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To: GACEC Policy and Law

CC: SCPD Policy and Law; DDC

From: Disabilities Law Program

Date: September 13, 2019

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

Proposed Regulations

1. **Proposed DDOE Regulation on Compliance with Gun-Free Schools Act, 23. Del. Register of Regulations 147 (Sept. 1, 2019)**

The Delaware Department of Education ("DDOE") proposes to amend 14 DE Admin. Code 603, which requires school districts and charter schools [hereinafter: school districts] to write and submit to DDOE a policy implementing the requirements of 20 U.S.C. § 7961, the federal Gun-Free Schools Act. This regulation also requires school districts to provide DDOE with descriptions of firearm and deadly weapon school expulsions.

The proposed amendment strikes the phrase "requesting assistance under the Elementary and Secondary Education Act (ESEA)" from Section 1.0. This change is correct, because the Guns-Free Schools Act hinges a State's eligibility for funds on it having every school district adhere to certain policy, not just the school districts that are seeking ESEA funding from the State. See 20 U.S.C. § 7961(b)(1).

The most notable change occurs in Section 2.0 of the proposed amendment. The current version of Section 2.0 reads as follows:

> Each school district and charter school requesting assistance under the ESEA shall submit the following to the Delaware Department of Education by June 1 each year, in such form as the Department requires:
>
> 2.1 An assurance that its policies comply with this regulation and with 11 Del. C. §1457(j) or its successor statute.
>
> 2.2 Descriptions of the expulsions imposed...

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DDOE proposes to strike the phrase "requesting assistance under the ESEA," and to exclude the requirement that school districts provide an annual assurance that their policies comply with the regulation and 11 *Del. C.* § 1457(j), which is State law on possession of deadly weapons in schools. The proposed amendment adds the current Section 4.0 requirements that school districts have an electronic Gun-Free Schools Act policy on file with DDOE and that each school district update its policy within 90 days of changing it.

The Gun-Free Schools Act requires districts seeking Elementary and Secondary Education Act (ESEA) funding from the State to include in their application for funding to the State Education Agency an assurance that they are complying with the Gun-Free Schools Act requirements and a description of any firearm/deadly weapon expulsions. 20 U.S.C. § 7961(d). The State must report the assurance and expulsion information to the United States Secretary of Education. 20 U.S.C. § 7961(e); 20 U.S.C. § 7801(46). It may be that DDOE proposes to strike the phrase "requesting assistance under the ESEA" because it wants to require all school districts, regardless of whether they have applied for ESEA funds, to annually report their policies, policy revisions, and expulsion information. However, the proposed amendment does not include a requirement that school districts applying for ESEA must make an assurance about their compliance. It may be that DDOE intends to obtain these federally mandated assurances from school districts in another way, such as in the school districts' applications for ESEA funding.

The proposed amendment leaves Section 3.0 unchanged. Section 3.0 states that this regulation does not change a school district or charter's obligations under IDEA. This is important because it is a reminder that students with disabilities who bring firearms/weapons to school are entitled to IDEA procedural protections.

Councils may wish to support this proposed amendment, but ask how DDOE will ensure it complies with the federal requirement to collect assurances from the necessary school districts and charter schools.

2. Proposed DDOE Regulation on Consortium Discipline Alternative Programs for Treatment of Severe Discipline Problems, 23. Del. Register of Regulations 149 (Sept. 1, 2019)

DDOE proposes to amend 14 DE Admin C. 611, which defines student eligibility for Consortium Discipline Alternative Programs ("CDAP"). These are alternative school(s)[1] for students with severe discipline problems. This regulation also discusses the procedures for placement in CDAP.

According to Section 611, students are eligible for CDAP if they have been expelled, suspended for ongoing conduct that will likely result in expulsion and no other behavioral intervention is being tried, or are having such serious discipline problems that expulsion is "imminent." 14 DE Admin. Code 611.1.2.1.

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[1] **These programs might be in a "regular" school building, but the program is separate from the "regular school setting." 14 DE Admin. Code 611.8.1.**

Both the present version of Section 611 and the proposed version do not allow students into CDAP who have been expelled or suspended pending expulsion for certain behaviors "equivalent to or greater than" the criminal offenses listed in the regulation. The "equivalent to or greater than" language is in the current regulation. However, Councils may want to ask for information on how it is decided whether an incident is equal to or greater than one of the offenses listed. The proposed version of Section 611 eliminates from the list of offenses 16 *Del. C.* § 4753A, trafficking in marijuana, cocaine, etc., which was repealed. The proposed regulation also adds drug dealing offenses (16 *Del. C.* §§ 4752 – 4754) to the list of disqualifying behaviors. Since 16 *Del. C.* §4754 does not specify a minimum amount of drugs that one must sell, it may be that a student whose behavior is "equivalent to" selling a very small amount of drugs will be excluded from this program. Councils may wish to voice concerns about limiting the available educational opportunities for students in this situation.

Councils may wish to get more information about the proposed change to Section 2.2. According to 14 Del. C. § 1604(8), CDAP placement is presumed appropriate for a student who is 16 years old or younger, and who is expelled or suspended pending expulsion so long as another statute or regulation doesn't render the student ineligible. The school district or charter school has the burden of establishing that CDAP is not an appropriate placement. Id. If the district cannot show by a preponderance of the evidence that placement is inappropriate, the student shall be placed in CDAP. Id. The current regulation states that the school district must consider whether there is space available in the program and the student's age. The proposed amendment adds two additional factors: the student's educational and behavioral modification needs. Since students with disabilities often require these modifications, Councils may wish to ask DDOE to elaborate about the addition of these factors and what, if any, anticipated effects there will be for students with disabilities.

Other proposed changes to this regulation are not substantive.

Councils may wish to support the proposed amendment, and ask for information about how it is decided whether an incident is equal to or greater than one of the offenses listed and how the changes to Section 2.2 may affect students with disabilities. Councils could consider asking DDOE to ensure students who sell small amounts of drugs with no other aggravating factors involved aren't excluded from a potential educational opportunity.

3. Proposed DHCC Regulations for the Health Insurance Individual Market Stabilization Reinsurance Program, 23 Del. Register of Regulations 178 (September 1, 2019).

House Bill No. 193, which was signed by Governor Carney on June 20, 2019, created the Health Insurance Individual Market Stabilization Reinsurance Program and Fund. The act amends 16 *Del. C.* §9903 and 18 *Del. C.* §§8701, 8702, and 8703. The program will start January 1, 2020.

The Delaware Health care Commission (DHCC), which will administer the program, promulgated and published these regulations to implement the act passed by the General Assembly.

The purpose of the act is to provide reinsurance to health insurance companies that offer individual health benefit plans. Reinsurance in its simplest terms is insurance for insurers. It is a reimbursement system that protects insurers from very high claims, and involves a third party paying part of the company's claims once they pass a certain amount. The act attempts to stabilize insurance rates and premiums in the individual markets while providing more available and more affordable choices for consumers seeking health insurance.

While the regulations cover an insurance company, health service corporation, health maintenance organization, managed care organization, and other companies providing health insurance or health benefits subject to insurance regulations, the regulations do not apply to Medicare, Medicaid, health care plans for state employees, or to stand alone dental, stand alone vision, long term care insurance, disability income insurance, and all accident only insurance.

The act and regulations create a fund with monies from the federal government under the Affordable Care Act (ACA) (pass through savings from the 1332 waiver), monies from the federal government for reinsurance, and monies from a 2.75% assessment on insurance carrier's premium tax liability. The fund would be used to provide payments to reinsurance carriers whose claims costs exceed the threshold benefit amount set by the Executive Director of the DHCC. It remains to be seen what the exact terms of when reimbursement would kick in and what the reimbursement will be, as the threshold amount and percentage of reimbursement have not yet been established by the DHCC. However, according to Delaware's 1332 waiver proposal, the state is planning on covering 75% of claims that are between $65,000 and $215,000.

The act and regulations are a laudable attempt to both offer more choices to health consumers while proving an incentive and safety net to carriers who offer benefit plans covered by the act if the claims they pay become overwhelming financially. It is also meant to "shore up" the ACA marketplace for Delawareans. Delaware has joined a growing number of states that have instituted a reinsurance program, which includes Alaska, Maine, Maryland, and New Jersey. The threshold amount and the percentage of reimbursement differ from state to state. For example, Maryland's reinsurance program pays 80% of the individual market claims that are between $20,000 and $250,000. If possible, the Executive Director should consider lowering the threshold amount from that stated in the proposal, which should help keep premiums from increasing and may well result in a decrease. Before the reinsurance program, insurers in Maryland had proposed significant rate increases; after implementation of the reinsurance program, Maryland saw the average premium decrease markedly.

Although the act and regulations do not apply to recipients of Medicare, Medicaid, or the health care plan for state employees, it should positively impact access to affordable insurance for working individuals with disabilities or those who cannot qualify for those programs for other reasons (immigration status for example). Councils may wish to endorse the Regulations with the recommendation that DHCC consider covering more claims at a higher threshold.

4. **Proposed DDDS Regulations on Reportable Incident Management and Corrective Measures, 23 Del. Register of Regulations 182 (September 1, 2019)**

In the June 2019 issue of the Delaware Register of Regulations (Volume 22, Issue 12 at p. 989) DDDS published proposed regulations clarifying the obligations of DDDS-contracted providers of home and community-based services under DHSS Policy Memorandum 46 ("PM 46") as well as DDDS's internal processes for investigation of reportable incidents and imposing corrective action. DDDS re-published an updated version of these proposed regulations in the September issue, after making extensive revisions in response to public comments received on the previous version of the proposed regulations.

As the DLP has received indication that, per the recommendation of the DDDS Task Force, a committee may be formed to more closely examine the proposed regulations, we anticipate that further changes may be forthcoming. Therefore this memo will briefly summarize the substantive differences between the new proposed regulations and what was previously published in June.

Sections 1.0 – 4.0 remain more or less the same substantively, although DDDS has changed wording in a number of places, particularly in the Section 3.0 ("Definitions"). Notable amendments to the definitions of terms in the updated regulations include but are not limited to:

- The definition of "Enhanced Collaboration" has been revised to make clear that this process "is voluntary, is initiated by request of DDDS or providers, and is implemented by mutual agreement."

- The definition of "Reportable Incident," has been modified to include the language "event that is witnessed by a mandated reporter, that has been reported to a mandated reporter, or that the mandated reported has reason to suspect occurred," replacing what previously read "suspicion of any of the following."

- In this version the language previously contained in the definition of "Substantiated" regarding the possibility of multiple component incidents has been removed and is now instead included in the definition of "Reportable Incident."

- The definition of "Service Recipient to Service Recipient" incident has been modified to only include incidents between service recipients that "result[] in injury or potential harm."

Throughout the regulations DDDS has replaced the language "as advised by the DDDS Deputy Attorney General" with the broader language "only information permitted by state law or DDDS policies" when referring to the contents of certain records and conditions for disclosure to a service recipient or a third party. While this generally makes sense so far as releasing

information to individuals outside of the agency, it is a bit confusing where used with respect to DDDS internal records pertaining to incidents (as indicated in the definition of "Incident Record" in 3.0). It is not totally clear what limitations state law or DDDS policy would impose on information contained in DDDS's internal records of critical incidents, which would presumably need to contain personally identifying information, health information protected under HIPAA, and personnel information.

Section 5.0 remains more or less the same although the title has been changed from "Safety of the Individual" to "Safety of the Service Recipient" presumably to clarify that the requirements of this section pertain specifically to individuals receiving services from DDDS who are involved in reportable incidents, and not all individuals involved in a particular incident. This section has also been amended to require that incidents resulting in death or bodily injury be reported to law enforcement within two hours, as is required by PM 46; this inconsistency in the prior proposed regulations had been noted by the Councils and other commenters.

Additions to Section 6.0 ("Reporting of Incidents") include a provision at 6.1.1 that DDDS will provide "educational materials" to service recipients and/or their guardians explaining incident reporting and investigations, and these materials will also be published on the DDDS website. Per the proposed regulations these materials will be available as of December 1, 2019.

Section 7.0 ("Who to Notify that an Investigation Has Been Opened or Completed") contains additional language at 7.3 to clarify that information pertaining to incidents or investigations may not be shared with third parties, including family members, who are not the service recipient's legal guardian without a specific release of information from the service recipient or guardian as applicable.

The provisions of Section 8.0 ("Determination of Investigative Method) remain essentially unchanged. DDDS has retained the requirement that should DDDS be assigned to perform an investigation as opposed to a provider investigator, 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." Presumably this is to minimize any interference with the DDDS investigation and maintain the integrity of DDDS's findings. The Councils and other constituent groups raised concerns regarding the impact this may have on the provider's ability to proceed with necessary quality assurance and personnel actions in a timely manner. Additional language was added to at 9.3 requiring that providers be notified within 24 hours that DDDS has completed initial fact finding (which is supposed to be completed within five business days, but extensions may be provided upon request) so that the provider may initiate its own investigation as needed.

In Section 9.0 ("Conduct of Investigations") DDDS has added minimum requirements at 9.1 as to what investigations should include in addition to being "conducted in accord with DDDS-approved investigator training." These include direct interviews with the service recipient, the reporter of the incident, and potential witnesses, as well as written statements from other involved parties and the review of documents and physical evidence. While currently the DDDS approved training provided by Labor Relations Alternatives (LRA) is very thorough, the Councils should encourage these more explicit requirements to ensure there is consistent understanding among investigators of what must be done to complete an effective investigation,

and so that staff and administrators within DDDS who have not completed the investigator training know what to look for when reviewing a completed investigation.

Section 10.0 ("Post-Investigation Analyses and Follow up") and 11.0 ("Quality Improvement Plans" are essentially unchanged. Section 12.0 was amended to provide flexibility to providers in how they report on the implementation of a QIP; per 12.1 the provider may submit a summary report as tasks or completed or at the end of QIP implementation. 12.3 was also revised to require a meeting between DDDS and the provider within five days of the disapproval of a QIP summary report "to provide specific feedback… regarding additional information needed."

Section 13.0 is essentially unchanged. The language in Section 14.0 ("Corrective Measures Committee Review and Enhanced Collaboration") has been updated throughout. One substantive change is that if the CMC does not make a recommendation for enhanced collaboration or corrective measures, DDDS must schedule a meeting with the provider within ten days (as they also have to when there is a recommendation for enhanced collaboration or corrective measures) to review the Committee's findings with the provider. Additionally, the revised proposed regulations allow for this section now allows for the provider to present evidence to dispute the investigation findings at its required meeting with DDDS when corrective measures have been imposed. DDDS must issue an updated final ruling after this meeting regardless of whether the provider has disputed the investigation findings.

Section 15.0 is more or less unchanged. Section 16.0 has been revised to modify requirements for provider reporting on CMPs, consistent with the changes made to QIP reporting requirements in Section 12.0. Providers may now elect to submit monthly updates on progress with the plan, or to submit a summary report at any point within the 90-day CMP period.

Section 17.0 ("Appeals") has been revised to remove the previously included framework for appealing investigation findings (now instead providers have the option to dispute these findings in its meeting with DPC after the imposition of corrective measures, as described at 14.6.1). Additionally, DDDS has added a fourth and final level of appeal of imposed corrective measures to the Division of Medicaid and Medical Assistance (DMMA) per the *Delaware Medical Assistance Program, General Policy Manual*. This appeal would not stop the adverse action, but under certain circumstances the provider may request a stay from the DMMA Director (see 17.2.5.2). The previous requirement for DDDS to submit new supporting data or other evidence in the third level of appeal process has been stricken in response to feedback from the Councils and others.

5. Proposed DMMA Regulation Regarding Drug Utilization Review, 23 Del. Register of Regulations 184 (September 1, 2019)

DMMA is proposing to amend the Title XIX Medicaid State Plan regarding the Drug Utilization Review (DUR), specifically updating provisions included in the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act) (P.L. 115-271). Under the SUPPORT Act, all states with a Medicaid program that includes a drug benefit are required to have a DUR program, including

safety measures for subsequent prescriptions of opioids. The proposed changes are consistent with the new federal requirements.

The required safety measures include requiring that states have in place safety edits for subsequent fills for opioids and a claims review automated process that indicates when an individual enrolled under the State plan is prescribed a subsequent fill of opioids in excess of any limitation that may be identified by the State. Additionally, states must have a claims review automated process that monitors when an individual enrolled under the State plan is concurrently prescribed opioids and benzodiazepines or antipsychotics.

The United States Department of Health and Human Services Office on Disability reports that over 4.7 million individuals in the United States have both a disability and substance abuse disorder. Opioids are among the most commonly abused substances. Under this amendment, Delaware's DUR Board, comprised of pharmacists, physicians, and community members, will assess and differentiate between necessary use and excess use and abuse among individuals with disabilities. Councils should support this effort to address access to medications that can lead to substance use-disorders.

6. **Proposed DMMA Regulation Regarding Acute Inpatient Hospital Readmission Claims, 23 Del. Register of Regulations 186 (September 1, 2019)**

DMMA is proposing to amend the Inpatient Hospital Provider Policy Manual regarding acute inpatient hospital readmissions claims. Currently, the Delaware Medical Assistance (DMAP) Medical Review Team reviews claims for acute care hospital services for patients readmitted within 10 days of discharge from the same hospital. DMMA's proposed regulation updates the readmission time interval from 10 days to 30 days. This proposed amendment aligns with the timeframe described in the Centers for Medicare and Medicaid's definition of a hospital readmission.

If the DMAP Medical Review Team determines that the readmission resulted from premature discharge based on information that the provider would have known or events that could have been anticipated at the time of discharge, payment will not be made for the second admission and instead the second admission is considered to have been reimbursed in the discharge rate for the initial admission. The increase to 30 days benefits patients and will encourage providers of acute care services to more carefully avoid premature discharge and inadequate discharge planning. Councils should support this amendment.

7. **Proposed DMMA Regulation Regarding Telehealth Services Originating Site Fees, 23 Del. Register of Regulations 188 (September 1, 2019)**

DMMA is proposing to amend the Title XIX Medicaid State Plan regarding telehealth services, specifically adding facilities to which originating sites fees can be paid. Telehealth seeks to improve a patient's health by permitting two-way real time interactive communication between the patient and the physician or practitioner at a distant site. Centers for Medicare and Medicaid Services (CMS) note that telehealth is a cost-effective alternative to the more traditional face-to-face way of providing medical care and that states can choose to cover under Medicaid.

Telehealth is an innovative method for health care delivery. Including Federally Qualified Health Centers and School Based Wellness Centers among facilities to which originating sites can be paid will increase access to telehealth. Councils should consider supporting this initiative.

8. **Proposed DMMA Regulation Regarding Obesity Drugs, 23 Del. Register of Regulations 191 (September 1, 2019)**

DMMA is proposing to clarify policy related to drugs indicated for the treatment of obesity. The proposed regulation clarifies that Delaware will cover drugs indicated for the treatment of obesity to address weight loss with co-morbid conditions with prior authorization.

Delaware is a founding member of My Healthy Weight, an initiative committed to working with providers and beneficiaries to increase utilization of standardized benefits, to encourage the collection of obesity metrics, and seeks to provide individuals with consistent coverage related to obesity services. Consistent with this effort, Councils should support this regulation and encourage DMMA to cover additional forms of treatment of obesity.

Final Regulations

1. **DSCYF Final Regulation 201 Child Placing Agencies, 23 Del. Register of Regulations 233 (September 1, 2019).**

DSCYF responded favorably to several comments filed by GACEC and SCPD.

First, DSCYF added a definition of "functional literacy" to mean " the ability to read and understand information to perform daily parenting activities/ The regulation was also revised to say "the licensee shall ensure an applicant has functional literacy."

Second, regarding the requirement that a foster parent must be able to communicate effectively, DSCYF added language to the regulations at 26.1.4 to read: "Addressed the child's need to preserve his or her cultural, racial and religious identities and <u>that the foster parent is able to communicate with the child with or without the assistance of communication aids, non-verbal communication or other accommodations."</u>

Third, the Department addressed concerns regarding references to substance abuse history and "emotional stability." Councils were concerned that a history of substance abuse or having a mental illness (whether the person was in treatment or recovered or not) could serve as a bar to becoming a foster parent. The Department added language to Section 39.7 : "A disclosure of previous drug or alcohol abuse does not disqualify an application on its own."

Fourth, regarding requirements that a foster parent have reliable and safe transportation, the Department added language clarifying that this includes "a properly maintained vehicle, access to reliable public transportation, or safe transportation arrangements with family, friends, case workers or teen household members."

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