

MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory Initiatives

Date: August 6, 2012

I am providing my analysis of eight (8) regulatory initiatives appearing in the August issue of the Registry of Regulations. Given time constraints, my commentary should be considered preliminary and non-exhaustive. Given the low number of regulations, I anticipate cancellation of the August 9 Committee meeting.

1. DSS Final Child Care Subsidy Program Income Reg. [16 DE Reg. 213 (August 1, 2012)]

The GACEC commented on the proposed version of this regulation in June, 2012. A copy of the GACEC's June 20 letter is attached for facilitated reference. The Council endorsed the proposed regulation with no suggested changes. The Division of Social Services has now acknowledged the endorsement and adopted a final regulation which conforms to the proposed regulation.

I recommend no further action.

2. DSS Final Relative Caregiver Transitional Services Reg. [16 DE Reg. 211 (August 1, 2012)]

The GACEC commented on the proposed version of this regulation in June, 2012. A copy of the GACEC's June 28 letter is attached for facilitated reference. The Council endorsed the proposed regulation with no suggested changes. The Division of Social Services has now acknowledged the endorsement and adopted a final regulation which conforms to the proposed regulation.

I recommend no further action.

3. DOE Final Charter School Regulation [16 DE Reg. 197 (August 1, 2012)]

The SCPD and GACEC submitted similar comments on the proposed version of this regulation in June, 2012. A copy of the GACEC's June 21 letter is attached for facilitated reference. The Department of Education has now adopted a final regulation incorporating a few technical edits prompted by the commentary.

First, the Councils recommended modifying the definition of "Highly Successful Charter School" to allow a charter school for "at risk" students to qualify without meeting the "above average performance on student assessment tests" standard. The DOE declined to effect the amendment. The DOE did amend (albeit incorrectly) a reference based on improper grammar.

Second, the Councils identified a grammatical error in §3.2 which the DOE corrected.

Third, the Councils recommended incorporation of a sentence requiring charter schools to offer "homebound" based on recently adopted Title 14 Del.C. §122(b)(24). The DOE declined to add the reference since it was contemporaneously publishing a proposed "homebound" regulation in the August 1 Registry of Regulations.

Fourth, the Councils recommended revision of a reference to the Gun Free Schools Act in §4.5.1.1. The DOE corrected the reference.

Fifth, the Councils recommended that the regulation be amended to require publication of the results of the performance evaluation on the DOE website. The DOE responded as follows: "The Department will take the comment under consideration for future revisions to this regulation."

Sixth, the Councils expressed concern with direct submission of criminal background check information by new board members to the DOE. The DOE effected no amendment.

Seventh, the Councils noted that the regulation was somewhat myopic in focusing on academic performance to the exclusion of other factors which make a school "successful". The DOE responded that schools could incorporate "mission specific measures" in their academic framework.

Eighth, the Councils recommended inclusion of a definition of "students at risk of academic failure". The DOE responded as follows: "The Department has taken the comment under advisement; however, maintains the need for flexibility in this area."

Ninth, the GACEC expressed concern with a provision which could effectively offer a school a blanket waiver from performance measures. The DOE responded that use of alternative performance goals would require DOE approval. No change was made.

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

#### 4. DMMA Proposed PACE Regulation [16 DE Reg. 170 (August 1, 2012)]

In October, 2011, the SCPD and GACEC endorsed a proposed regulation authorizing the establishment of a Program of All Inclusive Care for the Elderly (PACE) in Delaware. The regulation became final in December, 2011. See 15 DE Reg. 437 (October 1, 2011) (proposed); 15 DE Reg. 847 (December 1, 2011) (final). General background on this program is compiled in the attached CMS publication, “Quick Facts about Programs of All-inclusive Care for the Elderly (PACE)”. In an October 17, 2011 presentation, the DHSS Medicaid Director noted that the PACE program is intended to start on October 1, 2012. DMMA envisioned partnering with St. Francis Hospital with a Wilmington service area. The DMMA website contains only the attached brief description of the program which was last updated on September 28, 2011.

The Division of Medicaid & Medical Assistance is now proposing to adopt enrollment standards for PACE. I have the following observations.

First, the key eligibility standards are compiled in §5. There is some “tension” between §5 and §9 in the context of nursing home residency. The CMS document indicates that 7% of PACE enrollees live in nursing homes. Section 9 recites as follows:

9. Nursing facility services are part of the PACE benefit package.

The PACE Organization must notify the Division of Medicaid and Medical Assistance (DMMA) eligibility worker of the individual’s placement in a nursing facility.

The PACE individual is not required to contribute to the cost of their care while in a nursing facility.

Thus, the CMS guidance and §9.0 suggest that residents of nursing homes may be eligible for the program. However, §5 requires, as a matter of eligibility for enrollment, that the applicant “(b)e living in the community.” I infer that an individual must be in the community upon initial enrollment but that “continued eligibility” is not affected by post-enrollment nursing home residency. It would be helpful if DMMA clarified this aspect of eligibility.

Second, §10 b. contains the following justification for involuntary termination from the program:

Has decision making capacity and is consistently non-compliant with the individual plan of care and enrollment agreement, which may impact the participant’s health and welfare in the community;...;

This section would literally authorize termination for recurrent “minor/inconsequential” non-compliance with “minor/inconsequential” impact on health and welfare. Providers have a financial incentive to terminate eligibility of “expensive” individuals and it would be preferable to deter involuntary termination in the absence of significant non-compliance. There is also no requirement that the non-compliance be “wilful” rather than inadvertent. For example, an elderly individual’s plan may contemplate self-administration of medications. Due to memory deficits, the individual may periodically forget to take medications which affects the individual’s welfare. Under a literal reading of the regulatory standard, the individual could be terminated from the program based on consistent non-compliance impacting health. Consider the following substitute:

Has decision making capacity and is wilfully and consistently non-compliant with material components of the individual’s plan of care and enrollment agreement which may significantly impact the participant’s health and welfare in the community;...

Third, §10.b. contains the following additional justification for involuntary termination from the program:

Engages in disruptive, threatening or non-compliant behavior which jeopardizes his or her safety or the safety of others;...

Individuals with Alzheimer’s, dementia, Tourette’s or TBI may exhibit such behavior as a symptom of disability. Terminating their eligibility for symptoms of disability would violate §504 and the ADA. CMS requires programs to provide accommodations to participants with disabilities, not “dump” them. Cf. attached CMS Medicaid Director Guidance (July 29, 1998) and CMS Medicaid Director Guidance (May 10, 2010). See also attached October 11, 1985 HHS OCR LOF to Delaware DHSS which held the following regulation violated §504:

57.809 Mental Illness

A. Patients who are, or become, mentally ill and who may be harmful to themselves or others, shall not be admitted or retained in a nursing home.

OCR commented as follows:

Conditions such as Alzheimers Disease may be considered a mental impairment under the definition of handicapping condition; however the presence of this condition and its manifestations may in no way render one ineligible for the receipt of services normally provided. ...It is our preliminary determination, based on the preceding discussion, that Section 57.809 as written violates Section 504 of the Rehabilitation Act and its implementing regulation 45 CFR Section 84.4 and Section 84.52(a)(1).

[emphasis supplied]

Rather than authorizing termination from the program, enrollees manifesting such behavior due to disability should be considered for specialized treatment. See, e.g., 16 DE Admin Code 3225, §§5.5, 5.12 and 7.0; and 16 DE Admin Code 3201, §5.6. Consider the following substitute:

Has decision making capacity and wilfully engages in disruptive, threatening or non-compliant behavior which is not symptomatic of disability and which jeopardizes his or her safety or the safety of others;...

Fourth, it is unclear if “assisted living” services are part of the PACE benefit package. Compare §9.0. This could be clarified. Assisted living settings are required to be “homelike” (16 DE Reg. 3225, §3.0 (definition of “homelike”) and may be less restrictive settings than nursing facilities.

Fifth, the CMS document recites as follows: “If you disagree with the interdisciplinary team about your care plan, you have the right to file an appeal.” The DMMA regulation omits any reference to the right to a hearing to contest denial of program eligibility (§5.0); involuntary termination from the program (§10.0); and disagreements about the plan of care. It would be preferable to clarify that 16 DE Admin Code 5000 applies.

I recommend sharing the above observations with the Division with a courtesy copy forwarded to the DHSS Secretary and AARP.

#### 5. DMMA Prop. Estate Recovery & Civil Unions Reg. [16 DE Reg. 166 (August 1, 2012)]

In May, 2011, the Governor signed H.B. No. 30 which authorized civil unions between same-sex partners. In June of 2011, CMS issued the attached guidance to states entitled “Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery”. Based on the CMS guidance, the Division of Medicaid & Medical Assistance is now proposing regulations primarily incorporating references to “civil union partners” in the context of estate recover and liens.

I have the following observations.

First, DMMA proposes to amend §20500.5.3.2 to add “civil union partner” to the list of relatives who are eligible to request a waiver of estate recovery based on undue hardship. This is authorized by the CMS guidance at p. 3. Note that “spouses” are protected by a different regulation, §20500.5.1.

Second, DMMA proposes to amend §20500.6.1 to include “civil union partner” to the list of relatives whose presence in the home may justify deferral of a lien for costs of care while the beneficiary is in a nursing facility. This is authorized at pp. 1-2 of the CMS guidance. The same deferral will apply if the home is jointly owned with the civil union partner.

I did not identify any issues with the proposal which ostensibly comports with CMS

guidance and H.B. No. 30. I recommend endorsement.

6. DMMA Prop. Emergency Assistance Services Reg. [16 DE Reg. 173 (August 1, 2012)]

The Division of Medicaid & Medical Assistance proposes to amend its emergency assistance standards. The rationale for the changes is rewording, reformatting for clarity, and other non-substantive bases. At 173. Emergency assistance is statutorily authorized by Title 31 Del.C. §§501 and 521.

I have the following observations.

First, in §6002, Par. 1.B, definition of “financial eligibility”, the inclusion of “or” in Par 2 and “and” in Par. 3 is confusing. There are items in a series (Pars. 1-4) and it’s unclear if DMMA intends the references to be disjunctive or conjunctive. Perhaps Pars.2 and 3 could be combined into a single subsection.

Second, in the example involving A1 in §6003, Par. 3, first sentence, substitute “her” for “its” for consistency with other references to A1.

Third, in the same example, fourth sentence, substitute “A1” for “they” since the regulation would otherwise have plural pronouns (they) with a singular antecedent (A1).

Fourth, in §6005, Par. 1.A, it would be preferable to also authorize a home repair to provide “accessibility”. For example, an individual may suffer an injury requiring use of a temporary ramp for access to a dwelling unit. See also 4603A(a)(1) [contemplating minor modifications of dwellings for accessibility] and attached description of DSAAPD program covering home modifications and assistive devices. DSAAPD funds are limited and are often exhausted before the end of the fiscal year.

Fifth, there are many instances in which punctuation has been omitted. See, e.g., §6005, Par. 1.B.1.ii; §6005, Par. 1 I; and §6006. DMMA may wish to review these sections and insert appropriate punctuation.

Sixth, in §6005, Par. I.E, the criteria for “medical needs” could be expanded. For example, the enabling statute [Title 31 Del.C. §5002(6)] is relatively broad in scope. Moreover, query why prevention of short-term hospitalization or excessive pain or diversion from a nursing facility should not be qualifying justification for emergency medical services? Consider the following substitute:

A medical need is present if that need could result in serious impairment of health, ~~prolonged~~ hospitalization, institutionalization, excessive pain, or death.

Seventh, §6005, Par. 1.H. categorically limits clothing funds to loss from theft or fire. This

would literally exclude eligibility if loss were based on contamination (e.g. bedbugs; lice; skunk), flood, or other casualty. For example, mice will eat holes in clothes. Consider the following substitute:

Assistance in clothing is authorized only if the need results from casualty (e.g. fire; theft) or irreparable contamination.

I recommend sharing the above observations with the Division.

#### 7. DOE Proposed Supportive Instruction (Homebound) Reg. [16 DE Reg. 160 (August 1, 2012)]

The Department of Education is proposing some discrete amendments to its supportive instruction (homebound) regulation. Some of the changes are prompted by enactment of DLP-authored legislation (S.B. No. 112) in 2011. A copy of the engrossed bill is attached.

I have the following observations.

First, in §2.1, the term “public school” should be substituted for “school district”. The entitlement applies to public school students enrolled in either a district or charter school.

Second, in §2.1.3.2, the second sentence should be amended to read as follows: “Postpartum absences must be certified by a physician or an advanced practice nurse who is employed by or has a collaborative agreement with a licensed physician. This amendment is required by S.B. No. 112.

Third, in §3.1.1.2, substitute “public school” for “school district” since the homebound entitlement applies to charter schools.

Fourth, §§1.0 and 4.0 authorize public schools to provide homebound to a student who is suspended, expelled or subject to expulsion. Without further guidance, this may result in public schools violating Title 14 Del.C. §1604(8). See also attached H.B. No. 326 from 144<sup>th</sup> General Assembly which established §1604(8). By law, the described students are presumptively eligible for enrollment in an alternative school. The regulation could easily be misconstrued as authorizing public schools to routinely place described students on homebound for 3-5 hours weekly rather offering full-time placement in an alternative school. At an absolute minimum, the new sentence in §1.0 should include an introductory phrase - “Subject to Title 14 Del.C. §1604(8), (t)his may also include... Section 4.0 could then be amended by adding the following second sentence: “Such policy shall conform to, and not circumvent, any qualifying student’s eligibility for enrollment in a consortium discipline alternative program pursuant to Title 14 Del.C. §1604 and 14 DE Admin Code 611.”

Fifth, the 3-5 hour minimum standard in §3.1.1 is not even marginally adequate. See, e.g.,

Region IV OCR LOF to Memphis (TN) City School District, 20 IDELR 85, 86 (April 23, 1993) [provision of 3 hours weekly homebound instruction in IEP based on district policy violates §504]; and Region I OCR LOF to Boston Public Schools, 21 IDELR 170 (June 10, 1994) [four hours weekly of homebound instruction violates §504 and ADA]. Moreover, in practice, the minimum has historically been the norm. The U.S. Department of Education disallows homebound based on a formula or set number of hours for students with disabilities. See attached materials. At a minimum, the following third sentence should be added to §3.1.1.1 (or added as a new §3.1.1.3): “For students identified under the IDEA or §504 of the Rehabilitation Act, the extent of weekly supportive instruction must be individually determined to ensure FAPE.” This statement is consistent with long-standing DOE policy but absent from the regulation.

Sixth, the prevailing practice in Delaware is to offer homebound as an after-school hours option only. For students with disabilities, this may also violate §504 and the ADA. Region I OCR LOF to Boston Public Schools, 21 IDELR 170 (June 10, 1994)[disallowing practice of only offering “after-school hours” homebound]. The regulation contains no guidance in this context.

Seventh, S.B. No. 112 authorizes the DOE to “identify the licensed professionals authorized to certify eligibility for supportive instruction”. The DOE should consider adding “physician assistants” licensed under Title 24 Del.C. Ch. 17 and 24 DE Admin Code 1700, §24. Physician assistants, like APRNs, work under the supervision of a physician and can diagnose and prescribe treatment. Recent legislation has included physician assistants as well as APRNs as alternatives to physicians for authoritative medical opinions. See H.B. No. 261 (signed July 18, 2012); and S.B. No. 138 (signed July 6, 2009). See also Title 16 Del.C. §3003D( c).

I recommend sharing the above observations with the DOE and SBE. The GACEC could also consider sharing a courtesy copy with the Lt. Governor.

#### 8. DOE Proposed Immunization Regulation [16 DE Reg. 157 (August 1, 2012)]

In 2008, the Legislature enacted H.B. No. 297 which approved Delaware’s participation in the Interstate Compact on Education for Children of Military Families. At that time approximately ten states had approved the Compact. More than forty states have now approved the Compact. I am attaching background materials describing the terms of the Compact and identifying the “Compact Officials” for Delaware. Susan Haberstroh is the “Compact Commissioner”. The Compact is available in its entirety at <http://www.mic3.net/>.

One of the main features of the Compact is to reduce barriers to enrollment of children of military families given frequent relocations. This includes compliance with state immunization standards for entering students. The Compact contains the following provision:

Immunizations - Compacting states shall give thirty (30) days from the date of

enrollment or within such time as is reasonably determined under the rules promulgated by the Interstate Commission, for students to obtain any immunization(s) required by the receiving state. For a series of immunizations, initial vaccinations must be obtained within thirty (30) days or within such time as is reasonably determined under the rules promulgated by the Interstate Commission.

The Department of Education is now incorporating this standard in its immunization regulation. See §3.5. The only other proposed amendments are minor and non-substantive.

Since the regulation is essentially a “housekeeping” measure implementing the Compact, I recommend endorsement.

#### Attachments

8g: legis/812bils  
F:pub/bjh/legis/2012p&l/812bils