

To: GACEC Policy and Law

CC: SCPD Policy and Law; DDC

From: Disabilities Law Program

Date: January 2020

Consistent with council requests, DLP is providing an analysis of certain proposed regulations appearing in the January 2020 issue of the Delaware Register of Regulations and proposed bills.

Proposed Regulations

1. Proposed DDOE Regulations 614 Uniform Definitions for Student Conduct Which May Result in Alternative Placement or Expulsion, 23. Del. Register of Regulations 507 (January 1, 2020)

The Delaware Department of Education has proposed updates to the existing regulations found at 14 Del. Admin. C. § 614, which pertain to uniform definitions for student conduct which may result in alternative placement or expulsion. The regulations establish definitions of specific types of conduct that may result in student discipline, as well as various related terms. The regulations do not require that any specific conduct result in either expulsion or alternative placement; they solely define the applicable terms to be used in a school district or charter school's Code of Conduct.

None of the proposed amendments to the existing regulations are substantive; statutory citations have been updated where appropriate, and some edits to punctuation and capitalization have been made where appropriate. The only proposed change in wording is found in the definition of "Violation of Behavior Contract," in subsection 2.0, where "his/hers" is replaced with "the student's," presumably to make it gender-neutral.

As the proposed amendments do not change the substance of the existing regulations, and the regulations do not mandate any specific disciplinary action, the DLP sees no apparent reason for the Councils to oppose the proposed changes.

2. Proposed DHSS/DMMA Regulation Regarding Non-Emergency Medical Transportation, 23 Del. Register of Regulations 519 (January 1, 2020)

DHSS/DMMA is proposing to amend the Title XIX Medicaid State Plan regarding transportation, specifically to establish coverage and reimbursement methodologies for non-emergency medical transportation services (NEMT). The Medicaid NEMT benefit is authorized under the Social Security Act under § 1902(a)(70) and 42 CFR § 440.170. The benefit ensures necessary transportation to and from providers and includes coverage for transportation and related travel expenses necessary to secure medical examinations and treatments.

Prior to the proposed amendment, the Delaware State Plan provided non-emergency transportation through a brokerage program. While this brokerage system remains in place, the proposed regulation now allows NEMT to be provided without a broker when “it is medically necessary for the member to travel to receive treatment and/or medical evaluation; the location of the medical services provided is greater than 25 miles from the member’s place of residence and the member is required to remain on the premises of the medical services provider overnight; or the medical service provided results in displacement of the member for a consecutive 24-hour period.” This should assist with individuals needing transportation who in more remote areas or who require more intensive services that require overnight stays or travel.

Reliable medical transportation services are critical for ensuring access to care for individuals with disabilities. Councils should consider supporting this regulation and encourage other efforts to expand transportation services.

3. Proposed DHSS/DMMA Regulation Regarding Adult Dental Services, 23 Del. Register of Regulations 523 (January 1, 2020)

DHSS/DMMA is proposing to amend Title XIX Medicaid State Plan and the Alternative Benefit Plan (ABP) regarding dental services, specifically to add adult dental services and to maintain the State’s assurance that the ABP matches regular Medicaid. The adult dental benefit offers basic dental services to eligible adults 21 and over. While State programs are required by law to cover dental services for children, coverage for adult services is optional. Covered services for individuals 21 and older are limited to: diagnostics, preventive, basic restorative, periodontics, prosthodontics repairs, and oral and maxillofacial surgery.

Additionally, payments for dental care treatments have a \$3 recipient copay. The annual maximum benefit also may not exceed \$1,000 per year, with an additional \$1,500 that maybe authorized on an emergency basis.

This barebones language only serves to amend the state plan with CMS to allow for coverage of the dental benefit. Hopefully, DMMA will promulgate more extensive regulations elaborating on the program. Councils should consider endorsing this Medicaid state plan amendment.

4. Proposed DHSS/DMMA regulation related to LTC Community Spouses. 23 Del. Register of Regulations 526 (January 1, 2020)

This regulation seeks to bring language into alignment with DMMA practices regarding application of spousal impoverishment provisions in the Medicaid long term care program. Spousal impoverishment provisions are meant to protect income and assets of the community-based spouse of an institutionalized person who is seeking or receiving LTC nursing home Medicaid.

Current language defines a community spouse in DSSM 20910.2 as the spouse of an institutionalized person ...” not receiving home and community-based services”, excluding a spouse who does receive HCBS. The notice in the Register indicates that this language was not revised earlier in error. As a matter of practice DMMA includes as a community spouse someone who is receiving HCBS. The proposed amendment corrects an error in drafting of earlier spousal impoverishment provisions. Councils probably don’t need to take a position on this proposed regulation.

5. Proposed DHSS/DMMA Regulation on Delaware Healthy Children’s Program State Plan, 23 Del. Register of Regulations 528 (Jan. 1, 2020)

The Division of Medicaid and Medical Assistance (“DMMA”) proposes to amend section 2.2 of Title XXI Delaware Healthy Children’s Program State Plan regarding Health Services Initiatives, which governs governmental initiatives aimed at improving the health of Delawarean children. The regulation is being amended to revise the definition of “low-income” to align with the Delaware Department of Education’s (“DDOE”) definition of low-income in its Vision Services – School Based Initiative, and to revise the data collection process in an effort to aid in the identification of uninsured children.

Much of the proposed amendment poses little to no concern; however, Councils may wish to support the proposal with additional recommendations. The biggest change is with the change to the definition of “low-income” to align with DDOE’s definition, which has been in use since the 2013-14 school year. Currently, low-income is defined as a Title I school where at least 51% of the student body receives free or reduced-price meals. DMMA proposes to change the definition to include only those schools that qualify as a Community Eligibility (“CEP”) School. Schools are considered eligible for CEP if at least 40% of its students are “directly certified” through the Supplemental Nutrition Assistance Program (“SNAP”) or Temporary Assistance for Needy Families (“TANF”) and the school provides meals to its students. This definition is in line with DDOE’s definition and guidance provided by the U.S. Department of Education. U.S. Department of Education, Office of Elementary and Secondary Education, *Guidance The Community Eligibility Provision and Selected Requirements Under Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended* (January 2014).

In the 2019-20 school year, there are 116 total Delaware schools that qualify for CEP status. Delaware Community Eligibility Provision Schools, School Year 2019-2020 ([DDOE Link](#)). These CEP schools educate nearly 62,000 students, which is approximately 44% of the total student enrollment for Delaware. *Id.* This is less than the total number of Title I schools as recent as the 2018-2019 school year, which totaled 155. 2018-2019 Title I Schools by LEA ([DDOE Link](#)). This definitional change may reduce the number of students who qualify for vision screening services, which may be of concern.

In addition to the above concern, the United States Department of Agriculture (“USDA”) proposed to change the categorical eligibility in SNAP, by eliminating the broad-based categorical eligibility, which gives states the flexibility to waive specific asset and income limits for households receiving both SNAP and other benefits. In its analysis, USDA estimated that this change would result in approximately 1 million students automatically losing access to free school meals. Revision of Categorical Eligibility in SNAP, ([USDA Link](#)). USDA’s proposed regulation received tens of thousands of comments and resulted in petitions against the change and protests. Maria Godoy, *Activists Protest USDA Changes That Threaten Free School Lunch*, (Nov. 2019, <https://www.npr.org/sections/thesalt/2019/11/14/779491101/activists-stage-protest-against-usda-changes-that-threaten-free-school-lunch>).

Councils may wish to oppose these definitional changes especially because this change may result in fewer children receiving school-based vision services outlined under this plan. In addition, the threat of USDA’s proposal could mean that even more Delawarean students would become ineligible.

The second major change involves the process by which eligible students are identified and screened. Presently, once a student fails the school-supplied vision screening, a qualified provider would send home, with the student, a parental consent form. Only if a parent consented to the provider’s services would a student then be screened and provided with corrective lenses and frames in the on-site mobile eye clinic.

DMMA proposes to remove the need for parental consent before the provision of provider services. Instead of obtaining consent prior to service, the qualified provider would only be required to send home, with the student, a notice that the student would be receiving a vision screening, eye exam, and corrective lenses and frames if necessary. If a guardian does not want these services, they must return the form/notice to the school indicating their refusal. It is unclear from the proposal whether the form would need to be sent back to the school consenting to services before they are performed; however, the removal of the words “For children whose return with parental consent...” would lend itself to the belief that the proposal is removing the need for parental consent.

Under Delaware law, parental¹ consent is required for the provision of medical treatment to a minor. 13 Del C. § 707 (b). Medical treatment is defined as “developmental screening, mental health screening and treatment, and ordinary and necessary medical and dental examination and treatment[.]” 13 Del. C. § 707 (a)(2). Eye screenings and exams would arguably be included

¹ Parental consent includes those individuals capable of furnishing consent for a minor as outlined in 13 Del. C. § 707 (b). The word parent, as used in this document, includes those individuals outlined.

under this definition of medical treatment, which requires parental consent. We recommend DMMA not remove the requirement for parental consent, as required by state law.

DMMA also proposes to change the timeline for providing corrective lenses and frames to those students identified as having a need for these. Instead of being provided with corrective eyewear in the mobile eye clinic, the student will be given a notice to be sent home, explaining the student's need for corrective eyewear and requesting insurance information. There is no mention in the proposed changes of when the students would then be provided with the corrective eyewear. We recommend DMMA include a timeline of when students can expect to receive corrective eyewear once insurance information is provided.

In an effort to streamline the process, we recommend that in addition to not removing the requirement for parental consent for the provision of the eye screening and examination, DMMA also include the request for insurance information in the initial consent form. This would eliminate the need for providers to send a second notice/form home with students. The initial parental consent form would then include whether the parent consented to the eye screening and examination and, if the parent consents to the services, the student's insurance information.

The remainder of the identification process has not substantively been changed in the proposal although it has been edited in the regulations for readability.

Regarding the definitional change of low-income, Councils may wish to oppose the change given the reduction of eligible students that would receive this service – in addition to the threat of USDA's change. Councils may wish to support the rest of the proposed amendment but ask that DMMA make the below changes:

Do not remove the need for parental consent for the provision of eye screening, eye examinations, or corrective lenses and frames. Parental consent is required by Delaware law.

Include a timeline for when a student may receive corrective lenses and frames once identified as having a need and insurance information has been provided. The request for insurance information can be included in the initial parental consent form.

The poverty unit at CLASI will be evaluating DSS proposed regulations related to child care (23 Del Reg. 531 and 539). These analyses will be shared when available.

Proposed Legislation

H.B. 201, AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE RELATING TO THE STATEWIDE PROGRAM FOR SERVICES FOR STUDENTS WITH AUTISM SPECTRUM DISORDER. (June 11, 2019)

This bill, primarily sponsored by Representative K. Williams, would amend 14 Del. C. § 1332 to require that DDOE administer the statewide program ("program") for services for students with autism spectrum disorder ("ASD") and that DDOE hire a Director for the program. H.B. 201 is additionally sponsored by Senator Poore and Representative Jacques and Co-Sponsors Senators Delcollo, Hocker, Lockman, and Sturgeon and Representatives Bennett, Brady, Lynn, and

Matthews. The bill is currently on the Ready List after being voted out of the Education Committee with 13 votes On Its Merits.

Councils have previously expressed concerns about the program being administered within the Christina School District (“CSD”), including the “statewide” program not actually being statewide because it is centered in New Castle County (“NCC”); difficulty tracking students across the state in need of services because of a lack of data availability from the DDOE; funding issues; and changes in student population since the start of the program over 40 years ago.

Placing the program under the DDOE, and not within a school district or other entity, may alleviate concerns previously expressed by Councils. Councils have previously supported similar legislation for other low incidence populations, including the deaf and hard-of-hearing. Current Council priorities for 2020 include support for legislation such as H.B. 201. Councils may wish to support this bill as is.

HB 259, AN ACT TO AMEND TITLE 30 OF THE DELAWARE CODE RELATING TO COLLEGE SAVINGS AND “ABLE” SAVINGS ACCOUNTS

House Bill No. 259 was introduced in the House and Assigned to the Revenue & Finance Committee on June 30, 2019. The bill would allow residents of Delaware to have two new deductions from personal income tax. The first is a deduction of up to \$2,500 from taxable income for contributions to a “529” College Savings Plan. The second is a deduction from taxable income up to \$5,000 for contributions to a qualified ABLE program, also known as a “529A” Savings Account. House Bill No. 259, allows a Delaware resident taxpayer to be eligible for the deductions regardless of whether the contribution was to a 529 or 529A plan sponsored by the State or another state or institution, as long as the plans meet the federal criterion.

26 U.S.C. § 529A defines qualified ABLE program. In general, “ABLE Accounts, which are tax-advantaged savings accounts for individuals with disabilities and their families, were created as a result of the passage of the Stephen Beck Jr. Achieving a Better Life Experience Act of 2014 or better known as the ABLE Act. The beneficiary of the account is the account owner, and income earned by the accounts will not be taxed. Contributions to the account, which can be made by any person (the account beneficiary, family, friends Special Needs Trust or Pooled Trust), must be made using post-taxed dollars and will not be tax deductible for purposes of federal taxes.” An ABLE account will, with private savings, “secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, Medicaid, SSI, the beneficiary’s employment and other sources.”

Currently, the State of Delaware does not provide any income tax deduction for ABLE Accounts, while 13 other states do provide a deduction (including Delaware’s sister states of Maryland and Pennsylvania). Councils should support the proposed bill because it would provide more incentive to Delaware taxpayers to create ABLE Accounts which would be beneficial to disabled Delawareans.

HB 236 AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE RELATING TO LIMITATIONS ON USE OF SECLUSION AND RESTRAINT

This bill seeks to amend the definition of “public school personnel” to specifically exclude constables appointed pursuant to Chapter 27 of Title 10 from the definition. Section 4112F(a)(4) restricts public school personnel from most forms of seclusion and restraint, but it excludes “law enforcement officers” and DOC and DYRS employees and contractors from those restrictions. Additionally, individuals who are excluded from the definition of “public school personnel” who act as school resource officers and who interact with students with disabilities are required by Section 4112F(d) to undergo awareness training related to interactions with students with disabilities, and are also required to undergo annual general SRO training.

The current definition of “public school personnel” does not include constables because they are not “law enforcement officers” as defined in Title 11. The proposed bill seeks to add constables as a separate category. The DDOE regulations currently restrict SROs under 14 Del Admin Code 610. Section 2.0 to law enforcement officers as defined in 11 Del C §9200:

"School Resource Officer (SRO)" means a contractor, subcontractor or employee of a public school district or charter school who is a sworn law enforcement officer as defined in 11 Del.C. §9200.

Consequently, by regulatory definition, constables cannot serve as SROs; however, they currently do so in several school districts. This anomaly needs to be corrected, first by amending the statute and then by issuing new regulations. This sort of begs the question whether constables are suitable to serve as SROs. There have been many stories in the news of SROs acting in an inappropriate manner, and in particular assaulting students and not engaging in de-escalating techniques.

The training of constables is not nearly as in depth as that of police officers and the qualifications are stricter for police officers. Police officers must have at least 60 hours of postsecondary education (or 30 hours combined with substantial military experience). Del Tech provides “Constable Academy” that anyone other than retired police officers must take in order to become a constable. This is a one month course with 180 hours of instruction. SRO training takes place over five days. Constable training is overseen by a Board of Examiners. State Police training is 22 weeks; cadets must pass a written test and physical exam before being admitted to the program. Not all constables are permitted to carry weapons, but many do.

If school districts intend to employ constables as SROs, and perhaps this is out of medical necessity, it is better that the law clearly requires them to undergo the appropriate training. Therefore, councils may wish to consider endorsing the legislation or staying neutral.

HB 177- AN ACT TO AMEND TITLE 21 RELATING TO SUSPENSION OF DRIVERS LICENSES FOR SCHOOL EXPULSION

This amendment to 21 Del Code §2732(e) strikes language that requires DMV to suspend the license of any student who has been expelled from school. This amendment brings into conformity the provisions of Title 21 with those of Title 14 relating to the revocation of a student's driving privileges when he or she is expelled from a public school. Prior amendments to Title 14, Section 4130 and Title 21, Section 2707 removed the requirement that the Secretary of the Department of Motor Vehicles revoke a student's driving privileges upon notice from the superintendent of a public school that the student had been expelled. These changes were endorsed by councils last year. Councils may wish to endorse this bill.