

# Memo

To: GACEC; SCPD; DDC Policy and Law  
From : Disabilities Law Program, CLASI  
Re: Policy and Law Memo March 2021

Pursuant to request, please find below analysis of regulations and proposed legislation of interest to the councils.

## **1. Proposed DDOE Regulation on District School Board Member Special Education Due Process Hearing Training, 24 Del. Register of Regulations 826 (March 1, 2021)**

The Secretary of Education (“Secretary”) proposes to amend 14 Del. Admin. C. 210 to clarify Section 1.0, add definitions to Section 2.0, and specify in Sections 3.0-4.0, which concerns the District School Board Member Special Education Due Process Hearing Training. The proposed amendments would include charter school board members, to ensure consistent and clear language when referencing school district, charter school, and vocational technical school districts. The term was added to streamline language in accordance with the Delaware Administrative Code Style Manual. The training is to inform school board members of the educational and legal issues generally involved in special education due process hearings arising under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (“IDEA”).

Much of the proposed changes do not warrant much discussion or concern, so they will be mentioned only briefly. Proposed § 1049(b)(1) nearly verbatim clarifies the purpose of the training and adds the term “and charters” to include Charter School Board members in the required Due Process training.

In proposed § 1049(b)(2), the Secretary includes the definition of the “Special Education Due Process Hearing Training” which consists of a minimum of two (2) hours covering the topics described in Section 3.0.

In proposed § 1049(b)(3)(1)(1) the language that follows is identical to (1) Overview of special education requirements related to the identification, evaluation, and educational placement of children with disabilities, and the provision of a free, appropriate public education to children with disabilities; and (2) Overview of the due process hearing system; and (3) Summary of other procedural safeguards and dispute resolution options available to parents, school districts and charter schools under the IDEA and 14 Del. C. 31. The change noted refers to § 1049(b)(3)(1)(3) that adds “parents, school districts and charter schools” to ensure all student's legal rights are respected.

In conclusion, Councils may wish to support the proposed amendment and encourage that stakeholders receive more than a minimum of two (2) hours of Special Education Due Process Hearing Training.

## **2. Proposed DDOE Regulation on Notice to School Boards of Due Process Proceedings, 24 Del. Register of Regulations 828 (March 1, 2021)**

Pursuant to 14 Del. C. §3110(d), The Secretary of Education (“Secretary”) proposes to amend 14 DE Admin. C. 211, which concerns Notice to School Boards of Due Process Proceedings. This regulation is being amended to specifically recognize vocational school and charter school board members and to streamline language in accordance with the Delaware Administrative Code Style Manual.

The proposed changes do not warrant much discussion or concern, so they will only be mentioned briefly.

In proposed § 3110(d)(1), the Secretary proposes to include “district, including vocational technical school, and charter school” in the purpose of the regulation. To ensure consistent and clear language when referencing school districts, charter schools, and vocational technical schools during the Due Process Proceedings.

In proposed § 3110(d)(2) language was added to further clarify the definition of reorganized school districts or a vocational technical school. The language added “charter school board and vocational school board members” whether elected, appointed, or volunteers. This language was added to recognize all members sitting on a school board.

In proposed § 3110(d)(4) the Secretary establishes additional terms for the superintendent of a reorganized school district or a vocational technical school district as the head of the charter school. These terms were added to ensure that all school stakeholders were on notice of Due Process Proceedings.

In conclusion, this regulation did not have many notable changes. The proposed regulation should be supported by Councils to put all school board members on notice of Due Process proceedings.

## **3. Proposed DDOE Regulation on Alignment of Local School District Curricula to the State Content Standards, 24 Del. Register of Regulations 833 (March 1, 2021)**

The Secretary of Education (“Secretary”) intends to amend 14 DE Admin. Code 502 that concerns the Alignment of Local School District Curricula to the State Content Standards. The purpose of this amendment would be to align with modifications in State Content Standards and Department of Education reporting expectations of school districts and charter schools and to subsequently clarify the title of the regulation.

The Secretary proposes to eliminate “local” in the title and add “charter school”. The new title would read “Alignment of School District and Charter School Curricula to State Content Standards”.

The proposed language edits some of the definitions of this section. The definition of “Adoption” and “Recommended Statewide Uniform Curricula” are eliminated entirely, while several new definitions are added:

"Alignment" means meeting the expectations or outcomes outlined in each of the content area standards in 14 DE Admin. Code 501 and 14 DE Admin. Code 275.

"Curricula" means a coherent set of high-quality instructional materials, academic lessons, and content implemented for a particular subject and designed for teachers to facilitate learning that leads to students' mastery of standards.

“High Quality Instructional Materials” means comprehensive materials that are aligned with the adopted Delaware content standards. The materials are written with clear purpose, effective lesson structure, and pacing to provide equitable access to the course- or grade-level content, when used in accordance with their intended design.

“Implemented” means using aligned materials according to their intended design and with processes in place for continuous improvement, including initial and sustained professional learning to support the educators who are using or leading the use of the instructional materials.

“Supports” means professional learning and feedback required to successfully implement high quality instructional materials and curricula.

Further, the definition of “Evidence” is edited to include charter schools and as well as district schools in the entities that maintain documents reflecting alignment to State Content Standards that meet the definition of “Evidence.”

There are other substantial changes made to Section 3.0 Alignment Requirements. The section now states that school districts AND charter schools must “provide evidence to the Department that their curricula are aligned with the State Content Standards” The proposed language changes the list of curriculum subjects for which there are State Content Standards. “Agriscience, Business Finance and Marketing Education, Technology Education, Skilled and Technical Sciences, and Family and Consumer Sciences” are replaced with “Computer Science, Career and Technical Education programs of study, and Financial Literacy.”

Additional changes are made to Section 4.0 Documentation of Curriculum Alignment. In addition to including charter schools to all requirements, the proposed language expands the types of documents and information that must be available to the Department of Education upon request. Under the proposed language, school districts and charter schools must be able to provide “curriculum maps or scope and sequence of instructional topics” as well as “the names of the implemented high quality instructional materials” and a “description of the alignment process” to ensure compliance with curriculum standards.

The proposed language makes minor changes to Section 5.0 Documentation for Specific Student Populations. The language changes “modification or enhancements to the curricula for specific subgroups” to supports provided in its curricula for specific subgroups.” The original language specifically identifies students with disabilities, gifted students, and English language learners to the category of “subgroups” described in this section, but the proposed language adds that this category is “not limited to” these identified groups. The draft also adds the requirement that, “The district or charter school shall also certify alignment and equitable access to the grade-level or course-level State Content Standards” for these subgroups.

The draft language also makes some minor changes to Section 6.0 Subsequent Review of Alignment. The proposed language includes charter schools in these requirements. The draft also changes the language from a requirement “to certify curriculum alignment” to “maintain alignment” if curriculum changes occur. The draft also eliminates the sentence stating that, “Further, districts may be required to submit documentation of aligned curriculum in the assessed content area or areas which form the basis for any school rating.”

In general, Councils may wish to support these changes as they improve transparency and accountability, including charter schools in curriculum alignment and reporting requirements, expand requirements related to documentation related to alignment, and update curriculum subjects covered in this regulation.

#### **4. Proposed DDOE Regulation on Promotion, 24 Del. Register of Regulations 831 (March 1, 2021)**

These draft amendments propose to change the requirements for students to be promoted from grade to grade in K-12 education.

Section 1.2.2. has been removed and replaced with new promotion requirements, with the following changes:

- Promotion policies will apply to students in grades K-8, whereas before they applied to students in grades 1-8.
- Previously, students in grades 1-8 needed to have passed “50% of their of their instructional program each year (excluding physical education)” in order to be promoted. And “one of the subject areas that must be passed is English Language Arts or its equivalent.” Equivalent classes in the regulations included “English as a Second Language (ESL) and bilingual classes that are designed to develop the English language proficiency of students who have been identified as LEP.” Under the proposed changes, students must instead now pass “three (3) of the four (4) core classes to be promoted to the next grade level.” These core classes include: “English Language Arts, mathematics, science and social studies.” In addition, “two of the three core classes must be English Language Arts and mathematics.” So essentially, a student must pass English Language Arts and *either* Social Studies or Science to be promoted to the next grade level.

While these policies reflect higher standards for core content understanding that students do need to progress in their educational careers, heightening standards for promotion after a year of academic uncertainty and disruption due to COVID-19 may not be appropriate, and may disproportionately impact students whose lives had had the most disruption. Additionally, Councils should require that any proposed language retain exceptions or specific language allowing ESL and bilingual classes to count toward the Language Arts requirement.

Additionally, Section 2.0 Policy Reporting Requirements has been changed to require greater transparency about district level promotion policies. Whereas previously school districts and charter schools only had to “have an electronic copy of [their] current promotional polic[ies] on file with Department of Education,” they are now required to “post [their] promotion policies on [their] website[s], and notify a parent, guardian, or relative caregiver of each student in writing where this policy can be accessed.” Schools must also provide “a hard copy...to a parent, guardian or relative caregiver upon request.” Additionally, under the new proposed language, anytime there are any policy revisions, these revisions must be “update[ed] in the policy and website within thirty (30) days.”

Councils should support these changes that drastically improve parent, guardian, and student access to these policies. Councils may also recommend that these regulatory changes include language requiring school districts and charter schools to provide parents with notice and with the district’s promotion policy when a student is at risk of retention.

#### **5. Proposed DDOE Regulation on James H. Groves High School, 24 Del. Register of Regulations 835 (March 1, 2021)**

The Department of Education is proposing to amend existing regulations at 14 Del. Admin. C. § 915 relating to the operations of James H. Groves High School (“Groves”). Groves serves primarily as an adult education program, with campus locations throughout the state, however it also provides educational programming that is open to high school aged students.

The primary change in the proposed regulations would be amendment of the age guidelines for the In School Credit (“ISC”) Program for students currently enrolled in high school. According to the synopsis provided in the Delaware Register of Regulations, the minimum age for the ISC Program is being lowered from 16 to 14, so long as the student has completed at least one semester of high school, because “there is no longer a requirement that the ISC Program mirror federal regulations since Groves does not receive federal funding.” The change would be in effect through June 30, 2022, the stated reason being the Covid-19 pandemic. This would presumably increase flexibility for students whose attendance at school may have been disrupted by the pandemic. Additionally, minor wording changes to the existing regulations are proposed throughout to bring the regulations into compliance with the Delaware Administrative Code Style Manual. These changes do not alter the substance of the regulations.

Broadening the eligibility for this program seems like a reasonable measure to increase flexibility for students to complete credits in light of the unprecedented disruptions imposed by

the Covid-19 pandemic; for this reason the Councils should consider supporting the amendments to the regulations.

#### **6. Proposed DHSS Regulation Streamlined Medicaid Application, 24 Del. Register of Regulations 848 (March 1, 2021)**

The Delaware Health and Social Services (DHSS) Division of Medicaid and Medical Assistance (DMMA) is seeking to amend Title XIX Medicaid State Plan regarding the Streamline Application. The changes pertain to including questions for the justice-involved population (incarcerated individuals) and about retroactive eligibility. The changes would apply to services provided starting May 11, 2021.

This regulation had its genesis in Executive Order 27, signed by Governor Carney on December 4, 2018. The order recognized that “it is a paramount interest of the State for the benefit of all its citizens to: improve the transition from correctional custody to release in the communities; increase public safety; reduce recidivism; make better use of resources in correctional facilities; and expand partnerships with communities, nonprofit services providers and reentry advocates, and statewide justice-oriented membership organizations.”

The order created the Delaware Correctional Reentry Commission (DCRC). Among the objectives of the Commission were to “[d]evelop policies with the DOC [Department of Corrections] and the Department of Health and Social Services (“DHSS”) that provide a continuum of care for reentry for those with mental illness and/or substance use disorders, including the appropriate extension of services after relapse.”

Contiguous with the creation of the DCRC, the State requested and the Centers for Medicare & Medicaid Services (CMS), by Acting Deputy Administrator and Director Calder Lynch, approved the extension and amendment to the Diamond State Health Plan on July 31, 2019. The changes included eligibility for individuals the month they submit an application, and waiver of the three (3) month retroactive eligibility period.

To help implement these changes, the applications for services would include questions for incarcerated individuals, incarcerated dependents, and for retroactive eligibility. Several appendices and other documents are incorporated but not set forth in the proposed regulation because of their length. This reviewer will go over the forms individually as in some the language has changed and in others, it has not.

Appendix A is the Health Coverage From Jobs form. It does not contain any changes.

Appendix B is the American Indian or Alaska Native Family Member form. It also does not contain any changes.

Appendix C is the Assisting With Applications form. This form does not contain any changes.

The Benefit Application Form 100 Justice Involved and Retro Changes form contains the changes specified above. It is an application for food benefits, cash assistance, medical assistance, and child-care assistance. It addresses incarcerated individuals and incarcerated dependents and specifically states that they can apply for benefits. It also asks questions about the populations that are still eligible for retroactive eligibility.

The Health Coverage—Family Justice Involved and Retro form is an application specifically for medical assistance. It addresses incarcerated individuals and incarcerated dependents and specifically states that they can apply for benefits. It also asks questions about the populations that are still eligible for retroactive eligibility.

The Health Coverage—Short Form Justice Involved and Retro form is an application for health coverage. It is shorter and easier to complete than the Health Coverage—Family Justice Involved and Retro form. It contains the changes about incarcerated individuals. Single individuals who are incarcerated and do not have any dependents can use this form.

The last form attached is an application for long term care Medicaid, LTC Application. It does not contain any changes.

The purpose of this regulation is to make it easier for incarcerated individuals to access benefits so that their reentry into society is easier and can help lower or prevent recidivism. To this extent, the changes in the forms are salutary.

Unfortunately, with the good comes the not so good. As a result of the Medicaid Section 1115 Waiver, the State is eliminating the three (3) month period of retroactive eligibility for Medicaid benefits except for certain populations. This could be problematic. The reason given for eliminating the retroactivity for most individuals is that it will allow the State to better control the Medicaid costs while providing “high quality health coverage.” Nevertheless, “if monitoring or evaluation data indicate that demonstration features are not likely to assist in promoting the objectives of Medicaid, CMS reserves the right to require the state to submit a corrective action plan to CMS for approval. Further, CMS reserves the right to withdraw waivers or expenditure authorities at any time it determines that continuing the waivers or expenditure authorities would no longer be in the public interest or promote the objectives of Medicaid.”

Although Medicaid retroactive benefits are being curtailed, there is a review mechanism that allows the CMS to require the State to correct or fix any problems that may result from the waiver or even to withdraw the waiver if it determines that the objectives of Medicaid are not promoted or that the waiver is not in the public interest. Under the circumstances, Councils should consider endorsing the regulation.

## **7. Proposed DHSS Regulation on Market Stabilization Reinsurance Program and Fund, 24 Del. Register of Regulations 841 (March 1, 2021)**

The Delaware Health Care Commission (DHCC), Department of Health and Social Services (DHSS) and Social Services Division of Medicaid and Medical Assistance (DMMA) is seeking

to revise the Delaware Health Insurance Individual Market Stabilization Reinsurance Program and Fund.

These regulations implement House Bill 193. The bill was signed into law by Governor Carney on June 20, 2019. The law amended Title 16 and required the Delaware Health Care Commission to establish the Delaware Health Insurance Individual Market Stabilization Reinsurance Program and Fund. 16 Del. C. § 9903(g). The law also amended Title 18 to define the terms, applicability, and scope of the Delaware Health Insurance Individual Market Stabilization Reinsurance Program. The purpose of the legislation was to provide reinsurance to health insurance carriers that offer individual health care plans. In turn, the program would help to stabilize insurance premiums and provide more financial certainty to those seeking health insurance. The funds for the program come from pass-through monies to Delaware under the Affordable Care Act and a 2.75% annual assessment based on the health insurance carrier's tax liability. 16 Del. C. § 9903(h); 18 Del. C. § 8703(b). The program is administered by the DHCC.

The regulations apply to any health insurance carrier that provides health insurance, and includes insurance companies, health service corporations, health maintenance organizations, and managed care organizations. However, the regulations do not apply to carriers that issue health insurance under Medicare, Medicaid, 29 Del. C. § 5201 et seq., or other similar coverage under state or federal governmental plans. Moreover, the regulations do not apply to “stand-alone dental insurance, stand-alone vision insurance, long-term care insurance, disability income insurance, and all accident-only insurance.” (3.0 Definitions “Health insurance carrier” or “carrier”).

A reinsurance eligible health benefit plan is coverage offered in the individual marketplace that meets the standard of minimum essential coverage as set forth in the Internal Revenue Code, is approved by the Insurance Commissioner and “is delivered or issued for delivery by a carrier in the State.” (3.0 Definitions “Reinsurance eligible health benefit plan”).

Delaware entered into an agreement with the Centers for Medicare and Medicaid Services (CMS) to calculate reinsurance payments to participating carriers and to identify paid claims eligible for reimbursement under the reinsurance program based upon data submitted by the State. (4.1). “When the claim costs for at least one reinsurance eligible individual's covered benefits in a calendar year exceed the attachment point, ” a reinsurance carrier is eligible for a reinsurance payment.” (6.1). Reinsurance payments to all eligible carriers are made annually in the year following the benefit year. (6.3).

The balance of the provisions concern insurers reporting the information to the program, audits conducted by the administrator of the program, and the retention of documents by the eligible insurers.

These regulations were mandated by the law establishing the reinsurance program and fund and promulgated by the DHCC. They further the purpose of the program, namely, to provide reinsurance to carriers that offer individual health plans by reimbursing eligible claims as defined in the regulations. Councils should consider endorsing these regulations.

## **8. DHSS Proposed Regulation on Medication-Assisted Treatment,, 24 Del. Register of Regulations 851 (March 1, 2021)**

The Delaware Health and Social Services Division of Medicaid and Medical Assistance (DMMA) is seeking to amend Title XIX Medicaid State Plan regarding Medication-Assisted Treatment (MAT). The changes would make coverage of the MAT benefit mandatory where previously it was covered under the optional services sections of the Medicaid State Plan. The changes would apply to services provided on or after October 1, 2020.

This regulation was promulgated in response to the Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities (SUPPORT) Act, signed into law by President Trump on October 24, 2018. The SUPPORT Act was a comprehensive and bipartisan effort to address the opioid epidemic. The SUPPORT Act amends § 1902(a)(10)(A) of the Social Security Act. The act requires Medicaid plans to include coverage of MAT for participants in the state plan or waiver of the state plan. The SUPPORT Act requires state Medicaid plans to cover all FDA approved drugs, counseling services, and behavioral therapy from October 1, 2020, through September 30, 2025.

In accordance with federal mandates, this regulation moves coverage of the MAT benefit to the mandatory services section of the Medicaid State Plan. MAT is covered for Medicaid beneficiaries who meet the criteria for receiving services from October 1, 2020 through September 30, 2025.

The coverage under MAT specifically includes Naltrexone,<sup>1</sup> Buprenorphine, Methadone,<sup>2</sup> and all forms of the drugs approved by under § 505 of the Federal Food, Drug, and Cosmetic Act and all biological products licensed under § 351 of the Public Health Service Act. It also requires coverage for counseling services and behavioral therapies related to the required drug and biological coverage.

Under the regulation, coverage under MAT can occur on both an outpatient basis and in-patient residential basis for medically necessary care.

This regulation implements the requirements of the SUPPORT Act. Both the act and regulation are laudable efforts to address the opioid crisis. Councils can and should endorse the regulation.

### **Legislation**

#### **1. Senate Bill 66 Waiving License Fees for Individuals during Re-Entry**

This bill seeks to exempt recently incarcerated individuals from paying revoked license or driving privileges reinstatement fees. For this exemption, the individual must be eligible for and apply for reinstatement of the individual's license or driving privileges within 1 year of their release from Department of Correction Level V supervision. This amendment seeks to limit

financial barriers that may impede an individual from successfully reintegrating into the community after that individual has served their time. Sponsors believe the ability to legally drive is imperative for an individual to secure and maintain employment, access educational opportunities, and foster family and community connections that may lower recidivism. Reintegrating individuals may be required to complete all driver's license written, road, and eye-screen tests before reinstatement. Additionally, if an individual was incarcerated, the individual likely could not renew their license or driving privileges before the license or privilege lapsed. (The fees can be found on the Division of Motor Vehicles website: [https://dmv.de.gov/DriverServices/driver\\_improvement/index.shtml?dc=dr\\_di\\_suspension](https://dmv.de.gov/DriverServices/driver_improvement/index.shtml?dc=dr_di_suspension)).

This amendment is an attempt to make it easier for reintegrating individuals to restore their license and/or driving privileges. DLP suggests that Councils support this bill.

## **2. SB 71 – “Red Flag Indicator” Requirements for Schools**

SB 71 proposes to create requirements for school districts and charter schools regarding so-called “red flag indicators” of school violence. The bill was introduced on February 26, 2021 and is assigned to the Senate Education Committee. The bill would require schools to provide training to employees regarding red flag indicators and to also create an internal framework for reporting, tracking and referral of instances where red flag indicators are identified.

First, school district and charter school employees working with students in grades 6 through 12 would be required to complete annual training on red flag indicators. The initial required training would be three hours, with an additional hour of training required each year after the initial training and a further three hours of training required every five years after the initial training. Per the bill, “red flag indicator training must include... information that enables employees to recognize, identify, and understand the psychosocial indicators and behaviors that a student who is dangerous to self or dangerous to others may exhibit” as well as information regarding “red flag reporting, tracking, and referral requirements.”

Second, each school district and charter school would be required to “establish and maintain a red flag indicator reporting, tracking, and referral policy to ensure that a student identified as likely being dangerous to self or others may be reported, tracked, and referred for appropriate mental health evaluation or treatment or law enforcement action.” The bill would provide immunity from civil and criminal liability as well as professional discipline for all school district and charter school employees complying in good faith with the red flag indicator requirements. The bill also clarifies that the red flag indicator requirements would not alter reporting requirements for school employees of certain suspected crimes under 14 Del. C. § 4112 (which requires reporting of certain suspected crimes involving students or school property, including violent felonies, assault, or unlawful sexual contact), or other mandated reporting requirements involving suspected abuse of minors.

Additionally, the bill contains some technical corrections to adjust the numbering of certain sections of Chapter 14 of the Delaware Code, which do not result in any major substantive changes and will not be further addressed in this memo.

Delaware has a “red flag” law specifically relating to possession of firearms, enacted as the Beau Biden Gun Violence Prevention Act in 2018, that created a procedure for the issuance of relinquishment orders that would remove firearms from an individual’s possession when a threat of imminent harm has been identified. Under that law, the process for requesting a relinquishment order can be initiated by either a law enforcement officer or mental health professional. While some other jurisdictions have red flag laws with specific provisions delegating similar authority to school officials in cases where students may be presenting a potential threat of harm, Delaware’s red flag law did not specifically create any authority or procedures with respect to school employees or administrators. It is likely however, that some school employees would qualify as either enforcement officers or mental health professionals for purposes of the existing law.

A major critique of “red flag” legislation in general has been that it may further stigmatize individuals with mental illness and other mental or emotional disabilities and perpetuate the conception that they are more likely to commit certain violent crimes, when data consistently shows that a history of violent behavior is a far stronger predictor of future violence than any specific diagnosis (further analysis of misconceptions surrounding mental health and gun violence can be found in the Coalition for Smart Safety and the Coalition for Citizens with Disabilities Rights Task Force’s publication *Debunking the Myths: Mental Health and Gun Violence*, available at [http://www.bazelon.org/wp-content/uploads/2020/02/2-3-2020-DebunkingTheMyths\\_Follow\\_up\\_Materials.pdf](http://www.bazelon.org/wp-content/uploads/2020/02/2-3-2020-DebunkingTheMyths_Follow_up_Materials.pdf)). Another common concern is that the existence of red flag protocols and laws might discourage some individuals from seeking mental health treatment when they really need support because they fear being labelled as a threat. In the school context, adolescent students may particularly fear being ostracized or bullied by peers if they are labelled as potential perpetrators of school violence.

While the synopsis of the bill specifically focuses on preventing “mass murder,” presumably school shootings, of which there have unfortunately been numerous horrifying examples in other states in recent years, the scope of this bill is potentially much broader. The bill does not provide a lot of specific guidance as to what the red flag indicator training or “reporting, tracking, and referral” requirements would entail, and appears to leave those details largely up to the individual districts and charter schools. It is not clear to what extent the bill intends that schools would be relying on the processes in Delaware’s existing red flag law to specifically address a person’s access to firearms if a risk is identified, or if schools would be encouraged to take other action. It does not provide any further guidelines as to how schools should handle the report of a student demonstrating red flag indicators such as when to involve family or mental health professionals versus involving the police, or what notification a student may receive that they have been reported and what if any rights a student may have following an initial report.

The lack of specifics in the bill is concerning, as without more clear limits the implementation of these requirements could further stigmatize students with certain types of disabilities. Additionally depending on what protocols a school puts in place, well-intentioned reports based on genuine concerns for an individual student’s wellbeing could potentially expose that student to unnecessary law enforcement scrutiny and contact. This is of particular concern as statistically speaking students with disabilities, and particularly students of color with disabilities, are already

disproportionately likely to be arrested or otherwise referred to law enforcement. (See, e.g. American Civil Liberties Union, *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students* at p. 5, available at <https://www.aclu.org/report/cops-and-no-counselors>, which based on analysis of U.S. Department of Education data found that overall students with disabilities were nearly three times more likely to be arrested than students without disabilities, though “in some states, they were ten times as likely to be arrested.”).

The immunity provided to school employees may further encourage them to err on the side of reporting when they are not sure about a potential red flag indicator. While it is understandable why this would be included to encourage good-faith reports that may ultimately protect the safety of students and school staff, without a more clearly defined process for handling these reports it is unclear what impact this immunity could have on students who have been identified by school employees as displaying red flag indicators.

The Councils should oppose this bill in its current form. If the bill is to be revised, it would be helpful for more specific guidance to be provided regarding the procedures it contemplates being used by schools to respond to red flag indicators, including the rights of a student who has been identified as displaying red flag indicators. Ideally it would also contain specific language to clarify that the existence of a mental health condition or other mental or emotional disability on its own should not be considered a red flag indicator. Without such parameters, this legislation is likely to unfairly target students with disabilities and potentially strengthen the school-to-prison pipeline.

### **3. SB 19: An Act To Amend Title 14 Of The Delaware Code Relating To Exceptional Children In Homeschools.**

This bill proposes to amend Title 14 of the Delaware Code as it pertains to special education provision for homeschooled students eligible for special education.

The bill adds the following language, clearly defining the special education services a school district would be required to provide a homeschooled student in order to constitute a free appropriate education (“FAPE”):

d. For a student in a homeschool, under § 2703A of this title, “free appropriate public education” means speech language pathology and audiology services required to assist a child with a disability to benefit from an education under paragraphs (5)a.1. through (5)a.6. of this section.

and that:

(b) The rules promulgated by the Department of Education with the approval of the State Board of Education shall provide all of the following... (2) That a child with a disability who attends a homeschool under § 2703A of this title, is eligible for speech language pathology and audiology services in the same manner as a student who attends a private school is eligible for equitable services.

However, while the draft language proposes that the services provided to homeschool students mirror the services offered to students parentally placed, in public schools, the bill includes draft language proposing different child find obligations for private school and homeschooled students.

The bill includes existing language (with only slight alterations in this draft, describing that

(b) (1) ....each school district shall be required to identify, locate, and evaluate, or reevaluate, any children with disabilities residing within the confines of that school district, including children with disabilities who are homeless children or wards of the State, regardless of the severity of the disability, and who are in need of special education and related services.

However, the newly proposed language suggests that school districts would have less of an obligation to find, identify, and evaluate students who are homeschooled who may eligible for special education services. The language proposes that:

(2)a. On request of a parent or guardian of a student, each school district, excluding vocational school districts, shall evaluate, or reevaluate, a child with a disability who attends a homeschool under § 2703A of this title located within the confines of that school district, regardless of the severity of the disability, and who is in need of special education and related services for speech language pathology and audiology services.

Councils should oppose the addition of this language as it fails to meet the states IDEA Child Find mandate. IDEA regulations require that “the State must have in effect policies and procedures to ensure that—(i) All children with disabilities residing in the State, including ...children with disabilities attending private schools...who are in need of special education and related services, are identified, located, and evaluated...” 34 CFR §300.111. The proposed language shifts this federally mandated obligation from the state to the parents of homeschooled students. For all other purposes in this proposed bill, the language treats homeschooled students and private school students similarly. While the IDEA regulations do not specifically mention homeschooled students, the mandate clearly states that the Child Find obligation extends to students in private schools. While it is understood that finding, evaluating, and identifying homeschooled students may have unique challenges, the state cannot dismiss its obligation under federal statute and regulations. 20 U.S.C. § 1435 (a) (5); 34 CFR §300.111. Furthermore, due to the unique circumstances of the 2019-2020 and 2020-2021 school years, it is likely that more families may have decided to home school their students for the first time. It may be particularly crucial to avoid excluding students from services they are owed, particularly at a time when more families may be choosing this type of educational setting.

The rest of the draft language again proposes to provide related services for eligible homeschooled students in a similar manner to students parentally place in private school:

b. The school district shall evaluate or reevaluate a child under paragraph (b)(2)a. of this section in the same manner as children under paragraph (b)(1) of this section.

c. A child with a disability is eligible to receive related services for speech language pathology and audiology services under paragraph (b)(2) of this section as follows:

1. The parent or guardian educating the child must comply with the school district evaluation requirements and the services plan provided by the school district.
2. The child is eligible for services in the same manner as is a child who receives the services in a school district or charter school.

Councils should reject language proposing that school districts are only obligated to evaluate homeschooled students for special education services if their parent reaches out to the school district. The Child Find mandate requires school districts must locate, identify, and evaluate all students who may be eligible for special education services. This proposed language impermissibly shifts the Child Find obligation from the school district to parents, at time when even more students may be receiving educational services in a homeschooled setting and could benefit from evaluation and services.