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To: GACEC Policy and Law

Cc: SCPD Policy and Law; DDC

From: Disabilities Law Program

Date: October 10, 2019

Consistent with council requests, DLP is providing an analysis of certain proposed regulations appearing in the **October 2019** issue of the Delaware Register of Regulations.

Proposed Regulations

1. **Proposed DDOE Regulation on Supportive Instruction (Homebound), 23 Del. Register of Regulations 275 (Oct. 1, 2019)**

The proposed amendment to 14 DE Admin. Code 930 changes the definition of supportive instruction and the accompanying eligibility criteria. The current definition of "Supportive instruction" includes educational instruction provided to a student at home or in another alternative setting on account of a medical condition that prevents the student from participating in their regular academic setting for at least 10 days. The DDOE proposed regulation makes it explicit that supportive instruction is available for students experiencing a mental health condition by adding the terms "mental illness" and "mental health conditions." Councils may wish to support this amendment with the following suggestion.

To receive supportive instruction, the school must receive certification from the student's medical provider. Councils may wish to recommend that a broader category of medical professionals have authority to certify that a child has a mental health condition that will prevent him/her from attending school for at least ten days. The Proposed Section 2.3 would allow certification to be provided by a "licensed clinical mental health provider (such as a Licensed Clinical Social Worker, psychiatric nurse practitioner, psychologist, or psychiatrist)." It may be helpful to allow certification if it comes from a pediatrician or family medicine doctors, and their associated advanced practice nurses or physicians' assistants. Often these physicians and medical professionals are a child's sole provider. Furthermore, accessing specialized mental health services in a timely fashion can be difficult, given the shortage in Delaware.[1]

Councils may wish to support this proposed amendment, but ask that DDOE include pediatricians, family medicine doctors, and their associated advanced practice nurses or

[1] See generally *Mental Health Care Health Professional Shortage Area*, KAISER FAMILY FOUNDATION (Dec. 31, 2018), kff.org (open the drop-down menu and select "State Health Facts," then click "Providers & Service Use." Under the "Health Professional Shortage Areas" heading, click "Mental Health Care Health Professional Shortage Areas (HPSAs)").

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physicians' assistants to the list of providers able to certify supportive instruction requests for children with mental health conditions or illness.

2. **Proposed DDOE Regulation on School District/Charter School Policy Prohibiting Cyberbullying, 23 Del. Register of Regulations 263 (Oct. 1, 2019)**

The Delaware Department of Education ("DDOE") proposes to amend 14 DE Admin. Code 624 which defines "cyberbullying" and requires school districts and charter schools [hereinafter: school districts] to prohibit cyberbullying. The regulation is being amended to remove an outdated school year reference, update a statutory citation, and to comply with 29 Del. C. §10407, which requires regulations to be reviewed on a recurring basis, every four years.

The proposed amendment strikes the statutory reference "14 Del. C. §4112D(b)(2)" from Section 1.0 and replaces it with the statutory reference "14 Del. C. §4164(d)." The full sentence of the proposed regulation reads as follows:

> "In addition to the policy prohibiting bullying put in place by school districts and charter schools pursuant to 14 Del. C. §4164(d), each school district and charter school shall also prohibit cyberbullying (as defined herein) by students directed at other students."

The statutory reference in this sentence is placed adjacent to the term bullying rather than cyberbullying. The change is incorrect because the policy prohibiting bullying is 14 Del. C. §4164(b), whereas the policy prohibiting cyberbullying is 14 Del. C. §4164(d). A small move, or addition, of the statutory reference to the end of the sentence would then make the change correct. This could be addressed by changing the sentence one of two ways:

> "In addition to the policy prohibiting bullying put in place by school districts and charter schools, each school district and charter school shall also prohibit cyberbullying (as defined herein) by students directed at other students pursuant to 14 Del. C. §4164(d)."

Or

> "In addition to the policy prohibiting bullying put in place by school districts and charter schools pursuant to 14 Del. C. §4164(b), each school district and charter school shall also prohibit cyberbullying (as defined herein) by students directed at other students pursuant to 14 Del. C. §4164(d)."

The most notable change occurs in Section 2.4 of the proposed amendment. The proposal strikes the last sentence which included an enumerated list of mediums where posting of speech would be presumed to be available to a broad audience within the school community for the 2013-2014 schoolyear. It might be that DDOE proposed to strike the sentence because it included an outdated school year reference, and because of the ever changing social media technology. However, the regulation should still be explicit and enumerate examples of mediums

where posting of speech would be presumed to be available to a broad audience within the school community. The DDOE can indicate that this list is non-exhaustive.

Councils may wish to support this proposed amendment, but ask that DDOE fix the placement of the statutory reference to 14 Del. C. §4164(d), and to consider maintaining in the regulation examples of mediums that are interpreted as reaching a broad school audience.

Final Regulations

1. **DHSS Final Regulations 14110 and 14340, Documentation of State Residency, 23 Del. Register of Regulations 303 (October 1, 2019).**

DHSS responded favorably by adopting all of the changes proposed by Councils, save for the revision to institutionalized individuals capable of indicating intent.

The proposed changes, which DHSS adopted, mainly were to correct errors in citations to the federal regulations (in §§ 14110.6, 14110.7, and 14110.9) and to add clarity to two provisions (§§ 1411.8 (c) and 14110.9 (c)) by inserting an **"or"** between the first two bullet points.

Councils proposed that §14110.11 (b) on institutionalized individuals capable of indicating intent be clarified as to whether the regulation applies to individuals age 21 or over. Finding no guidance on point in the federal regulations (42 *C.F.R.* § 435.403), DMMA withdrew the proposed regulation.

This regulation to amend the Division of Social Services Manual regarding state residency documentation requirements for Medicaid was adopted and is effective as of October 11, 2019.

Councils should consider expressing their appreciation to the Department for taking their recommendations into account.

2. **DHSS Final Regulation 4006, TANF and GA Eligibility, 23 Del. Register of Regulations 308 (October 1, 2019).**

DHSS responded partially favorably to one of the changes proposed by Councils, and provided an explanation to address the Council's other concern.

First, the Councils recommended that the proposed regulation 4006 should cross-reference DSSM 4005.1, which explains that the first $50 of child support received in a month is disregarded in determining financial eligibility for TANF. Specifically, the Councils recommended adding the existing TANF $50 child support income disregard to the list of income exclusions in regulation 4006. The final regulation 4006 list of excluded income does not specifically list the $50 child support income disregard as recommended by the Councils. DHSS did add a reference to DSSM 4005.1 as a related policy at the end of the final regulation 4006. This reference does not explain the reason for the addition - that it has been inserted to capture the $50 child support income disregard. Thus the insertion does not do much to address the

Councils' concerns that this disregard will be missed by Division of Social Services staff, contributing to agency errors against the Councils' constituents.

Second, the Councils requested that DHSS add an income-exclusion for small, nonrecurring gifts for TANF and GA recipients. Federal regulations (45 C.F.R. §233.20(a)), permit states to disregard small, nonrecurring gifts of up to $30 per recipient in any quarter. The Department responded that such income would be captured as non-reoccurring lump sum payments that would not count toward TANF and GA eligibility because of their amount. In other words, the Department has clarified that such gifts would be viewed as resources rather than income. While the Department did not adopt our recommendation, their clarification is helpful.

Councils should consider continuing to raise the issue of adding the $50 child support income disregard to regulation 4006 in future comments regarding DSS policies.