



DISABILITIES LAW PROGRAM

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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, DLP is providing an analysis of certain proposed regulations appearing in the June 2019 issue of the Delaware Register of Regulations and several proposed bills.

Regulations

1. DDDS Proposed Regulations - Reportable Incident Management and Corrective Measures, 22 Del. Register of Regulations 989 (June 1, 2019).

The proposed new regulations clarify obligations of DDDS-contracted providers of home and community-based services under DHSS Policy Memorandum 46 ("PM 46"). The proposed regulations contain an extensive definitions section, which includes definitions of abuse, neglect, mistreatment and financial exploitation. The regulations restate the PM 46 requirements that before any reporting, steps should be taken to ensure the affected individual is safe and receives all appropriate treatment and examination. The regulations also restate the notification and investigation requirements already contained in PM 46, however they provide more specific guidance as to timeframes and how responsibility for investigations will be delegated between DDDS and provider agencies.

Following the report of an incident, the DDDS Office of Incident Resolution ("OIR") Administrator is required to complete a preliminary investigation within two business days, and then assign the matter to an investigator from the Division or the provider agency as appropriate.

"Critical incidents" must be investigated by a DDDS investigator. Critical incidents are defined by the proposed regulations as those which have "resulted in actual physical, financial, mental or emotional harm to individuals served (adverse outcome); or presents a significant and immediate threat to the health and safety of a service recipient." See proposed regulations at 3.0. Specific examples of critical incidents provided in the regulatory definition include abuse, neglect, mistreatment or financial exploitation, as well as medication errors, missed medical appointments for serious health conditions, and any incident resulting in serious injury to the service recipient.

If DDDS is assigned to perform the investigation, the provider agency cannot conduct its own internal investigation “beyond what is immediately needed to assure the health and safety of the individual(s) served, until such time as the DDDS investigation is completed.” See proposed regulations at 8.3. Presumably this is to minimize any interference with the DDDS investigation. If DDDS investigators cannot complete their reviews within the timeframes laid out by the proposed regulations, however, provider agencies could be limited in their ability to do a timely and effective internal review of an incident for their own quality assurance purposes, as witness recollections and evidence may be compromised after a certain amount of time.

The regulations make clear that all investigations, whether completed by DDDS or a provider agency, “shall be conducted in accord with DDDS approved investigator training.” See proposed regulations at 9.8. The Councils should encourage this requirement as it will encourage consistency in the methodology and quality of investigations as well as any written findings based on completed investigations.

According to the proposed regulations, critical incident investigation fact finding must be completed within five business days of assignment to an investigator. Within ten days of the completion of the critical incident investigation, written findings must be sent to the provider. Non-critical incident investigations must be completed “in no more than fourteen (14) business days from the date of the assignment to the investigator.” See proposed regulations at 9.7. The regulations would allow for extensions to be granted upon request for both types of investigations. These requirements differ slightly from what is stated in PM 46. PM 46 generally requires that investigations shall be completed within ten days, except that any investigations covered by 42 C.F.R. §§ 483.13 (c)(2) and (4) (this federal regulation is no longer current but involves certain types of incidents in long-term care settings that participate in Medicaid and/or Medicare), should be completed within five working days.

One notable omission is that the regulations do not restate PM 46’s requirements as to the minimum standards for investigation reports (found in Standard K of PM 46 at part 3c), which include direct interviews with the individual service recipient involved in the incident as well as the reporter of an allegation and all potential witnesses. While this could presumably be addressed in the training required for investigators, it might make sense to also restate this in the regulations for the sake of consistency and to encourage thoroughness in the investigative process.

Completed investigations must be reviewed by the IRP Administrator (this role is not defined by the regulations however based on context it appears this may have been intended to refer to the OIR Administrator) to determine whether an incident has been “substantiated” or “unsubstantiated.” The proposed regulations would require this determination to be made within ten days from the submission of the completed investigation, and that both the service recipient and the provider agency be notified in writing of the conclusions of the investigation.

The proposed regulations establish two pathways for corrective action to be taken with respect to a particular incident or patterns of certain types of deficiencies. First, following the completion of an incident investigation, the IRP Administrator (or OIR Administrator, see note above) can request that the provider agency submit a quality improvement plan (“QIP”) to address root causes of an incident or incidents, and specific goals and action steps to address the root causes, as well as specific allocation of responsibility and deadlines for implementing these

steps. The QIP must be submitted to DDDS within fifteen days, although extensions may be provided upon request. DDDS is required to review the QIP within five days of receipt and may reject a QIP that is unsatisfactory. At the conclusion of the QIP implementation, the provider must submit “a request to close out the QIP and a summary report and analysis that details implementation of goals and objectives.” See proposed regulations at 12.1.

Additionally, the proposed regulations refer to a body called the Corrective Measures Committee (“CMC”), which upon referral from the Division can consider various types of corrective action to be taken by DDDS against a provider agency. Referrals to the CMC are made by the Service Integrity and Enhancement Unit (“SIE”), based on “the determination that a pattern of substantiated critical or non-critical incidents exists that demonstrates that a provider is not able to provide care to service recipients that consistently meeting DDDS service standards.” See proposed regulations at 13.1.

The regulations create five levels of corrective measures, which from least restrictive to most restrictive are as follows: Enhanced Monitoring, Mandatory Technical Assistance, Enrollment Moratorium, Management Transfer, and Termination of Provider Agreement. The provider must be informed of corrective measures by letter. If the decision is made to impose corrective measures, the provider must submit a corrective measures plan (“CMP”) within 15 business days of receiving the corrective measures, which must be reviewed and approved by DDDS. The CMC will continue to review updates from the provider and determine the necessity of corrective measures on an ongoing basis.

The regulations also create appeal rights for providers in both the investigation and Corrective Measures Committee processes. Provider agencies may appeal the substantiation of a critical incident by OIR. There are two levels of appeal for this finding; the first level of appeal is to the Director of SIE, and the second level of appeal is to the CMC. A provider agency may also appeal any decision by the CMC imposing corrective action. There are three levels of appeal for corrective measures; the first level of appeal is to the CMC, the second level is to the Division Director, and the third level of appeal is to the Division of Health Care Quality (DHCQ) Investigation Unit.

There are a few specific provisions in the proposed regulations where the Councils may wish to suggest minor revisions:

5.4 – This provision requires that any suspected criminal activity must be reported to law enforcement “immediately,” however it does not restate PM 46’s requirement that this report should be made within two hours in cases of “serious bodily injury.”

8.0.1 – This provision states that the OIR Administrator will assign an investigation to either a provider or DHSS investigator. For clarity and specificity the Councils may wish to suggest that “DHSS” be replaced by “DDDS,” as it assumed from the rest of the text of Sections 8 and 9 that the investigator from DHSS would be a DDDS employee.

10.0 – 12.0 – Multiple provisions in these sections refer to an “IRP Administrator.” Based on context, this is presumably intended to read “OIR Administrator” as the role of “IRP Administrator is not separately defined anywhere in the proposed regulations.

11.1 – This provision states that the IRP administrator (or OIR administrator, if that is in fact the correct term) has “the discretion to... wave [sic] a QIP” where presumably it was intended to say that the IRP administrator may “waive” the QIP.

11.1.1 & 11.2 – These provisions seem to state the same thing (that a QIP may be required to explain poor documentation even when an incident is unsubstantiated) and may be duplicative.

17.2.4.3. – This provision states that for the third and final level of appeal of imposition of corrective measures by the CMC, DDDS must submit evidence and rationale the imposition of corrective measures in response to the receipt of an appeal request, and this submission “must identify supporting data or evidence that is new or different than what was presented in the second level of appeal.” This limit also applies to the provider agency submitting a third level appeal request, which makes more sense as presumably the evidence submitted by the provider agency at the second level of appeal was deemed insufficient to overrule the conclusions of the CMC. It doesn’t make as much sense for the Division to be required to submit new evidence when their findings had been upheld at both the first and second levels of appeal, and is arguably not the best use of the Division’s resources.

Substantively, assuming the Division has the resources to effectively carry out the requirements of the proposed regulations, imposing these requirements for the processing of critical incident investigations and the imposition of quality improvement and corrective measures plans would promote immediate and effective responses to incidents and greater accountability on the part of provider agencies. While there is no clear basis for comparison as no other DHSS division has published regulations on these topics, the Councils should consider supporting the creation of these procedures to promote safety and quality of care for service recipients. The Councils should encourage the development of similar regulations by other DHSS divisions bound by PM 46.

Bills

1. H.S. 1 for H.B. 92, Extended Learning Opportunities Subcommittee

The proposed amendment creates a new subcommittee called the Extended Learning Opportunities Subcommittee (“ELOS”) within the Interagency Resource Management Committee (“IRMC”). ELOS will be tasked with researching and developing recommendations to improve and coordinate before-and-after school care and summer programs (“extended learning programs”) for school-age children. The proposed amendment will also add the chairperson of ELOS to the IRMC as a nonvoting member.

Quality extended learning programs can boost academic performance and improve outcomes for children. *See generally* YOUTH.GOV, <https://youth.gov/youth-topics/afterschool-programs/benefits-youth-families-and-communities> (last visited June 10, 2019). Children with disabilities have unique needs, and these should be considered and addressed in the ELOS’ research and recommendations so that extended learning programs are accessible and improve outcomes for all children. The proposed amendment sets aside a seat on the subcommittee for a representative of GACEC, which will allow advocacy for persons with disabilities. Councils may wish to strongly support this amendment.

2. HB 164 , Developmental Disabilities Council

This legislation was recently introduced and relates to the organization and operation of the Developmental Disabilities Council. First, the bill might more comfortably fit in a different place in the Delaware Code. The Department of Safety and Homeland Security (DSHS) is the current “designated state agency” for the DDC. In the past, other agencies have been the designated state agency, and there is a process that extends to the Secretary of United States Department of Health and Human Services for changing the designated agency that could lead to a re-designation. DDC is at DSHS because DSHS does not provide services to individuals with ID/DD. There is no substantive overlap. Therefore, it may make more sense to codify the DDC in Title 16 as a new Chapter 55A, or in Title 29, Chapter 79, as §7910A.

HB 164 Proposed §8239(a)(1) does not fully state the role and scope of DDC, per the DD Act, and drops an entire clause from 42 USC §15021(2), the source of the proposed language. Therefore, language should be added at the end of this section: “and other forms of assistance that enable individuals with developmental disabilities to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life.”

Section 8239(b) recites the various duties and responsibilities of the DDC, but one wonders whether this is necessary given the cross citation to the DD Act. Please note that this section cites to the wrong section of the US Code. Section 15002 is the definitions section for the entire DD Act and doesn’t really outline DDC duties and responsibilities. The correct citation should be either “§15001 et seq” or “§ 15021 et seq.”

The subsequent list of activities in §8239(b) is found for the most part in §15025(c)(5)(A-L) of the DD Act. Creating a list of duties and responsibilities in the statute is not necessary because the DD Act is controlling; however, if one remains, it is important to state in (b)(1) that the list is non-exhaustive, and also to ensure that the lists match verbatim. Some of the listed items in §8239(b)(3) have been altered and some combined. For example, “Supporting and educating communities” from the DD Act is “Community Education” in HB 164. The DD Act provision has broader scope. Subsections F and G are combined but should not be, as G relates to specific collaborations with Centers for Independent Living and Parent Information Center, for example. Section H, “Barrier Elimination, systems design and redesign” has been re-designated as “Activities to eliminate barriers to access and use of community services,” which substantially understates the scope of this section in the DD Act.

Section (b)(3)(h) drops the corresponding heading in the DD Act (“Informing Policymakers”) and uses specific language instead. It is unclear why this was done, as all of the other subsections use the headings from the DD Act or a version of them. Finally, t HB 164 completely drops the DD Act language of “Other Activities” found in Subsection L. This language is important as it allows the DDC to engage in activities not otherwise listed in this subsection but that fall within the mission of the DDC. To reiterate, because this is a federal program governed by federal law, it would be much simpler to cross reference the DD Act rather than try to paraphrase the DD Act in HB 164. However, if this section remains, it should reflect, verbatim, what the DD Act says.

Section 8239(b)(4) does not reflect what the DD Act requires in §15025(6), which is that the DDC is to periodically review the designated state agency, not agencies as a whole. This is an important aspect of federal oversight to ensure that the designated state agency is providing the appropriate support functions under the DD Act and that the DDC inform the Governor if changes should be made.

The composition requirements for the DDC are found in §15025(b) of the DD Act. Again, it is unnecessary to codify this in state law and inappropriate to deviate from the statutory requirements. It is also worth noting that the DD Act does not impose a size limit but rather a requirement that 60% of membership be either a person with a developmental disability or parents or guardians of a child with a developmental disability, or immediate relatives or guardians of an adult with a developmental disability that is unable to self-advocate. Within these categories, one shall be either an immediate relative or guardian of an individual with a developmental disability who resides or did reside in an institution or an individual with a developmental disability who resides or did reside in an institution.

All members of the council are appointed by the Governor, upon the solicited recommendations from interested individuals, including non-state agency members of the DDC. The DDC is responsible for notifying the Governor of its membership requirements. Certain entities are specifically listed as having required seats. These are the state Protection and Advocacy agency, the UCEDD, and then specific state agencies based on their administration of federal funding streams. There is a classification for representatives of local and nongovernmental agencies and private nonprofit groups concerned with services for individuals with developmental disabilities.

Regarding, Section 8239(c), many of these provisions are already in existing bylaws and do not need to be codified. It would be extremely difficult to modify these operational policies if they are in code, and it is not necessary that they be so.

Subsection 8239(i) inappropriately names a specific private nonprofit to the DDC and then by omission excludes other representatives. The DD Act clearly indicates that more than one representative from local and nongovernmental agencies must serve. The DD Act also requires members be appointed by the Governor after consultation and solicitation of input from a broad range of individuals with developmental disabilities and other individuals interested in developmental disabilities including non-public agency members of the DDC. Naming a specific non-profit and limiting this category to one participant, and bypassing the consultation process that is required, is not in conformity with the DD Act.

HB 164 §8239(d) lays out a number of requirements that are either already listed in the DD Act or which are already governed by existing DDC bylaws, and doesn't include some important duties, such as creating a budget. First, §8239(d) places the DDC within DSHS "for administrative purposes." Historically, the Governor has named the designated state agency. If the legislature is now going to take this duty on, it should be stated clearly that DSHS is being

named as the “designated state agency” by the legislature; also, that such designation is subject to the provisions of the DD Act, including the processes that allow another agency to be so designated in the future. Getting back to the first point, it would be advisable and much simpler to place the DDC under Title 16 or under Title 29, Chapter 79. It would be cleaner to state that DDC will be housed administratively with whatever agency is the designated state agency under the DD Act and leave the designation of the agency to the Governor.

Provisions related to number of meetings or attendance policy are more appropriately addressed by the bylaws and DDC policy (which already exists). Finally, allowing participation by telephone notwithstanding state public meeting law should be allowed as a reasonable accommodation, but should be subject to DDC parameters set by bylaw, as it could easily become unworkable and undesirable for a large number of members to call in rather than attend in person.

To reiterate, it is not necessarily an issue to have a state statute setting up the DDC, but the only language needed regarding its duties, parameters and membership should be a cross reference to the DD Act. If a statute were to contain these terms, they must be wholly consistent with the DD Act. Finally, it would be needlessly complex for the legislature to be the entity that chooses the designated state agency (especially considering any potential re-designations in the future), and that task should be left, as it has been, to the Governor in consultation with the DDC.

3. HB 166, Lead Poisoning

This bill would amend the Childhood Lead Poisoning Prevention Act and the Insurance Code as it pertains to reimbursement for lead poisoning screening.

The bill recognizes that children are at risk of lead poisoning from numerous sources, including residing in houses built before 1978; residing near a lead paint removal, renovation, or demolition project; using playground equipment coated with lead paint; wearing jewelry and playing with toys that contain lead; eating food containing lead, drinking water contaminated with lead, exposure from employment or recreational activities that is spread to a family member, or wearing cosmetics containing lead. However, despite these risks, not all children are being screened or tested when they are 12 and 24 months of age. Early identification of elevated blood lead levels in a child is vital so that the source of exposure can be eliminated and that some of the developmental challenges caused by lead poisoning can be treated through diet and education.

This bill requires screening at 12 and 24 months of age. The primary health care provider of a child must order screening of the child for lead poisoning pursuant to the standards prescribed by the Division of Public Health “at or around 12 and 24 months of age. The bill defines screening as a capillary blood lead test (where a blood sample is taken from a puncture on a finger or heel). If screening reveals an elevated blood lead level, the health care provider must order a blood lead test. Testing under the bill means a blood lead test where blood is drawn from a vein. Health care providers and labs involved in blood lead level analysis, which includes screening and testing, have to participate in a reporting system as established by both the Division of Public Health and State Board of Health. Despite these requirements, §2602 (e) allows a parent or guardian to decline a screening or test for their child if it conflicts with their religious beliefs.

The bill also requires that proof of screening for lead poisoning for children 12 months old be provided for admission or continued enrollment in child care facilities, nursery schools, and preschools. Screening is also required for kindergartens, but screening can be done within 60 days of the date of enrollment. The proof required must consist of a statement from the child's primary health care provider that the child was screen for lead poisoning. In the alternative, a parent or guardian can provide a statement that the screening contravenes the parents or guardian's religious beliefs.

This bill also amends the Insurance Code to require that all individual health insurance policies (§3337) and group and blanket insurance policies (§3554) provide a covered benefit for a baseline lead poisoning screening. For children who are at a high risk for lead poisoning pursuant to the Division of Public Health guidelines, lead poisoning screening, testing, and diagnostic evaluation, and screening and testing supplies and home-visits shall be provided. However, deductibles, co-pays, and coordination of benefits can apply to the screening and testing benefits.

Finally, the bill requires the Division of Public Health to publish regulations to implement and enforce the act, which would include establishing the universal reporting system announced in §2602 (d). In addition, the Division of Public Health has to report annually on the elevated blood lead levels to the General Assembly.

This bill is a commendable effort by the General Assembly to deal with lead poisoning in children. This bill affects every child of the state and attempts to identify those children with elevated blood lead levels so that early intervention can be provided. This bill had broad support when introduced and should be enacted into law. That being said, the bill does not address reducing the sources of lead exposure. Once an elevated blood lead level is identified, there should be some effort aimed at identifying the source of the problem and sufficient resources available to eliminate the problem. Consideration should be given to these issues once there is an elevated blood lead level and bills should be introduced to adequately deal with identification of and elimination of the sources of lead contamination.

In §2602 (a), health-care has a hyphen between health and care, but in (b), (c), (d), and (f), healthcare is one word. The language in the bill should be consistent, and either spelling is acceptable. Also, §3554 of the Insurance Code should read Lead poisoning screening reimbursement rather than Lead poison screening reimbursement

4. H.B. 170, School Attendance

This proposed amendment increases the age that children are required to remain enrolled in school from 16 years old to 18 years old. The increase in age would be phased in over a two-year period; the compulsory school attendance age would rise to 17 years old, beginning in September 2022, and would increase to age 18, beginning in September 2023. The compulsory school attendance requirements would also apply to students with disabilities.¹ The proposed amendment also adjusts truancy statutes to align with the increase in compulsory attendance age.

¹ 14 Del. Admin. C. 923.9.3. The regulation says the compulsory school attendance requirements of § 2702 apply to children with disabilities between ages five and 16. The choice to limit its application to students up to age 16 is likely because that the current version of § 2702 applies to children between 5 and 16, and not a decision to create a different compulsory attendance age range for students with disabilities.

H.B. 170's sponsor supports increasing the compulsory attendance age to improve economic outcomes for individuals by increasing their job prospects and earning potential.² There is opposition to H.B. 170. Superintendent of Cape Henlopen School District, Bob Fulton, told the Cape Gazette that he, the Delaware Chief School Officers Association and the Delaware Association of School Administrators oppose H.B. 170 -- not because they do not believe students should remain in school until they graduate -- but because of the proposed alternative learning plan.³ According to Fulton, districts are unsure of how alternative learning plans would be "developed, monitored, and funded."⁴ The author could not find formal statements made by either the Delaware Chief School Officers Association or the Delaware Association of School Administrators. A bill to increase mandatory school attendance age to 17 years old was introduced during the 149th General Assembly, however it did not make it out of Committee. Del. H.B. 17, 149th Gen. Assem. (2016). As of 2017, 26 other states, including the District of Columbia, require school attendance until age 18 or older. NAT'L CTR. FOR EDUC. STATISTICS, *available at* https://nces.ed.gov/programs/statereform/tab5_1.asp.

There may be economic advantages to requiring students, including students with disabilities, to remain in school longer in hopes that they will earn their high school diploma. High school graduates earn approximately \$200 more per week than individuals with no high school diploma. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, *available at* <https://www.bls.gov/careeroutlook/2018/data-on-display/education-pays.htm>. Additionally, the unemployment rate for individuals without a high school diploma is approximately 5.6 percent versus 4.1 percent for individuals who earned a high school diploma. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, *available at* <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm>. On average, individuals with disabilities experience higher unemployment rates and earn less money than non-disabled peers. *See Those with disabilities earn 37 percent less on average; gap is even wider in some states*, AMERICAN INST. FOR RESEARCH (Dec. 14, 2014), <https://www.air.org/news/press-release/those-disabilities-earn-37-less-average-gap-even-wider-some-states>; John O'Neill, *Education and Employment outcomes for people with disabilities: is the glass half full or half empty?* KESSLER FOUND. (Mar. 11, 2016), <https://kesslerfoundation.org/info/education-and-employment-outcomes-people-disabilities-glass-half-full-or-half-empty>. However, increasing educational attainment for individuals with disabilities may improve employment outcomes. Individuals with disabilities who earned a high school diploma were more likely to be employed than individuals with disabilities who did not graduate from high school. U.S. DEPT. OF LABOR, BUREAU OF LABOR

to age 16 is likely because that the current version of § 2702 applies to children between 5 and 16, and not a decision to create a different compulsory attendance age range for students with disabilities.

² Matt Bittle, *Bills would raise dropout age and allow voting by mail*, DELAWARE STATE NEWS (May 30, 2019), <https://delawarestatenews.net/government/bills-would-raise-dropout-age-and-allow-voting-by-mail/>; *Legislators make another try at raising school attendance age to 18*, DELAWARE BUSINESS NOW (May 29, 2019), <https://delawarebusinessnow.com/2019/05/legislators-make-another-try-at-raising-school-attendance-age-to-18/>.

³ Ellen Driscoll, *School superintendents, administrators oppose proposed attendance law*, CAPE GAZETTE (June 2, 2019), <https://www.capegazette.com/article/school-superintendents-administrators-oppose-proposed-attendance-law/181824>.

⁴ *Id.*

STATISTICS, available at <https://www.bls.gov/spotlight/2018/labor-force-characteristics-of-people-with-a-disability/home.htm>.

As mentioned above, opposition is focused on the proposed alternative learning plan. If a child under age 18 seeks to leave school and does not have a health problem or already have a diploma, H.B. 170 will require that he or she obtain a waiver from the school district superintendent or their charter school's president of the board [hereinafter superintendent]. The superintendent may not grant the waiver until an alternative learning plan is in place for the student to obtain either a high school diploma or a secondary credential. According to the proposed amendment, "an alternative learning plan must include age-appropriate academic rigor and flexibility to incorporate the child's interests and manner of learning. A plan may include such components or combination of components of extended learning opportunities such as independent study, private instruction, performing groups, internships, community service, apprenticeships, and on-line courses."

H.B. 170 does not address funding, nor does it explain who will be charged with determining whether a child completes an alternative learning plan or how certain activities in a learning plan may translate into a diploma or secondary credential.

Councils may wish to support H.B. 170, as increased educational attainment may buoy employment opportunities and earnings, including for students with disabilities, but recommend clarification on how the alternative learning plan will work and, importantly, how it will be funded. An alternative learning plan seems similar to an IEP in that it appears to call for the creation of an individualized program. The school districts may need additional resources to create a meaningful individualized program for each child, and to monitor that child's progress after that child has stopped attending school.

Analysis will turn now to the text of H.B. 170.

14 *Del. C.* § 2702 contains the compulsory attendance mandate. The proposed amendment would require those with custody or control of a minor between 5 and 18⁵ years old to "except as otherwise provided...enroll the child in a public school in the school district of the person's residence, in another school district under the school district choice program under Chapter 4 of this title, or in a charter school established under Chapter 5 of this title."

Students enrolled in private schools or who are homeschooled are not subject 14 *Del. C.* § 2702. 14 *Del. C.* §§ 2703, 2703A. First, Councils may wish to recommend rephrasing the proposed § 2702 to take into account students, aside from those enrolled in the school choice program, charter or private or home schools, who do not have to enroll in their schools of residence. For instance, homeless children, as defined by the McKinney Vento Homeless Education Assistance Improvement Act, 42 U.S.C § 11431 et seq., ("McKinney Act") are not required to enroll in their school of residence. There are also special rules for children in the custody of the Department of Service for Children, Youth and Their Families (DSCYF). See 14 *Del. C.* § 202A. There may be other exceptions or categories of children now or in the future that

⁵ As mentioned above, the increase in compulsory education age is being phased in over two years, so the age depends on the year. Beginning September 1, 2023, it would be minors between 5 and 18 years old.

are not required to enroll in their school of residence, but do not fit into one of the identified exceptions; it might be easier to change that clause to say something like “enroll the child in a public school in the school district of the person’s residence, in another school district under the school district choice program under Chapter 4 of this title, in a charter school established under Chapter 5 of this title *or any other school as required or allowed by law.*”

H.B. 170 preserves and creates some exceptions to the compulsory education requirement. First, it preserves the exception that a parent/guardian may request an exemption on account of the child’s health. *See* proposed Sections 2705. In the event this exemption is being used for a student with a disability, the student’s IEP team must be involved in the determination, and must see if changes in programming or placement can be made to better accommodate the student. If a dispute arises between the school and family of the student with disabilities, Individuals with Disabilities Education Act (“IDEA”) procedural due process protections apply.⁶ H.B. 170 amends § 2705 to exempt students under 18 who have already obtained a diploma, or students who obtain a waiver from the superintendent. Proposed 2705(a)(1),(2). A superintendent may only grant the waiver upon proof the child is 16 years or older (until September 1, 2022, at which time the age will increase to 17 years or older) and has an alternative learning plan.

First, there will functionally be no superintendent waiver available to students seeking to leave school from September 1, 2022 through August 31, 2023. The proposed § 2705 would allow a superintendent waiver upon proof a child is 16 years or older until September 1, 2022, after which point the superintendent must have proof the student is at least 17 years old. Between September 1, 2022 through August 31, 2023, the compulsory attendance age will be increased to age 17. In other words, during that time period, a student who is 17 years old or older may make the decision to drop out, no exemption necessary. It seems more valuable to leave the age in the superintendent exemption at 16 years old until the compulsory age is increased to 18 years old. This could be accomplished by changing the effective date on line 31 to “[Effective until Sept. 1, 2023]” and the effective date on line 76 to “[Effective Sept. 1, 2023].”

Finally, there is an additional method available for students to leave school prior to age 18 that may not be intended by the General Assembly. H.B. 170 does not alter subsection (h) of 14 *Del. C.* § 2702. According to subsection (h), “a child over the age of 16 may withdraw from public school prior to graduation” if, in the case of a minor, the parent or guardian gives written consent, and the school holds an exit interview with the student and student’s parent or guardian. If subsection (h) remains in its current form, it is not clear that H.B. 170 will functionally change much; a minor could leave school with written parental consent after an exit meeting instead of pursuing a superintendent waiver or one of the other exemptions available in § 2705.

Councils may wish to support the amendment, while offering the following recommendations and requests for clarification:

- (1) Clarification on how alternative learning plans will work and how they will be funded

⁶ *See* proposed sections 2705; 14 *Del. Admin. C.* 923.9.3.

- (2) Amend the proposed Sections 2702 to contemplate additional categories of students who are not required to enroll in their schools of residence
- (3) Amend to make a superintendent waiver available to students during the interim year when the compulsory education age is increased to 17 years old
- (4) Clarification on how 14 *Del. C.* § 2702(h) will work in the context of H.B. 170.

5. SB 101, Fentanyl

This senate bill is remedial in nature and its laudable goal is to stop or reduce the unlawful manufacture and distribution of Fentanyl and its analogues (which are compounds with a molecular structure closely similar to that of another compound) in the state. This bill does not affect the medical manufacture and use of Fentanyl.

Illicit manufacturers constantly change or modify the composition of the drug to skirt the law. Although several of the analogues are being distributed here, some are not presently covered by the current law. Section (b)(46) specifically deals with these analogues and makes them controlled substances.

This bill is congruous with federal law and is an attempt to address the constantly changing molecular variations being made by the illegal manufacturers of Fentanyl. This bill is an estimable effort by the General Assembly to keep the opioid epidemic from expanding in the state. This bill affects every citizen of the state. This bill had broad support when introduced and should be enacted into law.

6. SB 111 - Amending Enabling Statute for the Advisory Council to the Division of Developmental Disabilities

SB 111 proposes some revisions to 29 *Del. C.* § 7910, the enabling statute for the Advisory Council to the Division of Developmental Disabilities Services. According to the bill's summary, this statute had been identified by the Joint Legislative Oversight & Sunset Committee to be in need of updating.

The proposed changes to the statute are largely minor changes in wording to make the language a bit more direct and straightforward. The bill also amends language regarding membership terms on the Council; instead of all terms being three years by default, the amended statute would allow the Governor to appoint members for terms of "up to 3 years to ensure that no more than 3 members' terms expire in a year."

The major change proposed by the bill would be to eliminate the party membership quotas for appointed members to the Advisory Council. The existing statute requires that "[a]t least 3, but no more than 4, of the members of the Council shall be affiliated with 1 of the major political parties and at least 2, but no more than 3, of the members shall be affiliated with the other major political party; provided, however, that there shall be no more than a bare majority representation of 1 major political party over the other major political party." Anecdotally, many similarly situated groups have found the party membership requirements to create obstacles to recruiting,

appointing and retaining members. Earlier this session a bill was introduced proposing to eliminate the party membership requirements for the Delaware Nursing Home Residents Quality Assurance Commission (see HB 62, passed with HA 1 on 5/16/19). The Governor's Advisory Council to the Division of Substance Abuse and Mental Health has also discussed at recent meetings whether similar changes may be necessary to its enabling statute.

The Councils should consider endorsing this bill as it cleans up the statute and would allow for greater efficiency in the appointment of members to the DDDS Advisory Council as well as greater continuity if fewer council members' terms are ending in the same year.

7. SB 121 Elections

SB 121 makes a number of changes to the Elections law to reflect the upgrades to election technology- both the polling machines and the poll books. Many of the changes are housekeeping edits- for example changing references to the Department of Elections to reflect the consolidation that took place several years ago. The phrase "voting machine" is changed to "voting devices" and "print" is changed to "create" to reflect the new digital technologies being used by the Department of Elections.

Some of the more significant changes relate to the inclusion of a verifiable "paper ballot" that is created under glass next to the screen on the voting device where ballot choices are made. The bill adds the requirement that posters required to be posted on election day by the Department of Elections have language informing voters of the "importance of verifying that the markings on the voting device-printed paper ballot reflect the voter's intended choices and instructions on what steps to take if the paper ballot does not reflect the voter's actual choices." (lines 279-281). The paper ballot under glass is the "legal ballot of record." (lines 336-337). These ballots are kept securely for 22 months in case of audit. There is both an electronic record and a paper ballot that is stored. There is no mention of how a person with a disability could seek assistance in verifying his paper ballot, should that be needed. Councils should consider requesting additional language addressing this concern.

The bill simplifies the statute related to polling place procedures on election day, including security procedures for handling the paper ballots and electronic media containing results. Councils should consider asking for an amendment to §3125 requiring the Department to furnish supplies to each polling place to provide adequate signage to the accessible entrance and signage and cones to demarcate accessible parking.

The bill deletes existing Chapter 50, Voting Machines, in its entirety and amends Chapter 50A, which relates to the use of electronic polling devices. Chapter 50, §2001(a)(13) required that voters be allowed to vote "independently and privately." This language has been dropped in Chapter 50A. The language comes from the Help America Vote Act, which requires that all voters be afforded the opportunity to vote independently and privately. The current statute does reference secrecy, but that is not the same thing. Councils should consider requesting an amendment that adds the requirement that voters be afforded the opportunity to vote both privately and independently.

The bill adds 5001A(c) which reiterates the requirement in 5001(d) that all voting devices selected by the Department of Elections be certified by the EAC as meeting or exceeding

voluntary voting systems standards or guidelines. Councils should consider asking for an amendment that indicates that the machines or devices comply with the most current guidelines at the time and also that voting devices be fully accessible to individuals with disabilities.

Section 5004A covers how many devices must be provided at each polling place. HAVA requires that each polling place have at least one accessible polling device. This requirement should be stated in this section, even if the current devices are all accessible (as we don't know what might happen in the future).

8. HCR 47 Special Education Task Force

HCR 47 is similar to a continuing resolution introduced last year to create a task force to investigate the cost of special education with the goal of making recommendations related to cost efficiency by April 1, 2020. The precatory language makes clear that the IDEA requires districts and charter schools to ensure the appropriate identification of students and access to FAPE. The focus seems to be on develop strategies to improve efficiencies and outcomes so that those savings can be redirected to be providing more and better special education services for students with disabilities. Part of the charge for the task force is to examine the “dramatic recent rise” in special education and funding. Councils expressed some concerns last year that the tenor of the resolution appeared to be focused on finding ways to spend less money on special education services. The language in the current proposed resolution indicates that any savings would be redirected to special education.

The Task Force is to be comprised of 32 individuals: 13 are DOE or education-related positions; 8 are parents or representatives of advocacy groups; 6 are state agency positions other than DOE; and 5 are Government-appointed at large positions. Councils may wish to endorse the proposal if comfortable with the balance of positions within the Task Force as the balance currently allows the DOE and related groups (40%) to have control over the agenda for the Task Force.

Other Matters:

1. DOE Regulations 545,609 and 917. These regulations are being reviewed as part of the normal four year cycle of review. There are no proposed changes to any of these regulations.
2. HB 198, Increasing Maximum weekly benefit for unemployment compensation. This change will assist individuals who are low income and in between jobs to avoid economic disruption; consider endorsement
3. HB 194, Increased oversight of Pharmacy Benefit Managers by Insurance Commissioner; this bill will allow more transparency and regulation of PBMs. Consider endorsement as regulation can lead to fairer pricing of pharmaceuticals for all Delawareans.
4. HB 182, Dropping foreign language requirement for high school diploma or certificate. Je ne sais pas ce que s'en pense.

5. HB 175, Permitting voting by mail; this bill would allow Commissioner of Elections to create drop boxes so that individuals can vote by mail rather at polling place; should allow more access to electoral process for those who find it difficult to vote in person. Consider endorsement.