

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Legislative and Regulatory Initiatives

Date: February 3, 2012.

I am providing my analysis of fifteen (15) legislative and regulatory initiatives in anticipation of the February 9 meeting. Given time constraints, the commentary should be considered preliminary and non-exhaustive.

1. DMMA Final Medicaid Reimbursement Regulation [15 DE Reg. 1160 (February 1, 2012)]

The SCPD reviewed the proposed version of this regulation in December, 2011. The Division of Medicaid & Medical Assistance was publishing amendments to its reimbursement methodology for several types of providers, including medical and dental clinics, optometrists, dialysis providers, and transportation providers. Given the complexity of the standards, the Council decided to issue no comments since it could not readily assess whether the proposed reimbursement standards were fair or appropriate.

The only provider organization which commented was the Delaware Optometric Association. The comments did not result in any amendment and the Division has now adopted a final regulation conforming to the proposed version.

I recommend no action.

2. DPH Final Communicable Disease Reporting Reg. [15 DE Reg. 737 (February 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in December. The Councils endorsed the regulation with no suggested changes. The Division of Public Health has now acknowledged the endorsements and adopted a final regulation which conforms to the proposed version.

No further action is warranted.

3. DLTCRP Final Assisted Living Med Error & Record Reg. [15 DE Reg. 1156 (February 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2011. A copy of the November 18 SCPD memo is attached for facilitated reference. The Councils' commentary was shared with the Delaware Trial Lawyers Association which prompted supporting DTLA comments to the Division. Other organizations also commented on the proposed regulation resulting in amendments apart from those prompted by the Councils.

First, the Councils recommended inclusion of a reference to "errors or omissions in treatment" within the definition of "significant medication error". The Division agreed and effected the amendment.

Second, the Councils objected to the reduction in retention of records from 5 years to 3 years. The Division agreed and adopted a standard of "5 years following discharge or 3 years after death". At 1158.

Since the Division adopted both of the Councils' suggestions, I recommend issuance of a "thank-you" letter or communication.

4. Insurance Dept. Final Health Premium Comparison Reg. [15 DE Reg. 1164 (February 1, 2012)]

The Department of Insurance published a proposed regulation in August, 2011 requiring insurers to provide information to the Department to facilitate consumer comparisons for comparable coverage. The SCPD and GACEC endorsed the regulation subject to deletion of some redundant references. In December, the Department published a revised proposed regulation which incorporated the amendment suggested by the Councils. The Councils once again endorsed the regulation while suggesting that the Department consider deletion of an exclusion for vision, dental, Medicare supplement, and long-term care plans. The Department has now adopted a final regulation without deletion of the exclusions.

Since the regulation is final, I recommend no further action.

5. DOE Final Career & Tech Education Programs Reg. [15 DE Reg. 1147 (February 1, 2012)]

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

The Department of Education has now acknowledged the endorsements and adopted a final regulation which conforms to the proposed version.

I recommend no further action.

6. DOE Final Standard Certificate Regulation [15 DE Reg. 722 (February 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in December. A copy of the December 12 GACEC letter is attached for facilitated reference. The Department of Education has now adopted a final regulation with one (1) amendment.

First, the Councils objected to expansion of the definition of “immorality” to cover conduct with no causal link to educator effectiveness. The DOE rejected the concern.

Second, the Councils noted the absence of punctuation at the end of §3.1.1. No change was made. The error remains.

Third, the Councils recommended deletion of the word “after” in §3.1.3.1. The DOE deleted the word.

Fourth, the Councils noted that eligibility was being narrowed in some discrete contexts. The Councils did not object to the changes. The DOE acknowledged its intent to narrow eligibility.

Since the regulation is final, I recommend no further action.

7. DOE Final Emergency Certificate Regulation [15 DE Reg. 1150 (February 1, 2012)]

The SCPD and GACEC commented on the proposed version of this regulation in December. A copy of the December 12 GACEC letter is attached for facilitated reference. The Department of Education has now adopted a final regulation with one (1) amendment.

First, the Councils identified a “typo” in §5.3. The DOE corrected the error.

Second, the Councils suggested extending the expiration date of the certificate from June 30 to a later date to minimize disruption of instructors for the 2,000+ students in 12-month programs. The DOE weighed the pros and cons of the suggestion and opted to effect no change. At 1150.

Third, the Councils recommended allowing an extension of the June 30 application based on a showing of good cause or exigent circumstances. The DOE effected no amendment.

Fourth, the Councils identified both pros and cons to the new approach to the emergency certificate without issuing a recommendation. No amendment resulted.

Finally, the DOE, without explanation, eliminated two definitions (“DPAS” and “Employing District”) and substituted “Authority” for “District” throughout the final regulation.

Since the regulation is final, I recommend no further action.

8. DOE Prop. Professional Development Standards Reg. [15 DE Reg. 1109 (February 1, 2012)]

The Professional Standards Board proposes to adopt a new set of professional development standards applicable to educators. In a nutshell, the Board is adopting the National Staff Development Council's "Standards for Professional Learning (Learning Forward, 2011) guidelines (§§1.1-1.3). I attach some background materials from the NSDC's Website. The materials suggest that many organizations participated in the development of the guidelines. However, I did not identify any disability-related organizations among the participants.

I have the following observations.

First, there are some positive aspects to the standards with a disability nexus. For example, §2.5 recites that "(l)ike all learners, educators learn in different ways and at different rates." Section 7.3 notes that the "characteristics of the learners" should influence "decisions about learning designs". Section 2.2 recites that "(a)n Educator's commitment to all students is the foundation of effective professional learning." Enhanced results for "all students" is an established goal (§§6.2, 9.1, and 9.3). A "team" approach based on the concept of "learning communities" is emphasized (§3.0). Educators are held to "high standards" (§9.2). These features merit endorsement.

Second, in §1.1, the word "Council" should be substituted for "Counsel".

Third, in §1.3, the following edits should be considered:

A. In the first sentence, substitute "is" for "are". A summary is set forth..."

B. In the second sentence, "in-depth" should be substituted for "in depth". See attached definition from Merriam-Webster dictionary.

C. In the second sentence, "are" should be substituted for "is". The compound subject, "descriptions, explanations, examples, criteria and guidance", should be followed by a plural verb.

Fourth, in §5.4, the compound subject, "understanding and tracking" should be followed by a plural verb. The word "facilitate" should be substituted for "facilitates".

Fifth, in §6.2, the word "data" is a plural noun. The word "lead" should be substituted for "leads".

Sixth, §6.2 refers to "increased results for every student." Section 9.3 similarly refers to "increases results for all students". See also §6.1 and §9.1 references to "increases ...results". "Increasing results" is an odd term since the "increased/more" results could be "good" or "bad". Other sections (§8.2 and 9.4) more appropriately adopt a standard of "increases in student learning". I recommend substitution of this concept. Alternatively, the references could be amended to refer to "enhanced student performance" or "improved student performance results".

I recommend sharing the above observations with the Professional Standards Board, SBE,

and the DOE Administration.

9. H.B. No. 244 (Compulsory School Attendance)

This bill was introduced on January 17, 2012. It was tabled in the House Education Committee on January 25, 2012. Background materials, including an informative January 25, 2012 News Journal article, are attached.

I have the following observations.

First, the purpose of the bill is to raise the current compulsory school attendance age from 16 to 18. This would occur in steps. The compulsory attendance age would be raised to 17 effective January 1, 2013. It would be raised to 18 effective January 1, 2014.

According to the News Journal article, 20 states currently require students to attend school through age 18. According to the attached January 26, 2012 CLASP article, another 11 states mandate school attendance until age 17. With 31 states requiring school attendance to either age 17 or 18, Delaware is among the minority of states with its current age 16 standard.

The attached fiscal note estimates the legislation would result in the following costs:

FY13: \$620,000 - \$1,551,000 (State) and \$211,000-\$528,000 (local)

FY14: \$853,000 - \$2,172,000 (State) and \$290,000-\$739,000 (local)

FY15: \$879,000 - \$2,237,000 (State) and \$299,000-\$761,000 (local)

Second, there are pros and cons to raising the compulsory school attendance age. The attached National Conference of State Legislatures (“NCSL”) summary identifies perceived advantages and disadvantages. Advantages include encouraging more students to attend college and decreasing dropout rates, juvenile crime, and teen pregnancy. Disadvantages include financial costs and devotion of resources to truancy and disruption linked to students who do not wish to be in school. In 2010, the National Association of Secondary School Principals (“NAASP”) adopted the attached position statement endorsing compulsory education to age 18. However, both the attached NAASP and CLASP materials and January 28, 2012 News Journal editorial stress the importance of adopting additional strategies to promote effective implementation of higher-age compulsory attendance. For example, the NAASP statement included the following recommendation:

Provide funding for graduation coaches, counselors who focus solely on at risk students. They monitor student’s academic progress and attendance and work with teachers to identify those who are falling behind or at risk of doing so. Graduation coaches also focus on getting parents involved and will make home or workplace visits with parents.

Third, individuals who drop out of school at age 16 typically regret the decision later. The brains of sixteen year olds may not be sufficiently developed to make mature and deliberative decisions regarding their long-term needs. See, e.g. the attached May 16, 2003 USA Today article.

According to the January 25 News Journal article, the prime sponsor, Rep. Heffernan, intends to “revise and reintroduce the bill in March.” I recommend endorsement of the concept of the current bill subject to the following: 1) consideration of including some support components (e.g. graduation coaches; drop-out recovery system) identified by NAASP and CLASP; and 2) correction of several technical errors in the bill. The technical errors are as follows:

A. Lines 20-21 and 23 refer to “public school or charter school”. A charter school is a public school. See Title 14 Del.C. §§503, 504(c), and 8590(3). However, simply referring to a “public school” can result in confusion over the applicability of the bill to charter schools based on Title 14 Del.C. §505(a). The sponsors may wish to consider substituting “public school, including a charter school” for “public school or charter school”. Compare Title 14 Del.C. §4136(a).

B. Line 38 limits a waiver to proof that a student “has an alternative learning plan for obtaining either a high school diploma or its equivalent”. This would literally disallow a waiver for a student with an intellectual disability placed by parent in Melmark, Benedictine, AdvoServ or other private or home school in which a diploma is not a realistic outcome.

Parenthetically, a GACEC member recently suggested the attached amendment (lines 28-35) to H.B. No. 244. The proposed amendment raises several concerns:

A. Line 29 only refers to the “superintendent of schools” which would omit students enrolled in charter schools. Line 35 then contains an inconsistent reference to “the public education system or charter school”. A charter school is a public school so the reference is not apt.

B. The “optional alternative education track” is inflexible and must categorically include “life skills” and “work place safety skills”. These may not be appropriate for all students. A student may have missed schooling due to substance abuse dependency or other cause but otherwise be quite bright.

C. The amendment covers a very narrow class of students, i.e., those age 16 upon entering ninth grade. I suspect this is a very small group of students to address in a statute. It would be preferable to generally promote strategies to deter dropping out of school such as those espoused by the CLASP or NAASP materials.

I recommend sharing the above observations with policymakers with the exception of the comments on the amendment. The comments on the amendment could be shared with the prime sponsor only. The SCPD may wish to defer the comments on the amendment to the GACEC.

10. H.B. No. 226 (Regulation of Child Care Facilities)

This bill was introduced on June 30, 2011. As of January 27, it remained in the House Sunset (Policy Analysis & Government Accountability) Committee.

The Office of Child Care Licensing is charged with regulating individual home and facility-based child care. Title 31 Del.C. §344. However, some facilities are exempt based on the following statutory subsection:

(d) This section shall not apply to any institution, agency, association or organization under state ownership or control, nor shall it apply to any maternity ward of a general hospital.

Thus, publicly operated day care centers located in schools or State facilities are not licensed or regulated by the OCCL. The Councils have previously criticized this exemption. One major concern is that the exemption disallows OCCL investigation of allegations of child abuse or neglect occurring in such settings. Moreover, the OCCL has many salutary health, safety, and hygiene standards that protect and benefit children.

The bill would eliminate the exemption for state-owned or controlled day care programs. Head Start programs (federally regulated) and maternity wards would be exempt. Moreover, the OCCL curriculum standards would not apply to child care settings subject to State Department of Education curricular standards.

I recommend endorsement subject to a technical observation. H.B. No. 225, with the same co-sponsors, also envisions substituting a new subsection “(d)”.

11. H.B. No. 225 (Child Care Center Food & Beverages)

This bill was introduced on June 30, 2011. As of January 27, 2012 it remained in the House Sunset (Policy Analysis & Government Accountability) Committee.

As background, the attached Office of Child Care Licensing (OCCL) regulation [9 DE Admin Code 101, §67] requires licensed child care providers to have policies on the content of meals supplied by parents and to assess the nutritional content of food brought from home. [§67.1.1.4-5] This legislation would bar the OCCL from regulating the nutritional content of food or drink brought from home.

The bill implicates competing public policies.

On the one hand, parents should know their child’s eating requirements and habits and enjoy some autonomy in their choice of food and beverages.

On the other hand, consistent with the attached articles, there is a national, alarming epidemic of childhood obesity which is being addressed at the federal, state, and local levels of government. The January 26, 2012 New Journal article describes new, rigorous USDA nutrition standards applicable to schools. Moreover, the Legislature enacted H.B. No. 3 in 2011 banning trans-fats in schools. Finally, consistent with the January 31, 2011 News Journal article, “eating behavior starts at an early age” and “(c)hildren start to choose things that taste good instead of what is good for their bodies”. If parents were effective and adept at regulating children’s food and

beverage intake, there wouldn't be an epidemic of obesity.

Balancing the competing public policies, I recommend supporting the concept of the bill. A strict interpretation of the bill could endanger child welfare. For example, if a parent supplied a clearly inadequate amount of food and beverages to a child, the child care center would be hamstrung in its ability to “supplement or replace a child’s food or drink ” (lines 8-9). A child could theoretically starve to death on a diet of parent-provided rice cakes and water since the child care provider would be barred from questioning the nutritional value of home-supplied food and drink. Similarly, a strict interpretation of the bill could prevent a child care provider from questioning the nutritional wholesomeness of the food despite evidence of spoilage or mold.

Parenthetically, there is a technical problem with the bill. Line 1 contemplates “inserting a new subsection (d)” in Title 31 Del.C. §343. There is already a subsection (d) in the statute. Moreover, H.B. No. 226 also envisions creation of a different subsection (d).

12. H.B. No. 224 (Child Care Licensing: Developmental Child Needs)

This bill was introduced on June 30, 2011. As of January 27, 2012 it remained in the House Sunset (Policy Analysis & Government Accountability) Committee.

The legislation effects some discrete changes to the child care licensing statutes.

First, the bill deletes a requirement that a home or facility meet the “moral” and “educational” needs of children. Instead, the home or facility would be required to meet the physical, social, mental and developmental needs of a child. These changes merit endorsement. “Moral” needs are subjective and may easily result in conflicts between the parent and the provider. Substituting “developmental” for “educational” is apt and encompasses a broader spectrum of needs.

Second, the bill adopts more “inclusive” language by deleting a reference to “needs of the average child” and substituting “children for whom the home or facility will care”. The latter provision is more appropriate since homes and facilities vary in the composition of children by age, disability, and primary language. The current fictional “average child” reference ignores the diversity of children in child care settings and may violate federal and state laws (ADA; §504 of Rehabilitation Act; Equal Accommodations statute) requiring accommodations for children with disabilities.

I recommend endorsement of the bill.

13. H.B. No. 243 (School Crime Reporting)

This bill was introduced on January 17, 2012. An amendment was placed with the bill on January 24 and the legislation was reported out of the House Education Committee on January 25. I have the following observations.

As reflected in the synopsis, the legislation is the result of work of the School Discipline Task Force. The bill reduces the scope of offenses that must be reported to law enforcement. For example, a principal would have discretion to not report conduct of youngsters under age 12 amounting to a misdemeanor (lines 135-139). Moreover, the categorical referral to an alternative program based on probable cause that a crime has been committed is deleted (lines 163-166). In recent years, both national and local policymakers have determined that school discipline and reporting requirements were unduly strict. See attached articles. In 2010, the General Assembly passed H.B. No. 347 which amended mandatory reporting standards. H.B. No. 243 would effect further changes which are consistent with the attached Committee findings:

Committee Findings: The committee found that the bill simplifies the mandatory disciplinary report requirements for schools. They believed the (bill) (sic “law”) previously required an overindulgence of disciplinary reporting.

I recommend endorsement subject to consideration of a few amendments.

1. In line 18, I believe the word “hired” has been inadvertently omitted from the Code. The provision reads as follows:

(7) “School employee” includes all persons by a school district, attendance zone or charter school; subcontractors such as bus drivers or security guards; substitute employees; and persons hired by or subcontracted by other state agencies to work on school property.

Consistent with the attached Section 2 of H.B. No. 347, the reference should ostensibly be “includes all persons hired by a school district”.

2. In line 26, the definition of “school volunteer” is being limited to persons 18 years of age or older. I recommend deletion of “18 years of age or older”. Otherwise, if a school employee learns that a 17 year old volunteer has been assaulted or sexually abused, no report to the principal would be required (lines 107-121). Moreover, a Girl Scout or Boy Scout troop could be performing voluntary service at a school and the scouts would not be protected.

3. In line 144, the notice to a parent should only be issued if the victim is a juvenile. Compare line 122.

14. H.B. No. 253 (Juvenile Competency)

This bill was introduced on January 24, 2012. As of January 30, it remained in the House Judiciary Committee.

As background, both juveniles and adults must be “competent” as a precondition of participation in proceedings which may lead to an adjudication of guilt. Delaware’s criminal code

includes a somewhat outdated competency statute [Title 11 Del.C., §404] which applies the same standard to both adults and juveniles. In 2006, Family Court Commissioner Loretta Young published the attached article, “Juvenile Competency: Legal, Clinical, and System Issues” which offers a critique of Delaware’s approach to juvenile competency in the Family Court.

H.B. No. 253 would establish a comprehensive system for adjudication of juvenile competency in the Family Court. It is generally well written and represents a significant improvement over existing statutory law. It addresses competency limitations linked to chronological immaturity; mental condition, including mental illness; and cognitive impairment, including autism and TBI. However, I have the following observations.

First, at lines 11-12, the definition of “cognitive impairment” is as follows:

(3) “Cognitive impairment” shall mean any disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills including but not limited to intellectual disability, developmental disabilities, autism spectrum disorders and traumatic brain injuries as supported by the latest version of the DSM.

There are three (3) problems with the definition.

A. This definition is not met unless a child has limitations in both intellectual functioning and adaptive behavior. A significant impairment in intellectual functioning should be sufficient, by itself, to qualify as a cognitive impairment. For example, someone with a traumatic brain injury may have deficits in executive functioning and memory and only minor limitations in everyday, “practical adaptive skills”. The Family Court should not be categorically barred from making a determination of incompetency due to “cognitive impairment” based solely on a significant impairment in intellectual functioning. The definition of “mental condition” at lines 21-22 contains no such categorical requirement of significant deficits in adaptive behavior.

B. The definition does not address another potential feature of traumatic brain injury, memory deficits, including amnesia.

C. The term “expressed” is somewhat “odd”. Literally, the definition refers to “limitations expressed in skills”. This may be difficult to interpret.

I therefore recommend substituting the following definition of “cognitive impairment”:

(3) “Cognitive impairment” shall mean any disability characterized by significant limitations ~~both~~ in intellectual functioning or a combination of intellectual functioning and ~~in~~ adaptive

behavior as ~~expressed~~ manifested in conceptual, social, memory, and practical adaptive skills including but not limited to intellectual disability, developmental disabilities, autism spectrum disorders and traumatic brain injuries as supported by the latest version of the DSM.

Second, the current statute [Title 11 Del.C. §404(a)] includes the following option for defense counsel involved in a competency assessment:

However, upon motion of the defendant, the court may conduct a hearing to determine whether the State can make out a prima facie case against the defendant, and if the State fails to present sufficient evidence to constitute a prima facie case, the court shall dismiss the charge.

H.B. No. 253 omits this option. It would be preferable to incorporate it into the legislation.

Third, the bill contains multiple references to “the average child respondent” (lines 96-97 and 112-113):

(6) The mental disability expert shall compare the child being examined to the childhood norms that are broadly defined as those skills typically possessed by the average child respondent.

The mental disability expert shall report the comparison between the child being examined and the average child respondent.

The “average child respondent” is an “odd” point of reference. Consider the following:

A. There is no reference to age. The statistically “average” youngster charged with delinquency may be 15 years old. The statute would require the expert to compare a 10 year old respondent to the norms for 15 year olds.

B. The “average” youngster charged with delinquency is probably lower functioning than the “average” youngster in Delaware. Kids with an “A” average in school are not the typical child charged with delinquency. The expert is therefore directed to compare the respondent to a lower functioning peer group rather than the “average” child in society.

Fourth, the time frames (lines 133-140) for dismissal upon a finding “that the child is incompetent and will never be able to have competency restored or acquired” range from 1-3 years after the incompetency finding (which may be months or years after an incident). This is an

excessive time period. The pendency of the charges may be highly stressful for the child and parents and adversely affects employability. See Title 10 Del.C. §1014. There is obviously some “tension” between such excessive time periods and the U.S. Supreme Court’s opinion in Jackson v. Indiana, 406 U.S. 715 (1972)[unless formal civil commitment proceedings are initiated, defendants found incompetent to stand trial cannot be held longer than necessary to restore their competency, or to determine that their competency cannot be restored in the foreseeable future]. Maintaining the charges for years is “Kafkaesque”. Moreover, the Family Court judge has no discretion to dismiss the charges sooner than the categorical time periods to be set in statute. This makes no sense. The Court would be categorically barred from dismissing charges for years, based on lines 133-139, upon a judicial finding that a child with an I.Q. of 40 will never be able to acquire competency.

Fifth, Subsection “e” at line 142 should be revised to delete the words “the Court shall”. The bill currently reads as follows: “If the Court determines...that the child is incompetent..., the Court shall:...e. Prior to dismissal of the charges, the Court shall order...”

Sixth, to strengthen the Court’s ability to promote remedial services to a child, I recommend inserting the following sentence at line 145:

Consistent with its jurisdiction over public education conferred by §§921(3) and 921(10) of this title, the Court may also issue a referral to the Interagency Collaborative Team pursuant to §3124(a)(5) of title 14 and otherwise entertain appropriate petitions to address public school services for the child.

I recommend sharing the above commentary with the Governor, Lt. Governor, Legislature, Family Court Chief Judge Kuhn, the Public Defender, and ACLU.

15. S.B. No. 152 (Three Wheeled Motorcycle Driver License Endorsement)

This bill was introduced on June 30, 2011. As of February 2, it remained in the House Public Safety & Homeland Security Committee. It would have an impact on disability-prevention.

Current law allows anyone with a standard class D operator’s license to operate a 3-wheeled motor vehicle with 3-foot distance between wheels without special endorsements or exams. This bill would eliminate that authorization and require operators of three-wheeled motorcycles to take appropriate knowledge and skills tests and obtain a motorcycle endorsement on their driver license. Moreover, if someone “tests” on a 3-wheel cycle, they their endorsement would be limited to operating a 3-wheel cycle. Otherwise, someone could test on the “easier” 3-wheel cycle and operate a 2-wheel cycle. A “grandfather” provision would apply to current owners of 3-wheel cycles but they would be required to obtain an endorsement limited to operation of a 3-wheel cycle on their license.

This bill represents a “common-sense” approach to operator and highway safety and merits endorsement.

Attachments

8g:legreg/212bils
F:pub/bjh/legis/p&l/211bils