Memo

To: SCPD Policy and Law

From: Disabilities Law Program

Re: November 2020 Policy and Law

Date: 11/12/2020

1. Emergency Regulation:

DHSS Communicable Diseases Emergency Regulation 4202, 24 Del. Register of Regulations 434 (November 1, 2020)

Effective October 1, 2020, the Department of Health and Social Services (DHSS) issued an emergency regulation implementing the emergency order dated March 10, 2020, requiring all laboratories and providers to immediately report all SARS-CoV-2/COVID-19 tests and results to the Division of Public Health. While the existing Control of Communicable and Other Disease Conditions regulation, 14 Del. Admin. C. § 4202, specifies that Severe Acute Respiratory Syndrome (SARS) is a notifiable disease/condition, under which SARS-CoV-2/COVID-19 falls, this Emergency Order clarifies that all novel coronavirus causing severe acute respiratory disease, including the 2019 novel coronavirus disease COVID-19, are considered notifiable and are required to be reported to the Division of Public Health. This regulation simply modifies an existing regulation by striking "Severe Acute Respiratory Syndrome (SARS)" and replacing it with "Coronavirus, novel (novel coronavirus causing severe acute respiratory disease including the 2019 novel coronavirus disease [COVID-19], severe acute respiratory syndrome-associated coronavirus disease [SARS-CoV], and Middle East Respiratory Syndrome [MERS-CoV])." It continues to be a "report by rapid means" category. This change is a technical clarification to address the pandemic. Comment by the Councils is not necessary. Should the Councils wish, they could express their support for DHSS's action in clarifying that COVID-19 and other similar novel coronaviruses are rapid report notifiable diseases/conditions, since quick response to testing and follow-up contact tracing are such essential components to the State's COVID response.

2. Proposed Regulations:

i. Proposed DHSS Communicable Diseases Proposed Regulation 4202, 24 Del. Register of Regulations 464 (November 1, 2020)

Like the emergency regulation, Proposed Regulation 4202 clarifies that all novel coronavirus causing severe acute respiratory disease, including the 2019 novel coronavirus disease COVID-19, are considered notifiable and are required to be reported to the Division of Public Health in accordance with these regulations. Other revisions include technical changes such as adjusting capitalization, modifying how similar terms are internally referenced, adjusting

statutory citation formats, removing gender pronouns, striking the term "carrier," and clarifying that educational institutions include higher education institutions such as nursing schools, technical and community colleges, and universities. Yersiniosis was removed from the reportable diseases/conditions.

Comment by the Councils is not necessary. Should the Councils wish, they could express their support for DHSS's action in clarifying that COVID-19 and other similar novel coronaviruses are rapid report notifiable diseases/conditions, since quick response to testing and follow-up contact tracing are such essential components to the State's COVID response.

ii. Proposed DDOE District and School Shared Decision Making Regulation 201, 24 Del. Register of Regulations 445 (November 1, 2020)

The Secretary of the Delaware Department of Education "DDOE" seeks the approval of the State Board of Education to repeal 14 Del. Admin. C. § 201 District and School Shared Decision Making. The regulation implements 14 Del. C. Chapter 8 (note the proposed regulation incorrectly lists the citation as 18 Del. C. Chapter 8) which was enacted in the late 90s. According to the DDOE, the DDOE has not processed a School Shared Decision Making Transition Planning Grant in a number of fiscal years. "Shared decision-making" is defined by statute to mean "inclusive, representative decision-making process in which members of the school community at the school and district levels participate as equals. Shared decision-making may occur at all levels of a school system." 14 Del. C. § 801(2). The DOE justifies the move to rescind the regulation based on the lack of recent applications and indicates that the regulation simply mirrors the statute. By statute, the DOE has to promulgate guidelines for the approval of school improvements grants. 14 Del. C. § 806. It seems that DOE wants to discontinue this program since it is not being used but it is proceeding backwards by rescinding the regulation prior to the statute, especially given the statutory dictate to promulgate guidelines for these grant applications. That said, since the program is not being used currently the existence of the regulation is unlikely to impact students with disabilities, and thus it is likely not worth the Council's time to comment on this.

i. Proposed DDOE Regulation 934 Family and Large Family Care Homes, 24 Del. Register of Regulations 453 (November 1, 2020)

The DDOE proposes to revise existing regulations pertaining to standards for the licensure and operation of family childcare homes and large family child care homes. These regulations now fall under the jurisdiction of the DDOE due to the recent relocation of the Office of Child of Care Licensing ("OCCL") from the Department of Services for Children Youth & Families ("DSCYF") to the DDOE. "Family child care home" and "large family care home," as defined by the regulations, generally refer to "a private home in which a licensee lives and provides licensed child care," although large family child care homes may also be provide care in a non-residential setting. A "family care home" is distinguished from a "large family care home" by the number of children provided care; family care homes may serve as many as six to nine children depending on the home's designated level (Level I or Level II) and the ages of the respective children, while large family care homes may serve as many as twelve children. As the regulations are quite lengthy, only the proposed amendments to the existing regulations will be discussed here.

The amendments to the regulations are primarily wording changes for consistency and compliance with the Delaware Drafting & Style Manual (for example, changing replacing the word "administrator" with "director" in reference to OCCL leadership, and numerous adjustments of "his or her" to more gender neutral language). There are three revisions that provide substantive clarification to existing rules. First, language is added in the proposed amended regulations at 6.6 to clarify that only one license can be issued for a given address. Second, the proposed amended regulations at 8.1.7 would require a licensee to have both property liability insurance and comprehensive general liability insurance, while the existing regulations simply require liability insurance without further specification.

The third substantive clarification, in the form of deletions in the proposed amended regulations at 4.2, 55.2-55.5, and 56.2-56.3, is that family care home licensees cannot designate another entity to provide childcare services. Per the synopsis published with the proposed regulations, this is to address "a previously posted error that allowed a family child care home to designate a family provider, when the licensee must be the provider." It is not clear why the regulations were previously published allowing for the designation of a family provider. Per the proposed amended regulations at 4.2, it appears a licensed large family child care home could still designate a "large family provider," however the amendments would further clarify that "[a] licensee must designate a natural person, not an entity." If that distinction between family child care homes and large family child care homes was intended, it would be helpful for additional language to be added to emphasize that only large family care homes can designate a large family provider, while other family care homes cannot designate a family provider and that the licensee must act as the provider. Simply removing existing references to designation leaves it a bit ambiguous.

It does not appear the proposed amendments would result in any major substantive changes in the actual provision of childcare in this context.

ii. Proposed DDOE Regulation 1581 School Reading Specialist, 24 Del. Register of Regulations 458 (November 1, 2020)

The DDOE proposes to amend 14 Del. Admin. C. § 1581, which describes the requirements for obtaining the School Reading Specialist standard certificate (hereinafter "Certificate") pursuant to 14 Del. C. § 1220. DDOE, in cooperation with the Professional Standards Board (hereinafter "The Board"), is proposing to amend this regulation to add definitions to Section 2.0, clarify the requirements for issuing a Certificate, specify application requirements, and add Sections 7.0-10.0 which concern the validity of the Certificate, discipline actions, requests for the Secretary of Education to review applications and, recognizing past certifications, respectively.

DDOE, in partnership with the Board, has been systematically reviewing and updating the requirements for the different Standard Certificates since approximately April of 2020. Councils have previously submitted comments to several of these proposed regulations with little to no effect. Of the recommendations put forth by Councils, DDOE and the Board have adopted only one – clarifying the language of subsection 3.2, which was ambiguous in the proposed regulation for the Special Education Teacher of Students with Disabilities (found at 14 Del. Admin. C. § 1571). This change has been adopted in the proposed regulations which followed.

As this proposed regulation is nearly identical to the previous, Councils may wish to support the proposed regulation as is.

3. Final Publication

i. Final DHSS Title XXI Delaware Healthy Children's Program State Plan – Health Services Initiatives – Vision Services – School-Based Initiative, 24 Del. Register of Regulations 480 (November 1, 2020)

In the January 20, 2020 Delaware Register of Regulations, Delaware Health and Social Services (DHSS) and Division of Medicaid and Medical Assistance (DMMA) proposed changes to Delaware's Healthy Children's Program State Plan regarding Health Services Initiatives. The regulation sought to revise the definition of low income to comport with the Delaware Department of Education's (DDOE's) definition of low income in its vision services and to revise the process to aid in identifying uninsured children.

CLASI reviewed the proposed amendments and made several recommendations, which Councils adopted and forwarded to the Planning & Policy Development Unit of DMMA. Councils opposed the definitional change that would include only those schools that qualify as a Community Eligibility (CEP) Schools because it would result in fewer children receiving school-based vision services. Moreover, if the United States Department of Agriculture (USDA) proposed change to the categorical eligibility in SNAP is adopted, one (1) million students nationwide, including students in Delaware, would lose access to free school means. Because of this, Councils recommended that DMMA retain the current definition of low-income based upon a Title I School.

In addition, Councils recommended that the need for parental consent for the provision of eye screening, eye examinations, or corrective lenses and frames be retained since consent is required by Delaware law (13 Del. C. §707(a)(2). Councils also recommended that the request for insurance information be included in the initial consent form, in order to streamline the process. Lastly, Councils recommended that DMMA should include a timeline of when students could expect to receive corrective eyewear once the insurance information that was requested of parents was provided.

CLASI was asked to address whether the recommendations tendered by Councils were accepted or rejected by DMMA. It should be noted, that in addition to the comments from Councils, DMMA received numerous comments from other sources. Regarding the recommendation made by Councils concerning the definition, namely that the current definition be retained based upon Title I school, DMMA rejected the recommendation because of changes in the school-based nutrition program.

Regarding parental consent, DMMA will continue to require parental consent since it is required by law. As to the timeline on when students can expect to receive glasses once insurance information is provided, DMMA said it will take the "recommendation under consideration."

Regarding the recommendation that DMMA request the insurance information as part of the initial consent form, DMMA rejected it and indicated that it will continue to solicit information "after the screening."

In sum, Councils was successful in having the regulations retain parental consent and as to the timeline of when the corrective lenses would be supplied, DMMA is at least considering this recommendation. Unfortunately, the definition of low income that DMMA adopted will constrict the number of students that will be eligible for school-based vision services.

ii. Final DHSS / DPH Regulation 4470 State of Delaware Medical Marijuana Code, 24 Del. Register of Regulations 485 (November 1, 2020)

The Delaware Department of Health and Social Services ("DHSS") provided an explanation to both questions raised by Councils.

First, Councils requested additional information for why anxiety was not included as a qualifying condition eligible for access to the entire Delaware Medical Marijuana Program. In response, DHSS explained that SB 170[1] established a CBD-Rich medical marijuana card for the treatment of anxiety or other conditions approved by DHSS for treatment with CBD-Rich medical marijuana. The proposed regulations were updated to conform to this law, which was signed by Governor Carney on July 7, 2020. DHSS did not provide a direct response as to whether the Substance Abuse and Mental Health Services Administration's ("SAMHSA") restriction on funding for programs which advocate or supply medical marijuana as treatment has any bearing on the addition of anxiety as a qualifying condition.

Second, Councils requested additional information regarding the regulation's potential impact on the current availability of CBD oil outside of the medical marijuana context. The response by DHSS does not directly answer the question but provides that: "[c]ommercial CBD oil can be derived from hemp or medical marijuana strains rich in CBD. Compassion centers may use hemp-derived CBD as a lower cost alternative. The Office of Medical Marijuana requires that each batch of medical marijuana or hemp sold in a Delaware compassion center undergoes comprehensive testing for mold, fungus, and pesticides by batch or lot number."

This regulation was adopted and will become effective November 11, 2020. Councils may wish to express their appreciation for DHSS's responses to the Councils' questions; however, Councils may also wish to clarify / re-request information concerning the regulation's impact on CBD products outside of the medical marijuana context.

iii. Final Department of Insurance Regulation 1409 Insurance Coverage for Telemedicine and Telehealth, 24 Del. Register of Regulations 488 (November 1, 2020)

Regulation 1409 enumerates the requirements for insurance coverage for the delivery of healthcare services through telemedicine and telehealth. The Department of Insurance is updating Regulation 1409 to confirm with the House Bill that was signed by Governor Carney on July 17, 2020. It should be noted that the law incorporates the requirements for telehealth

[1] https://legis.delaware.gov/BillDetail/47770

contained in Governor Carney's Declaration of a State of Emergency and the joint order of the Department of Health and Social Services (DHSS) and the Delaware Emergency Management Agency.

Because the amendments to the regulation make them consistent with changes in the law without otherwise altering the substance of the regulation, neither public notice nor comment is required. These amendments to the regulation take effect on November 11, 2020; both the law and the amendments to the regulation expire on July 21, 2021.

Telehealth is the use of technologies such as telephones, remote patient monitoring devices, or other electronic means used to provide health care, consultation, health related education, public health, and health administration services not requiring technology allowing visual communication.

These amendments require insurers who issue individual or group policies providing hospital, medical, surgical, or major medical coverage; health service corporations who issue or provide individual or group accident and sickness subscription contracts; and managed care organization and health maintenance organizations that provide a health care plan for health care services to provide coverage for the cost of such health care services provided through telehealth. However, to be covered, the service must be a covered service and the health care provider providing the service is licensed under state law and is practicing within the scope of state law.

In addition, the afore-mentioned insurers, health service corporations, and managed care organization or health maintenance organizations shall not restrict an insured from seeking medical care by telehealth solely because the service is provided through telehealth. These restrictions include but are not limited to preauthorization, medical necessity, homebound requirements, or requiring the use of technology permitting visual communication.

These amendments conform to the law. Even though comments or public notice are not needed, it is easy for Councils to support these amendments as they permit insureds to utilize telehealth.