

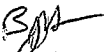


DISABILITIES LAW PROGRAM
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MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman 

Re: Recent Regulatory Initiatives

Date: December 12, 2016

Consistent with the request of the SCPD and GACEC, I am providing analyses of five (5) regulatory initiatives appearing in the December Registry of Regulations. Given time constraints, the analyses should be considered preliminary and non-exhaustive.

1. DOE Final Immunization Regulation [20 DE Reg. 441 (12/1/16)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2016. A copy of the SCPD's October 24, letter is attached for facilitated reference.

The Councils identified a single concern with the initiative, i.e., the need to clarify a reference to the responsible administrator in §6.0. The Department of Education (DOE) is now adopting a final regulation which thanks the Councils for the observation and adopts a close variation of the Councils' suggested language.

Since the regulation is final, and the DOE incorporated an amendment consistent with the Councils' recommendation, no further action is warranted.

2. DOE Final Medication & Treatment Regulation [20 DE Reg. 445 (12/1/16)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2016. A copy of the SCPD's October 24, letter is attached for facilitated reference.

The Councils identified a single concern with the regulation, i.e., “tension” between the State enabling statute which bans school staff or contractors from administering prescribed medical marijuana oil and federal law requiring schools to administer prescribed medications to accommodate the needs of students with disabilities. The Councils recommended the addition of a non-regulatory note. The Department of Education has now adopted a final regulation with no changes. No rationale is provided, only a recital that “(t)he Department is abiding by the requirements of the statute.”

Since the regulation is final, no further action appears warranted.

3. DOE Final Poss., Use or Distribution. Of Drugs/Alcohol Reg. [20 DE Reg. 436 (12/1/16)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2016. A copy of the SCPD’s October 24, letter is attached for facilitated reference. The Department of Education is now adopting a final regulation with some amendments.

The Councils raised four (4) concerns.

First, the Councils noted that a reference to “minimum” requirements invited district adoption of non-uniform standards contrary to statute and other DOE regulations. No change was made.

Second, the Councils recommended deletion of §4.1.7 as “meaningless”. The DOE deleted the section. Parenthetically, the DOE also decided to delete the definition of “expulsion” since “not specifically referenced in the regulation” (p. 437). This is incorrect since there is a bold reference to “expulsion” in §4.1.9.

Third, the Councils recommended deletion of a reference to release of liability. No change was made.

Fourth, the Councils identified some “tension” between the State enabling statute which bans school staff or contractors from administering prescribed medical marijuana oil and federal law requiring schools to administer prescribed medications to accommodate the needs of students with disabilities. The Councils recommended the addition of a non-regulatory note to §4.3. The DOE made no change. No rationale is provided, only a recital that “(t)he Department is abiding by the requirements of the statute.” At 437.

Since the regulation is final, no further action appears warranted.

4. DMMA Prop. Del. Healthy Children Program Premium Reg. [20 DE Reg. 416 (12/1/16)]

The Delaware Healthy Children Program represents the State's implementation of the federal SCHIP program which provides health assistance to uninsured, low income children. Delaware has included a premium requirement in its program from its inception. In 2014 the Division of Medicaid & Medical Assistance (DMMA) proposed and ultimately adopted some changes to its premium standards. At 417. DMMA then collaborated with CMS to update the provisions in the CHIP State Plan and reconcile them with federal law during 2015-2016. DMMA is now issuing a proposed regulation to conform to the consensus reached with CMS.

I did not identify any shortfalls with the proposed standards. They uniformly benefit families since they raise the thresholds which trigger the premium requirement. For example, the \$15/month premium previously applied to families with countable income at or above 143% of the Federal Poverty Level. That threshold has been raised to families with countable income at or above 177% of the Federal Poverty level. At 418.

Since the proposed changes are being prompted by CMS and benefit families, the Councils may wish to consider endorsement.

5. DMMA Prop. Purchase of Care-Licensed Exempt Provider Reg. [20 DE Reg. 412 (12/1/16)]

The Division of Medicaid & Medical Assistance (DMMA) proposes to change its standards applicable to Purchase of Care Providers.

As background, the federal Child Care and Development Block Grant funds child care for low income families who are working or participating in education or training activities. In 2016, new federal regulations were adopted which are prompting DMMA to revise its provider standards. The changes will be effective on February 11, 2017. At 413.

One significant change is curtailing the scope of providers exempt from licensing. At 414. Persons who come into the child's home and relatives who provide care in their own homes remain exempt from licensing. Id. However, the following entities would no longer be exempt:

- (1) public or private school care;
- (2) preschools and kindergarten care; and
- (3) before and after school care programs.

DMMA recites that “(t)he final rule requires that all providers receiving Purchase of Care (POC) funding must now be licensed, including those that were previously license exempt, in order to continue receiving POC funding.” I could not verify the accuracy of this recital which, read literally, would disallow the exemption of persons coming into a child’s home and relatives providing care in their homes. At 414. The federal regulation, with commentary, exceeds 600 pages so it is difficult to confirm the accuracy of the statement without extensive review. It is published at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-22986.pdf> The attached federal regulations (§§98.2 and 98.40) do not categorically require Delaware to remove the current licensing exemption of the above 3 types of entities. However, §98.40 does require DHSS to describe the rationale for any exemptions in its Plan. The regulation does not provide the rationale for retaining the exemption for persons coming into a child’s home and relatives who provide care in their home apart from a bare listing of some health and safety standards.

A second change is deletion of an authorization category of “double time (D) which is two days”. At 415. The specific rationale for this change is also not provided.

I did not identify any inconsistencies or facial issues in the proposed regulation.

The Councils may wish to consider the following approach:

- 1) note that no inconsistencies or facial issues were identified;
- 2) note that the regulation could be improved by including the rationale for retaining the 2 exemptions in §11004.4.1 consistent with the attached federal §98.40;
- 3) suggest that DMMA resolve the inconsistency between reciting that “all providers receiving Purchase of Care (POC) funding must now be licensed....” and still exempting 2 classes of providers; and
- 4) suggest that DMMA provide the rationale for deleting the authorization category “double time (D) which is two days”.

Attachments

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STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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October 24, 2016

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 20 DE Reg. 227 [Proposed Immunization Regulation (10/1/16)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation to adopt some discrete revisions to its immunization standards to align with statutory law [14 Del.C. §131]. The proposed regulation was published as 20 DE Reg. 227 in the October 1, 2016 issue of the Register of Regulations. SCPD has the following observation.

The regulation applies to "public schools", inclusive of districts and charter schools. See 14 Del.C. §131(a) and proposed §§1.0 and 5.4. In contrast, §6.0 refers to "superintendent or his or her designee" which would omit a charter school's chief administrative officer. The DOE could consider the following amendment:

Evidence that the vaccines were administered shall be presented to the [district] superintendent [or charter school chief administrative officer or their respective designees] ~~or his or her designee.~~

Alternatively, the DOE could simply refer to the "chief school officer". See, e.g. 14 DE Admin Code 603.1.2. However, this might lead to confusion if interpreted to mean a school district principal. DOE regulations are inconsistent in references to charter school chief administrative officers. Compare, e.g., 14 DE Admin Code 601.5.1 ("head administrator") and 14 DE Admin Code 103.12.2 ("lead authority").

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

Sincerely,

Jamie Wolfe

Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Laura Makransky, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Valerie Dunkle, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

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October 24, 2016

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 20 DE Reg. 231 [Proposed Medications & Treatment Regulation (10/1/16)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation to conform to recent enactment of the attached S.B. 181. The legislation essentially authorizes a designated caregiver to administer medical marijuana oil to a minor in a preschool, school, or school bus. The proposed regulation was published as 20 DE Reg. 231 in the October 1, 2016 issue of the Register of Regulations. SCPD has the following observations.

First, the DOE revisions are limited to nonregulatory notes. Council did not identify any significant concerns with the proposed revisions.

Second, there is some "tension" between S.B. 181 and disability-related laws. S.B. 181 categorically bars a school nurse, employee or contractor from serving as a designated caregiver for the purpose of administering prescribed medical marijuana oil. In contrast, schools are required to accommodate the needs of students with disabilities under the ADA, Section 504, and the IDEA. In the medication context, public schools have been required to administer insulin, epinephrine, and other drugs. See, e.g., Region IX OCR LOF to Conejo Valley (CA) Unified School District, 20 IDELR 1276 (October 27, 1993) [district violated Section 504 by declining to establish an appropriate emergency response system for insulin-dependent child and disallowing trained laypersons to administer injections]; and Region III OCR LOF to Berlin Brothersvalley (PA) School District, 14 IDELR 353: 124, 125 (December 23, 1988) [district violated Section 504 by requiring parent to sign waiver of liability as precondition of administration of allergy medication]. Cf. Cedar Rapids School District v. Garrett, 526 U.S. 66 (1999) [adopting broad view of school responsibility to provide school health services to students with disabilities]. Administration of medications is a type of school health service. See 34 C.F.R. 300.34. Thus, if an IEP team determined that administration of prescribed marijuana oil were necessary to permit a student to attend school and receive a FAPE, the school would be responsible for implementing/facilitating that determination. At a minimum, the DOE may wish to include a non-regulatory note:

For students with disabilities, limitations on administration of medications are subject to exceptions based on the Americans with Disabilities Act, Section 504, and the IDEA, including a duty to provide school health services and health-related accommodations.

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

Sincerely,

Jamie Wolfe

Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Matt Denn, Attorney General
The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Laura Makransky, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Valerie Dunkle, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

20reg231 doe medications and treatment 10-24-16



SPONSOR: Sen. Lopez & Rep. Schwartzkopf & Rep. Ramone
Sens. Henry, Townsend, Hocker, Reps. Spiegelman, Hudson,
Baumbach, Osienski, Paradee, Lynn, K. Williams

DELAWARE STATE SENATE

148th GENERAL ASSEMBLY

SENATE BILL NO. 181
AS AMENDED BY
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 16 OF THE DELAWARE CODE RELATING TO MEDICAL MARIJUANA OIL
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 4904A, Title 16, Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§4904A Limitations

(a) This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal, or other penalties for engaging in, the following conduct:

(2) ~~Possessing~~ Except as provided in subsection (b) of this section, possessing marijuana, or otherwise engaging in the medical use of marijuana:

a. In a school bus;

b. On the grounds of any preschool or primary or secondary school; or

c. In any correctional facility;

d. In any health care or treatment facility operated by the Department or funded contractually through the Department.

(b) School exceptions. Notwithstanding subsection (a) of this section, a designated caregiver registered pursuant to §4908A of this Title may possess for the purpose of administering, and may administer to a minor qualifying patient medical marijuana oil in a school bus and on the grounds or property of the preschool, or primary or secondary school in which a minor qualifying patient is enrolled. The designated caregiver shall not be a school nurse or other school employee hired or contracted by a school unless he or she is a parent or legal guardian of the minor qualifying patient, and said parent

or legal guardian possesses no more than the number of dose(s) prescribed per day of medical marijuana oil which is kept at all times on their person . Provided further, this exception shall only apply within the physical boundaries of the State of Delaware.



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October 24, 2016

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 20 DE Reg. 223 [Proposed Possession, Use or Distribution of Drugs/Alcohol Regulation
(10/1/16)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation to adopt a set of amendments to its regulation covering possession, use and distribution of drugs and alcohol. The proposed regulation was published as 20 DE Reg. 223 in the October 1, 2016 issue of the Register of Regulations. SCPD has the following observations.

First, §1.0 merits reconsideration. The current preface to the regulation contemplates public schools complying with its terms. The proposed change would make the terms "minimums" from which public schools could vary:

The purpose of this regulation is to outline the minimum requirements to be included in all public school district and charter school policies on the Possession, Use, or Distribution of Drugs and Alcohol.

This approach is at odds with legislation directing the DOE to adopt "uniform" definitions of student conduct subject to discipline and "uniform" disciplinary due process. See 14 Del.C. §122(b)(26) and 14 DE Admin Code 614.1.0. The "minimum requirements" reference is an invitation to public schools to adopt non-uniform standards resulting in the hodgepodge of standards the Legislature sought to eliminate.

Second, proposed §4.1.7 should be deleted since it refers to "the following penalties" which are being deleted. Standing alone, §4.1.7 is meaningless.

Third, in §4.2, it would be preferable to delete the reference to a release of liability. As a practical matter, students reliant on an insulin pump, asthmatic inhaler, or autoinjectable epinephrine will be covered by Section 504 and their access to such life-saving supports cannot be conditioned on a parental release of liability. Moreover, the DOE regulation is literally mandatory, i.e., public schools must incorporate the release requirement into local standards even if they disfavor it. It would simplify the regulation to eliminate the requirement altogether.

Fourth, §4.3 is based on S.B. 181. There is some "tension" between S.B. 181 and disability-related laws. S.B. 181 (and §4.3) categorically bars a school nurse, employee or contractor from serving as a designated caregiver

for the purpose of administering prescribed medical marijuana oil. In contrast, schools are required to accommodate the needs of students with disabilities under the ADA, Section 504, and the IDEA. In the medication context, public schools have been required to administer insulin, epinephrine, and other drugs. See, e.g., Region IX OCR LOF to Conejo Valley (CA) Unified School District, 20 IDELR 1276 (October 27, 1993) [district violated Section 504 by declining to establish an appropriate emergency response system for insulin-dependent child and disallowing trained laypersons to administer injections]; and Region III OCR LOF to Berlin Brothersvalley (PA) School District, 14 IDELR 353: 124, 125 (December 23, 1988) [district violated Section 504 by requiring parent to sign waiver of liability as precondition of administration of allergy medication]. Cf. Cedar Rapids School District v. Garrett, 526 U.S. 66 (1999) [adopting broad view of school responsibility to provide school health services to students with disabilities]. Administration of medications is a type of school health service. See 34 C.F.R. 300.34. Thus, if an IEP team determined that administration of prescribed marijuana oil were necessary to permit a student to attend school and receive a FAPE, the school would be responsible for implementing/facilitating that determination. At a minimum, the DOE may wish to include a non-regulatory note:

For students with disabilities, limitations on administration of medications are subject to exceptions based on the Americans with Disabilities Act, Section 504, and the IDEA, including a duty to provide school health services and health-related accommodations.

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

Sincerely,

Jamie Wolfe

Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Matt Denn, Attorney General
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Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

20reg223 doc possession, use or distribution of drugs-alcohol 10-24-16

learning and strengthen and retain (including through financial incentives and compensation improvements) the child care workforce.

3. Amend § 98.2 as follows:

- a. Revise the definition of *Categories of care*;
- b. Add in alphabetical order definitions for *Child experiencing homelessness*, *Child with a disability*, and *Director*;
- c. Revise the definition of *Eligible child care provider*;
- d. Add in alphabetical order a definition for *English learner*;
- e. Revise the definition of *Family child care provider*;
- f. Remove the definition of *Group home child care provider*; and
- g. Revise the definitions of *Lead Agency*, *Programs*, and *Sliding fee scale*; and
- h. Add in alphabetical order a definition for *Teacher*.

The revisions and additions read as follows:

§ 98.2 Definitions.

* * * * *

Categories of care means center-based child care, family child care, and in home care;

* * * * *

Child experiencing homelessness means a child who is homeless as defined in section 725 of Subtitle VII–B of the McKinney-Vento Act (42 U.S.C. 11434a);

Child with a disability means:

- (1) A child with a disability, as defined in section 602 of the Individuals with Disabilities Education Act (20 U.S.C. 1401);

(2) A child who is eligible for early intervention services under part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431 *et seq.*);

(3) A child who is less than 13 years of age and who is eligible for services under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); and

(4) A child with a disability, as defined by the State, Territory or Tribe involved;

* * * * *

Director means a person who has primary responsibility for the daily operations and management for a child care provider, which may include a family child care provider, and which may serve children from birth to kindergarten entry and children in school-age child care;

* * * * *

Eligible child care provider means:

(1) A center-based child care provider, a family child care provider, an in-home child care provider, or other provider of child care services for compensation that—

(i) Is licensed, regulated, or registered under applicable State or local law as described in § 98.40; and

(ii) Satisfies State and local requirements, including those referred to in § 98.41 applicable to the child care services it provides; or

(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, siblings (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;

English learner means an individual who is an English learner, as defined in section 8101 of the Elementary and Secondary Education Act of 1965 or who is limited English proficient, as defined in section 637 of the Head Start Act (42 U.S.C. 9832);

* * * * *

Family child care provider means one or more individual(s) who provide child care services for fewer than 24 hours per day per child, in a private residence other than the child's residence, unless care in excess of 24 hours is due to the nature of the parent(s)' work;

* * * * *

Lead Agency means the State, territorial or tribal entity, or joint interagency office, designated or established under §§ 98.10 and 98.16(a) to which a grant is awarded and that is accountable for the use of the funds provided. The Lead Agency is the entire legal entity even if only a particular component of the entity is designated in the grant award document;

* * * * *

Programs refers generically to all activities under the CCDF, including child care services and other activities pursuant to § 98.50 as well as quality activities pursuant to § 98.53;

* * * * *

Sliding fee scale means a system of cost-sharing by a family based on income and size of the family, in accordance with § 98.45(k);

* * * * *

Teacher means a lead teacher, teacher, teacher assistant, or teacher aide who is employed by a child care provider for compensation on a regular basis, or a family child care provider, and whose responsibilities and activities are to organize, guide, and implement activities in a group or individual basis, or to assist a teacher or lead teacher in such activities, to further the

(3) The clarification that assistance received during the time an eligible parent receives the exception referred to in paragraph (f) of this section will count toward the time limit on Federal benefits required at section 408(a)(7) of the Social Security Act (42 U.S.C. 608(a)(7)).

(g) Include in the triennial Plan the definitions or criteria the TANF agency uses in implementing the exception to the work requirement specified in paragraph (f) of this section.

19. In § 98.40, redesignate paragraph (a)(2) as (a)(3), revise newly redesignated paragraph (a)(3), and add new paragraph (a)(2).

The addition and revision read as follows:

§ 98.40 Compliance with applicable State and local regulatory requirements.

(a) ***

(2) Describe in the Plan exemption(s) to licensing requirements, if any, for child care services for which assistance is provided, and a demonstration for how such exemption(s) do not endanger the health, safety, or development of children who receive services from such providers. Lead Agencies must provide the required description and demonstration for any exemptions based on:

(i) Provider category, type, or setting;

(ii) Length of day;

(iii) Providers not subject to licensing because the number of children served falls below a State-defined threshold; and

(iv) Any other exemption to licensing requirements; and

(3) Provide a detailed description in the Plan of the requirements under paragraph (a)(1) of this section and of how they are effectively enforced.

* * * * *