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To: GACEC Policy and Law

CC: SCPD Policy and Law; DDC

From: Disabilities Law Program

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Consistent with council requests, I am providing an analysis of certain proposed regulations appearing in the January 2019 issue of the Delaware Register of Regulations. There are several new bills that will be addressed in a separate memo.

Proposed Regulations

1. **Proposed DDOE Regulation 507 Regarding Student Success Planning, 22 Del. Register of Regulations 562 (January 1, 2019).**

This regulation requires school districts to create a Post-Secondary Advisement Plan (PSAP), which is a plan that outlines processes the schools district will adopt to help students learn about post-secondary education opportunities, and identify their aptitudes and interests. The regulation also requires every student in grade 8 and above to have a Student Success Plan (SSP), which is written plan stating students' post-high school goals.

Currently, 14 Del. Admin. Code 505 requires students to have SSPs. A proposed amendment, published in the November 2018 Register of Regulations, would eliminate SSPs from Section 505.[1] The synopsis of the proposed amendment to Section 505 stated a new regulation on the topic would be forthcoming. The Councils asked for clarification on how student post-secondary education planning would work until a new regulation was promulgated. Section 507 is that "new regulation." The amended Section 505 has not yet been adopted.

[1] **22 Del. Reg. 335 (Nov. 2018).**

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Under Section 505, an SSP fulfils two functions. First, it identifies a student's post-secondary goals, and creates "a program of study" comprised of academic courses, electives and extra-curricular activities that will prepare a student for entry into their desired career path.[2] Next, it requires the school district to ensure the student is satisfying graduation requirements, and is taking the steps necessary to meet their career goals.[3] If there are concerns about the student failing or if they are "not on track" to meet their career goals, the SSP must identify necessary supports that the district shall provide.[4]

Section 507 appears to remove the program of study, and the identification and provision of necessary support requirements from the SSP. Section 507 defines an SSP as a "written plan which sets post-secondary goals based on a student's career interests."[5] It states that SSPs should be developed in conjunction with student exposure to, *inter alia*, college and career information, internships, aptitude and career testing, and discussions with parental figures and school employees, and that by the student's senior year, the plan should identify "the necessary steps to transition."[6]

Section 507 does not explicitly mandate the creation of a "program of study" nor inclusion of supports necessary to help the student reach their career goals. Removing the "program of study" and the supports requirements may make SSPs less impactful. While it is certainly helpful for students to develop written career goals, it is likely even more valuable to assist students with creating a plan on how to achieve their written goals, and to identify and provide supports the student may need along the way. Section 507 does require an SSP to "identify the necessary steps to transition" by the student's senior year of high school. However, a student may be more successful in their desired career path if he or she, with input and support from the school district, creates and follows a concrete plan more than one year in advance of graduation.

Section 507 does require school districts to create a PSAP, or a plan that lays out processes the school district will follow to ensure that, *inter alia*, there are "activities, supports and resources" available to allow students to gain exposure to career and college information,

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[2] 14 Del. Admin. Code 505.1.0.
[3] 14 Del. Admin. Code 505.1.0, 5.2.4.
[4] 14 Del. Admin. Code 505.5.2.4.
[5] 22 Del. Reg. 562 (Jan. 2019) (See proposed section 2.0).
[6] 22 Del. Reg. 562, 563-564 (Jan. 2019) (See proposed section 3.0).

"such as but not limited to:... one-on-one Advisement."[7] Advisement is defined as "a documented process that engages students in ongoing discussion and planning with school staff to identify their personal talents and interests and plan their career goals."[8] It may be that students will develop a concrete plan to achieve their post-secondary goals through advisement, and it is just no longer placed in an SSP. While it seems like good policy to couple goals with plans in the same document, at least students would still be engaging in a formal career-planning process. However, if this is the case, the advisement requirement should likely be removed from subsection 4.1.2.2 to clarify that school districts are still responsible for working with students to plan their career paths, and are not just responsible for planning how the student will be exposed to opportunities to learn about career and post-secondary education opportunities and requirements. Even if students will still engage in a planning process, Section 507 still appears to eliminate the requirement that school districts identify and provide necessary supports in the event the student is failing or if they are "not on track" to meet their career goals.

Additionally, it appears school districts would no longer be required to as aggressively monitor whether a student is satisfying graduation requirements or making progress toward achieving post-secondary goals. Section 505 requires school districts to "actively monitor[] … educational progress and career planning toward life goals" by holding conferences between the student and their advisor at least once every marking period.[9] Section 505 also requires annual review and updates to the SSP, and review of the student's transcript at the end of each school year to ensure the student is satisfying graduation requirements. Section 507 does contemplate revision of the SSP "annually as necessary" and that students should have the opportunity "have meetings with counselors, teachers, parents, guardians, care-givers at regular intervals to discuss student interests regarding careers."[10] However, the school district would no longer be required to review the student's transcript at the end of the year to ensure the student is on track to graduate, nor does the regulation require conferences every marking period. While it may not be problematic to give school districts more discretion on how often they engage in the career planning process with students, Councils may wish to consider recommending that an annual transcript review be included, as this requirement does not appear in other regulations.

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[7] 22 Del. Reg. 562, 564 (Jan. 2019) (See proposed section 4.1.2.2).
[8] 22 Del. Reg. 562 (Jan. 2019) (See proposed section 1.0).
[9] 14 Del. Admin. Code 505.5.2.2.
[10] 22 Del. Reg. 562, 564 (Jan. 2019) (See proposed Sections 3.1.2, 3.2).

Additionally, the Councils may want to seek inclusion of a section on SSP requirements for students with IEPs. Section 505 requires SSPs to incorporate the IEP transition plan requirements in 14 DE Admin. Code 925. Section 507 would eliminate this requirement.

Finally, one minor recommendation that the Councils may wish to make is to have the term "Core Course Credit" and the respective definition stricken from Section 2.0. The proposed regulation does not use that the term, therefore the definition is unnecessary.

One positive aspect of this regulation, which Councils may wish to support, is the creation of the PSAP and the progress report requirement. As discussed, *supra*, school districts will have to identify processes to assist students with post-secondary education goal setting. The school districts will have to report their progress to the Delaware Department of Education annually. This oversight will hopefully ensure that students in all school districts will be getting exposure to career and post-secondary education information.

Councils may wish to support this regulation, while seeking the following amendments and clarifications:

(1) clarify that school districts will still assist students with developing a program of study or plan to clearly identify what steps a student must follow to achieve career goals, even if it is no longer placed in the SSP;

(2) amend to include a requirement that school districts identify and provide supports necessary to help a student achieve their career goals;

(3) amend to include a transcript review requirement;

(4) amend to include a section that requires SSPs to incorporate the IEP transition plan requirements in 14 DE Admin. Code 925;

(5) amend to strike the definition of Core Course Credit.

2. **Proposed DHSS Regulation Regarding Dialysis Centers , 22 Del. Register of Regulations 565 (January 1, 2019).**

The purpose of this regulation is to establish quality assurance standards for dialysis centers to implement the 2014 and 2015 changes in the law (16 *Del. C.* §122(3)(aa)). It also gives the Department of Health and Social Services (DHSS) authority to charge licensing fees to offset the costs of performing their responsibilities under the statute and regulation. This is a

comprehensive regulation that aims to protect the public in in obtaining dialysis services from an independent or hospital based center.

The regulation applies to dialysis centers and they are defined in both the statute and regulation as "an independent or hospital-based unit approved and licensed to furnish outpatient dialysis services (maintenance dialysis services, home dialysis training and support services or both) directly to end stage renal disease (ESRD) patient(s)."

In sum, this regulation is comprehensive and deals with all aspects of dialysis, including independent and hospital based centers, as well as home dialysis services offered by those centers. It mandates licensing requirements and gives the Department authority to impose a variety of sanctions for nom-compliance with the regulation. It requires a center to have a governing body and imposes numerous duties and responsibilities on that body. Each center is required to have medical staff which includes a medical director, nurse manager, charge and staff nurses, a dietitian, social worker, patient care technicians, and water treatment system technicians. Patients or their representatives must be informed of the patient's rights and responsibilities. An interdisciplinary team consisting of the patient or patient's representative, nurse, social worker, dietitian, and doctor must prepare a comprehensive assessment of the patient which is then used to formulate a treatment plan. If home dialysis is provided by the center, it must be approved by the Department to provide this service and the interdisciplinary team must oversee the training to the patient and patient caregivers. The center must also provide support services to home dialysis patients. Detailed medical records of all patients must be kept and be accessible for review by the Department. There are several patient rights measures, including a provision that requires the center to report the involuntary discharge or transfer of a patient to DHSS. This is an important safety measure. Lastly, the center must have emergency preparedness in that the dialysis machines must operate for at least four (4) hours on an alternative power source if there is a power outage.

Although some of the provisions of this regulation are onerous, the regulation deals with a medical service that is necessary for those individuals with kidney disease. This regulation should meet its intended goal of protecting dialysis patients by establishing standards and guidelines so that they receive competent medical care for a life-saving procedure. Counsels may wish to endorse the regulation as it comprehensively addresses this crucial outpatient service.

3. **Proposed DMMA Regulation Regarding Chiropractic Centers , 22 Del. Register of Regulations 566 (January 1, 2019).**

The Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend Title XIX Medicaid State Plan and the DMMA Provider Policy Specific Manual regarding chiropractic services, specifically, to remove annual numerical limitations placed on chiropractic care visits for the purpose of treating back pain. This amendment is meant to align with the General Assembly of the State Delaware's Senate Bill 225, an Act to Amend Title 16, Title 24, Title 29, and Title 31 of the Delaware Code Relating to Insurance Coverage for the Treatment of Back Pain. The Act encourages the use of proven non-opioid methods of treating back pain by prohibiting numerical limits of chiropractic care.

Councils should support the DHSS/DMMA amendment and encourage expanding access to alternative pain care treatment options.

4. **Proposed DMMA Regulation Regarding Eligibility, 22 Del. Register of Regulations 570 (January 1, 2019).**

Federal Medicaid law contains a special protection to help individuals who have been on SSI keep health insurance when they lose their SSI because they start receiving Social Security benefits on a parent's account that exceed the SSI payment amount . Unfortunately, the Delaware Medicaid regulation that implements this provision of the federal law contained an improper provision that required the person to have received their SSI before age 22. That provision has been amended to remove the restriction, but in a way that still leaves some unintended ambiguity.

Under the previous regulation, the State required that the person have lost his or her SSI before the age of 22. That is not a requirement of the federal statute. Rather, the disability that gives rise to eligibility for Social Security benefits on parent's account has to exist before the person turned 22. The federal statute requires loss of SSI and current eligibility for Social Security benefits for a disability that began before age 22. They are required to have lost SSI, but do not need to have recovered it before age 22. There are many reasons why a disabled person may not receive SSI before age 22 that are unrelated to their disability, such as income, resource or other non-disability related eligibility criteria.

The proposed change removes the impermissible requirement that existed in the previous regulation, but is still not entirely correct. It reads: "have been receiving SSI because of disability or blindness, which began before he or she attained the age of 22."

It is not a requirement of the federal statute that the SSI be received because of disability that began before age 22. We recommend simply dropping the words after SSI in the above sentence. The statute requires loss of SSI and current eligibility for Social Security benefits for a disability that began before age 22. There is no need to inquire regarding the basis for receipt of SSI. If a person is receiving Social Security Disability benefits on the account of a parent, by definition, that means that he or she has established to the satisfaction of the SSA that the disability began before age 22. There is simply no need for the State to be involved in this inquiry. We recommend that the Councils support this change in the eligibility requirements for a vulnerable group of adults with disabilities, with the one adjustment.

5. **Proposed DSCYF Regulation Regarding Delacare Early Care and Education and School Aged Centers , 22 Del. Register of Regulations 574 (January 1, 2019).**

The Office of Child Care Licensing (OCCL) has re-published proposed Delacare regulations concerning the health, safety, well-being, and positive development of children who receive care in early care and education and school-age centers. This anaylsis will focus on amendments meant to ensure that licensed centers comply with the Americans with Disabilities Act (ADA) by meeting the needs of children with disabilities who require medication while in child care.

OCCL made a number of revisions in response to Council comments on the November 2018 version of these proposed regulations. Some of the most notable improvements include new requirements mandating that at least one staff member with a valid Administration of Medication certificate be present at all times to provide medications (Subsection 26.6), including during field trips and routine program outings (Subsection 63.1). These changes help make clear that child care centers should be prepared to administer medications on both a routine and emergency basis and during field trips.

The proposed regulations could still be strengthened, however, in the ways described below:

a. Written Policies on Administration of Medication and Need for Statement About Reasonable Accommodations

Concerns still remain about how OCCL will ensure that licensees develop and consistently implement a written policy on administration of medication. Although OCCL requires policies on medication administration to be included in the parent/guardian handbook (Subsection 23.1.13), the proposed regulations do not indicate that these policies must be approved by OCCL. Nor do they provide any guidelines on what the policies in the parent/guardian handbook must convey. As was previously recommended, policies on medication administration should clearly state that the child care center will provide reasonable accommodations for children with medication needs, including medication by non-intravenous injections. New Jersey, for example, requires child care centers to inform parents and guardians that the center "will provide reasonable accommodations for the administration of medication or health care procedures to a child with special needs, if failure to administer the medication or health care procedure would jeopardize the health of the child or prevent the child from attending the center."[11] Such a statement of non-discrimination is critical because parents and guardians are often unaware of their rights with regard to medications and reasonable accommodations. [12] This lack of awareness is likely even more of a problem in Delaware because the state previously did not allow laypersons at child care centers to provide medication by injection. A formal non-discrimination statement related to medications will also promote child care centers' compliance with federal and state anti-discrimination laws and enhance centers' public accountability.

b. Notice to Licensees That Administering Medication Via Injections May Be Mandatory Under State and Federal Laws

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[11] Manual of Requirements for Child Care Centers at 70-71 (Subchapter 3A:52-7.5), State of New Jersey Department of Children and Families, *available at* https://www.nj.gov/dcf/providers/licensing/laws/CCCmanual.pdf (effective March 6, 2017).

[12] To the extent that OCCL does not want to mandate medication administration, it should be noted that a non-discrimination statement committing to provide *reasonable* accommodations (as required under the Americans with Disabilities Act) does not mean the child care center must administer medications in all cases (i.e. cases where providing medication would not be reasonable).

As explained in prior comments, another major concern is that child care centers may interpret the language in Subsection 63.6 as meaning that they have complete discretion over whether or not to deliver medication by injection. We sought a subsection to Section 63.0 that clarified that medication administration – including administration via injections – must be part of the reasonable accommodations that child care facilities must make under the ADA in order to provide equal services to children with disabilities. In response, OCCL added Subsection 63.8, which states: "The administration of medication is encouraged, but not mandated pursuant to these regulations. However, if an agency, administrative body, court, or other entity responsible for enforcing Federal, State, and local laws and regulations (including but not limited to the Americans with Disabilities Act and the Delaware Equal Accommodations Law) makes a finding that the refusal of a licensee to administer medication is a violation of the law, OCCL shall take appropriate enforcement action consistent with subsection 12.5, due to licensee's failure to comply with subsection 15.2[13]."

The effect of the wording in Subsection 63.8 is to highlight that OCCL will not mandate the administration of medication by injection and will only take enforcement action in limited circumstances. While it is true that OCCL does not enforce the ADA or the Delaware Equal Accommodations Law (DEAL), child care facilities frequently misunderstand their obligations under these anti-discrimination laws. We therefore urge OCCL to revise Subsection 63.8 to explicitly note that medication administration may be required under state and federal laws even though it may not be mandatory under OCCL's own regulations. This extra emphasis and clarification are especially critical because OCCL's new regulations on administering medication by injection are a significant departure from longstanding policies. Thus, child care centers may resist modifying their own policies and practices around this issue. Yet under the ADA, child care facilities must, as a general rule, provide medication by injections when parents or guardians request them to.

c. Comprehensive Referrals and Tracking for Complaints

The new Subsection 12.5, referenced in the above Subsection 63.6, explains how OCCL will refer complaints relating to the laws of other governmental entities, including but not limited

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[13] Subsection 15.2, which was amended since the November proposal, requires licensees and employees to adhere to federal, state, and local laws, such as the ADA and the Delaware Equal Accommodations Law.

to the ADA and DEAL, to appropriate enforcement authorities for investigation. Subsection 12.5 also states that OCCL will request a report of the findings. Two concerns regarding this Subsection are ensuring that referrals are comprehensive and that OCCL actually follows up with the complaining party or enforcement authority for a report. Families have faced problems in the past with trying to file complaints with OCCL. For example, DLP is aware of a family who was referred by OCCL to the US Department of Justice but not the Division of Human Relations (DHR) for a case involving reasonable accommodations for a child with a disability. Because an equal accommodations complaint in Delaware must be filed within 90 days of the alleged incident, it is important that OCCL promptly refer complaining parties to DHR when appropriate and advise parties to be mindful of deadlines. It is also unclear whether and how OCCL will receive the results of any investigation arising from a complaint to other agencies. OCCL must have a process for tracking complaints so that it can follow up on the outcome of investigations and prevent the burden from always falling on complaining parties to report back to OCCL for further enforcement activity. Moreover, for disability-related complaints, OCCL should not only refer complaining parties to the relevant enforcement authorities, but also to Community Legal Aid Society for advice or possible representation. As Delaware's Protection & Advocacy agency, CLASI is willing and able to help families and individuals who wish to pursue ADA and DEAL complaints.

In conclusion, while Councils should endorse the proposed Delacare regulations for early care and education and school-age centers, they should also request further revisions. OCCL should require child care centers to inform parents and guardians that they will make reasonable accommodations for children with medication needs. The language in Subsection 63.8 should also be modified to more clearly warn child care centers that even if OCCL regulations do not require licensees to administer medication by injections, it may be mandatory to do so under state and federal laws. Finally, for complaints under Subsection 12.5, OCCL should promptly refer complaining parties to all appropriate agencies and develop a system for tracking complaints, as well as consider referring disability-related complaints to Community Legal Aid Society.

<u>Proposed DELACARE Regulations Re: Family and Large Family Child Care Homes</u>

OCCL also proposes to amend the Delacare regulations for family and large family child care homes. These amendments are largely similar or identical to the proposed changes to the

regulations for early care and education and school-age centers. CLASI recommends that Councils endorse the amendments but ask for the revisions discussed in our analysis above.

Final Regulations in January Register

A number of regulations previously commented on by Councils were published in final form in the January Register. These include DDOE 290 and 1517 related to Educator Preparation Programs and Paraeducator Permits. The DDOE addressed Council comments but did not make any substantive changes.

The following bills were recently introduced and may warrant attention by the Councils:

1. HB 21 and HB 22, which relate to educational issues for inmates. Currently, inmates required to participate in education programs have to get a diploma or GED to be eligible for sentence modification and other benefits, which disadvantages inmates with disabilities. The bill adds the option of inmates working under an IEP for an alternative diploma. It is similar to bills introduces last year.
2. HB 24, which prohibits insurers and pharmacy benefits managers from "clawing back" the difference between a patient's co-pay and the actual cost of the medication.
3. HB 19, which requires every school to have a school nurse.