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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 March 2019 issue of the Delaware Register of Regulations and several proposed bills.

Final Regulations

1. **Final Department of Education Regulation regarding High School Graduation Requirements and Diplomas, 22 Del. Register of Regulations 762 (March 1, 2019)**

The State Board of Education finalized the proposed amendments to 14 DE Admin. Code 505. The amendments to section 505 align with several statutory changes, one of which was House Substitute 1 to House Bill 287, which eliminated the Certificate of Performance and created the Diploma of Alternate Achievement Standards for students who satisfy their Individualized Education Program ("IEP") requirements, but are not eligible for a traditional high school diploma. The proposed amendment also eliminated the guidance on Student Success Plans ("SSPs") and stated in the synopsis that a new regulation on SSPs would be issued "in the near future." SSPs are developed with every student beginning in the eighth grade, and outline a student's post-high school goals along.

Councils supported the amendment, but sought clarification on how SSPs would work while a new regulation was being created and information on when the new regulation would be issued. The State Board of Education addressed Councils' concern by subsequently promulgating

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Section 507, which is the new regulation that addresses SSPs. It appeared in the January 2019 issue of the Delaware Register of Regulations.

Finally, the Board made an additional change to the finalized regulation; it changed the definition of "Career Pathway" by removing the sentence stating "Career Pathway shall be included in the Student Success Plan." 22 Del. Reg. 762, 763. Career Pathway are a series of "pre-planned" courses that expose students to and help them gain skills in career and academic areas. *Id.* The Board stated it changed the definition because "a new regulation will be created in the near future that will specifically provide guidance around Student Success Plans. Therefore, reference to Student Success Plans in the definition of "Career Pathway" has been struck." *Id.*

It does not follow that the definition of Career Pathway must be changed just because a new regulation about SSPs was created. It is not clear whether this change will result in the removal of Career Pathway planning from SSPs. Even if Career Pathway planning does not go into the SSP, it may not affect student experience because Career Pathway is not itself removed from Section 505; in other words, students may still be engaging with school officials about Career Pathway options even if it is no longer included in the SSP.

Councils may wish to support the finalized amendment, and perhaps raise any concerns about SSPs in its comments on Section 507, which is discussed below.

2. Final Department of Education Regulation regarding Student Success Planning, 22 Del. Register 763 (March 1, 2019)

The State Board of Education finalized a new regulation that 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 eight and above to have a Student Success Plan (SSP), which is a written plan stating students' post-high school goals. Previously, the requirements for SSPs were located in 14 DE Admin. C. 505. The previous SSP rules required school districts to help students create "a program of study" comprised of academic courses, electives and extra-curricular activities that would prepare a student for entry into their desired career path. It also required the school district to ensure the student was satisfying graduation requirements, and was taking the steps necessary to

meet their career goals. If there were concerns about the student failing or "not being on track" to meet their career goals, the SSP was to identify supports the school district would provide. Unfortunately, Section 507 is much less clear about what will go into an SSP, whether school districts must still work with students to create "a program of study," whether individualized supports will be provided to students who are "not on track" to meet their post-secondary education goals, and what post-high school planning will look like for each individual student.

The Councils asked for clarification and amendments. Councils sought clarification that Section 507 requires school districts to still help students develop a program of study, even if it is no longer in the SSP. The Department's response was that the regulation requires school districts' PSAPs to "list the specific activities and supports they are providing to help students explore potential career interests, establish and refine goals to prepare them to pursue the goals after high school." 22 Del. Reg. 764 (Mar. 2019).

PSAPs are not tailored to an individual child; the purpose of the PSAP is for districts to create processes to follow to ensure that, *inter alia*, there are "activities, supports and resources" available to allow students to gain exposure to career and college information. While there is no doubt value in school districts planning activities and supports that will be provided to the student body as a whole, the concern still exists that the development of a plan to achieve career goals under Section 507 will be less individualized. In other words, it is one thing for a district to plan how it will expose its student population to career and post-secondary education opportunities, but another for a school district to sit down with a particular student and help that particular student create a concrete plan on how to reach the particular career goal(s) that are in her SSP given her particular background, aptitudes and skills. Both are arguably valuable, but different. Councils may wish to reiterate the importance of ensuring individualized planning is still occurring.

Councils sought inclusion of a requirement that school districts identify and provide supports necessary to help students achieve their career goals. The Department believes this concern is addressed by Section 4.1.1.2, which requires school district PSAP plans to "include the activities, supports and resources to enable students to fulfill the opportunities identified in the regulation, as well as requires the plan to be district-wide to enable a comprehensive approach to support students from 8th to 12th grade. Incorporating this into their plans will enable

districts to identify areas where students need additional supports and continue those supports between middle and high school." 22 Del. Reg. 764 (Mar. 2019).

There are two concerns with the response. First, as discussed above, PSAPs are not individualized to the student. It is one thing to create a plan to contemplate supports and resources that will be available to the student body as a whole, it is another to tailor specific supports for a particular student.

Next, providing supports to achieve "the opportunities identified in the regulation" may be different than the provision of supports to achieve post-secondary and career goals. Section 4.1.1.2 requires PSAPs to include a process for "activities, supports and resources to enable students to fulfill the opportunities as identified in Section 3.0, such as but not limited to: small and large group activities, in-school and out-of-school supports, and one-on-one Advisement." Section 3.0 states that students should have the opportunities to learn about "career and industry trends and earning potential…; to identify their strengths and interests connected to careers;…to identify educational and financial requirements related to potential career interests." The activities, supports and resources to help students achieve these goals will likely look different than providing activities, supports and resources to help a particular student achieve a particular post-secondary education goal. For example, to help students achieve the opportunities in Section 3.0, school districts may have to think about students' transportation needs to help students attend career fairs or after-school talks or what steps school districts might take to attract guest speakers. Provision of supports to help a student reach a particular career goal might consist more of things like ensuring she is completing coursework necessary for admission into a particular college program or provision of tutoring in relevant subject areas.

Councils noted in their comments on the proposed regulation that perhaps use of the term "advisement" in Section 4.1.2.2 may mean that students will still be developing a concrete plan to achieve their post-secondary goals, even if it is just no longer placed in an SSP. Councils recommended the advisement requirement be removed from subsection 4.1.2.2 to clarify that school districts are still responsible for working with students to help them form a concrete plan to achieve their post-high school goals, and *not* that they are just responsible for planning how the student will be exposed to opportunities identified in Section 3.0, which are essentially the

opportunities to learn about career and post-secondary education options and requirements. The Department declined to make this amendment.

Councils may wish to reiterate the importance of school districts providing support services for students not on track to achieve their career goals, as was required in the previous regulation, not just providing the supports necessary to expose students to career information.

Councils sought inclusion of a transcript review requirement The Department declined to include the transcript review requirement, which was previously included in Section 505, because high school counselors will continue to review transcripts "as part of the requirement to increase graduation rates under the Every Student Succeeds Act" and the Delaware School Success Framework monitors graduation requirements. 22 Del. Reg. 764 (Mar. 2019). It is good to hear transcript review will continue, and hopefully the information gleaned from those transcript reviews will be applied by the school districts to student career planning.

Councils sought inclusion of a section requiring SSPs to incorporate the IEP transition plan requirements in 14 DE Admin. C. 925. The Department found that this requirement is unnecessary because it believes the transition plan may serve as the SSP, so long as the transition plan satisfies the SSP requirements. 22 Del. Reg. 764 (Mar. 2019). There may be privacy concerns if school districts decide to consolidate a student's SSP into their transition plan. Transition plans are located within the IEP. IEPs contain sensitive information that may not be found in an SSP. Depending on how SSPs are used, this may create some issues; there may be some situations where it is appropriate to share a students' SSP, but not to disclose everything that is in their IEP.

Councils requested removal of definition the definition "Core Course Credit" The Department adopted this change.

Councils requested inclusion of a requirement for data collection on access to ESSA measures and Career Pathways programming for students with IEPs The Department responded that "district plans are required to identify how they will measure student impact in meeting their post-secondary goals and progress reports will show their progression towards these goals, including measurable outcomes as outlined in the regulation. This includes all students, including those with IEPs." 22 Del. Reg. 764 (Mar. 2019).

While school districts may be required to measure all students, it still would be helpful to identify which datasets belong to a student with an IEP so that outcomes for students with disabilities can be differentiated from outcomes for all students and tracked. In other words, the data will not be as useful for determining outcomes for students with disabilities unless data for students with disabilities can be disaggregated from the data of all other students. Council may wish to reiterate its request for a requirement that school districts collect data in such a way as to ensure the progress of students' with disabilities can be monitored.

In conclusion, Councils may wish to reiterate the importance of ensuring individualized planning is still occurring; that there is a distinction between providing supports that allow a student to gain exposure to career information versus supports to help a student achieve their particular career goals, and the importance of school districts providing both types of supports; and that school districts ought to be required to disaggregate data to allow the outcomes of students with disabilities to be tracked.

3. **Final DSS Regulations on CMR Requirements for TANF Recipients, 22 Del. Register of Regulations 773 (March 1, 2019)**

DSS has finalized changes to various sections of the DSS Manual concerning the Contract of Mutual Responsibility (CMR) for TANF (cash assistance) recipients. TANF is a limited cash benefit for families with little to no income, and adult recipients must participate in work programs to receive the benefit. The CMR is essentially an individual responsibility plan and an agreement between the TANF client and DSS that "sets obligations and expectations for helping the client achieve self-sufficiency." The amended changes were intended to enhance the definition of the CMR, provide clarity to the requirements of the contract and responsibilities of TANF recipients, improve readability, and introduce the requirement of a financial coaching orientation.

These final regulations do not explicitly refer to accommodating TANF recipients with disabilities in the context of CMRs. DSS declined to include such references in response to comments recommending that it do so. Instead, DSS added a provision in DSSM 3009 stating that "DSS encourages clients to disclose any difficulties that may create barriers for meeting the CMR requirements. DSS will not impose a sanction if good cause exists." The amendments

also now provide that "DSS will work with clients to identify barriers" and "will provide supportive services to clients to assist in reducing identified barriers." The amended regulations do not detail what supportive services are available, although elsewhere, the DSS Manual notes that child care and transportation services can be offered, while other supports are provided by vendors.

In explaining its decision to omit references to accommodations for people with disabilities, DSS wrote that "DSS will continue to make accommodations for any client with barriers to complying with the CMR components" and pointed to the Transitional Work Program (DSSM 3017.1) as outlining accommodations for individuals who have been determined unable to work in an unsubsidized employment setting by a health professional. Although the TWP policies do address accommodations for TANF recipients who are eligible for that program, DSS is obligated under the Americans with Disabilities Act and Section 504 to ensure that all of its programs and services accommodate people with disabilities.

In sum, while the final regulations now include language on identifying and reducing client barriers, they fail to clearly note that DSS will offer reasonable accommodations for clients with disabilities in the context of CMRs. Although the Transitional Work Program (which is discussed in CLASI's comments on proposed amendments to DSSM 3017.1) is one form of accommodation, it does not – as DSS seems to suggest – fulfill the agency's legal responsibility to create policies allowing for reasonable accommodations throughout the entire TANF program. At this time, DSS is continuing to revise other sections of the DSS Manual pertaining to the CMR. Therefore, Councils should continue to raise the issue of accommodations in future comments on proposed amendments.

4. **Review of DHSS annual grant application for Birth Through Three federal funding under Part C of the IDEA Act. (Notice Del . Register of Reg, March 1, 2019)**

DHSS posted for public comment its application for federal fiscal year 2019 ("FFY 2019") funding under Part C of the Individuals with Disabilities Education Act (IDEA). The FFY 2019 application is available online at https://dhss.delaware.gov/dhss/dms/epqc/birth3/directry.html under the "Public Notice for Public Comment" subhead. The federal Part C grant is administered by the Office of Special Education Programs ("OSEP"), and provides the State funding to maintain and implement a system of early

intervention services for infants and toddlers with disabilities or developmental delays. 34 CFR 303.100.

Title 34, Part 303 of the implementing regulations detail what must be included in each State's grant application. The application consists of three main parts: Section II-A, which requires the State indicate whether it is providing OSEP the policies, procedures, methods or descriptions ("policies, etc.") that are required by 34 CFR 303.201- 212; Section II-B, which asks the State to make assurances about its ability to comply with various requirements; and Section III, which requires to State's to outline how it proposes to spend federal funds.

Application Section II-A

In Delaware's FFY 2018 application, the State indicated it could provide OSEP all Part II-A required policies, etc., and that all these policies, etc., were already on file with OSEP. The FFY 2018 application also stated Delaware could make all Part II-B assurances.

However, in the FFY 2019 application Delaware states that it cannot provide all of the Part II-A policies, etc. Since the federal regulations have not changed since 2011, a member of the DLP reached out to DHSS to find out why Delaware could not satisfy II-A requirements since OSEP had Delaware's previous year's policies, etc. on file and there have not been any federal regulatory changes that would have rendered Delaware's policies, etc. insufficient. The DLP was informed that incorrect boxes were selected in Part II-A, and DHSS will promptly release a corrected application. Delaware is able to satisfy all Part II-A requirements.

Application Section II-B

The FFY 2019 application differs from the 2018 application in that Delaware will not be making all of the Part-B assurances this year. If a State is unable to make an assurance, it must provide anticipated date no later than June 30, 2020 by which it will bring itself into compliance. This year, Delaware will not make the following assurances:

- State rules, regulations, policy, and procedure about early childhood intervention for infants and toddlers with disabilities "conform to the purposes and requirements of 34 CFR Part 303." *See* Section II-13 of the FFY 2019 application. Delaware's estimated completion date is June 30, 2020.

- There are policies and procedures "relating to establishment and maintenance of qualification standards to ensure that personnel… are appropriately and adequately trained." *See* Section II-16 of the FFY 2019 application. Delaware's estimated completion date is June 30, 2020.
- Procedural safeguards satisfy the federal regulations. *See* Section II-18 of the FFY 2019 application. Procedural safeguards include confidentiality of information, parental consent and notice, and dispute resolution and hearing rights. Subpart E of 34 CFR Part 303. Delaware's estimated completion date is June 30, 2020.
- Policies and procedures exist to ensure "traditionally underserved groups, including minority, low-income, homeless and rural families and children with disabilities who are wards of the state" are engaged in "planning and implementation" of Part C and these families can obtain "culturally competent services" in their area. *See* Page II-20 of the FFY 2019 application. The estimated completion date is June 30, 2020.
- The State has a policy that requires it make "good-faith efforts" to recruit qualified personnel to provide early intervention services to infants and toddlers with disabilities, including in areas of the State where there is a personnel shortage. *See* Page II-21 of the FFY 2019 application.

A member the DLP spoke with the Part C Coordinator, Ms. Susan Campbell, to ask why Delaware would not be making all of its assurances this year since the State was able to last fiscal year and the federal regulations have not changed since 2011. Based on that call, it appears the State has declined to make the aforementioned assurances, not because it cannot meet the minimum federal requirements, but because it wants to strengthen and change its policies. For instance, Delaware's procedural safeguards have not been updated since the 1990s, and the State wishes to review and update it before making assurances.

Delaware does not risk losing federal dollars this year by failing to make all assurances. Rather, Delaware would be granted conditional approval, and would be required to indicate in next year's application whether it resolved the issues identified in this year's application.

Councils may wish to seek information about what actions and procedures Delaware is planning to take to ensure the State can make all assurances next year. If DHSS is planning on

revisiting and strengthening policies, Councils may wish to inquire how the public may offer input.

Councils may wish to seek clarification on why no answer is provided to assurance number four on page II-13. Assurance number four asks the state to assure its early intervention system includes the "components" in 34 CFR §§303.11 through 303.126. Councils may also want clarification on why assurance 2 is checked yes. Assurance 2 asks whether the State has policies and procedures "that address, at a minimum, the components required in 34 CFR §§ 303.111 through 303.126." *See* Page II-13 of the Application. Delaware has indicated it is not able to provide assurances it complies with §§ 303.119(a)-(d), 303.123. Perhaps it has checked yes to that question because it can assure that its policies do at least minimally address CFR §§ 303.111 through 303.126 requirements, even if the State cannot assure that we are actually in compliance with these requirements.

Councils may wish to ask why some answer choice boxes are blacked out; sometimes the box that is blacked out is the answer that was not selected, however other times, the answer that was not chosen is not blacked out. *Compare* Assurance 25 with Assurance 26, Page II-20 of the application.

Application Section III

Section III details how much funding the State is requesting, and how the State proposes to spend those funds. Delaware is seeking roughly the same amount of money as it did in FFY 2018, however there are some substantial differences in how the State proposes to spend those federal dollars.

In FFY 2018, Delaware requested $581, 357 for the provision of direct early intervention services. Direct services include the provision of developmental services (such as treatment and assessment) and physical, occupational, and speech and language therapies. In FFY 2018, Delaware requested approximately $214,000 for developmental services, $102,000 for physical therapy; $81,000 for occupational therapy, and $181,000 for speech and language therapy.

In the FFY 2019 application, Delaware requested $128,784 for direct services- approximately $51,000 for developmental services,[1] $18,000 for physical therapy, $12,000 for occupational therapy, and $45,000 for speech and language therapy.

It could be that Delaware will be using State dollars or money from another source to fund direct services. However Councils may wish to ask for clarification on how these important services will be funded.

This year, the State proposes to spend more federal dollars on "maintenance and implementation activities" than it did last year (FFY 2018: approximately $900,000 compared with 1.4 million for FFY 2019). Some of the largest differences between FFY 2018 and 2019 in proposed spending are as follows: approximately $155,000 more proposed for contractors that evaluate infant and toddler eligibility, $110,000 for computer and technology expenses, $100,000 for contractual services on policy development, and $40,000 on child find and public awareness efforts.

In conclusion, Councils may wish to request the following clarifications:

(1) What the State will be doing this year to ensure it can make all assurances next year, and if it is planning on revising and strengthening policies, how the public may offer input.
(2) Why no answer is provided to Assurance 4 on page II-13.
(3) Why the State has made Assurance 2, based on its answers in other areas of Section II-B.
(4) Why some answer choice boxes are blacked out.
(5) How Delaware will be funding direct support services, since it is proposing to use significantly less federal dollars to fund them.

Proposed Regulations

5. Proposed DOE Regulation Regarding Private Business and Trade Schools, 22 Del. Register of Regulations 716 (March 1, 2019).

The Department of Education is proposing to amend 14 DE Admin. Code 282 Private Business and Trade Schools. Most notably, the proposal clarifies the definition of "Private

[1] This category is now called "Early Childhood Education," but based on the description it appears to be identical to what was labeled as "Developmental Services" in the FFY 2018 application.

Business or Trade School." The proposed amendment shortens the definition to "an educational institution privately owned and operated for profit or nonprofit by an owner, partnership or corporation, offering business or trade and industrial courses for which tuition may or may not be charged, and which may include those courses usually associated with business training schools, trade schools, specialized skill training schools, or institutes."

The DOE should take appropriate steps to ensure access to a variety of educational opportunities for students with disabilities, including access to private business and trade schools. The clarification of this definition does not appear to impact access for students with disabilities.

6. **Proposed DOE Regulation Regarding Requirements for Issuance of the Secondary Credential, 22 Del. Register of Regulations 720 (March 1, 2019).**

The Department of Education is proposing to amend 14 DE Admin. Code 910 Delaware Requirements for Issuance of the Secondary Credential. The regulation is being amended to add definitions for clarification purposes. The proposed definitions are as follows: "Assessment" means a set of tests that evaluates high school skill levels in the content areas of English Language Arts, Math, Science, and Social Studies; "Department" means the Delaware Department of Education, and; "Secondary Credential" means a document that verifies the successful completion of the assessment that evaluates high school skill levels in the content areas of English Language Arts, Math, Science, and Social Studies." This proposed regulation does not appear to limit the opportunities for students with disabilities to receive a secondary credential.

7. **Proposed DMMA Regulation on Providing EPSDT Services to Children in IMDs, 22 Del. Reg.728 (March 1, 2019).**

The Division of Medicaid and Medical Assistance is proposing to amend the Medicaid State Plan to "*insure individuals under 21 in qualified inpatient psychiatric hospitals and facilities are guaranteed access to necessary services.*" 22 DE Reg.728 (Prop.) (emphasis original). These changes are to meet requirements of amendments to the Social Security Act by the 21st Century Cures Act ("the Cures Act"), Pub.L. 114 - 255 114 – 255.

The Cures Act was enacted by Congress in December 2016. Section 12005 of the Cures Act requires that children under the age of 21 who are receiving care in inpatient psychiatric settings have access to all Early Periodic Screening, Diagnostic, and Treatment ("EPSDT") services. According to the informational bulletin issued by the Center for Medicaid and CHIP Services ("CMCS," part of the Centers for Medicare and Medicaid Services) on June 20, 2018, states are not required to amend their state plans to comply with this provision of the Cures Act but must ensure that all requirements described in the guidance are met effective January 1, 2019. See CMCS Bulletin, p. 3.

The purpose of the EPSDT benefit is "providing early and periodic screening and diagnosis of eligible Medicaid beneficiaries under age 21 to ascertain physical and mental defects, and providing treatment to correct or ameliorate defects and chronic conditions found." 42 U.S.C. § 441.50. Historically individuals under 21 have been one of the exceptions to the broader "IMD exclusion" under 1905(a) of the Social Security Act, which prohibits the use of Medicaid payment for services in institutions for mental disease, commonly referred to as "IMDs." Within this category, non-hospital facilities providing psychiatric care to individuals under 21 are generally referred to as psychiatric residential treatment facilities, or "PTRFs." Prior to the Cures Act, outside of the care provided by the facility, other services reimbursable by Medicaid for children in PTRFs were limited. Reimbursement was generally limited to items or services that were "included by the state as part of the rate paid to the facility for care" or were otherwise "authorized under the child's plan of care" and provided under an arrangement with the PTRF. CMCS Bulletin, p. 2. In effect this meant coverage for services that would otherwise be covered by the EPSDT benefit for children residing elsewhere were not reimbursable for children residing in a PTRF. See CMCS Bulletin, p. 2.

The Cares Act's amendments require that children under 21 are guaranteed access to any EPSDT items or services, regardless of the provider of the services or whether the item or service is part of the individual's plan of care at the IMD. Accordingly, DMMA's proposed amendments to the Medicaid State Plan make clear that psychiatric residential treatment facilities, or "PTRFs" will be reimbursed through EPSDT for any needed medical service provided on or after January 1, 2019, regardless of whether they are included in the PTRF's per diem reimbursement rate or already identified in the child's treatment plan.

The DLP encourages approval of these changes to the Medicaid State Plan to formalize this change in Medicaid procedures that is required by federal law, and ensure children in PTRFs have access to all needed medical services.

8. **Proposed DSS Regulation on Defining Household Income in the Food Supplement Program, 22 Del. Register of Regulations 740 (March 1, 2019)**

DSS is amending the DSS Manual (Section 9055, "Defining Household Income") regarding the Food Supplement Program in order to more clearly define household income and income reporting requirements. The updated language defines household income to mean the combined income of all members of a food benefit household (excluding certain exceptions), and it specifies that DSS requires households to report income from all sources, including both earned and unearned income. These changes are not substantive, nor are they problematic. They improve the clarity of DSSM 9055, and Councils should endorse the amendments.

9. **Proposed DSS Regulations on CMR Requirements for TANF Recipients, 22 Del. Register of Regulations 744 (March 1, 2019)**

DSS is proposing to amend the DSS Manual to update provisions regarding the Contract of Mutual Responsibility (CMR) for TANF (cash assistance) recipients. TANF is a limited cash benefit for families with little to no income, and adult recipients must participate in work programs to receive the benefit. The CMR is an agreement between the TANF client and DSS with specific requirements that are meant to help the client achieve self-sufficiency. DSS' revisions are intended to more concisely define the TANF CMR, update the required elements of the contract, and improve the readability of policies.

The proposed amendments could be strengthened in various ways and must ensure that DSS is fulfilling its obligations under the ADA and Section 504 to provide people with disabilities equal access to the TANF program. The US Department of Health and Human Services' Office of Civil Rights (HHS OCR) has issued policy guidance for state TANF agencies that specifically addresses how they must serve people with disabilities. Among other things, this guidance emphasizes that TANF agencies must have comprehensive written policies that incorporate modifications to policies, practices, and programs to ensure that individuals are not subject to disability-based discrimination:

> Clear written policies that describe in detail how to respond when a TANF participant has a disability should be provided to all TANF agency and provider staff who have contact with beneficiaries with disabilities. These policies should be incorporated into any manual, handbook or directive that sets out agency policy with respect to the State's TANF program as well any regulations promulgated by the agency.

See "Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF," available at https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/summary-policy-guidance/index.html.

I. DSSM 3009.1, Imposing Sanctions for Non-Compliance with CMR Requirements

The updated version of DSSM 3009.1 explains that DSS will impose sanctions when clients fail to comply with their CMR requirements, but will not sanction a TANF case if DSS "determines a client has good cause for non-compliance with the CMR." However, no explanation is offered regarding how DSS will make this determination. The need for DSS to explain how case workers will determine "good cause" for non-compliance is especially important given DSS' obligations to provide reasonable accommodations under the ADA and Section 504.

Just as DSS proposes that "DSS case workers must verify that clients are compliant....before sanctions can end," DSS should also require case workers to verify the reason for a reported instance of non-compliance before imposing a sanction in the first place. DSS should not place all the burden on families to notify their case workers of compliance barriers. Rather, DSS should take affirmative steps to contact parents to inquire about non-compliance to ensure that it is not improperly sanctioning a family. Families – particularly those experiencing hardships like homelessness, disability, or medical emergencies that lead to non-compliance – often have great difficulty getting in touch with their case workers to report obstacles to complying with TANF requirements. Improper and erroneous sanctions can then drive these families into further poverty.

II. DSSM 3010, Requiring Participation and Cooperation in Developing the CMR

DSSM 3010 does not explain in sufficient detail how DSS will accommodate people with disabilities in developing the CMR. HHS OCR guidance stresses that TANF beneficiaries with disabilities must receive an assessment that incorporates "an individualized analysis of each person's ability to meet the program requirements." The CMR should take the results of such an assessment into account, as well as the needs of the individual with a disability. We recommend language that expressly requires CMRs to reflect any needed accommodations required by a TANF household member with a disability. DSS must have policies that explain that it will consider and grant any substantiated reasonable accommodation request from a recipient with a disability (or a member of the household with a disability) when developing or revising a CMR.

Further, in its recommendation for best practices, HHS suggests that TANF agencies address in individual responsibility plans "not only the suitability of job opportunities, but also the needs of a beneficiary with a disability for health care, benefits counseling, and disability-related services and supports...the agency [should] also [provide] comprehensive case management/service coordination."

Another area for improvement is DSSM 3010(2)(C), which states that DSS "will give clients the opportunity to understand the CMR and its requirements," and that DSS will give clients a copy of the proposed CMR to review outside of the DSS office at the request of the client. This language is too vague. In its effort to make sure that clients understand the requirements of the CMR, DSS should clearly require its case workers to review certain topics with clients. For example, Pennsylvania requires its case workers to explain the following areas when completing individual responsibility plans:

- List of responsibilities both for the person and for the [County Assistance Office] assisting the person
- Right to appeal and have a fair hearing
- What constitutes good cause
- Penalties for noncompliance with eligibility requirements

See PA Department of Human Services Cash Assistance Handbook at 107.6, "Completing the AMR."

Moreover, instead of simply relying on TANF recipients to request the opportunity to review the CMR outside of the office, DSS should require case workers to inform all recipients of this opportunity so that they are aware of this option and can choose to exercise it. DSS should also ensure that the CMR uses plain language that the recipient can understand, as well as offer translated copies to persons with limited English proficiency.

DSS also proposes in DSSM 3010(2)(F) that, although clients may object to certain elements of the CMR, DSS has the final authority to determine what elements are included. More explanation is needed. How will DSS ensure that client objections are taken into account? Will DSS record these objections in the case record? What standards will DSS use in arriving at their final determinations of what elements are required in the CMR? DSS should clarify how it will ensure that case workers are not making these decisions unilaterally.

In DSSM 3010(3), the proposed amendments state that failure to comply (without good cause) in developing the CMR will result in a sanction. Again, DSS should require case workers to take affirmative steps to verify the reason for non-compliance and whether good cause exists. Further, DSS proposes that it will allow clients up to 10 days "to reach a resolution" if they are negotiating contract terms or "to complete contract review." It is unclear what DSS means by reaching "a resolution." Also, clients who are negotiating contract terms should still be offered additional time to review the CMR outside the office. DSS should also waive the 10-day requirement for clients with extenuating circumstances who may need extra time, such as clients with disabilities.

III. DSSM 3017.1, "Participating in the Transitional Work Program"

This proposed Subsection, which describes the Transitional Work Program (TWP) for "clients who have been determined unable to work in an unsubsidized employment setting by a health professional," emphasizes that failure to comply (without good cause) with the TWP Employability Plan will result in sanctions. Again, DSS should require case workers to verify the reason for non-compliance before imposing a sanction so that good cause can be ascertained and reasonable accommodations offered when necessary.

In response to previous comments by CLASI, DSS has pointed to DSSM 3017.1 as "[t]he policy that speaks to ADA accommodations." While the TWP program can be considered an accommodation, DSS should be incorporating reasonable accommodations for people with disabilities throughout the entire TANF program in order to ensure they have equal access to all TANF programs and services for which they qualify. HHS guidance cautions that "agencies should take steps to ensure that individuals with disabilities can participate in all programs and services for TANF individuals, not just those programs and services that are designed solely for individuals with disabilities."

In conclusion, Councils should ask for significant revisions to the proposed policy amendments regarding the Contract of Mutual Responsibility. DSS should provide more details on how it will accommodate people with disabilities in developing the CMR and imposing sanctions. Councils should also request that DSS case workers be required to verify the reasons for non-compliance before imposing sanctions so that the burden is not only on families to report reasons that may constitute good cause. In addition, DSS should offer clear guidance on what topics case workers must review with TANF recipients when completing a CMR, as well as additional explanation on how it will ensure that TANF recipients' concerns and objections are accounted for when finalizing the contract.

Proposed Legislation

SB 25 – Raising the minimum sale age for tobacco products to individuals over 21.

This bill prohibits the sale tobacco products and tobacco substitutes to individuals who are under 21 years of age, imposes a civil penalty for sales to individuals between 18-21, repeals the ability of a parent or guardian to purchase tobacco or tobacco substitutes for a minor, amends the definition of tobacco products to include "vapor products," "liquids used in electronic smoking devices," and "electronic smoking devices," and prohibits individuals under age 21 from entering vapor establishments. Current law prohibits the sale of tobacco products to those under the age of 18. As of March 1, 2019, seven states – California, New Jersey, Massachusetts, Oregon, Hawaii, Maine and Virginia– have raised the tobacco age to 21, along with at least 440 localities, including New York City, Chicago, San Antonio, Boston, Cleveland, Minneapolis, both Kansas Cities and Washington, DC.

In addition to this legislation, Councils should consider advocating for the implementation of proven smoking cessation treatments and services, along with targeted media campaigns that effectively address the challenges people with disabilities may face when attempting to quit using tobacco products. According to the CDC, the percentage of adults who smoke cigarettes is higher among people with disabilities than people without disabilities. This difference in rates of smoking demonstrates the importance of making sure that programs that focus on reducing smoking to promote health and prevent long-standing diseases are inclusive for people with disabilities. Inclusive smoking cessation programs need to be accessible to those who want to participate and in some cases adapted to address the needs and expectations of the target population.

HB 59: Community Transportation Fund Reporting Requirement

This bill requires the Secretary of the Department of Transportation ("DelDOT") to publish information about the use of the Community Transportation Fund ("CTF") to the public. For each member of the General Assembly, the Secretary must publish information about how much money is in the member's CTF account, how much is allocated to the member's CTF account in a given year, the amount of for transfers to and from the account, and the "amount, purpose, and location of each expenditure authorized by the member." The bill does not affect how CTF funds are allocated or how members of the General Assembly can spend their allocated funds. It merely creates a reporting requirement so that the public can more easily see how these funds are used.

The CTF is composed of pools of money allocated to each member of the General Assembly. This money is used primarily to fund repairs of roads and sidewalks in subdivisions, and the individual legislators decide what projects will get funded. Because of this program, DelDOT does not take responsibility for subdivision roads and sidewalks. The money has historically been divided evenly across all of the members of the General Assembly, leading some legislators to complain that, because their districts have a disproportionately high number of subdivisions, the system is unfair. Additionally, because legislators can choose what projects to fund, there is no guarantee that the roads in most need of repair will be those that actually get repaired.

For a brief overview of the CTF and some of the controversy surrounding it, see https://www.delawareonline.com/videos/news/2017/07/31/community-transportation-fund-debate-explained/104170124/; https://delawarestatenews.net/government/legislator-questions-subdivision-paving-program-seeks-changes/

Because the existence of the CTF arguably absolves DelDOT of responsibility for roads and sidewalks in subdivisions, it potentially complicates matters when there are disability-related problems with subdivision streets and sidewalks. For example, many public schools are located within subdivisions. A poorly paved or damaged sidewalk near the entrance to a public school (but beyond the edge of the school's property) could create an accessibility problem for persons with disabilities. Attempting to get such a problem fixed (or filing a complaint or lawsuit, if necessary) is much easier if there is an agency (i.e., DelDOT) that is responsible for the sidewalk. If the responsibility lies directly with the individual legislator, it is may be more complicated to try and resolve the situation, and there are additional complications if a complaint or lawsuit needs to be filed.

The prior paragraph notwithstanding, the DLP advises that the councils support this bill. The CTF and system surrounding it will continue to exist regardless of what happens to this bill, but the increased transparency will let the public see how legislators choose to spend their CTF dollars. Persons with disabilities and advocates in districts where a lack of road and sidewalk maintenance are creating accessibility problems can then engage with their legislators directly. If their projects are not funded, they will be able to see what projects the legislator believed were more important. In the alternative, because the connection to disability rights is somewhat attenuated, the councils may wish to take no position on this bill.

HB 61: Update to Uniform Controlled Substances Act Regarding Benzodiazepines

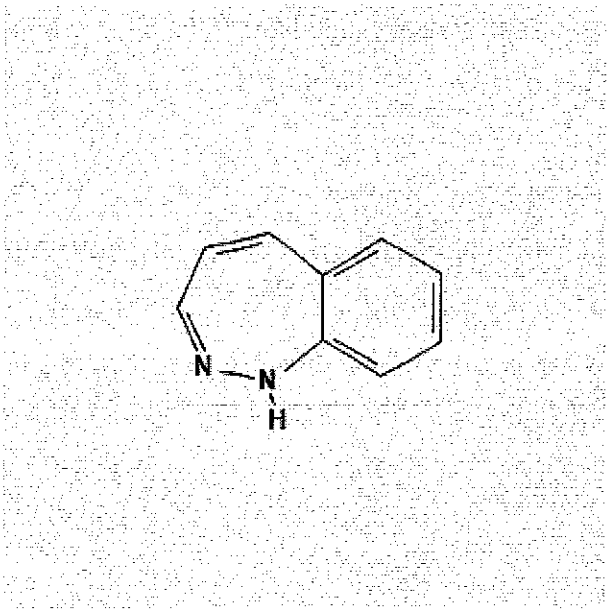
This bill updates Delaware's Uniform Controlled Substances Act with regard to benzodiazepines, a class of drugs commonly used to treat a variety of medical conditions including anxiety, seizures, and alcohol withdrawal. Common benzodiazepines include alprazolam (brand name: Xanax), clonazepam (brand name: Klonopin), chlordiazepoxide (brand name: Librax), diazepam (brand name: Valium), and lorazepam (brand name: Ativan). Under current state and federal law, benzodiazepines are listed as "Schedule IV" controlled substances.

The "schedules" for controlled substances range from Schedule I ("high potential for abuse" and "no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." 16 *Del. C.* § 4713) down to Schedule V ("low potential for abuse relative to the controlled substances listed in Schedule IV," "has currently accepted medical use in treatment in the United States," and "has limited physical dependence or psychological dependence liability relative to the controlled substances listed in Schedule IV." 16 *Del. C.* § 4721). By way of example, LSD is Schedule I, methamphetamine is Schedule II, Tylenol with codeine is Schedule III, Valium is Schedule IV, and Robitussin A-C is Schedule V.

The proposed bill leaves benzodiazepines as Schedule IV controlled substances but makes two significant changes. First, it creates a general category of benzodiazepine drugs "so that all current and future benzodiazepine drugs are included in Schedule IV." It then includes a non-exclusive list of benzodiazepine drugs. The list contains the benzodiazepine drugs listed in the current statute and adds a significant number of additional benzodiazepine drugs.

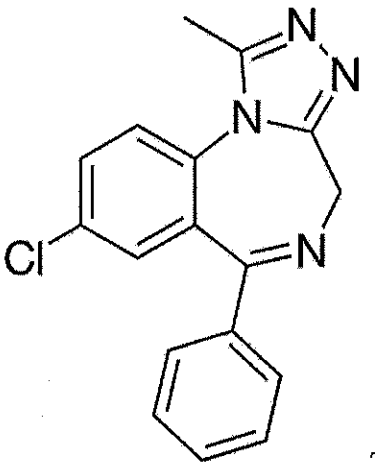
This bill is not directly related to disability-rights issues. As such, the councils may wish to take no position on bill. If the councils choose to take a position on the bill, the DLP recommends that the councils support the addition of these new drugs to Schedule IV. Some of the new drugs are sold as "designer drugs" that persons can use to mimic the effects (and risks) of illegal drugs while attempting to stay ahead of the government's ability to classify the drugs as illegal or attempting to avoid detection on drug tests. Classifying these drugs as Schedule IV will allow the government to properly regulate them, as they currently do with the benzodiazepines covered under the current law.

The bill uses the following general language to create the "benzodiazepine" category of drugs: "Any material compound, mixture, or preparation that contains benzodiazepine." The molecule benzodiazepine is a diazepine ring (a 7-member ring with 5 carbon atoms and two nitrogen atoms) fused with a benzene ring (a 6-member ring of carbon atoms with bonds such that each carbon only has one additional bonding site). The nitrogen atoms can be located in different locations. The figure below is an example of a benzodiazepine molecule (specifically 1H-1,2-benzodiazepine. Benzodiazepine drugs contain 1,4-benzodiazepine structures, so the nitrogen atoms are not adjacent to one another):



(For those unfamiliar with molecular diagrams, N is nitrogen, H is hydrogen, the lines are bonds between atoms (single or double bonds, depending on the number of parallel lines). Any place where lines meet or end without a letter is a carbon atom. Bonding sites on carbon atoms are presumed to be filled with hydrogen atoms unless something else is specifically drawn in)

Drugs that are generally referred to as "benzodiazepines" contain a benzodiazepine unit as a core structure. For example, this is the structure of Alprazolam (aka Xanax).

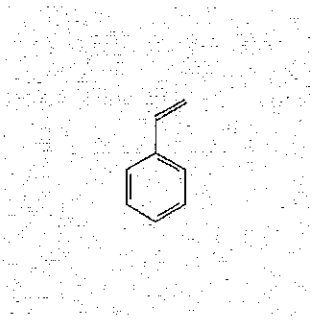


The proper name for the molecule is "8-chloro-1-methyl-6-phenyl-4H-[1,2,4]triazolo[4,3-a][1,4] benzodiazepine," which is why no one calls it by its proper name.

In order to avoid having to deal with overly-specific chemical names, the Delaware Code defines "benzodiazepine" as: "any substance or drug which contains a benzene ring fused to a 7-

member diazepine ring, results in the depression of the central nervous system and *is primarily intended to treat insomnia, convulsions and anxiety, and used for muscle relaxation and pre-operation treatment.*" 16 *Del. C.* § 4701(6) (underlining and italics added). This definition is under-inclusive because of the intent language (italicized in the quotation). We are now in the age of designer drugs. Some designer drugs are developed for "recreational" purposes, and the intent language arguably excludes those drugs from the definition of "benzodiazepine." As such, if the bill's intention was to place all drugs (1) with a benzodiazepine structure at their core that (2) also depress the central nervous system onto Schedule IV, the bill fails to do that. This problem could be addressed be eliminating or broadening the intent language from 16 *Del. C.* § 4701(6)

Although the bill likely intended to use the definition of benzodiazepine from 16 *Del. C.* § 4701(6), the situation is no better if it intended to use the strict chemical definition. Although the drugs generally referred to as "benzodiazepines" contain a diazepine ring fused to a benzene ring at their core, they are not, strictly speaking, the molecule known as benzodiazepine. The differences matter. By way of example: styrene (also called ethenylbenzene and vinyl benzene)



is basically a benzene ring with a two carbon chain attached to it, but that seemingly small difference makes a huge difference with toxicity. The OSHA permissible airborne exposure limit for an 8-hour workday is 100 parts per million ("ppm") for styrene but only 1 ppm for benzene.

The bill contains an additional inaccuracy. The list of specific benzodiazepines contains several drugs that are not benzodiazepines by any definition because they do not contain "a benzene ring fused to a 7-member diazepine ring." These drugs appear to have been included because they are structurally similar to benzodiazepines and act on the body in a way similar to

benzodiazepines, but this does not make them benzodiazepines. Specifically, Zapizolam is a pyridotriazolodiazepine (the benzene ring is replaced by a six-member ring with 5 carbons and one nitrogen). Metizolam, Deschloroetizolam, Brontizolam, and Etizolam are thienotriazolodiazepines (the diazepine ring is fused to a thiophene ring (five-member ring with one sulfur atom and four carbons) and a triazole ring (a five-member ring with three nitrogens and two carbons) instead of a benzene ring). While these drugs may very well deserve to be included in Schedule IV, they should not be included as benzodiazepines. If the intent of the bill is to place all current and future benzodiazepines and benzodiazepine analogues (such as pyridotriazolodiazepines and thienotriazolodiazepines) onto Schedule IV, it needs to be rewritten. In the alternative, the non-benzodiazepine drugs could be added to the list of specifically enumerated drugs in 16 *Del. C.* § 4720(b). Leaving the non-benzodiazepine drugs in the list is akin to listing whales and alligators in a list that begins "the following fish are illegal to catch and keep." It may make the point that you can't fish for whales or alligators, but whales and alligators are not fish. Law should strive to be as clear as possible.

Given the technical nature of the problems with the general "benzodiazepine" provision in the bill, and because the bill is not directly related to disability-related matters, the councils may wish to decline to comment beyond the possibility of a general statement of support (if the councils are inclined to make such a statement).