DISABILITIES LAW PROGRAM
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MEMORANDUM

To: SCPD Policy & Law Committee

From: Laura J. Waterland

Re: Recent Regulatory Initiative

Date: January 9, 2018

Consistent with Council requests, I am providing an analysis of proposed regulations appearing in the January 2018 issue of the Register of Regulations. There were no identified education regulations, but there are a few proposed regulations potentially impacting people with disabilities, as well as several final regulations that Councils commented on previously. I have also included a brief review of several newly introduced bills.

Proposed Regulations

1. DSS Proposed Child Care Eligibility Regulation [21 DE Reg. 542 (January 1, 2018)]

The Division of Social Services proposes to amend the Delaware Social Services Manual (DSSM) 11002.4, Persons Eligible for Child Care Assistance, and DSSM 11004 Application Processing, with the stated goal of "clarify[ing] policy related to determination of eligibility."

As background, the Division of Social Services administers a child care subsidy program through both state and federal grants. This program, sometimes referred to as "Purchase of Care" provides subsidies to families for child care expenses. The program is especially helpful for families of children with special needs because it allows payments to individuals for child care when group child care is not available, and extends the benefit to children over age 12 who have special needs and for whom child care is very difficult to find. It also supports parents or other caretakers with disabilities who need to place their children in child care due to their own needs.

I have the following observations.

First, the amendment of 11002.4 eliminates a lengthy regurgitation of the PRWOA definitions of eligible and ineligible immigration status, and also deletes specific categories of eligibility. The amendment then sets out a much more simplified list of eligibility criteria. The revised language does not alter the eligibility criteria for this program. To be eligible, children must be under 13 or over 13 and incapable of self-care as determined by a medical professional. Children must also be citizens, qualified aliens (defined elsewhere) or referred by DFS.

The next section further extends eligibility to children who are in need of protective services, homeless or in foster care; however, it is unclear whether this is irrespective of age or alien status. The regulation would benefit from language clarifying that this group of children is eligible irrespective of age or immigration status, if that is the case.

Subsection 2 lists the eligibility requirements for parents and Caretakers which includes those who "report a special need." It might be beneficial to cross-reference the definition of "special need" in 11003.7.8.

The second set of amendments to section 11004 "Applying for Child Care Assistance" again seeks to simplify the language describing the application process. The language contemplates allowing case workers to conduct an "informal" review of eligibility, and make a disposition that a potential applicant is ineligible, without issuing a written decision and without the person having any right to appeal. The proposed language in paragraph 2 indicates that "Parents and caretakers who appear to be eligible may complete a formal application process." Unfortunately, case handlers make mistakes and potential applicants can be erroneously and unnecessarily discouraged from filing applications that would trigger a formal decision and a right to appeal. Some of the eligibility rules are complex (such as alien status) and some aspects of eligibility, such as having a special need, are subjective and not suitable for an informal decision by a case worker. Families who are told they probably not eligible by a case worker are not likely to pursue an application. The policy needlessly and unfairly skews the process against families.

These provisions violate due process requirements and also make erroneous denials of services much more likely. The Councils may wish to recommend that DSS revise the regulation to require an application be processed for each family that asks for services. This would be consistent with other benefits programs and also with due process requirements.

2. Repeal of 18 DE. Admin. Code 906 regarding Use of Credit Information [21 DE Reg. 546 (January 1, 2018)]

The Department of Insurance proposes to repeal Regulation 906, which concerns the use of credit information by insurance companies. He repeal is due to the enactment of HS1 For HB 80 (18 Del. Code §8301 et seq.). The regulation would be repealed on May 1, 2018, the effective date of the new statute.

As stated in the synopsis of the public notice, the regulation does not contain some of the requirements of the new statute. In addition, some requirements in Regulation 906 now contradict and are inconsistent with the requirements of the new law. For instance, the regulation states that insurers cannot use bankruptcies that are more than ten (10) years old. The new statute lowers the time to five (5) years. The regulation also states that insurers cannot use suits and judgments that are more than seven (7) years old or the expiration of the applicable statute of limitations, whichever is greater. The new statute lowers the time to the greater of five (5) years or the applicable statute of limitations.

In addition to replacing Chapter 83 (18 *Del. C.* §§8301 to 8304), the new statute amends 25 *Del.C.* §2503(a) by adding paragraph ten (10) that prohibits an insurer from increasing the renewal rate on a personal automobile insurance policy sole because the insured in 75 or older and paragraph eleven (11) that prohibits an insurer on a personal automobile insurance policy from charging a higher rate because of a change in marital status due to the death of a spouse.

Repeal of Regulation 906 does not adversely affect the rights of consumers. The new statue is broader in its protections of consumers and insureds overall. The new statute broadly states that its purpose is to protect consumers in the use of credit information for personal insurance by insurers. Section 8304(a)(1) prohibits an insurer from using "income, gender, sexual orientation, gender identity, education, address, zip code, race, ethnic group, religion, marital status, or nationality of the consumer to calculate an insurance score. The new statute incorporates and expands upon the "extraordinary personal circumstance" from regulation 906 7.3. The statute creates an "Extraordinary Life Circumstances" section that allows an applicant for insurance or an insured to request from an insurer that uses credit information a reasonable exception to the insurer's rates, rating classifications, tier placement, or information that has been influenced by, *inter alia*, a catastrophic event; serious illness or injury to the insured or an immediate family member; death of a spouse, parent, or child; divorce; identity theft; unemployment for more than three (3) months through no fault of the applicant or insured; military deployment overseas, and other events as determined by the insurer (18 *Del. C.* §8305).

In sum, the repeal of Regulation 906 will not adversely affect consumers applying for insurance or those who already have insurance and may reduce denials based on inappropriate factors. For that reason, the Councils may wish to endorse the proposed repeal of the existing regulation.

3. DNREC Amendment to 7 DE Admin. Code 1363 Boiler Inspections [21 DE. Reg. 554 (January 1, 2018].

DNREC is proposing to amend its regulation regarding Boiler Safety. Briefly, the new regulation would require building owners to have the boiler inspected by an outside technician in addition to adding significant affirmative obligations of their own regarding maintenance. The regulation covers public spaces, such as churches, businesses, schools as well as some housing. This bill has the potential to impact many individuals with disabilities. This regulation would impact individuals who live in multifamily apartment dwellings where more than six units are served by a boiler. (Councils may recall a very unfortunate and fatal carbon monoxide incident that killed four tenants in 2016 caused by a faulty boiler pipe.) Consequently, individuals who live in larger apartment buildings would potentially be positively impacted by this regulatory change. Although it would be preferable for this regulation to be more broadly applicable, Councils may wish to endorse this regulation as improving safety for individuals with disabilities and other members of the public.

Final Regulations

1. DMMA Final Special Needs Trust Regulation [21 DE. Reg. 566]. Councils endorsed the amendment with the recommendation that the effective date be changed to reflect the CURES Act. This modification was made by DMMA.

2. DMMA Final Medicaid Managed Care Reg. [21 DE. Reg. 568 (January 1, 2018)]. Councils recommended amendments to the proposed changes in November 2017. Most comments related to the way in which DMMA was approaching the notice and hearing requirements under the revised CMS regulations for MCOs. DMMA changed the proposed regulation to reflect the requirement individuals be allowed to ask for a fair hearing if the MCO does not adhere to notice and timing requirements and that when an MCO fails to adhere to these requirements, the exhaustion requirement in the regulation is deemed to have been satisfied.

3. DMMA Final Regulation on Excluded Income [21 DE.Reg. 572 January 1, 2018]. SCPD endorsed this regulation.

4. DDDS Final Lifespan Waiver Regulation, [21 DE. Reg. 574 (January 1, 2018)]. Councils commented specifically on deductions for waiver participants. DDDS accepted Councils' clarifying suggestions in the final regulation.

5. DSS Final Regulation on Child Care Redeterminations [21 DE. Reg. 576 (January 1, 2018)]. Councils endorsed this regulation.

Proposed Bills

These comments are preliminary and will be fleshed out after conversations with the Policy and Law Committees of both councils.

HB 285. This bill makes significant changes to the provisions in Chapter 11 related to prohibitions on possession and purchase of firearms or other deadly weapons for individuals with mental illness. DLP staff are conducting a comprehensive review of this legislation and will provide analysis when it has completed that review.

HB 286. This bill attempts to bring DOE into compliance regarding training and certification of special education teachers. The bill creates a "Certificate of Eligibility" for special education teachers and describes acceptable alternative routes for teacher licensure and certification as teachers of students with disabilities (new §1266). The district must commit to assist the recipient in achieving the skills necessary to meet certification requirements.

a. DLP would like input from SCPD and GACEC regarding this legislation. It is unclear whether DOE can still issue an Emergency Certificate to a special education teacher. It may be the intent to only allow Certificates of Eligibility for teachers of students with disabilities, but this writer does not see language that prohibits an emergency certificate from being issued.
b. DLP is curious as to the source of the alternative routes criteria in §1266. The language is sparse; for example, there is no explicit language requiring the alternative route to certification actually be a specialized course.

HB 287. This bill amends Title 14 to rename the "Certificate of Performance" with "State of Delaware High School Diploma of Modified Performance Standards." The change allows schools to issue a document recognizing the completion of a course of study consistent with the student's identified goals and performance outcomes. The new title validates the student's work and reduces stigma, but as a practical matter will improve the student's ability to attain post –secondary education, training and/or work. The name will not mislead any prospective employer regarding the student's performance track at school. There is no downside to renaming the Certificate, and Councils may wish to endorse this legislation.

HB 292. This bill implements the recommendations of the Autism Educational Task Force Report and overhauls the statewide educational program (DAP) for children with autism. The bill requires the employment of a statewide director, hired in consultation with a Peer Review Committee. The bill lists a number of requirements for the director. The bill creates a three year pilot program mandating training and technical assistance for all public schools which includes practices specifically relevant to children with ASD classification using evidence based practices. The bill mandates at least one training specialist for every 100 students with ASD classification (the bill contemplates a phase in of this requirement). The bill has qualification requirements for training specialists. Funding for the program will come from a variety of sources, including state appropriations, unit funding, pass through funds and grants, and "fees for service for support." There are to be numerous committees including a parent advisory council, a Peer Review Committee, and a Statewide Monitoring Review Board.

The goal appears to be to create a less centralized DAP where students who have a classification of ASD can be educated in their own districts. The goal of the pilot is to increase capacity in all school districts through coordinated training and access to specialists. The Councils may wish to endorse this concept only if it is properly resourced and funded. A less centralized system without adequate resources would severely compromise the educational quality for students with the ASD classification. There is also concern about what would happen after the three year pilot program has been completed.