DISABILITIES LAW PROGRAM

COMMUNITY LEGAL AID SOCIETY, INC.
100 W. 10th Street, Suite 801
Wilmington, Delaware 19801
(302) 575-0690 (TTY) (302) 575-0696 Fax (302) 575-0840
www.declasi.org

MEMORANDUM

To: SCPD Policy & Law Committee
Cc: GACEC

From: Laura J. Waterland and DLP Staff

Re: Recent Regulatory Initiatives and Legislation

Date: April 10, 2018

Consistent with Council requests, I am providing an analysis of relevant proposed regulations appearing in the April 2018 issue of the Register of Regulations. . As requested, I have also included a review of several newly introduced bills, at the request of GACEC and SCPD.

Proposed Regulations

1. DDOE Section 1504 Certificates of Eligibility [21 DE Reg. 700, April 1, 2018].

The Professional Standards Board and the Delaware Department of Education (DDOE) are proposing regulations related to the issuance of Certificates of Eligibility. Certificates of Eligibility provide temporary certification for teachers of students with disabilities that cannot meet the standard certification requirements, but are working toward satisfying them by participating in an alternative route to certification program.

Certificates of Eligibility were created by Delaware House Bill 286, which passed in 2017 and became effective January 29, 2018.[1] Prior to this law, teachers who did not qualify for a standard teaching certificate could receive an Emergency Certificate if the employing school district or charter school demonstrated the proposed recipient was competent and that the employer would support the proposed recipient in obtaining the skills and knowledge necessary to meet standard certification requirements. House Bill 286 created a new certificate for "teachers of students with disabilities"[2] that do not meet the requirements for a standard certificate in an attempt to staff special education classrooms, while also complying with IDEA

[1] Del. H.B. 286, 149th Gen. Assem. (2017).
[2] The term "teacher of students with disabilities" probably means a special education teacher. However, no definition could be located. It makes practical sense, based on the way the statutes are written, that Emergency Certificates will be issued to general education teachers, while Certificates of Eligibility will be issued to special education teachers. However, this term should be explicitly defined because general education teachers also teach students with disabilities. This might create confusion about which certificate is necessary. The proposed regulation may indirectly define what category of teachers the law applies to because it states the regulation applies to educators pursuing certain certifications.

requirements.[3] Emergency Certificates still exist, but will now likely only be used for general education teachers.

Certificates of Eligibility are specifically for educators teach students with disabilities and who lack certification. To obtain a Certificate of Eligibility, the employer must satisfy an additional requirement; in addition to demonstrating the proposed recipient's competence and its willingness to assist the recipient in gaining the skills and knowledge necessary to obtain a standard certificate, the employer must show that the "proposed recipient is participating in a state-approved, appropriate alternative route for teacher licensure and certification program for teachers of students with disabilities."[4]

Though the DDOE would likely argue that Certificates of Eligibility and Emergency Certificates are distinct from one another, they are both being used for the purpose of allowing schools to utilize teachers that do not satisfy the requirements to obtain a Standard Certification. For this reason, a comparison between the Emergency Certificate regulation and this proposed regulation is informative. There are several potentially important differences between the Emergency Certification regulation and the proposed Certificate of Eligibility regulation.

First, the proposed regulation for Certificates of Eligibility does not require school districts to affirmatively notify parents or guardians that their child's teacher does not have a standard teaching certificate. 14 DE Admin. C. § 1506, which discusses issuance requirements for Emergency Certificates, contains a provision that requires parental notification if a student is assigned to a teacher with an Emergency Certificate. The employing authority must also submit copies of the parental notification to the DDOE.[5]

The same policy concerns that likely resulted in the addition of the parent notification requirement when a child is being taught by a teacher with an Emergency Certificate likely exist in the Certificate of Eligibility context: a parent's child is being taught by someone who does not have the "prescribed knowledge, skill or education," as defined by law. A Standard Certificate is a credential issued to an educator that "has the prescribed knowledge, skill or education to practice in a particular area, teach a particular subject, or teach a category of students." 14 DE Admin. C. § 1507.2. To demonstrate acquisition of the prescribed knowledge, skill, or education, an educator must *complete* an approved educator preparation program or an advanced certification, such as an alternative certification program. 14 DE Admin. C. § 1505.3.1.[6]

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[3] Del. H.B. 286 syn., 149th Gen. Assem. (2017).

[4] 14 *Del. C.* § 1221.

[5] "Any year that an educator holds an Emergency Certificate, the employing authority shall notify parents of the students within the educator's responsibility. Parents shall be notified within (60) days of the assignment or the start of the school year each year" 14 DE Admin. C. § 1506.5.1.

[6] Though the proposed regulations do not explicitly state why a Certificate of Eligibility is issued rather than a Standard Certificate, it is likely due to the prescribed knowledge, skill, or education requirement. *See* 14 DE Admin. C. § 1506.2.2, the regulation that discusses Emergency Certification. It defines an Emergency Certificate as a credential provided when the teacher "lacks necessary skills and knowledge to immediately meet certification requirements in a specific content area."

It may be that parental notification is required under the Every Child Succeeds Act,[7] but it is likely easier and faster to ask for the inclusion of the notification now, rather than determine how Delaware's Certificate of Eligibility fits into the Federal law.

Another potentially important difference between the Emergency Certificate regulations and the proposed regulation is the competence requirement for license renewal. An Emergency Certificate recipient must show documented progress toward earning a Standard Certificate *and* "continued competence" before DDOE will reissue the certificate for a second year. 14 DE Admin. C. § 1506.2. "Continued competence" is demonstrated through "receiving a satisfactory §summative evaluation on DPAS-II or another Department-approved evaluation system." 14 DE Admin. C. § 1506.2.1. On the other hand, the proposed Certificate of Eligibility regulations, as written, do not make re-issuance of the certificate contingent on the holder demonstrating competence. The only requirement is that the teacher makes progress toward earning a Standard Certificate by continuing to participate in an alternative-route-to-certification program. It does not appear that the competence requirement would be somehow backed into the law indirectly – for instance, no provision states that the teacher must demonstrate competence for continued participation in an alternative route to certification program. It is not clear that the 14 *Del. C.* § 1221 competence requirement comes in to play during a certificate *renewal* decision.

Next, one minor consideration is that given the date Certificates of Eligibility expire, it may not be possible for teachers with this certificate to participate in the Extended School Year. Depending on how many special education teachers are utilizing the Certificate of Eligibility, this could potentially create a shortage of qualified teachers during the summer months.

Councils should consider seeking the following changes to the proposed regulation: add in a parental notification and a competence requirement for renewals. Councils may also seek clarification whether Regulation §1507 will be updated to reflect its application to Certificates of Eligibility for special education teachers. It is worth noting that the proposed regulatory change does not address the specific requirements of an ARCP for special education teachers.

2. OCCL Regulation 101 Delacare Regulations for Early Care and School-Age Centers, [21 DE. Reg. 784 April 1, 2018]

Office of Child Care Licensing of Division of Family Services has issued proposed regulations that simplify language, address environmental requirements, and elaborate on background checks, among other issues. For purposes of this memo, the important change is added language in Section 57.0 related to the Administration of Medication. Section 57.1 requires a provider to have a staff with the proper Certification on site at all times when a child who may need medication is present. Section 57.7 indicates that if a child requires administration of non-intravenous medication or any other medical care that is not part of the Administration of Medication Guide, that family can request through a form a "Medical Accommodation." Families are obligated to provide medical documentation from the treating physician. The provider has five days to process a completed request. The regulation also allows for the self-administration of medication by older children. The inclusion of a reasonable

[7] 20 U.S.C. § 6312(e)(1)(B).

accommodation policy for medical issues outside of standard medication administration will prove beneficial to children with disabilities.

The other relevant language is in 62.2 that states that a the provider is obligated to consult with a child's guardian and professionals, if necessary , to develop a plan to correct unacceptable behavior for any child. This obligation is not restricted to children with disabilities. The regulation eliminates existing language that requires the center to "adapt behavior management practices for a child with a special need," although Section 63.3.4 appears to require that these adaptations be made.

A concern is that providers need to be aware that some behavioral issues are manifestations of disability, whether they are "unacceptable" in the view of some, or not. This language is crucial in trying to avoid expulsions of young children with behavioral challenges from child care centers. Suspensions and expulsions are disruptive to families and children alike, and undermine the self-esteem of children, which can lead to a pattern of failure. [8]

Finally, the 63.3.4 revisions simply reword requirements that existing providers are obligated to adapt interactions, strategies, activities, materials and equipment that are described in IEPs, IFSPs, and Section 504 plans, and to allow services to be provided to a child on site.

Councils should consider endorsing changes related to the creation of a Medical Reasonable Accommodation Process, and ask for clarification that providers continue to be obligated to adapt behavioral strategies and management practices to address the needs of children with disabilities.

3. OCCL Regulation 103 Delacare Regulations for Family and Large Family Child Care Homes, [21 DE. Reg. 791 April 1, 2018]

Office of Child Care Licensing of DFS issued proposed regulations that are almost identical to the regulations analyzed above for Child Care Centers regarding Medical Reasonable Accommodations. Councils should consider endorsing this change.

Final Regulations

Only one regulation that had been commented on previously by Councils was in Final format this month: DSS Amendments to Child Care Assistance Sections 11002.1 and 11004,[21 DE Reg. 808. April 1 2018]. DSS made one change adding a cross reference to the definition of special need, and did not change the language related to requiring that an application be taken, confirming that "DSS encourages all Delaware residents to apply for available programs."

[8] https://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ece-expulsions-suspensions.pdf

Proposed Bills

HS 1 for HB 49- Enhanced Security Features at Schools

This bill requires schools to install various safety features whenever "a new school is constructed or a major renovation is undertaken." The required features are (1) a secure vestibule to screen visitors, (2) ballistic resistant materials in areas used to screen visitors (3) doors that can be locked from the outside but that still comply with fire prevention regulations, and (4) a panic button or intruder alert system. The bill also requires that construction plans be reviewed with the Department of Safety and Homeland Security to verify compliance.[9]

Although this bill does not address matters specifically focused on persons with disabilities, it does potentially affect persons with disabilities. Specifically, all renovations under the bill should comply with state and federal requirements for accessibility. Although these requirements will be in effect regardless of whether there is specific language in the bill so requiring, it is important that accessibility be affirmatively considered when plans are made. It is much less expensive to build the new vestibules to meet accessibility standards than it is to correct an inaccessible vestibule that has already been constructed. Moreover, schools should consider how locks might impact evacuation of students with mobility and other impairments. For this reason, we suggest that the councils support HS 1 for HB 49 in principle but request the addition of language specifically requiring construction plans to abide by state and federal accessibility requirements.

SS1 for SB 85 -Data Requirements for School Disciplinary Reports

This bill seeks to amend Title 14 of the Delaware Code by requiring schools to collect data on school discipline among various subgroups, including students with disabilities, as part of an effort to reduce suspensions and promote greater fairness in disciplinary practices. Under this Act, the Department of Education will use the data to publish an annual report and identify schools with high or disproportionate out-of-school suspension rates. The data is meant to "help the Department of Education and community partners identify opportunities to provide greater supports to schools, students, and their families."

The requirements for the annual report could be strengthened in several ways. The bill states that the report will disaggregate data by race, ethnicity, gender, grade level, limited English proficiency, incident type, discipline duration, and whether the student is identified as having a disability. The report should also, however, be disaggregated by socioeconomic status. Further, the report should include totals on not only the number of disciplinary incidents, but also the number of students affected, because individual students may experience multiple incidents in a school year. Information about the total number of days of missed instruction that result from disciplinary exclusion would enhance the report as well.

The reporting of school discipline data should allow for analysis by the general public. Data should be presented in a way that allows for the capacity to calculate rates of disciplinary

[9] These plans would also likely have to be approved by the Architectural Accessibility Board.

actions across multiple subgroups (for example, rates of out-of-school suspensions for African-American students with disabilities). Additionally, the report should be accessible and written in language that the public can understand.

Another component of the annual report will be a list of schools with high or disproportionate out-of-school suspension rates. These schools will be required to review their data and incorporate strategies promoting greater fairness in disciplining students. However, because in-school suspension is still exclusionary discipline, schools with high or disproportionate rates of suspensions rates in general – whether those suspensions occur in school or out of school – should be required to take steps to increase disciplinary equity. The report should also explain the data that led to each school being placed on the list.

As for the measurement of suspension rates, it should be noted that measuring the number of suspensions per 100 students will not show how many students were affected by suspensions. As previously discussed, one student may be suspended multiple times. A better approach may be to measure discipline rates both in terms of the number of disciplinary actions and the percentage of students disciplined.

The bill notes that calculations for the list of schools with problematic suspension rates will exclude subgroups that contain fewer than 15 students. While it is understandable that the bill might want to prevent schools from being penalized due to unrepresentative samples, this exclusion might result in less accountability for smaller schools (e.g. charter schools) that have fewer students. Instead of excluding subgroups, the report could instead note that small sample sizes at certain schools limit the statistical value of the data. Further, data about a school over multiple years will help identify patterns that will aid in showing whether a school's appearance on the list is due to a statistical anomaly rather than a systemic problem.

Schools that need to improve their discipline rates should be encouraged to deliver research-based behavioral interventions as part of their overall strategy to increase fairness in discipline. In addition, schools should have methods in place to track the effectiveness of various practices and programming. This data could then be used as part of the progress report that some schools (the schools with problematic suspension rates for three consecutive years) will have to submit.

Lastly, the bill makes no mention of how the Department will verify that data is accurate. Standardized definitions of offenses and disciplinary actions will help ensure that schools collect data uniformly. The Department will also need to establish quality controls to uncover inconsistencies in data and improve data quality.

In sum, Councils should consider asking for amendments to the bill that will: (1) strengthen requirements for data collection, disaggregation, and presentation; (2) require the Department to identify schools with high/disproportionate rates of in-school suspension; (3) require measuring discipline rates both in terms of the number of disciplinary actions and the percentage of students disciplined; (4) remove the exclusion of subgroups with fewer than 15 students in calculations; and (5) clarify how schools will track data (including the effectiveness of interventions), as well as the methods that will be used to verify accuracy.

HB 332- Financial Exploitation

This bill is designed to help prevent financial exploitation of "elderly persons" and "vulnerable adults" (collectively "Eligible persons"). Vulnerable adults include persons with disabilities who would be at an increased risk of exploitation. The purpose of the bill is not to prohibit financial exploitation, because such acts are already illegal or otherwise constitute actionable conduct. The purpose of the bill is to create reporting requirements for "qualified individuals" in the financial sector (i.e., "any agent, broker-dealer, investment adviser, investment adviser representative or any person who serves in a supervisory, compliance, or legal capacity for a broker dealer or investment advisor"[10]) and to permit those persons to delay disbursements of funds if there is suspected exploitation.

Qualified individuals will be required to report to both the Investment Protection Director (in the Investor Protection Unit of the Delaware DoJ) (the "Director") and to the Department of Health and Social Services ("DHSS") if they "reasonably believe" that financial exploitation of an eligible person has occurred, was attempted, or is being attempted. The qualified individual is permitted, but not required, to notify other persons to whom disclosure is permitted by law, rule, or regulation (including a person that the eligible person has designated) of the suspected exploitation.

Qualified individuals can also delay disbursements of funds if they reasonably believe, after conducted an internal review, that the disbursement may result in financial exploitation. Notice to all parties authorized to transact business on the account is required unless the party is the one suspected to have engaged in or attempted exploitation. The notice must contain both the fact of and reason for the delay. The transaction can be delayed for a total of 10 business days unless the Director requests an extension, in which case the delay can be extended to a total of 40 days. Further extensions by the Director or a court are possible. Qualified individuals are also required to provide documents related to suspected or attempted financial exploitation to relevant investigatory agencies.

Preventing exploitation is a laudable goal, and the general premise of this bill is not a bad one, but it does raise certain potential concerns:

1. Why single out the "elderly persons" and "vulnerable adults"? The conduct consisting of financial exploitation is conduct that would be unacceptable regardless of whether the victim is "elderly" or "vulnerable." For example, if a person "in a position of trust and confidence" uses "deception, intimidation, or undue influence" "to obtain or use the property, income, resources or trust funds . . . for the benefit of a person other than the [rightful owner or beneficiary],"[11] should it matter whether the victim is an older adult or a person with a disability? Because the duty to report only exists when the qualified individual "reasonably believes" that there is possible exploitation, why should the duty only exist if the victim is "elderly" or "vulnerable"? If someone is being financially exploited, why should their status matter?

[10] HB 332 at lines 31-32.
[11] HB 332 at lines 22-24.

2. Who is to say what constitutes a vulnerable adult? The Delaware Code defines "vulnerable adult" as "a person 18 years of age or older who, by reason of isolation, sickness, debilitation, mental illness or physical, mental or cognitive disability, is easily susceptible to abuse, neglect, mistreatment, intimidation, manipulation, coercion or exploitation."[12] The "qualified persons" described in this bill are persons in the financial sector. They are not trained to determine whether a particular person's "mental illness or physical, mental or cognitive disability" qualifies them as a vulnerable adult. Asking such persons to make this determination may result in them relying upon conscious or unconscious prejudices about disability in making their decisions. This may result in persons with disabilities being denied equal access to financial services because of well-intentioned but ill-informed decisions.[13] Similarly, a person with a disability might be left unprotected if the "qualified person" handling the transaction believes that there is potential exploitation but that the individual in question does not qualify as vulnerable.

3. The degree of disruption caused by the erroneous reporting of exploitation can be profound. Accounts can be frozen, for up to up to 40 business days (with an extension.) For individuals who are not wealthy, this can mean financial disruption and ruin, with evictions and power shut-offs the likely outcome. The drafters may have wealthy old people with multiple sources of income in mind; however, for many, the inability to access an account for 40 days would prove catastrophic.

Mandatory reporting of reasonably suspected financial exploitation has the potential to protect many people, but by making persons untrained in working with persons with disability the arbiters of who does or does not need protection, the bill as written runs the risk of both failing to protect some people who need protection and infringing on the autonomy of those who may not. Moreover, there does not appear to be any rational purpose in creating a system where a person at a financial institution might reasonably suspect exploitation but not be required to report it because they do not believe that the person qualifies as a "vulnerable adult." Ultimately, when it comes to preventing exploitation, whether a person is "susceptible" to exploitation is less important than whether they are, in fact, being exploited.

The councils should consider requesting that this bill be amended so that the reporting requirements exist when there is a reasonable belief that exploitation is occurring regardless of the status of potential victim.

HB 338 -Extension of FAPE Eligibility

HB 338 proposes to extend the end of eligibility for FAPE from the end of the school year when a student turns 21 to the end of the school year when a student turns 22. States are split on the termination age for FAPE. Currently, Arizona, California, District of Columbia, Florida, Georgia, Indiana, Michigan, New Mexico, Oklahoma, Tennessee, Utah, Vermont, and

[12] 11 *Del. C.* § 1105(c).
[13] DLP has heard anecdotally of several instances of low level bank staff refusing account access to individuals with mild cognitive disabilities based on nothing more than subjective understanding of that person's capabilities.

Virginia extend the termination age to 22 (Michigan actually goes to 25).[14]

Extension of FAPE to special education students for an additional year will benefit the students and their families by allowing them time to finish their studies and more importantly arrange for and establish transitional supports for adult services, living arrangements and employment. There are several work incentives from SSA that extend to age 22. Councils should consider endorsing this measure.

HB 344- Education for offenders with learning disabilities

This bill purports to "remove barriers and unrealistic goals to offenders with learning disabilities when being considered for parole or a sentence modification." HB 344 (synopsis). Persons convicted of crimes can be required to participate in educational programming and can be barred from seeking parole or sentence modification unless they receive a high school diploma or GED. For inmates with disabilities who, were they not incarcerated, would have received a "diploma of modified performance standards"[15] in lieu of a standard diploma, completing the requirements for a standard diploma or GED may be functionally impossible. The purpose of the bill is to allow inmates who are able to complete the requirements for a "diploma of modified standards" in accordance with their IEPs to do gain the same benefit as inmates who receive standard diplomas or GEDs. It also instructs the DoE to "promulgate rules and regulations to implement" the section.

Although well-intentioned, this bill is unlikely to benefit most inmates with disabilities. It will potentially benefit inmates who have IEPs. Those inmates are inmates who were identified as requiring special education services and who are no older than 21[16] and who have not waived their rights to educational services.[17] The bill would exclude all other inmates with disabilities, because they have no IEPs on which to base a "diploma of modified standards." The broad swath of inmates who would be excluded include inmates who aged out of special education services prior to receiving their "diploma of modified standards" as well as those who were never identified as requiring special education services and those who acquired their disability after age 21 (e.g., due to a brain injury).

It does not appear that it is the intent of the bill to exclude these categories of inmates, but this is the effect. Even for those inmates who had IEPs when they were in school, the IEPs are no longer valid once the inmate turns 21. Even if there were potentially some continued viability, there is no guarantee that an IEP from many years, or even decades, ago will provide the appropriate goals and supports for an inmate many years after it was last reviewed. The current system, where inmates who are unable to receive a standard diploma or GED due to disabilities can be barred from seeking parole or sentence modifications is deeply flawed and

[14] https://www2.ed.gov/programs/osepidea/618-data/.../idea-partb-exiting-2013.doc

[15] HS 1 to HB 287 with HA 1 , which passed, changed the term "diploma of modified performance standards" to "Diploma of Alternate Achievement Standards." The language in HB 344 will need to be amended to make it consistent with HS 1 to HB 287 with HA 1.

[16] The right to special education services under IDEA terminates at the earlier of (1) receiving a diploma or (2) the end of the school year after the student turns 21 years old.

[17] The DLP has received reports that some DoC staff may be encouraging inmates who may otherwise be eligible to waive their rights to receive educational services under IDEA.

potentially discriminatory. Efforts to fix that problem are laudable, and any progress is better than no progress, but this bill will leave many, if not most, of the affected inmates no better off than they are now.

If the goal is to ensure that inmates with disabilities have access to the benefits available to those who are able to receive standard diplomas or GEDs, a more in depth program will be required. Inmates who were formally eligible for IEPs would need to be evaluated, and the IEPs would need to be updated into some sort of "adult IEP" and deemed to have validity outside of the confines of IDEA. Something similar would need to be done to identify inmates who might need these "adult IEPs" who, for whatever reason, were never provided with special education services and do not have an original IEP to use as a starting point. This would be a significantly more involved program.

Of course, an easier solution is to provide an exemption from the compulsory educational programming for inmates with disabilities who cannot reasonably be expected to receive a standard diploma or GED. This eliminates the "penalty" suffered by inmates with disabilities who cannot receive a standard diploma or GED but also prevents them from receiving the benefits of educational programming. As such, this would also be an imperfect solution. Although this bill will help some inmates with disabilities, it does not solve the problem that it purports to solve. As such, the councils should consider whether to support the bill or withhold support and request a more robust bill that will help more people. Regardless, the language should be amended to reflect the changed terminology in HS 1 to HB 287 with HA 1.

HB 354 –Amendments to Equal Accommodations statute

Amendments to Equal Accommodations statute related to service animals. The drafters made changes that DLP suggested in its earlier memorandum analyzing the bill. See separate DLP Memo. Councils should consider endorsing this legislation as it clarifies the scope of the Equal Accommodations statute and makes clear that the accommodation of a service animal is not restricted to individuals with physical disabilities.

HB 363- Extension of Voting Hours for Referendums

HB 363 extends the hours for holding school elections from 10 am to 8 pm to 8 am to 8 pm. This measure should improve access to the voting process, especially voters who work and/ or use public transportation. Councils should consider endorsing this measure.