

Memo

To: SCPD Policy and Law ; GACEC

From: Disabilities Law Program

Re: October 2020 Policy and Law

Date: 10/15/2020

1. Proposed DDOE Regulation on 1011 Interscholastic Athletics during the COVID-19 Pandemic, 24 Del. Register of Regulations 313 (October 1, 2020)

The Delaware Department of Education (“DDOE”) proposes to add new regulations, 14 Del. Admin. C. § 1011, which govern interscholastic activities during the COVID-19 pandemic for Delaware Interscholastic Athletic Association (“DIAA”) member schools. DDOE previously adopted an emergency regulation, 14 Del. Admin. C. § 1010 Interscholastic Athletics during the COVID-19 Pandemic, which was effective for 120 days beginning on July 1, 2020. The proposed regulation, § 1011, is intended to replace the place of the emergency regulation. The proposed regulation includes pre-participation physical examination requirements, addresses when interscholastic athletic activities are suspended, provides four Return to Play Stages, specifies the dates for the fall, winter, and spring sport seasons during the 2020-2021 school year, and sets forth sport-specific requirements that are designed to protect the physical well-being of student athletes during the COVID-19 pandemic.

Although the regulation covers all students participating in interscholastic sports, DDOE proposes specific requirements related to what it calls a “vulnerable individual.” This reviewer will focus on this specific population in their analysis.

The definition DDOE proposes for a “vulnerable individual” is a person who:

... is strongly advised to shelter in place based on the Delaware Division of Public Health's guidance, including a person who is over the age of 65, a person who is immunocompromised, and a person with an underlying health condition. Conditions that can cause a person to be immunocompromised include cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications. Underlying health conditions include chronic lung disease, moderate to severe asthma, a serious heart condition, severe obesity (body mass index of 40 or higher), and diabetes.

Proposed 14 Del. Admin. C. § 1011.2.0. This will likely catch a significant number of Delaware students with disabilities, including those who have participated in DIAA activities in the past and those who may be looking at starting them this year.

The requirements and limitations that DDOE proposes for a “vulnerable individual” are more severe than those for non-vulnerable populations. These limitations include the following:

DIAA Return to Play Stage 1 - During DIAA Return to Play Stage 1, Workouts are permitted subject to the limitations in subsection 4.5.4.4. Practices, Scrimmages, Competitions, Play Days, Tournament events, Conditioning Programs, and Open Gym Programs are not permitted. Vulnerable individuals shall not attend Workouts. Proposed 14 Del. Admin. C. § 1011.4.5.4 (emphasis added).

DIAA Return to Play Stage 2 - During DIAA Return to Play Stage 2, Workouts; Practices in the sports specified in subsection 4.5.5.4; and Practices, Scrimmages, and Competitions in the sports specified in subsection 4.5.5.5 are permitted subject to the limitations in subsection 4.5.5.6. Play Days and Tournament events are not permitted. Conditioning Programs and Open Gym Programs that are held indoors or outdoors are permitted. Vulnerable Individuals shall not attend Workouts, Practices, Scrimmages, Competitions, Conditioning Programs, or Open Gym Programs. Proposed 14 Del. Admin. C. § 1011.4.5.5 (emphasis added).

DIAA Return to Play Stage 3 - During DIAA Return to Play Stage 3, Workouts; modified Practices in the sports specified in subsection 4.5.6.4; and Practices, Scrimmages, and Competitions in the sports specified in subsection 4.5.6.5 are permitted subject to the limitations in subsection 4.5.6.6. Play Days and Tournament events are not permitted. Conditioning Programs and Open Gym Programs (indoors and outdoors) are permitted. Vulnerable Individuals may attend Workouts, Practices, Scrimmages, Competitions, Conditioning Programs, and Open Gym Programs if permitted by the Delaware Division of Public Health's guidelines. Proposed 14 Del. Admin. C. § 1011.4.5.6 (emphasis added).

DIAA Return to Play Stage 4 - During DIAA Return to Play Stage 4, Workouts and Practices, Scrimmages, and Competitions in all sports are permitted subject to the limitations in subsection 4.5.6.6. Play Days and Tournament events are permitted provided the plans have been approved by the Delaware Division of Public Health. Conditioning Programs and Open Gym Programs (indoors and outdoors) are permitted. Vulnerable Individuals may attend Workouts, Practices, Scrimmages, Competitions, Conditioning Programs, Open Gym Programs, Play Days, and Tournament events if permitted by the Delaware Division of Public Health's guidelines. Proposed 14 Del. Admin. C. § 1011.4.5.7 (emphasis added).

It is this reviewer’s belief that the more restrictive limitations proposed by DDOE for a “vulnerable individual” are to ensure the utmost safety and health of each individual student. However, DDOE cannot forget the requirements set forth under the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“Section 504”) which require equal access to all students with disabilities to the programs, activities, and facilities of a school and school district.

Although the DIAA is not an official arm of the DDOE, such as the Exceptional Children Resources Workgroup, the General Assembly in creating the DIAA intended for it to work “in consultation and cooperation with the [DDOE] to implement [its] charge.” Annual Report to the 149th General Assembly and Governor of Delaware, DIAA, January 1, 2017 to December 31, 2017

(<https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/326/Annual%20Report%20to%20%20G%20A%20%202017%20-%20.pdf>). The DIAA is responsible for developing rules and regulations for its Delaware member schools, both public and private, relating to middle and high school interscholastic athletics. Id. As of the above Annual Report, membership in DIAA includes 63 Delaware high schools and 55 Delaware middle schools for a total of 118 Delaware

schools, both public and private. Id. Furthermore, during the 2016-17 school year, over 30,000 students participated in high school interscholastic athletics with DIAA. Id.

Based on the above information, it is clear that participating in interscholastic athletics is an activity in which many students desire to participate. Although the DIAA Annual Report cited above does not include information about how many students with disabilities participate in their activities, it is unlikely that that number has been or remains at 0. Regardless of that number, DDOE and the DIAA need to ensure that equal access to these programs, activities, and facilities are, indeed, provided to all students, inclusive of those students with disabilities which may put them in the proposed category of a “vulnerable individual.”

Instead of completely restricting the participation for a “vulnerable individual” in interscholastic activities, there should be an individualized assessment to determine whether it is appropriate for a student to participate. Failure to do so could lead to a violation of the ADA or Section 504 and will surely begin and continue to further segregate students with disabilities from their peers. Councils may wish to recommend that DDOE and the DIAA either (1) completely remove the restriction for a “vulnerable individual” or (2) change the language to remove the complete restriction (the words “shall not”) and instead include a more individualized assessment for each student.

2. Renewal with proposed amendments of DHSS/DPH Emergency Regulations regarding COVID testing, 24 Del. Reg. 304 and 315 (3201 Nursing Homes and ICF/MRs); 306 and 317 (3225 Assisted Living Facilities); and 308 and 320 (3230 Rest Residential Facilities) (October 1, 2020)

The first set of emergency regulations (pages 304, 306 and 315) extend the mandatory testing and other protocols for each type of facility for 60 days, as of 9/30/2020, based on the Governor’s Emergency Orders. DLP believes the second set, (pages 315,317 and 320) which is identical to the first, makes the regulations permanent. Making the regulation permanent will obviate the need to keep re-issuing emergency regulations.

In terms of the regulations themselves, they do the following for all three settings:

1. 6.11.1.1 Suggest but does not compel resident testing upon identification of another resident with symptoms consistent with COVID or if staff have tested positive .
 - a. Comment: DPH could mandate testing of residents. Shouldn't they test residents if staff are suspected of COVID and not wait for a positive test?

2. 6.11.1.2 State that all other testing should be consistent with DPH guidance during the emergency.
 - a. Comment: Why isn't this mandatory language? Is it up to the facility to decide whether to follow DPH guidance? Shouldn't the requirement to test if there are positive cases continue even if the public health emergency is no longer in effect? It is absolutely conceivable that coronavirus will be in existence after the emergency has ended.

3. 6.11.1.3 All testing must be documented in the medical record
4. 6.11.1.4 All resident results must be reported to DPH.
5. 6.11.2.1 All staff, vendors and volunteers must be tested within two weeks of the effective date of the regulation.
 - a. Comment: It makes no sense to keep this language. Are they asking for the facilities to do a new run of testing or keep going with the existing protocol?

6. 6.11.2.2 All new staff, vendors and volunteers who cannot provide proof of a previous positive testing must be tested prior to their start date.
 - a. Comment: There is no evidence regarding the duration of any immunity that previous infection may create. There is no timeframe for when any prior positive test might have occurred. Therefore, any new staff, vendor or volunteer needs to have a recent (within several day) negative test prior to accessing any facility.

7. 6.11.2.3 All staff, vendors and volunteers must be retested consistent with DPH guidelines for the duration of the public health emergency.
8.
 - a. Comment: Again, what about after the public health emergency. Should facilities be screening staff, vendors and volunteers for COVID-19 in some fashion on an ongoing basis?

9. 6.11.2.4 Facilities must report all staff, vendor and volunteer testing results to DPH.
10. 6.11.2.5 Facilities must follow recommendations of CDC and DPH regarding provision of care and services for residents by staff vendor or volunteer found to be positive for COVID-19.
 - a. DLP is not entirely sure what this means. Is it suggesting that facilities can allow staff and others who test positive to continue to care for residents consistent with CDC guidelines? There was some discussion early in the

pandemic about allowing asymptomatic COVID positive staff to continue to work because of shortages. I am not sure that SCPD or others should endorse this practice. It may be more to do with how long staff need to stay off work or get negative testing, although that appears to be addressed in Section 6.11.2.6.

11. 6.11.2.6 Series of provisions requiring facilities to amend communicable diseases policies and procedures regarding work exclusion and return to work protocols,,staff refusals to test, staff refusals to consent to release of test results, procedures to obtain staff authorizations for obtaining test results, and plans to address staffing shortages and facility demands.
 - a. Comment. This particular regulation provides no particulars or guidance about the parameters or requirements for these policies. For example, wouldn't it make sense to indicate that staff that refuse testing should be suspended from work until they get tested? Without having some degree of specificity and guidelines, this requirement is essentially meaningless. Can facilities each make up their own rules for when a positive employee can return to work?
12. 8.3 The regulation adds the requirement that facilities include plans to address staff shortages and facility demands as part of their Emergency Preparedness Plan.
 - a. Comment: This makes sense.

3. Proposed Department of State Div of Professional Regulation, Board of Nursing Regulation 1900, 24 Del Register of Regulations 334 (October 1, 2020).

This proposed amendment adds to the list of potential offenses that are subject to discipline 10.1.2.30 Failing to practice without discrimination as to age, race, religion, sex, sexual orientation, national origin, or disability. Councils should consider endorsing this change.

Proposed DSS regulations to POC do not impact people with disabilities. However, CLASI poverty law staff are evaluating and I will share those analyses when they are available