a party declines to give testimony under a claim of privilege.” The corresponding Delaware Rule of Evidence explicitly bars such a “negative assumption”:

Rule 512. Comment upon or inference from claim of privilege; instruction.

(a) Comment or inference not permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

It is highly inappropriate to penalize a party for invoking the attorney-client or other privilege.

9. Section 5600.1, Par. D.1 recites as follows: “Privileges are waived by a claimant if the information is relevant to the defense of the action or inaction under appeal.” This is also “overbroad”. Simply because what a party told his attorney could be “relevant” to a defense does not automatically waive the attorney-client privilege.

10. Section 5604, Par. 1. B, recites as follows: “However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer.” There is no definition of “made final”. Moreover, the regulation ostensibly allows ex parte contact. This authorization is problematic for several reasons. A party can ask for reconsideration of a fair hearing decision. Cf. Henry v. Dept. of Labor, 293 A.2d 578, 581 (Del. Super. 1972)(Delaware quasi-judicial administrative hearing bodies have inherent jurisdiction to entertain applications for reconsideration). If one party has already had ex parte contact with the hearing officer, the hearing officer could not impartially entertain the application for reconsideration. A party could also request “reopening” based on criteria contained in the attached Superior Court (Civ) Rule 60. Accord, Henry at 581. If parties have had ex parte contact with the hearing officer, such applications could not be impartially entertained by the hearing officer.

11. Section 5605, Par. 2, which addresses continuances, is problematic.

a. This section omits consideration of the status of a party’s attorney or representative (e.g. illness). This should be included in Par. 2.B .1.

b. There are no exceptions for a continuance within 24 hours of hearing. A medical emergency, hospitalization, or sudden illness can occur within 24 hours of hearing. Adoption of a “no-exceptions” regulation violates due process.

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

14. DMMA Notice: Vocational Services Reimbursement Methodology [15 DE Reg. 1088 (1/1/12)]

The Division of Medicaid & Medical Assistance has published a Public Notice of “Change to the Reimbursement Methodology for Supported Employment, Day Habilitation and Pre-Vocational Services”. The Notice recites that the standards are being contemporaneously published as an emergency regulation. At 1089. However, this did not occur. The Notice recites that the rate has already been approved by CMS and is effective January 1, 2012. At p. 1089.

The Notice recites that CMS is requiring the establishment of an hourly rate for supported employment, day habilitation and pre-vocational services provided under the DDDS Medicaid Waiver. The method for arriving at the hourly rates is described. The hourly rate for supported employment will be \$49.02. It is unclear what rate will apply to day habilitation and pre-vocational services.

Input from DelARF and Easter Seal was solicited to assist the SCPD in its analysis and hopefully will be shared prior to the P&L Committee meeting.

My preliminary observations are as follows:

First, there is ostensibly some advantage to allowing hourly billing vs. per diem billing since some individuals may be employed in a sheltered workshop part of the day and in supported employment for the balance of the day.

Second, there is a disincentive to provide supported employment insofar as billing is apparently not allowed for transportation to and from job sites. This provides a financial disincentive for supported employment and an incentive to provide sheltered workshop activities.

Third, the Notice is internally inconsistent in its "Fiscal Impact Statement". It recites that application of the new rates would have resulted in a "reduction in expenditures" in FY11 while referring to a "pattern of increasing expenditures". At p. 1089.

I recommend awaiting further input from provider agencies prior to commenting on this initiative.

15. New Castle County Glasgow Skate Park (1/1/12)

Since the SCPD Brain Injury Committee (BIC) did not meet this month, I am sharing this initiative with the P&L Committee.

As background, New Castle County has contracted for the erection of a huge, 20,000 square foot skateboard arena situated within the 300-acre Glasgow Park. Prior to completion, many skateboarders "hopped the fence" and began using the facility. The attached News Journal article describes the situation:

For nearly a month, they have torn down the signs, scaled the fences, and use the park. On Thursday, 150 people were there...

In response, the County hired a security firm to deter use until the construction is completed and the skateboard park officially opened.

The article notes that the County plans to maintain the park with no oversight and no

standards for safety equipment. This has raised valid concerns within County Council:

There will be no security guard at the park once it opens. People can use it from dawn to dusk. “We’ll have rules, but it’s going to be an unmanned facility,” he (Jon Husband) said. “It will be skate at your own risk. We’ll recommend that people wear helmets and pads, but if they choose not to, it will be their own risk and their own liability.”

That concerns County Councilman Bob Weiner, who thinks the county should look into having someone monitor skating at the park or hire a contractor to do so. He thinks the county could get sued if someone is injured in the park.

“It’s an ultra-hazardous activity and precautions need to be taken,” Weiner said.

On January 2, the News Journal published the attached follow-up article discussing the issues.

I recommend that the SCPD adopt a lead role in encouraging a “staffed” site, requirement of at least a helmet, and other safety standards. Virginia Beach has maintained a similar 24,000 square foot skate park for decades known as Mt. Trashmore. It therefore has considerable experience with operation. Consistent with the attachments, it requires all participants to apply for a free park pass which includes a signed waiver of liability. The park is staffed and, upon presentation of the pass, pass holders are given a wrist band to enter the park. Helmets are required. No electric or motorized scooters or bikes are permitted.

The county’s laissez faire approach to the park will predictably be disastrous. With 150 participants there during construction, the park will be extremely crowded upon opening with a hodgepodge of little children, teens, and large adults using skateboards, bikes, skates, and rollerblades doing “tricks” on uneven concrete surfaces with metal railings with no helmets or protective gear. It is difficult to imagine a more “risk-laden” situation that will predictably result in many concussions and broken bones.

I recommend sharing the above observations with the County Administration and County Council. I also recommend soliciting the support of DHSS, BIAD and BIC members, including medical providers such as the A.I. duPont Institute and Nemours.

16. H.B. No. 196 (Absentee Voting & Polling Sites)

The SCPD and DLP received a draft of this bill in May resulting in some informal comments. The legislation was formally introduced on June 16, 2011. It passed the House on June 29, 2011. It awaits Senate action. The SCPD’s set of “Public Policy Priorities” for the upcoming LIFE Conference includes the following information about the bill:

In addition, we support the concept of H.B. No. 196 which would permit persons whose business or occupation is providing care to a parent, spouse or child requiring constant care due to illness, injury or disability to self-administer the affidavit for absentee ballot; permit voters who are sick or have physical disabilities to be sent and to return absentee ballots by electronic transmission; and require recipients of State funding to make facilities available for polling, so long as it would not be incompatible with the recipient's primary purpose.

The bill would enhance voting by persons with disabilities. It would expand the potential range of facilities available as polling sites and obviate election officials having to "beg" for the cooperation of polling sites. It would also facilitate absentee voting for persons with disabilities and caregivers.

Since the SCPD has not formally issued comments on the bill, I recommend endorsement and submission of positive commentary to policymakers.

17. H.B. No. 199 (State Constitution Requirement of Voter Identification)

This bill was introduced on June 21, 2011. As of January 9, it remained in the House Administration Committee.

I have the following observations.

The synopsis of the bill is somewhat misleading. It recites as follows: "This is the first leg of a constitutional amendment to allow the General Assembly to enact laws related to requiring photographic and signature identification to vote." The implication is that the General Assembly currently lacks such authority. Companion legislation (H.B. No. 200), introduced on the same day, would require voter photo identification and signature verification without a Constitutional amendment. The text of H.B. No. 199 is not an "authorization" or "allowance" of the General Assembly to adopt voter identification laws. Instead, it categorically eliminates any discretion by the General Assembly in this context:

The General Assembly shall enact general laws requiring photographic and signature identification for a person to be entitled to cast a ballot at any general election at the regular polling place of the election district in which he or she is registered.

If enacted in 2012 and in the next General Assembly, future General Assemblies would be hamstrung in their ability to modify voter identification laws based on problems and experience. It is manifestly imprudent to "tie the hands" of future General Assemblies to address this controversial issue.

Consistent with the attachments, voter identification laws have a disproportionate effect on individuals with disabilities and the elderly. Individuals in nursing homes or institutions such as the Stockley Center have little need for a current photo identification or ability to sign. Moreover, Delaware's current Constitution (Article V, §2) at least contains an authorization for individuals to vote who cannot sign their name "by reason of physical disability". H.B. No. 199 is categorical and includes no such accommodation for individuals lacking a proper signature due to quadriplegia, orthopedic, impairment, or sensory impairment. Cf. Title 15 Del.C. §4937(b).

Delaware election officials encourage voting by individuals with disabilities. See, e.g., attached October 10, 2010 News Journal article, "Determined Voter Casts Her Ballot from Bed". Nevertheless, the voting rate for Delawareans with disabilities is only 58.7% versus a 68.4% rate for Delawareans without disabilities. Additional hurdles to voting will only exacerbate that difference.

I recommend opposition to the legislation.

18. H.B. No. 200 (Statutory Requirement of Voter Identification)

This companion bill to H.B. No. 199 was introduced on June 21, 2011. As of January 9, 2012, it remained in the House Administration Committee.

This bill would require every voter to present a "current and valid picture identification" from a list of 5 government sources. If the government photo identification lacks a signature, an additional identification bearing a signature must also be presented. If either is lacking, the voter can only vote a provisional ballot whose validity is later reviewed by an undefined Board of Canvas. The law covering processing of provisional ballots is extremely cumbersome. Title 15 Del.C. §4948

Under current law, if a voter appears at his/her election district to vote, and lacks identification, the voter can "sign an affidavit or affirmation that the voter is the person listed on the election district record". Title 15 Del.C. §4937(a). Challenges are resolved promptly by "the opinion of a majority of the inspector and judges." Title 15 Del.C. §4939. There is a "hefty" deterrent to fraudulently voting since it is a misdemeanor subject to both a fine and up to 2 years in prison. Title 15 Del.C. §5128. Prosecution for perjury is also authorized. Title 15 Del.C. §5135. There is no evidence that this system is not effective.

Finally, the bill is technically infirm since it creates conflicts with other statutes, including Title 15 Del.C. §§4937 and 4948.

Consistent with the above critique of H.B. No. 199, voter identification laws have a disproportionate impact on voters with disabilities, the elderly, and minorities.

I recommend opposition.

Attachments

§g:lawreg/112bils
F:pub/bjh/legis/2012p&l/112bils