Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 10/14/2021

Re: October 2021 Policy and Law Memo

Please find below per your request analysis of pertinent regulations from the October Register of Regulations.

Proposed DDOE Amendments to 14 DE Admin. Code 615: School Attendance, 25 Del Reg. of Regulations 360 (October 1, 2021)

Summary

The Delaware Department of Education ("DDOE") proposes new edits to regulations governing school attendance. These proposed amendments include new requirements about the contents of school attendance policies and require these policies to:

- "…[I]nclude information on how families and students may access supports and resources for student absences due to social, emotional and behavioral wellness." (2.1)
- "…[P]ermit one excused absence per school year for students in grades 6 through 12 to attend civic engagements, such as visits to the United States Capitol, Delaware Legislative Hall, political or cultural significance sites, to advocate or testify on behalf of legislation, or to participate in a rally, march, or protest. The student's parent, guardian, or relative caregiver must submit a signed, written excuse which is received by the district or charter school at least three (3) days before the student's absence." (2.2)
- Include procedures for excusing absences for religious observances. (2.3)
    - These procedures must permit excusals for a provided list of Baha'i, Buddhist, Hindu, Islamic, and Jewish holidays upon written and signed request from a student's parent/ caregiver. (2.3.1)
    - The proposed policy also states that schools "*may* excuse student absences on any other day not included on this list for religious or cultural observances." (emphasis added). (2.3.2)
    - The proposed policy requires schools to permit students to make up any grading event that was scheduled during a religious holiday. Additional, under the proposed amendments, no student "shall be deprived of any award or eligibility to compete for any award" due to absence for religious holiday observance. The proposal also requires that "attendance polic[ies] must discourage teachers from scheduling major grading events…on religious holidays." (2.3.3-2.3.5)
    - Under the proposed amendments, the Department of Education "shall annually release a list of upcoming religious holidays for the upcoming school year and

shall also keep an updated list on the Department of Education website," and will send the annual calendar to each school district and charter school "in time for school calendars creation." The annual list of holidays will not include outside of the school year. (2.3.6-2.3.8).

Additionally, the proposed amendments require school districts or charter schools to provide a parent or guardian with a hard copy of the attendance policy "when absences have exceeded ten (10) unexcused absences," The hard copy of the attendance policy provided must "include phone numbers to area supports and a school contact number." (3.3) This requirement is in addition to the current requirement that the attendance policy must be provided to each student at the beginning of the school year or upon enrollment and to parents or guardians upon request. Under current policy, the attendance policy must also be available on the school website (with written notice to the parent/guardian and to the student of where the policy can be accessed). The amended policies also proposes that the attendance policy must also be provided to "educators and support staff at the beginning of each school year." (3.4).

Considerations

The proposal addition 2.1 states that "[t]he attendance policy shall include information on how families and students may access supports and resources for student absences due to social, emotional and behavioral wellness." While this is a beneficial proposal, Councils may wish to recommend further amendments addressing student health and wellness as it extends to attendance, particularly as schools return to near universal in-person instruction following remote learning during the COVID-19 crisis.

For example, Illinois has enacted legislation permitting students to request up to five excused absences for mental health purposes without requiring a doctor's note.[1] Under this new Illinois legislation, after a student requests their second excused mental health absence, they will be referred to a mental health professional. This is part of a growing trend (Arizona, Colorado, Connecticut, Maine, Nevada, Oregon, and Virginia), and several states have adopted similar policies permitting excused absences for student mental health.

Councils may also consider recommending policies to provide more proactive, non-punitive support for students and families who are experiencing chronic absenteeism, or who have experienced frequent absenteeism since March 2020 during periods of remote instruction.

Councils may also consider recommending further additions to the proposed language regarding excused absences for religious observation. The proposed language in Section 2.3.1 provides a discrete list of religious holiday observances that school districts and charter schools must excuse. However, under the proposed language for 2.3.2, schools appear to have discretion as to whether they must recognize any other religious holiday not included on that that list. Councils may wish to amend this language to require school districts or charter schools to recognize religious holidays outside of the prescribed list developed by the Department of Education.

Finally, Councils may wish to recommend that the attendance policy also be provided to each parent each year. Under the amended language, the attendance policy must be provided to every

[1] https://www.ilga.gov/legislation/102/SB/PDF/10200SB1577lv.pdf; https://www.npr.org/sections/back-to-school-live-updates/2021/09/02/1033605650/illinois-children-mental-health-days-schools-coronavirus

student, faculty member, and support staff member each school year (3.1-3.2;3.4), but parents are only provided with written notice of where the attendance policy can be found on the school website. Under the proposed amendments, parents will only be provided with a hard copy of the policy upon request or after a student has had ten or more absences during a single school year (3.3). It seems like it may be more streamlined to simply provide parents with the attendance policy annually, with additional reminders of the policy if students have ten or more absences during a school year.

DHSS Emergency Orders, 25 Del. Register of Regulations 319-357 (October 1, 2021)

The Delaware Department Health and Social Services ("DHSS") adopted a number of emergency regulatory amendments to Title 16 of the Delaware Administrative Code related to healthcare services throughout the Delaware community. DHSS is adopting these emergency orders pursuant to its authority under 29 Del. C. § 10119, which authorizes an agency to adopt emergency regulations when it determines it is necessary to protect the public health, safety, or welfare from imminent peril.

Due to the widespread transmission of COVID-19, many vulnerable individuals have been significantly impacted. Although the availability of COVID-19 vaccines has helped mitigate some of the risk, the protocols related to health and safety should not be discontinued. To protect Delaware citizens from COVID-19, a comprehensive infection control and prevention program was developed based upon guidance from the Centers for Disease Control and Prevention ("CDC") as well as other national organizations. These emergency orders build upon the emergency regulations published in the July 2021 Delaware Register of Regulations (25 DE Reg. 6-37). These emergency regulations apply to:

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§ 3210 Nursing Homes Admitting Pediatric Residents (25 DE Reg. 319)
§ 3301 Group Home Facilities for Persons with AIDS (25 DE Reg. 321)
§ 3305 Group Homes for Persons with Mental Illness (25 DE Reg. 324)
§ 3310 Neighborhood Homes for I / DD (25 DE Reg. 326)
§ 3315 Family Care Homes (25 DE Reg. 328)
§ 3320 Intensive Behavioral Support and Educational Residence (25 DE Reg. 330)
§ 3330 Regulations Governing Dialysis Centers (25 DE Reg. 333)
§ 3335 Office-Based Surgery (25 DE Reg. 335)
§ 3340 Free Standing Emergency Departments (25 DE Reg. 337)
§ 3345 Personal Assistance Services Agencies (25 DE Reg. 339)
§ 4402 Regulations for Adult Day Care Facilities (25 DE Reg. 341)
§ 4403 Free Standing Birthing Centers (25 DE Reg. 343)
§ 4405 Free Standing Surgical Centers (25 DE Reg. 346)
§ 4406 Home Health Agencies--Aide Only (Licensure) (25 DE Reg. 348)
§ 4407 Hospital Standards (Construction, Maintenance, and Operation) (25 DE Reg. 350)
§ 4409 Prescribed Pediatric Extended Care Centers (PPECC) (25 DE Reg. 352)
§ 4410 Skilled Home Health Agencies (Licensure) (25 DE Reg. 354)
§ 4468 Delivery of Hospice Services (25 DE Reg. 357)

The emergency regulations propose the following specific requirements related to COVID-19:

1. Before their start date, all new staff, vendors and volunteers must be tested in accordance with Delaware Division of Public Health ("DPH") Guidance.
2. All staff, vendors and volunteers must be tested for COVID-19 in a manner consistent with DPH guidance.
3. The licensee must follow recommendations of the CDC and DPH regarding the provision of care or services to residents by staff, vendor, or volunteer found to be positive for COVID-19 in an infectious stage.

Furthermore, it requires that licensees amend their policies and procedures to include:

1. Work exclusion and return to work protocols for staff tested positive for COVID-19.
2. Staff refusals to participate in COVID-19 testing;
3. Staff refusals to authorize release of testing results or vaccination status to the licensee.
4. Procedures to obtain staff authorizations for release of laboratory test results to the licensee to inform infection control and prevention strategies; and
5. Plans to address staffing shortages and licensee demands should a COVID-19 outbreak occur.

Lastly, it requires that staff in the impacted health care settings either provide evidence of COVID-19 vaccination or undergo regular testing to prevent the transmission of COVID-19. Although employees will have the choice between getting vaccinated or getting tested, DHSS is urging employers to encourage employees to get vaccinated. Federal guidance allows employers to require vaccinations as long as employers comply with the reasonable accommodations requirements under the Americans with Disabilities Act ("ADA"), the Civil Rights Act of 1964, and "other Equal Employment Opportunity considerations."[2]

The Emergency Orders are set to expire 120 days after September 30, 2021 with an option to renew the order for a period not to exceed 60 days.

On August 12, 2021, Governor Carney announced the "Vaccination or Testing" requirement for long-term care facilities, health care facilities, and state employees.[3] This announcement and these regulations come after several announcements and actions taken by the federal government concerning "Vaccination or Testing" requirements. Not all of DHSS's requirements will align with current and / or forthcoming federal guidance / requirements.

Executive Order

On September 9, 2021, President Biden signed an Executive Order requiring that *all* federal employees be vaccinated against COVID-19, subject to exceptions as required by law (such as

[2] EEOC Issues Updated COVID-19 Technical Assistance. (May 28, 2021). https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance

[3] COVID-19 Vaccination and Testing Updates for Long-Term Care Facilities, Health Care Facilities, and State Employees. (August 12, 2021). https://news.delaware.gov/2021/08/12/covid-19-vaccination-and-testing-updates-for-long-term-care-facilities-health-care-facilities-and-state-employees/

reasonable accommodations under the ADA).[4] This Executive Order was extended to cover contractors that do business with the federal government.[5]

Centers for Medicare and Medicaid Services

On August 18, 2021, the Centers for Medicare and Medicaid Services ("CMS"), in collaboration with the CDC, announced it was developing an emergency regulation which would require that staff working within Medicare and Medicaid-participating nursing homes be vaccinated against COVID-19.[6]

On September 9, 2021, CMS announced it would develop an interim final rule this month which would expand the COVID-19 vaccination requirement to include not only Medicare and Medicaid-participating nursing homes but also Medicare and Medicaid-participating hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others.[7] Under the forthcoming rule, staff vaccinations will be a condition to continue participating in Medicare and Medicaid programs.

CMS is encouraging covered facilities to ensure its health care staff are vaccinated *now* to make sure they are in compliance when the rule takes effect.

Given the guidance and recommendations coming from the federal government, Councils should consider recommending that DHSS revise its proposed emergency regulations to require staff vaccinations for all impacted health care facilities, subject, of course, to exemptions under federal law (such as the ADA).

DHSS DMMA SPA PROGRAM OF ALL-INCLUSIVE CARE FOR THE ELDERLY, 25 Del. Reg. of Regulations 384 (October 1, 2021)

The Delaware Health and Social Services (DHSS), Division of Medicaid and Medical Assistance (DMMA) is seeking to amend the Title XIX Medicaid Plan to incorporate the current version of the Program of All-Inclusive Care for the Elderly (PACE). The state plan amendment will apply to services provided on or after December 11, 2021. The comment period ends November 1, 2021, and the decision whether to adopt the state plan amendment will be based upon the analysis by DHSS DMMA staff and comments and materials received from interested parties. The state plan amendment needs to be approved by the Centers of Medicare and

[4] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/
[5] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/
[6] https://www.cms.gov/newsroom/press-releases/biden-harris-administration-takes-additional-action-protect-americas-nursing-home-residents-covid-19
[7] https://www.cms.gov/newsroom/press-releases/biden-harris-administration-expand-vaccination-requirements-health-care-settings

Medicaid Services (CMS). The previous state plan became effective on October 1, 2011 and was approved February 28, 2012.

By way of background PACE is a model of care that can be traced back to the 1970's in the Chinatown-North Beach community of San Francisco.[8] As of 2017, there were 122 PACE programs in thirty-one (31) states.[9] This model of care is referred to as managed care at home and in some jurisdictions, is known as the Life (Living Independence for the Elderly) program.

To be eligible for PACE, an individual has to be at least fifty-five (55) years old, living in a PACE provider service area, meets a nursing home level of care at determined by DMMS, and is able to live safely in the community when the person enrolls in the program. Saint Francis LIFE is Delaware's only PACE program and provides services in New Castle County.

Delaware has voluntarily elected to provide medical assistance for PACE program services. The proposed plan amendment is the latest iteration where PACE is a provider under Medicare that allows states to pay for PACE services under Medicaid. The state negotiates rates with the PACE organization, and they are less than the amount the state would pay for a comparable population.

Although there is only one (1) PACE program in the state and it only provides services for eligible individuals in New Castle County, new PACE programs could be established in all three (3) counties. Where PACE is not available, Medicaid managed care is provided for eligible individuals through managed care organizations (MCO) (and is not covered by this plan amendment). The latest plan amendment simply brings the state's program into compliance with the current version of PACE. This is an easy amendment for Councils to endorse.

DMMA Public Notice – Targeted Case Management for Individuals with Intellectual and Developmental Disabilities Meeting Delaware DDDS Criteria Living in Their Own Home or the Family Home, 25 Del Reg. of Regulations 422 (October 1, 2021).

The Division of Medicaid and Medical Assistance ("DMMA") has issued a public notice announcing proposed changes to the reimbursement methodology used for Targeted Case Management ("TCM") for individuals with intellectual or developmental disabilities ("IDD") qualifying for services from the Division of Developmental Disabilities ("DDDS") who are living in their own home or the family home. Targeted Case Management services are defined by the relevant Medicaid State Plan Amendment ("SPA") as "services furnished to assist individuals, eligible under the State Plan, in gaining access to needed medical, social, educational, and other services, regardless of the funding source for the services to which access is gained" (see State Plan Amendment Transmittal DE-16-011, *available at* https://www.medicaid.gov/sites/default/files/State-resource-center/Medicaid-State-Plan-Amendments/Downloads/DE/DE-16-011.pdf). These services are provided by "Community Navigators" who are employed by contracted provider agencies. TCM services were approved

[8] National PACE Association, https://www.pace4you.org.
[9] Id. Is Pace for You? History.

to be provided to both individuals who were living in their own home or the family home and to individuals receiving Residential Habilitation services through a DDDS-contracted provider.

The reimbursement methodology currently in use was approved by CMS as part of the SPA that introduced coverage for TCM for DDDS clients in 2017. According to DMMA's explanation, as TCM services had not previously been provided as defined by the 2017 SPA, 'initial rates were established based largely on budgeted cost data and assumptions of Medicaid eligibility and service utilization." The current methodology uses a "carry forward adjustment to compensate for differences between estimated and actual costs from the prior period used in the TCM rate calculation."

DMMA is proposing to shift to a "prospective negotiated rate structure" for TCM services provided to individuals in their own homes or their family home. This would entail DMMA agreements with providers based on a restructured calculation method for the overall reimbursement rate. Rates could still be renegotiated by the provider should "unforeseen policy changes" result in more than a 5% increase in program costs. The proposed new methodology would restructure the limits for General and Administrative costs for contracted providers. DMMA's reasoning for the proposed change in methodology is that the current methodology "combined with changes to the service delivery model that have been implemented over time" have resulted in "wide swings in the annual TCM rates" that have resulted in some unpredictability in reimbursement rates. DMMA feels that such wide variation in rates is potentially discouraging to both current and prospective contracted providers of TCM services. DMMA does not specify what the changes in the TCM service delivery model have been, however the proposed changes do not appear to affect what services would be covered as part of TCM or what categories of costs would be reimbursable for providers.

According to the information provided in the notice, the change in reimbursement methodology is not expected to result in a change in overall cost, however it is expected to result in more stable rates over time. Despite the change in reimbursement methodology providers would still be required to submit regular cost reports "to enable DDDS to monitor trends and changes and to complete a time study as specified by the State."

The quality of and service recipient and family member satisfaction with case management services available to individuals with IDD have been a persistent issue in Delaware. Data from the Human Services Research Institute ("HRSI") and the National Association of State Directors of Developmental Disabilities Services ("NASDDDS") National Core Indicators Survey has shown Delaware rating significantly below average in many categories (and in some categories the lowest among states surveyed) with respect to various aspects of case management and the communication of information about available services and supports for individuals with IDD living in their family home (see, e.g., National Core Indicators Adult Family Survey, 2019-2020 Final Report, *available at* https://www.nationalcoreindicators.org/upload/core-indicators/2019-20_AFS_National_Report_4_5.pdf). As provider recruitment and retention is a necessary component of ensuring the availability and quality of these services, and the proposed change in reimbursement methodology should not change what services would be offered to individuals and their families through TCM, the Councils may wish to support the proposed changes.