

Memo

To: GACEC; DDC; SCPD
From: DLP/Stefanie Ramirez
Date: 8/16/2022

Re: August 2022 Policy and Law Memo

Councils have asked us to review and analyze the following regulations for this month. You have already received analysis of the regulation related to DDDS Eligibility Criteria; we have included in this memo as well.

Proposed DDOE Regulation on 701 Unit Count, 26 Del. Register of Regulations 82 (August 1, 2022)

The Delaware Department of Education (“DDOE”) proposes to amend 14 Del. Admin. C. § 701, which describes how students are to be counted in the September unit counts to determine funding. DDOE is proposing to amend this regulation to change how schools are required to notify each other in the event of an intrastate transfer from fax to email. DDOE also proposed additional non-substantive changes to ensure the regulation complies with the *Delaware Administrative Code Drafting and Style Manual*.

Specifically, proposed 14 Del. Admin. C. § 701.3.1.3 would require

District and charter schools enrolling an in state transfer student during the last 10 school days of September [to] notify the student's previous district or charter school of such enrollment no later than the last student attendance day of September. The notification shall be by **electronic submission via email** with a follow up letter to the previous district or charter school’s unit count coordinator’s office. The notification shall be clearly labeled Unit Count Transfer Students and include the student's name, grade, and previous school of attendance. A student enrolling with a formal notice of withdrawal from the previous district or charter school is exempted from this notification requirement. Failure to follow the notification procedure may result in including the same student in two different district or charter school enrollments and hence unit counts. If that occurs, the student will be disallowed from the receiving district or charter school’s enrollment and unit count. Copies of the **electronic submission via email** and follow up letters shall be on file to substantiate the student's inclusion in the receiving district or charter school’s enrollment and unit count.

(emphasis added). The bold font indicates the only substantive changes proposed. This proposed change does not impact students with disabilities and merely changes how school districts should communicate regarding intrastate transfers. Therefore, no action is warranted.

Proposed DDOE Regulation on 702 Education Opportunity Fund, 26 Del. Register of Regulations 87 (August 1, 2022)

DDOE proposes to create 14 Del. Admin. C. § 702, which will identify the types of services and supports which may be funded with the per pupil funding monies from the Opportunity Fund

(hereinafter, “the Fund”), established under Senate Bill 56 of the 151st General Assembly.¹ SB 56 codified the Fund at 14 Del. C. § 1726, which provides an additional source of educational funding for Delaware public schools that is intended to support the increased needs of low income (“LI”) and English learner (“EL”) students. 14 *Del. C.* § 1726 also establishes the parameters for how the funding is to be distributed to school districts and charter schools and requires DDOE to adopt regulations relating to the services and supports for which monies from the Fund may be used.

The types of services and supports for which monies from the Fund may be used are (1) additional staff, including personnel dedicated to improving reading comprehension and math proficiency, and staff who provide additional wrap-around services, mental health supports, and other services listed in the regulation; and (2) contractual services and supplies and materials needed for the foregoing services.²

Proposed 14 *Del. Admin. C.* § 702.2 includes definitions for English Learner, Low Income students, Mental Health Supports, Opportunity Fund, Students with Interrupted Formal Educations, WIDA English Language Development Standards, and Wrap-around Services. Of concern are the definitions related to ELs, mental health supports, wrap-around services.

The proposed definition of an EL is “an individual who has English language speaking, reading, writing, or understanding difficulties sufficient to deny the individual the ability to meet challenging state academic standards as defined using Delaware's standardized entrance and exit procedures.” This definition does not require either that the child’s native language be other than English or that the child be from an environment where a language other than English has had a significant impact on the child’s level of English language. Thus, under the definition an EL student could be one from a home where only English is spoken, which would be inconsistent with the reason for EL funding being included in Opportunity Funds. Councils may wish to recommend that the definition be changed to amend that requirement.

The proposed definition for mental health supports is

a variety of strategies and services that can support the social, emotional and behavioral wellbeing and mental health of students and their families. Supports of this type include, behavioral assessment and intervention, individual and group, family psychoeducation and support intervention, social and emotional learning, and mental health promotion, instruction and support, engagement strategies, assessment, screening, crisis management, suicide prevention and coordination of services.

This definition specifically includes the support of psychoeducation yet fails to include its counterpart – psychological treatment. Councils may wish to recommend that “psychological treatment” be added to the definition to ensure psychological treatment is available under the Fund.

¹ <https://legis.delaware.gov/BillDetail/48348>.

² 14 *Del. C.* 1726(b)(1).

The proposed definition for wrap-around services is “a variety of strategies and services to support the needs of the student in the areas of attendance, academic engagement, behavior incidents or referral.” This definition takes a narrow view of what constitutes wrap-around services by focusing in on the student and his or her interaction with the school environment and disregarding the need for also supporting the student’s family.

For example, the National Wraparound Initiative says³

Wraparound differs from many service delivery strategies, in that it provides a comprehensive, holistic, *youth and family-driven* way of responding when children or youth experience serious mental health or behavioral challenges. Wraparound puts the child or youth and family at the center. With support from a team of professionals and natural supports, the family’s ideas and perspectives about what they need and what will be helpful drive all of the work in Wraparound.

(*emphasis added*). The definition of wrap-around also refers to academic engagement but fails to mention academic achievement. Councils may wish to address both these points by recommending that the definition be modified to make clear that the Fund may be used to provide services directed at the student’s family, outside of the school itself, and to promote academic achievement.

Proposed 14 Del. Admin. C. § 702.3 lists personnel, contractual services, and supplies and materials for which Fund monies may be used. The following are concerns within those terms:

1. There is no provision to pay for transportation. However, the contractual services do include extended day learning experiences and summer learning experiences. Therefore, it is important that the contractual services available also include transportation to enable EL and LI students to attend after school programs intended for them.
2. One permitted use of the funding is “[d]ata systems to support instructional decisions” found at proposed 14 Del. Admin. C. § 702.3.1.2.9. Data systems should not be funded by money intended specifically to enhance services for EL and LI students.
3. The list of services and supports that can be funded include school social workers and licensed clinical social workers (“LCSW”), the latter of which presumably means it could be any LCSW regardless of whether they have specific training for providing services in schools.⁴ The list also includes funding for school psychologists;⁵ however, it does not include other licensed psychologists or mental health therapists. To make this provision clear that they are included, Councils may wish to request that, at the very least, DDOE include a specific provision which would allow employing additional personnel such as mental health therapists.

Finally, the language used throughout the proposed regulation (e.g. “such as” and “includes”) makes the lists appear to be non-exhaustive. The authorizing legislation, 14 *Del. C.* § 1726(b)(1), directs that the DDOE, via regulation, identify the types of services that may be paid for with money from the Fund. To support having the regulation comply with the statute, and to best

³ <https://nwi.pdx.edu/wraparound-basics/>.

⁴ 14 Del. Admin. C. §§ 702.3.1.1.9 and 3.1.1.11.

⁵ 14 Del. Admin. C. § 702.3.1.1.10.

serve EL and LI students by requiring that the monies from the Fund only be used for purposes that DDOE has determined are needed to enhance services for EL and LI students enrolled in Delaware public and charter schools, Councils may wish to recommend that the following changes be made to ensure the lists are exhaustive.

1. Change proposed § 3.1.1 from “Employing additional personnel such as:” to “Employing the following additional personnel:”;
2. Change proposed § 3.1.2 from “Contractual services such as:” to “The following contractual services:”;
3. Add § 3.1.2.11 which would be “Any other service or support provided for in § 3.1.1 or § 3.1.3”; and
4. Change proposed § 3.1.3 from “Supplies and materials such as:” to “The following supplies and materials:”.

DDOE’s proposed regulation is necessary and required by law. Therefore, Councils should support proposed 14 Del. Admin. C. § 702. However, Councils may wish to accompany that support with the recommendations detailed above and briefly recited here:

1. modify the definition of EL to require that, in addition to what is already included in the definition, the child’s native language be other than English or that the child be from an environment where a language other than English has had a significant impact on the child’s level of English language;⁶
2. “psychological treatment” be added to the definition of mental health supports;
3. modify the definition of wraparound services to make clear the services include those directed at the student’s family, outside of the school itself and to promote academic achievement;
4. include a provision to pay for transportation;
5. remove “data systems” from the list of services and supports for which the Fund may be used to provide because they should generally be funded by monies not intended for EL and LI students; and
6. include a provision to pay for mental health therapists or other licensed psychologists.
7. make the language changes in proposed §§ 3.1.1-3.1.3 to ensure the lists of services and supports for which monies from the Fund are available are exhaustive lists.

Proposed DMMA Regulation on extension of Medicaid to post-partum women, 26 Del. Register of Regulations 92 (August 1, 2022)

DMMA proposes to amend the DSSM, the Medicaid State Plan and the CHIP state plan to extend automatic extension of Medicaid coverage to post-partum women and girls from 60 days to 12 months. ARPA provided states with the option of making this extension of coverage. The hope is that the extension of coverage will help improve Delaware’s dismal infant and mortality morbidity and mortality rates and improve overall health by helping to address higher incidences of chronic medical issues among Medicaid recipients. Councils should consider endorsement of this initiative.

⁶ This would be consistent with the definition of EL in the Every Student Succeeds Act at 20 U.S.C. § 7801(20).

Proposed DDDS Regulation 2100 Eligibility Criteria, 26 Del. Register of Regulations 81 (August 1, 2022)

The Delaware Division of Developmental Disabilities Services (“DDDS”), proposes to modify 16 Del. Admin. C. § 2100, establishing eligibility criteria for DDDS. The proposed regulation, § 2100, is intended to:

- Update terminology;
- Clarify details regarding age and citizenship.
- Add provisional eligibility to individuals ages three (3) through eight (8) who do not have requisite assessments;
- Allow DDDS discretion to decide eligibility without all required assessments;

The proposed regulation strikes in its entirety the existing regulation and replaces it with new language. This analysis will walk through the updated terminology and then the various important subsections of the proposed regulation.

A. Updated terminology

The current regulation uses outdated terminology that is inconsistent with current diagnostic classifications and people first language. For example, the regulation utilizes the term “mental retardation” while the current version of the Diagnostic and Statistical Manual (“DSM-5-TR”) and prior version (“DSM-5”), use the term “intellectual disability.” This change occurred when the DSM-5 was published in 2013. See https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Intellectual-Disability.pdf and <https://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm#:~:text=DSM%E2%80%935%20was%20published%20in%202013>. **The councils may wish to be supportive of these updates to terminology.**

B. Clarifications around citizenship.

The regulation changes non-citizen residency from “a lawful alien of the United States” to “qualified alien according to DE Medicaid Requirements,” referencing 16 DE Admin. Code § 14310, which utilizes an existing Medicaid regulation’s definition to establish eligibility. Qualified aliens include individuals with permanent residency, refugees, asylees, victims of trafficking, and certain other immigrant classifications. “A lawful alien” did not correlate with Medicaid terminology, so changing to be consistent with Medicaid terminology and definitions will make interpretation clearer, especially for those seeking long term care/Medicaid waiver services. **Councils may wish to request that DDDS clarify in the regulation that the five-year bar, which qualified aliens are subjected to before eligibility for Medicaid services,**

does not apply to non-Medicaid DDDS services and would not be a barrier to DDDS eligibility.

The change in terminology does eliminate from eligibility “lawfully residing nonqualified aliens,” including individuals with temporary resident Amnesty status, a spouse or child of a U.S. citizen who is waiting for their lawful permanent residency to be approved, and children with pending applications for Special Immigrant Juvenile Status (“SIJS”, which is a type of benefit for abused, neglected, and abandoned children; these children would be eligible as qualified aliens once they become permanent residents), see 16 DE Admin. Code § 14320. Some such lawfully residing nonqualified aliens are eligible for Medicaid benefits until the age of 21, or while pregnant, including those who have applied for SIJS. 16 DE Admin. Code §14350. **Thus, the Councils may wish to advocate that DDDS include lawfully residing nonqualified aliens covered by §14350.**

C. Changes around Age

1. Addition of a minimum age

The proposed regulation adds a minimum age of three. This is a new addition with this regulation and eliminates eligibility for individuals ages 0-3. However, such children would likely be eligible and receiving services from Child Development Watch / the birth to three program, which provides services to this age group.

2. Provisional eligibility for ages 3-8

Another change the proposed regulation makes around age is to allow for provision eligibility for potential service recipients between the age of three and eight, who have not yet undergone the required diagnostic evaluations, if certain circumstances are met. This could help younger children start sooner with DDDS, since it may not be developmentally appropriate to administer some of the tests required for DDDS eligibility.

3. Increased flexibility when records before age 22 are not available

Finally, DDDS has maintained the requirement that there be documentation that an applicant’s disability arose before the age of 22, this proposed regulation adds that DDDS *may* accept a “comprehensive assessment and diagnosis of a qualifying condition by a licensed practitioner” that is completed after the age of 22, if there have been “unsuccessful attempts to obtain assessments and records from the developmental period.” This will allow for an exception for older individuals applying for DDDS services, whose records from age 22 and earlier may no longer exist. For example, individuals who were cared for at home, and were not in the DDDS system, may find themselves needing DDDS services due to aging caregivers, or caregivers who pass away. Rather than being stuck without a way to receive appropriate services, this may assist those individuals to qualify for DDDS services.

The councils may wish to support the second two changes with respect to age.

D. Clinical criteria

The clinical criteria was consolidated in the proposed regulation. Intellectual disability and brain injury now share the same clinical requirements. The regulation now requires an IQ or equivalent score of approximately 70 or below, rather than scores. The regulation preserves the “approximately” here which allows for consideration of standard of error and other factors.

The proposed regulation removes Asperger’s Syndrome and lists only Autism Spectrum Disorder. This is consistent with changes made in the DSM-5, to remove a separate classification for Asperger’s and to instead use an Autism Diagnosis. See <https://www.cdc.gov/ncbddd/autism/hcp-dsm.html> and <https://www.autismspeaks.org/dsm-5-and-autism-frequently-asked-questions>.

The adaptive functioning requirements were also updated to require either composite scores of approximately 70 or below, or in at least one domain, and clarifies what to do when there are multiple responders. However the way the subsections under 2.1.3.2 (adaptive functioning) appear is a bit unclear based on the phrase “as established by the following” and two subsections separated by a semi-colon, implying they both are required, when the second subsection may not apply. **The councils may wish to request clarification on this.**

This regulation does allow for some flexibility with the criteria, however it continues to use a score driven approach rather than a functional approach. For example, see: Report to North Dakota, Eligibility, Service Array and Person-Centered Practices: Observations and Recommendations for Consideration, Summer 2017 at 6-7 and 38 (“Some states do require that all individuals they serve must have an intellectual disability to qualify for services, but most states allow for individuals with developmental disabilities (and related conditions) to qualify without regard to intellectual disability as long as the functional limitations, age of onset and a need for services similar to those provided to individuals with ID/DD are met.”; “North Dakota may consider that an individual with borderline ID could meet related conditions if they have functional limitations and require treatment or supports similar to those provided to individuals with ID.”) available at <https://www.nd.gov/dhs/services/disabilities/docs/2017-final-report-for-nd-dd-eligibility-service-array-practices.pdf>. Taking a functional approach is more inclusive and would help to include some individuals who test too high for eligibility, but whose functioning is equivalent to those eligible for DDDS services. **The Councils may wish to support the regulation overall but encourage DDDS to explore moving to a functional approach in the future.**

E. Accepted Assessments

This section clarifies who assessments may be accepted from (licensed practitioners and school psychologists), and where the “list” of accepted assessments can be found, rather than listing the

assessments in the regulation. This allows DDDS to update acceptable assessments without the regulatory notice and comment process. This would allow them to respond more timely to changes in nationally accepted assessments, but also may not allow for the same public input.

The proposed regulation also adds that DDDS will accept other assessments if they are “comprehensive, structured,” and use normed and standardized instruments. This also allows for more flexibility. The proposed regulation also adds a requirement that Autism assessments include a detailed developmental history interview with evidence of the behavioral characteristics present during the developmental period (or rather, before age 22).

F. Exceptions to Documentation Requirements; redetermination of eligibility

The proposed regulation adds in a provision in cases of “bona fide extraordinary or exigent circumstances” that DDDS may determine eligibility without some of the required documentation, reserving the right to redetermine eligibility if such documentation is located later. **Councils may wish to be supportive of this provision, as it would permit DDDS to act in extraordinary circumstances, even if they do not have all of the documentation they need.**

Finally, DDDS also adds a right for them to redetermine eligibility until an individual reaches age 22.

Councils may wish to support this regulation overall, but make the requests for clarification or correction bolded above, and the encouragement to revisit a more “functional” rather than score driven approach in the future, as noted above.

FINAL REGULATIONS

Final DDOE Regulation on 3003A Family and Large Child Care Homes, 26 Del. Register of Regulations 103 (August 1, 2022)

The DDOE regulations related to Large and Family Child Care Homes, 14 Del. Admin. Code 3003A were listed as final. Councils filed comments and the DDOE notes the following:

- The Department will ensure alignment of Regulations 933, 934 and DPH regulations with the DPH regulations on lead testing
- The Department made one non-substantive change to the proposed regulation in response to the comment: changing "Individualized Educational Plan" to Individualized Education Plan" and will propose other recommended changes related to inclusion of 504 plans and other definitions at a later date.