



## DISABILITIES LAW PROGRAM

COMMUNITY LEGAL AID SOCIETY, INC.

100 W. 10th Street, Suite 801  
Wilmington, Delaware 19801  
(302) 575-0660 TTY (302) 575-0696 Fax (302) 575-0840  
www.declasi.org

### MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory Initiatives

Date: November 15, 2013

I am providing my analysis of eight (8) regulatory initiatives. Given time constraints, the commentary should be considered preliminary and non-exhaustive.

1. DMMA Final Medicaid Drug Reimbursement & Drug Rebate Reg. [17 DE Reg. 501 (11/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in September, 2013. The Councils endorsed the initiative with no recommended amendments. The Division of Medicaid and Medical Assistance has now acknowledged the endorsements and adopted a final regulation which conforms to the proposed version.

I recommend no further action.

2. DMMA Final Medicaid Provider Screening Reg. [17 DE Reg. 519 (11/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in September, 2013. A copy of the GACEC's September 27 letter is attached for facilitated reference.

The Councils identified two (2) concerns and recommended amendments to conform to CMS guidance.

First, the Councils noted that an appeal from a provider terminated from participation in another state does not allow the provider to relitigate the underlying reasons for termination. DMMA agreed and amended §1.39.2.5 by addition of the following provision:

Denial and termination decisions following provider screening and enrollment procedures are appealable; however, the scope of the appeal is limited to whether the provider was terminated by Medicare or the initiating state Medicaid or CHIP program. The appeal does not provide an opportunity for the provider to contest the basis of the termination by Medicare or other state's Medicaid or CHIP program.

Second, the Councils noted that CMS does allow states to request a waiver of termination of a provider terminated by Medicare, another state Medicaid agency, or CHIP. DMMA amended §1.39.2.4 as follows:

DMAP will terminate providers and disclosed entities or individuals who do not meet ACA screening guidelines *[unless DMAP, in its sole discretion, opts to request a waiver from CMS]*.

Since the regulation is final, and the Division incorporated amendments based on each of the Councils' recommendations, no further action is warranted.

### 3. DPH Final Trauma System Regulation [17 DE Reg. 523 (11/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in September, 2013. A copy of the September 26 SCPD memo is attached for facilitated reference.

First, the Councils recommending inclusion of an actual effective date for a "grandfather" provision. The Division agreed to insert a specific date.

Second, the Councils recommended insertion of an introduction to §5.2.4 which otherwise consists of only an outline/ list. The Division declined to adopt a revision based on the rationale that "(t)he section is formatted to be in alignment with (a) national document", the American College of Surgeons' trauma standards.

Third, the Councils recommended an amendment to clarify that the standards apply to not only patients "transferred" to a facility but also patients directly "admitted" to the facility. No change was made.

Since the regulation is final, and the Division addressed each of the Councils' comments, I recommend no further action.

### 4. DSS Final Child Care Subsidy Program "Relative" Definition Reg. [17 DE Reg. 526 (11/1/13)]

The SCPD commented on the proposed version of this regulation in September. A copy of the Council's September 26 memo is attached for facilitated reference.

First, the Council identified multiple concerns with the definition of "relative". Based on the concerns, the Council recommended adoption of the following definition: "An adult who is by marriage, blood relationship, or court decree, the grandparent, great grandparent, sibling, aunt or uncle of the child receiving care". The Division agreed and adopted the suggested definition verbatim.

Second, the Council recommended, based on federal law, that the Division consider issuing a proposed regulation in the future amending the definition of "parent" to include "in loco parentis". The Division agreed to "consider this for a future change". At 527.

Since the regulation is final, and the Division addressed each Council concern, I recommend no further action.

5. DOE Final Charter Schools Regulation [17 DE Reg. 497 (11/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in September, 2013. A copy of the September 19 GACEC letter is attached for facilitated reference.

First, the Councils suggested that a reference to an “informal” audit could lead to problematic results. The Department noted that it “considered the comment, but is not making the change during this update”. The implication is that the Department may consider an amendment in the future.

Second, the Councils noted that the enabling statute requires the DOE to include recommended changes to education law in its annual charter report. The regulation omitted this requirement. No change was made. The Department provided the following explanation: “After review, the Department believes the definition is adequate as it contemplates meeting the statutory definition now and if subsequent changes to statute are made.”

Third, although not earmarked for amendment, the Councils noted that a provision allowing the Department to adopt a moratorium on new charter applications was contrary to statute. The Department deleted the inconsistent provision.

Fourth, the Councils identified a grammatical error. The Department corrected the error.

Since the regulation is final, and the Department addressed each of the Councils’ comments, I recommend no further action.

6. DSS Prop. Child Care Subsidy Program Education Reg. [17 DE Reg. 486 (11/1/13)]

Earlier this year the SCPD and GACEC commented on a proposed DSS regulation which addressed the types of post-secondary education that would qualify a student for enrollment in the child care subsidy program. The Councils noted ambiguity in regulatory provisions. In response, the Division deleted a section in anticipation of issuing a new regulation. See 16 DE Reg. 717 (January 1, 2013) (proposed); 16 DE Reg. 990 (March 1, 2013) (final)]. DSS is now issuing a new proposed regulation. The standards are brief and clarify that a caregiver with a Bachelor’s degree or higher is not eligible. I did not identify any concerns.

I recommend endorsement.

7. DOE Educator Mentoring Regulation [17 DE Reg. 472 11/1/13)]

Title 12 Del.C. §1210 ( c) recites as follows:

If a licensee intends to apply for a continuing license, the licensee shall, prior to expiration of that licensee’s initial license, complete professional development and mentoring activities as may be required by rules and regulations promulgated and adopted pursuant to this chapter.

The Department of Education is revising its educator mentoring regulation which implements this statute.

I have the following observations.

First, in §3.2, I recommend inserting “and” between “develop” and “then”.

Second, the implication of §3.4.1, is that it covers specialists and teachers since §3.4.2 covers administrators. For clarity, the DOE may wish to consider modifying the reference as follows: “(a) training program for Specialist and Teacher Lead Mentors”.

Third, although the regulation covers all public schools, including charter schools [§2.0, definition of “educator”], §7.2.4.2 refers to “district”. The Department should consider substituting “employing authority” which is defined in §2.0.

I recommend sharing the above observations with the Department and SBE.

#### 8. DOE Proposed GED Test Credential Regulation [17 DE Reg. 469 (11/1/13)]

Consistent with the attached November 7, 2013 News Journal article, a “for-profit” entity has acquired a joint ownership interest in the GED Testing Service which has historically been operated by the nonprofit American Council on Education. Effective January, 2014, the new test will be computer-based and cost \$120 in contrast to the current \$75. At 470. The Department of Education is revising its regulation entitled “Delaware Requirements for Issuance of the GED Test Credential”.

I have the following observations.

First, the revised regulation eliminates most references to “GED” and substitutes “secondary credential assessment”. The Department indicates that the GED is an approved secondary credential assessment. However, the Department will publish annually a list of other approved assessments. See §4.0. This approach could result in unintended consequences since many current statutes only refer to a “GED”, not an equivalent “secondary credential”. See, e.g., 14 Del.C. §159(a)(2); 24 Del.C. §1122(b)(1); 11 Del.C. §6711; 11 Del.C. §6531A(e); and 11 Del.C. §8570(3)b. The Department may wish to consider the ramifications of its regulatory approach.

Second, the title to the regulation, which refers to “GED Test Credential”, may now be “underinclusive”. The Department may wish to consider changing the title as follows: “Delaware Requirements for Issuance of a Secondary Credential, Including GED Test Credential”.

I recommend sharing the above observations with the Department and SBE.

#### Attachments

8g:1113bils

F:pub/bjh/legis/p&l2013/1113bils

**GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS**

GEORGE V. MASSEY STATION  
516 WEST LOOCKERMAN STREET  
DOVER, DELAWARE 19904  
TELEPHONE: (302) 739-4553  
FAX: (302) 739-6126

September 27, 2013

Sharon L. Summers  
Planning & Policy Development Unit  
Division of Medicaid and Medical Assistance  
1901 North DuPont Highway  
P. O. Box 906  
New Castle, DE 19720-0906

**RE: DMMA Proposed Medicaid Provider Screening [17 DE Reg. 282 (9/1/13)]**

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Medicaid and Medical Assistance (DMMA) proposal to adopt regulations implementing §§6401 and 6501 of the Affordable Care Act (ACA). In a nutshell, the Centers for Medicare and Medicaid Services (CMS) adopted regulations in 2011 which: 1) require states to adopt certain screening and enrollment standards for Medicaid providers; 2) collect an enrollment fee for institutional providers; 3) authorize a temporary Medicaid provider enrollment moratorium when directed by CMS; 4) terminate provider participation in Medicaid and CHIP if another state has terminated the provider's participation on or after January 1, 2011; and 5) adopt provider screening standards at enrollment, reenrollment and revalidation. Given time constraints, the GACEC has not conducted an exhaustive comparison of the proposed regulation to extensive federal statutory, regulatory, and subregulatory ACA standards; however, Council did identify two areas of concern.

First, §§1.39.2.4 and 1.39.2.5 authorize providers terminated from program participation to invoke full appeal rights compiled in the General Policy Provider Manual. In contrast, the attached CMS Bulletin (CPI-B 11-05) contains the following limitation on provider appeal rights:

...When subsequent States terminate based on that initial termination, the scope of their appeals should only review whether the provider was, in fact, terminated by the initiating program. The subsequent appeals process should not review the underlying reasons for the initiating termination. The appeal process in subsequent States does not provide a new forum in which to litigate the basis of termination by another State Medicaid program, Medicare, or CHIP.

DMMA may wish to incorporate this limitation into §1.39.2.5.

Second, §1.39.2.4 recites that DMMA will check federal databases monthly and “will terminate providers and disclosed entities or individuals who do not meet ACA screening guidelines.” This is a “no-exceptions” standard. In contrast, the attached CMS Bulletin (CPI-B 11-05) clarifies that termination is not the invariable result of identification of termination of a provider by another state:

Q. Are there any exceptions to the requirement to terminate a provider that was terminated by Medicare or another State Medicaid program or CHIP?

A. Yes. The statute provides for the same limitations on termination that apply to exclusion under §§1128(c)(3)(B) and 1128(d)(3)(B) of the Social Security Act. Thus, a State may request a waiver of the requirement to terminate a particular provider’s participation. State agencies may submit such waiver requests to their respective CMS Regional Offices.

DMMA may wish to consider the following amendment to the last sentence in §1.39.2.4:

DMAP will terminate providers and disclosed entities or individuals who do not meet ACA screening guidelines unless DMAP, in its sole discretion, solicits and secures a waiver from CMS.

Thank you in advance for your time and consideration in reviewing our observations. Please feel free to contact me or Wendy Strauss should you have questions or concerns.

Sincerely,



Terri A. Hancharick  
TAH:kpc

CC: Stephen Groff, DMMA

Enclosures



STATE OF DELAWARE  
STATE COUNCIL FOR PERSONS WITH DISABILITIES  
MARGARET M. O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 1  
DOVER, DE 19901

VOICE: (302) 739-3620  
TTY/TDD: (302) 739-3699  
FAX: (302) 739-6704

MEMORANDUM

DATE: September 26, 2013

TO: Ms. Deborah Harvey  
Division of Public Health

FROM: Kyle Hodges, Director  
State Council for Persons with Disabilities

RE: 17 DE Reg. 288 [DPH Proposed Trauma System Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Public Health's (DPH) proposal to adopt many discrete amendments to its 16-page set of regulations covering Delaware's trauma system. Some of the key features are as follows: 1) general alignment with American College of Surgeons' trauma standards (§5.1); 2) authorization to exceed the American College of Surgeons' standards (§5.1.1); 3) incorporation of DPH pre-hospital trauma triage guidance in lieu of listing specific guidance in the regulation (§6.1); 4) authorization of some discretion (given time and distance considerations) to transfer patients with significant head trauma or spinal cord injury to a Level 1 or Level 2 Trauma Center without an available neurosurgeon (§6.2); 5) adoption of more liberal standards for referral to burn centers (§6.4); and 6) adoption of new criteria, effective January 1, 2014, for patient inclusion in the hospital trauma registry (§7.7). The proposed regulation was published as 17 DE Reg. 288 in the September 1, 2013 issue of the Register of Regulations. SCPD has the following observations.

First, §5.2.2.4 recites as follows:

Desirable

5.2.2.4. Emergency Medicine department physicians, orthopedic surgeons, and neurosurgeons taking trauma call must be Board certified or eligible.

(NOTE: Non-boarded physicians in these specialty areas who have active privileges at a designated Trauma System facility at the time of promulgation of these revisions will be grandfathered)

Assuming "promulgation of these revisions" refers to an earlier version of the regulation, it

would be clearer to simply insert a date. Individuals reading the regulation will otherwise have to guess at the effective date of the provision. Moreover, it is conceptually "odd" to have a "desirable", non-essential "grandfather" provision. In effect, covered facilities are encouraged, but not required, to employ only a Board Certified or eligible physician unless the physician is grandfathered.

Second, §5.2.4 consists of an outline/list of "essential" participating hospital criteria. It would benefit from an introductory narrative. For example, the introduction could simply recite as follows: "Trauma System Participating Hospitals must have the following in place:"

Third, in §7.7.1.1, the former standards contemplated patient inclusion in the hospital Trauma Registry based on "admission". The new standards literally only authorize inclusion of patients in the Registry based on a "transfer". It may be preferable to include patients in the Registry who are directly admitted to a trauma center without being "transferred" from another facility.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

cc: Dr. Karyl Rattay  
Ms. MarySue Jones  
Ms. Deborah Gottschalk  
Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

17reg288 dph-trauma system 9-26-13



STATE OF DELAWARE  
STATE COUNCIL FOR PERSONS WITH DISABILITIES  
MARGARET M. O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 1  
DOVER, DE 19901

VOICE: (302) 739-3620  
TTY/TDD: (302) 739-3699  
FAX: (302) 739-6704

MEMORANDUM

DATE: September 26, 2013

TO: Ms. Sharon L. Summers, DSS  
Policy, Program & Development Unit

FROM: Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: 17 DE Reg. 289 [DSS Proposed Child Care Subsidy Program "Relative" Definition Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Social Services' (DSS) proposal to adopt a revised definition of "relative" for purposes of its Child Care Subsidy Program. The summary of proposed changes states that the current definition is vague and leads eligibility determination workers to the Delaware Temporary Assistance for Needy Families (TANF) policy definitions. The proposed rule change is intended to ensure that eligible relatives provide authorized child care services. The proposed regulation was published as 17 DE Reg. 289 in the September 1, 2013 issue of the Register of Regulations. SCPD has the following observations.

First, the new reference to "step-relatives" could be interpreted in different ways:

- A. All step-relatives (even step-cousins and step-parents) qualify as a "relative"; or
- B. Only step-grandparents, great-grandparents, aunts, uncles and siblings qualify.

This is confusing.

Second, the definition omits persons related by adoption. Compare 45 C.F.R. §98.2 (definition of "eligible child care provider"), which reads, in pertinent part, as follows:

- (2) A child care provider who is 18 years of age or older who provides child care services only to eligible children who are, by marriage, blood relationship, or court decree, the

grandchild, great grandchild, sibling (if such provider lives in separate residence), niece, or nephew of such provider, and complies with any applicable requirements that govern child care provided by the relative involved;...

See also analogous references to "natural, legal, adoptive, step" relatives in 16 DE Admin Code §11003.9.3 and definition of parent in §11002.9 covering "natural, adoptive, and step" relatives.

Third, based on the above excerpt from 45 C.F.R. §98.2 (definition of "eligible child care provider"), SCPD surmises that a "relative" must be an adult. The definition in the proposed regulation only requires a sibling to be an adult. An aunt or uncle could be under 18 years of age in the State regulation.

Based on the above observations, DSS could consider the following alternative:

Relative        An adult who is by marriage, blood relationship, or court decree, the grandparent, great grandparent, sibling, aunt or uncle of the child receiving care.

Fourth, the Division may wish to consider amending its definition of "parent" and adding a definition of "in loco parentis" in a future proposed regulation. Consider the following:

The federal definition of "parent" (45 C.F.R. §98.2) includes a "legal guardian" and "other person standing in loco parentis":

Parent means a parent by blood, marriage, or adoption and also means a legal guardian, or other person standing in loco parentis.

In contrast, the DSS definition of "parent" in §11002.9 omits guardians and other persons standing in loco parentis:

Parent        The child's natural mother, natural legal father, adoptive mother or father, or step-parent.

Moreover, another federal regulation requires the State to specifically adopt a definition of "in loco parentis". See 45 C.F.R. §98.16(f)(9).

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

cc: Ms. Elaine Archangelo  
Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

17reg289 dss-child care subsidy relative definition 9-26-13

**GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS**

GEORGE V. MASSEY STATION  
516 WEST LOOCKERMAN STREET  
DOVER, DELAWARE 19904  
TELEPHONE: (302) 739-4553  
FAX: (302) 739-6126

September 19, 2013

Susan Haberstroh, Regulation Review  
Department of Education  
35 Commerce Way, Suite 1  
Dover, DE 19901

**RE: DOE Proposed Charter School Regulation [17 DE Reg. 275 (September 1, 2013)]**

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education (DOE) proposal to adopt some discrete amendments to its charter school standards. Council would like to share the following observations.

First, in §2.0, there is a definition of "audit" which recites that it is "(a)n informal financial, programmatic, or compliance audit of a charter school. The term is then used in §7.0 to refer to "a required audit of the business and financial transactions, records, and accounts of the school" pursuant to Title 14 Del.C. §513(a). Although not earmarked for revision, the DOE may wish to delete the term "informal" in the definition in the current regulation or prospective proposed regulation. Council is unfamiliar with the term "informal" audit when required by statute. The use of the term allows a charter school to argue that errors, misleading information and omissions in the published audit are not important since the audit is simply "informal".

Second, in §2.0, the definition of "Department's Annual Charter Report" omits any reference to recommended changes in education laws. Senate Bill No. 147, signed by the Governor on July 18, 2013, amended Title 14 Del.C. §514 to require the DOE report to include "the Secretary of Education's analysis of, recommendations relating to, and proposed changes relating to Delaware education laws, in light of the content of annual reports submitted pursuant to Section 513 of Title 14;..."

Third, §3.6 recites that "(n)o application for a new Charter School will be accepted by the Department in any year in which the Department with the approval of the State Board has decided not to accept applications". Although not earmarked for revision, the Department may

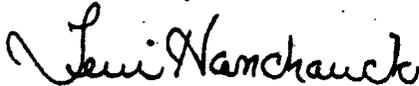
wish to consider whether this statement conforms to the current Code. House Bill No. 165, signed by the Governor on June 26, 2013, revised Title 14 Del.C. §511(h) through the following "strike-out":

~~The Department of Education with the consent of the State Board of Education may also decide that it will not accept any new charter school applications under this chapter provided that it does so annually upon affirmative vote of its board at a public meeting on or before October 1.~~

Fourth, in §7.0, there is a plural pronoun ("their") with a singular antecedent ("School"). Council recommends substituting "its" for "their".

Thank you in advance for your consideration of our observations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,



Terri A. Hancharick  
Chairperson

TAH:kpc

CC: The Honorable Mark Murphy, Secretary of Education  
Dr. Teri Quinn Gray, State Board of Education  
Dr. Donna Mitchell, Professional Standards Board  
Mary Ann Mieczkowski, DOE  
Ilona Kirshon, Esq., DOE  
Terry Hickey, Esq., DOE  
Paula Fontello, Esq., DOE

# Test takers rush to complete GED

By Kimberly Hefling  
Associated Press

WASHINGTON—Americans who passed part, but not all, of the GED test are rushing to finish the high school equivalency exam before a new version rolls out in January and their previous scores are wiped out. About 1 million people could be affected.

With the new version, test takers must use a computer instead of paper and pencil. The test itself will be more rigorous and cost more — at \$120, the price in some states will be significantly higher than previous versions. Some places may subsidize all or part of the cost.

"This is the thing that's sort of putting the spur in the saddle," said Leicester

Johnson, executive director of Academy of Hope, an adult charter school in Washington, D.C. "People just don't want to start over."

Test takers have been warned for more than a year about the approaching Dec. 31 deadline to complete the test. States and localities are phoning people, and thousands of letters have gone out—including to 32,000 Californians who passed parts but not all of the test in the past two years.

"We don't want anyone to be caught off-guard and come in and test in January or February thinking they have their old scores, and they have to start over," said Pam Blundell, who oversees adult education for the Oklahoma

State Department of Education. She said Oklahoma test sites have added additional test days and referred students to other sites.

Nicole Chestang, executive vice president at GED Testing Service, said the rush was expected. In 2001, the year before the previous upgrade, there was a 30 percent increase in test takers, most toward the end of the year, she said. She advised people to register for the exam now, even if they don't take it until later in November or December.

Some critics have challenged the price increases and the mandate that test takers use a computer — issues that affect many people living in poverty.

This is the first up-

grade since for-profit Pearson Vue Testing acquired a joint ownership interest in the GED Testing Service. For 70 years, GED Testing Service has been run by the nonprofit American Council on Education.

GED exam officials have said the changes will modernize the test and align it with new college and career-ready standards adopted in a majority of states. They say basic computer skills are needed in a modern workplace.

On a recent test given to adults worldwide of workplace skills including math, reading and problem-solving using technology, American adults scored below the international average.

1-7-25