



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 February 2020 issue of the Delaware Register of Regulations and proposed bills.

Proposed Regulations

1. DSS Proposed Regulations – SNAP Employment and Training, 23 Del . Register of Regulations 619 (February 1, 2020)

These regulations seek to update the definitions section of the DSSM related to the Employment and Training Program of the SNAP program, Section 10001.1. The existing regulation simply spells out acronyms. The proposed regulation adds some terms, such as ABAWD (able bodied adult without dependents) and eliminates some terms that are outdated. From a disability perspective, the only definition that may be problematic is the one for “good cause,” which is defined in proposed regulation as “an adequate or substantial reason why an individual has not taken an action.” Good cause is further defined later in the existing regulations in §10004.2. The list of actions that might support good cause in §10004.2 does not include any reasons related to need for accommodations or other disability-related reasons; the list also does not include any matters related to impediments related to being a victim of domestic violence.

DSS has steadfastly refused to include disability related reasons to its definitions of good cause. Councils commented last year on several DSS regulations that failed to list or elaborate on the requirement that DSS make reasonable accommodations for participants with disabilities in all facets of its programs. The requirement to make accommodations is independent from exemptions from the work program that may be available to individuals with disabilities. Councils may wish to take this opportunity to ask DSS again to incorporate the requirement that it make reasonable accommodations for participants with disabilities as part of good cause determinations.

2. DSS Proposed Regulations – Child Care Subsidy Program, 23 Del. Register of Regulations 624 (February 1, 2020)

The Division of Social Services (“DSS”) has proposed updates to existing provisions of the Delaware Social Services Manual (“DSSM”) pertaining to the Child Care Subsidy Program also known as Purchase of Care (“POC”). The regulations that DSS proposes to amend address payment to child care providers for absent days or holidays, as well as the termination of child care providers and clients who have self-arranged care. In addition to formatting updates, the proposed regulations would update the substance of both sections of the DSSM.

The proposed amendments relating to payment for absent days or holidays (the existing regulation can be found at 15 Del. Admin. C. § 11006.4.1) add details relating to the new child care copayment. The proposed amendments make clear that DSS will pay for absent days “after the family’s copayment has been paid and there is a remaining balance due to the provider.” If a copayment is not assigned then DSS will pay for up to five absent days per month in accordance with the existing policy. Additionally the proposed amendments specify that the State will pay for up to six major holidays per year of the provider’s choice; the existing regulations do not set a limit on the number of paid holidays but paid holidays must be indicated in the provider’s contract.

With respect to termination of child care providers or clients who have self-arranged care (found at 16 Del. Admin. C. § 11006.5.1), the amendments make two substantive changes. First, the training requirements for relative care providers are adjusted from 47 hours of mandatory training to be completed within 18 months to 28 hours of mandatory training to be completed within 12 months; this change simply reflects the current requirements as found at 16 Del. Admin. C. § 11006.7. Additionally, a provision is added stating that DSS may terminate a parent or caretaker who has self-arranged care from the POC program for the following reasons: submission of fraudulent attendance records, failure to keep an open bank account and receive direct deposit payments, and failure to attend the mandatory orientation for self-arranged clients.

While the proposed amendments do not directly pertain to children or parents/caregivers with disabilities, it is possible that some disabilities or other health conditions may cause more frequent child absences than the stated maximum of five days per month that DSS will pay for. This provision is not new, and follows what is recommended by federal regulation to “support the fixed costs of providing child care services by delinking provider payments from a child’s occasional absences” (see 45 C.F.R. § 98.45). For some families in which a child or parent/caregiver has special needs, however, more than five days in a month may be missed on a more regular basis. While absence is not considered a reason for possible termination from the program unless there are “excessive unexplained absences” (see the DSSM at 16 Del. C. § 11004.12), low-income families with disabilities may encounter difficulty paying for additional days that a child was not present for contracted child care due to either the child or parent’s disability. While presumably a parent or child with a disability would potentially be legally entitled to a reasonable modification of program rules under the Americans with Disabilities Act, the Councils may wish to suggest that there is some provision made for the payment of more than five absences in one month in certain circumstances when the absences are directly related to a child or parent’s disability or other serious health condition.

Proposed Legislation

SB 202, AN ACT TO AMEND TITLE 6 AND TITLE 21 OF THE DELAWARE CODE RELATED TO EQUAL ACCOMMODATIONS IN PARKING

Senate Bill No. 202 was introduced and assigned to the Transportation Committee in the Senate on January 15, 2020. The bill seeks to amend Title 21, Sections 2134 and 2135 to clarify that a person with a special license plate or permit for persons with disabilities which limit or impair the ability to walk may park for an unlimited period where the length of time is otherwise limited and must be able to park in a metered parking space for at least 1 hour. The bill further seeks to clarify that it is a violation of the state equal accommodations law in Title 6 to “not allow” parking by a holder of a special license plate or permit for persons with disabilities which limit or impair the ability to walk or to post a sign prohibiting parking by a holder of a special license plate or permit.¹ The bill also makes technical corrections to conform existing law to the standards of the Delaware Legislative Drafting Manual.

The major thing that the bill attempts to address is parking time restrictions for drivers with a special license plate or permit for persons with disabilities which limit or impair the ability to walk (permit holders). The time restrictions for permit holders to park are generally defined by local law. For example, in the city of Wilmington “Drivers with disabilities who have a valid handicapped plate and placard may park in a handicap space (i.e. space with a blue meter) but must observe the same parking rules and procedures that apply to non-disabled drivers.”² This bill would allow permit holders to park for an unlimited period of time where the length of time is otherwise limited. This could be extremely beneficial in areas that have a very short time frame for metered parking. For example, certain metered parking spots in Rehoboth Beach have a maximum parking time limit of 30 minutes. This bill would allow a permit holder to park for double that amount of time. The increases in the time limit would give those with disabilities additional time to get to and from their destination.

The bill does not specify whether a permit holder who parks at metered parking would have to pay the charge. “About two-dozen states have laws that allow people with placards to park for free at metered spaces, and the majority of them have no time limit.”³

Councils should consider supporting the proposed bill, but attempt to clarify whether permit holders have to pay the charge at metered parking spaces. One also wonders how often a

¹ It may be problematic to include this in the Equal Accommodations law rather than as part of the Motor Vehicle statutes. Putting it in Title 6 may have the positive effect of increasing opportunities for enforcement; however, the piecemeal amendments to the Equal Accommodations statute (i.e. front door access, service animals, accommodations for some protected classes and not others) have been used by DHR to justify a narrow construction of the law.

² Wilmington, DE, Handicapped Parking | Wilmington, DE, <https://www.wilmingtonde.gov/residents/parking-in-wilmington/handicapped-parking> (last visited Feb 10, 2020).

³ States Cracking Down On Accessible Parking Abuse, Disability Scoop (2014), <https://www.disabilityscoop.com/2014/11/17/states-parking-abuse/19851/> (last visited Feb 10, 2020).

business or other entity would actually not allow a person with a special license or placard to park or post a sign that prohibited a person with a special license or placard from parking? It might be worth clarifying the goal of the Title 6 amendments. If the intent of the amendment to the Equal Accommodation law is to prohibit public accommodations from refusing to install accessible spaces, the language will have to be rewritten.

SB 204 – Public School Start After Labor Day

SB 204 requires public schools to begin their school year after Labor Day. A majority of members of the School Start Task Force voted to recommend that the State require that each school year start after Labor Day.

The bill cites several economic studies conducted by nearby states considering similar changes to the school year calendar. While these studies demonstrate potential economic benefit for the State's tourism industry, it is concerning that the bill solely focuses on economic studies and does not cite any study indicating that this change to the calendar has any benefit to students. When considering such a change, economic interests should not dismiss concern over the impact on academics. A highly cited research study on the topic suggests "summer learning loss disproportionately impacts low-income students who may lose as much as two months of reading achievement while out of school for the summer. This is often explained by low-income students not having the same access to quality summer learning opportunities as their wealthier peers. Meanwhile, almost all students lose valuable math skills over the summer."⁴

Councils should examine what research, if any, was considered by the School Start Task Force to determine that this change will positively impact student learning. Councils may wish to ask for clarification based on these concerns.

HB 263 Bill to Cap out of pocket cost for insulin and require inclusion on formularies

This bill deals with health insurance contracts and would amend Chapters 33 and 35 of Title 18 and Chapter 52 of Title 29 as it pertains to contracts for individuals, groups, and State employees respectively.

The amendments to §§ 3344B, 3560A, and 5212 would limit the amount that an individual has to pay for prescription insulin drugs for the treatment of diabetes to no more than \$100.00 per month regardless of the amount or kind of insulin that is required by the insured individual. The plans must include at least one formulation of insulin on the lowest tier of the drug formulary maintained by the carrier.⁵

⁴ Cooper, H., Nye, B., Charlton, K., Lindsay, J., & Greathouse, S. (1996). The Effects of Summer Vacation on Achievement Test Scores: A Narrative and Meta-Analytic Review. *Review of Educational Research*, 66(3), 227–268. <https://doi.org/10.3102/00346543066003227>; Dave Reid, "Summer is Coming: Teaching and Learning During the Summer Months." <https://edwp.educ.msu.edu/green-and-write/2015/summer-is-coming-teaching-and-learning-during-the-summer-months/>

⁵ Placing controls on insulin coverage and pricing is a national trend. <https://www.newsweek.com/illinois-becomes-second-state-cap-monthly-insulin-prices-more-states-are-considering-it-1483987>; <https://www.cnn.com/2020/02/08/us/states-passing-bills-insulin-insurance-copay-trnd/index.html>

A drug formulary is the list of medicines that a health insurance plan will pay for and contains guidelines about how the carrier is going to share the cost of the prescriptions. A formulary will have tiers, which are groups of drugs that are classified according to costs. Drug tiers set the price that a specific prescription drug will cost a covered individual. Based on the tier that a drug is in, it will usually have a specific copayment or coinsurance payment set by the insurer.

Tier one is the lowest tier and contains the least expensive prescription drugs available, typically generic drugs. Tiers two and above contain more expensive generic drugs and preferred brand name drugs, non-preferred and expensive brand name drugs, and newly approved or specialty drugs.

The bill would require the insurer or carrier to include at least one insulin drug in tier one of its formulary. In all likelihood, this would be a generic insulin drug. Nevertheless, by making the carrier include a tier one insulin drug in its formulary, the actual cost to an insured individual could be considerably less than the \$100.00 limit, thus making the cost of the drug more affordable. Otherwise, the carrier could include only higher priced drugs in its formulary, thus costing the insured individual more (up to the limit of \$100.00 per month).

The bill does permit the insurer or carrier to impose a deductible, coinsurance payment (in which the insured individual pays a percentage of the cost of the drug), allowable charge limitation, coordination of benefits provision, or a restriction limiting coverage to services by a licensed, certified, or carrier approved provider.

Despite these restrictions, the bill is an attempt to establish a maximum monthly amount that an insured individual has to pay for his or her insulin medication. The maximum amount is a \$100.00 a month and applies regardless of what tier classification the insulin medication has or costs. If this bill became law, it would apply to all policies, contracts, or certificates issued, renewed, or reissued after January 1, 2021.

This is a laudable attempt by the legislature to help keep the cost of prescriptions down and should be endorsed by councils. Untreated diabetes can lead to a myriad of health complications and disabling conditions.

HOUSE BILL 265, Tax exemptions for Veterans

This bill deals with property and school taxes for disabled veterans and would amend Chapter 81 of Title 9 and §1902 of Title 14. For qualified veterans, this bill would **completely exempt county property taxes and local school taxes**. This bill requires the counties and school districts to exempt the taxes for qualified veterans but allows them to prescribe the application forms. The bill also allows the counties to establish rules and regulations to implement the law (assuming it becomes law).

In order to receive the exemption, the veteran must either be 100% disabled according to the Veterans Administration (VA) scheduled ratings table or be totally disabled based upon

individual unemployability (IU) (§8157(a)). As eligibility for this exemption begins with whether a veteran is disabled, a brief digression into the types of disability that qualify is required.

To be assigned a scheduled 100% rating, the veteran must have one service-connected condition that meets the 100% rating criteria specified for that condition, or the veteran must have multiple service-connected disabilities whose individual disability ratings combine to 100%. Examples of impairments that are eligible for disability benefits (up to the 100% rating) include: bipolar disorder; cancer; depression PTSD, mental conditions, spine and joint disorder, and traumatic brain injuries. If the veteran has a 100% service connected disability, he or she meets the disabled qualification of this bill.

Even if the veteran is not a 100% disabled according to the VA ratings table, a veteran can receive the monthly disability compensation amount of 100% by demonstrating IU. To qualify for IU, the veteran must be unemployable due to his or her condition. In addition, the service connected condition must meet the scheduled ratings criteria for at least a 60% rating or alternatively, if the veteran has more than one service connected condition, they must total at least a 70% combined rating with at least one condition rated at 40%. If the veteran meets the requirements for individual unemployability, he or she can receive the monthly disability compensation amount of 100%, while their total scheduled rating is actually less than 100%. If the veteran is IU, he or she meets the disabled qualification of this bill.

Section 8157(a) is careful to delineate between the two (2) different types of disability that qualify, namely "100% disability compensation due to a service-connected, permanent and total disability based on individual unemployability or a 100% disability rating."

Assuming the veteran is disabled, there are several other criteria that must be met in order to be eligible. The veteran must own the property individually or jointly with his or her spouse and it must be his or her residence (§8157(a)(1)). In addition, the veteran must have been domiciled within the state for such period as established by the counties. The veteran has the burden of showing that he or she resides in the state (§8157(a)(2)).

The bill does not apply to property taxes levied by a municipality (§8157(d)) or to ditch taxes, light taxes, sewer charges, or road charges (§8157(e)). In the text of "section 1902. Power of district to levy taxes for school purposes" of the bill, there is an **error** in subsection (4). It reads "Section 8157 of Title 8" where it should read Section 8157 of Title 9, as it incorporates new "Subchapter IV Veterans with Disabilities."

If this bill became law, it would take effect on the first day of the county fiscal year following enactment. The fiscal year for New Castle, Kent, and Sussex Counties is July 1st.

This bill would supplement the exemptions already in existence for the eligible elderly, disabled, and disabled veterans in New Castle County. In accordance with 9 *Del. C.* §320(a), New Castle County provides a veteran who became disabled while in any branch of the armed services with an additional exemption for all real property taxes to an assessed valuation not exceeding \$5,000.00. (§§14.06.304 of the New Castle County Code).

This bill would supplement the exemptions already in existence for the eligible disabled, and disabled veterans in Kent County. In accordance with 9 *Del. C.* §320(b), Kent County provides a veteran who is totally disabled as a result of service in any branch of the armed services with an additional exemption from all property taxes on \$5,000 of assessed value of the veterans eligible property. (§191-9 of the Kent County Code).

This bill would supplement the exemptions already in existence for the eligible totally disabled in Sussex County. In accordance with 9 *Del. C.* §320(c), Sussex County provides an exemption to property taxes for individuals with a disability and surviving spouses of individuals with a disability on real estate to an assessed valuation not exceeding \$12,500. (§103-1 of the Sussex County Code).

If this bill becomes law, it would expand the exemptions to include school taxes and it would exempt all school and property taxes for qualified disabled veterans. It would be preferable if the bill also included an exemption for the surviving spouse of the disabled veteran.

This bill recognizes the service and dedication of those individuals who were severely disabled in the service of their country. This is an admirable attempt by the legislature to help some severely disabled veterans and should be endorsed by councils. Councils should recommend that the bill be amended to include an exemption for the surviving spouse of the disabled veteran.

Final Regulations

1. DDOE Final Regulation on Family Educational Rights and Privacy Act (FERPA), 23 Del. Register of Regulations 645 (February 1, 2020)

Councils commented on this regulation in December 2019. Councils suggested that DOE leave in the sentence explaining that SPPO will investigate and review alleged FERPA violation complaints that are filed with its office and noted that the zip code listed on SPPO's website (20202-5920) differs from the zip code stated in the proposed regulation (20202-4605). DDOE in the final regulation corrected the zip code and noted that the complaints section is in 4.1; DDOE agreed to place the language regarding complaints in bold type to make it more prominent.

2. DDOE Final Regulations – English Language Learners, 23 Del . Register of Regulations 653 (February 1, 2020)

GACEC submitted comments on proposed regulations related to Programs for English Language Learners in November. DDOE ignored all suggested concerns except for removing the phrase “to the extent practicable” from the requirement that communication with family members must be in a language understood by the family.

3. DMMA Final Regulations – Medicaid Sate Plan Drug Utilization Review, 23 Del . Register of Regulations 657 (February 1, 2020)

Councils inquired why references to MCO requirements for DUR were removed from the proposed regulation. DMAA explained that CMS instructed them that this reference should not be included on the state FFS plan pharmacy DUR pages.

4. DMMA Final Regulation of Medicaid/CHIP Accountable Care Organizations, 23 Del . Register of Regulations 659 (February 1, 2020)

Councils comments on these regulations in December 2019. ACOs are part of the value based health care strategy being developed as part of the State Innovation Model grant from CMS. DMMA addressed the substantial comments made by several entities but did not make any amendment, deferring most concerns to the application process.

5. DPH Final Regulation Regarding Medical Marijuana, 23 Del. Register of Regulations 667 (February 1, 2020).

Councils commented on these regulations in December 2019. DHSS addressed comments but did not make any changes.