

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 12/9/2022

Re: December 2022 Policy and Law Memo

Please find below, per your request, analysis of pertinent proposed regulations identified by councils as being of interest.

Proposed DOE Regulation on 14 DE Admin. Code 601 Schools and Law Enforcement Agencies, 26 DE 434 (12/01/22).

The Secretary of Education intends to amend 14 **DE Admin. Code** 601 School and Law Enforcement Agencies. The regulation is being amended pursuant to 29 **Del.C.** §10407 to ensure alignment with existing practice and to clarify the titles of head of charter schools and individuals required to report crimes. Moreover, typographical and grammatical errors are being remedied to comply with *Delaware Administrative Code Drafting and Style Manual*. The purpose of the proposed amendment is to ensure that “effective communication and working relationships exists between public schools and law enforcement agencies.”¹ The changes consist of approximately 20 grammatical or typographical differences.

Moreover, the amendment clarifies that- when any instance of misconduct, as defined in subsections 6.1.1 through 6.1.14 happen on school property or at a school function, it must be reported to the Department of Education. The amendment further states that should misconduct fall under subsection 6.1.6.1, which covers both alleged and substantiated instances of cyberbullying as defined in 14 **DE Admin. Code** § 624, subsection 2.1, must be reported to the Department of Education, regardless of where the speech occurred.

Under 14 **DE. Admin. Code** § 624, the place of origin of the speech that is considered cyberbullying is immaterial; if the speech is an unwelcome electronic communication through means other than a face-to-face interaction and it (1) interferes with a student's physical well-being; or (2) is threatening or intimidating; or (3) is so severe, persistent, or pervasive that it is reasonably likely to limit a student's ability to participate in or benefit from the educational programs of the school district or charter school, it meets the threshold of cyberbullying. Where the cyberbullying originated does not matter.

¹ Proposed DOE Regulation on 14 DE Admin. Code 601 Schools and Law Enforcement Agencies, 26 DE 434 (12/01/22).

This proposed amendment remedies concerns that were expressed by councils regarding the proposed October 2022 amendment, wherein the cyberbullying distinction was not clarified. As noted in October's Law and Policy memo, it is crucial that cyberbullying continues to be reported; almost 60% of teenagers experienced some form of cyberbullying in 2018, according to a Pew Research study. Councils should consider endorsing this revision as it was responsive to concerns.

Proposed Repeal of DOE Regulation on 14 DE Admin. Code 1505 Standard Certificate, 26 DE 455 (12/01/22).

The Professional Standards Board and the Department of Education propose to repeal 14 **Del. Admin. Code** 1505. The regulation provides the requirements for issuing a Standard Certificate. However, the Professional Standards Board has incorporated these requirements for each Standard Certificate into each of the Standard Certificate regulations and thus the regulation is no longer necessary. Councils should consider whether any comment is appropriate.

Proposed DOE Regulation on 14 DE Admin. Code 1512 Issuance and Renewal of Advanced License, 26 DE 459 (12/01/22).

The Professional Standards Board and the Department of Education developed amendments to 14 **DE Admin. Code** 1512 Issuance and Renewal of an Advanced License in accordance with 14 **Del.C.** §§1213 and 1214. The proposed amendments include: (1) revising the title of the regulation; (2) clarifying Section 1.0; (3) clarifying Section 3.0; (4) specifying requirements for obtaining an Advanced License in Section 4.0; (5) specifying the application requirements in Section 5.0; (6) adding Section 6.0, which concerns the requirements for renewing an Advanced License; (7) adding Section 7.0, which concerns the validity of an Advanced License; (8) adding Section 8.0, which concerns extensions for exigent circumstances; (9) adding Section 9.0, which concerns leaves of absence; (10) adding Section 10.0, which concerns the requirements for retaining an Advanced License; (11) adding Section 11.0, which concerns disciplinary actions; and (12) adding Section 12.0, which concerns applicants' and Educators' contact information with the Department and specifies how they can change their name or address.

Section 3.0 includes a new statement, noting "[t]he Department shall not act where the allegations include but are not limited to conduct such as immorality, misconduct in office, incompetence, willful neglect of duty, disloyalty, or falsification of credentials until the applicant provides evidence of the investigation's resolution."

Section 4.0 adds that an applicant may be issued an Advanced License should the applicant achieve and currently maintain National Board Certification from the National Board for Professional Teaching Standards and if the applicant holds a Standard Certificate issued by the Department.

Section 5.0 adds that applicant must disclose criminal history and that failure to disclose such history may result in denial of an Advanced License. Moreover, Section 5.0 qualifies that the applicant must hold a certificate from the National Board for Professional Teaching Standards,

must hold a Standard Certificate, and supply any additional documentation required by the Department.

Section 6.0 adds that an Educator with an Advanced License must renew the license before its expiration date. Section 6.0 also outlines the application process for renewal of an Advanced License.

Section 7.0 adds information regarding how long an Advanced License is valid – for up to a period of ten years.

Section 8.0 adds a provision regarding extensions of an Advanced License in exigent circumstances. Exigent circumstances are defined in the section as “unanticipated circumstances or circumstances beyond the license holder’s control, including serious illness of the license holder or a member of the license holder’s immediate family, activation to active military duty, and serious emergencies that necessitate the license holder’s temporarily leaving active service as an Educator.” Additionally, the section notes that should a license holder’s License expire during the school year, it may be extended until the last day of the fiscal year upon request by the superintendent or administrator.

Section 9.0 adds that an Educator may take a leave of absence for up to 3 years and may maintain a valid Advanced License during that time period.

Section 10.0 adds the requirements that a license holder must maintain to retain an Advanced License. This includes holding a Standard Certificate and any related requirements to retain the Standard Certificate, maintenance of the Educator’s National Board for Professional Teaching Standards certificate, and should an Educator be new to the state or area, completion of the applicable Comprehensive Educator Induction Program.

Section 11.0 adds information regarding disciplinary action. An Educator’s Advanced License may be revoked, suspended, or limited for cause under 14 **DE Admin. Code** 1514. Moreover, an Advanced License will be revoked if there is anything materially false or misleading the Educator’s application for an Advanced License. Should disciplinary action be taken, the Educator is entitled to a full and fair hearing before the Standards Board.

Finally, Section 12.0 details that all applicants and Educators must update contact information in DEEDS to be current. If an Educator legally changes his or her name and wishes to update the name on his or her Advanced License, the Educator must provide a notarized copy of evidence of the name change.

Councils should consider supporting these changes that add clarity and safeguards for educators seeking to obtain or educators who have already obtained an Advanced License.

Proposed DDOE Regulations on 922, 923, 924, 926 Children with Disabilities, 26 Del. Register of Regulations 437-442 (December 1, 2022)

The Delaware Department of Education (“DDOE”) proposes to amend 14 Del. Admin. C. §§ 922, 923, 924, and 926. These sections of Delaware’s Title 14 regulations represent four of the eight sections comprising Delaware’s state equivalent to the federal Individual’s with Disabilities Education Act implementing regulations, found at 34 C.F.R. § 300, *et seq.* DDOE is proposing to amend these regulations to bring them into compliance with House Bill 454 of the 151st General Assembly² (“HB 454”), which was passed last session and signed into law on July 22, 2022. The bill amended Chapters 31 and 17, Title 14 of the Delaware Code relating to Exceptional Children and Unit funding, respectively to extend eligibility for special education services to August 31 after the school year in which a student turns twenty-two.

The only substantive change in these regulations relates to changing all mentions of the age twenty-one to twenty-two. There are no additional substantive changes.³

Councils previously provided support for HB 454 in June 2022. Councils may wish to express its support for these proposed changes to sections 922, 923, 924, and 926 of Title 14 of the Delaware Administrative Code to ensure the regulations are not only compliant with Delaware state law but federal law and regulation as well. Furthermore, amendment of these regulations will ensure that students with disabilities eligible for special education and related services are provided a free appropriate public education until August 31 after the school year in which they turn twenty-two.

Proposed DMMA Change to Regulation regarding Guardianship Fees, 26 Delaware Reg. of Regulations 465 (12/01/22).

DMMA back in August amended the state plan to allow for residents in LTC facilities on Medicaid who otherwise must pay all of their income from any source toward care, less a small personal needs allowance, to set aside up to \$100 of income to pay for guardianship fees. As part of the SPA process, the decision was made to clarify that the provision was meant to cover all income, not just earned income. Therefore the existing regulation must be further amended to change the language from “gross earned income” to “gross income.” This revision makes sense, as most residents of LTC facilities have only unearned income, such as SSA benefits. Councils should consider whether it is necessary to comment on these regulations.

Proposed Change to Children’s Health Insurance Program (CHIP) – Early, Periodic, Diagnosis, & Treatment (EPSDT) Coverage, 26 Delaware Reg. of Regulations 467 (12/01/22).

² <https://legis.delaware.gov/BillDetail/109603>.

³ The other changes throughout the proposed regulations are stylistic to ensure compliance with the *Delaware Administrative Code Style Manual*.

The Delaware Department of Health and Human Services (“DHSS”) proposes to amend Children’s Health Insurance Program (“CHIP”) coverage to align it with Early, Periodic, Diagnosis, & Treatment (“EPSDT”) Coverage. This is a proposed CMS state plan amendment. CHIP provides health insurance to children who are uninsured and low-income. CHIP covers children whose families have household incomes that are too high for Modified Adjusted Gross Income (“MAGI”) Medicaid, with CHIP covering children in households with income up to 217% of the federal poverty level (“FPL”). Presently CHIP excludes Non-Emergency Medical Transportation (“NEMT”) and Prescribed Pediatric Extended Care (“PPEC”). This proposed change would add NEMT and PPEC to CHIP benefits. DHSS also indicates that the change will reduce CMS administrative requirements that are placed on states whose CHIP and Medicaid programs do not align services.

The publication also indicates that changes to the Delaware Medical Assistance Program (“DMAP”) Provider Policy Specific Manuals and/or Delaware Medical Assistance Portal will be updated as needed. **Councils may wish to object to DHSS’s noted intention to make changes to the DMAP policies and portal without public notice and comment, as this circumvents public notice and comment required by the Administrative Procedures Act** and its implementing regulations, prior to changes to “any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide” for the decision of cases by it or others. 29 Del. C. § 10102(7); see 29 Del. C. § 10101 et seq., generally, and 29 Del. Admin. C. § 101.

Comparing section 6.2 versions, all pre-existing elections are included substantively as in the original except as noted below:

1. Inpatient mental health services are not specifically enumerated;
2. Outpatient mental health services are not specifically enumerated;
3. Wrap around and specialty dental services are not specifically enumerated although dental services are listed;
4. Inpatient substance abuse treatment services and residential substance abuse treatment services are not specifically enumerated;
5. Outpatient substance abuse treatment services are not specifically enumerated;
6. Medical transportation is no longer limited to emergencies or disasters;
7. Home and community-based health care services no longer excludes personal care, chore services, daycare, respite, or home modifications; and
8. Private duty nursing services is no longer subject to a 28 hour per week cap.

Importantly, expansion of NEMT to provide transportation services outside of emergencies or disaster will likely increase access to healthcare for low-income children. This may increase preventative care and result in better disability management, as well as potentially preventing the development of a disability due to earlier intervention. The changes to home and community-based health care noted above, to allow PPEC and home modifications, among other services, could help prevent institutionalization of children with disabilities who are not otherwise eligible for Medicaid programs through which they could receive such services. **Thus, Councils may**

wish to support these changes as they are likely to increase/improve access to a variety of health services for children with disabilities.

However, Councils may wish to verify that DHSS will be covering inpatient and outpatient mental health and substance abuse services, as well as wrap around and specialty dental care, in other categories, since specific language as to these services were removed. Not covering these items would have a hugely detrimental impact on children with disabilities. It's likely that DHSS intends to cover these in the broader categories such as "inpatient services" and "outpatient services" or the catch all of "any other health care services or items specified by the Secretary." The proposed amendment specifically includes the Medicaid Early Periodic Screening Diagnosis and Treatment ("EPSDT") definition of medical necessity, as "Secretary-approved Coverage," which as discussed below, is robust and expansive coverage.

EPSDT is the benefits package required by the federal Medicaid Act for all Medicaid-eligible children from birth through age 21. 42 U.S.C. § 1396a (a)(10), (a)(43); 42 U.S.C. § 1396d(r). The federal Medicaid Act contains a specific definition of medical necessity that states must apply when evaluating services for coverage for EPSDT (i.e. child) Medicaid beneficiaries: under EPSDT, medical services must be covered for beneficiaries under age 21 if the services are "necessary. . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. § 1396d(r)(5). By articulating a definition of medical necessity specifically for children who receive Medicaid (in addition to placing an emphasis on preventative healthcare, see, e.g., 42 U.S.C. § 1396d(r)(1) (mandating periodic screening services), and mandating that states cover for children all services which are considered optional under federal law for adults, see 42 U.S.C. § 1396d(r)(5)), Congress demonstrated its intention to ensure that Medicaid coverage of children's benefits be expansive. In this proposed state plan amendment, in section 6.1.4 DHSS lists as "Secretary-approved coverage" all "medically necessary screening, and diagnostic services... that are necessary to correct or ameliorate any defects and mental and physical illnesses or conditions... whether or not those services are covered by the Medicaid state plan." This is a restatement of the EPSDT definition of medical necessity from federal Medicaid law. Thus, DHSS is announcing its decision to use the EPSDT definition of medical necessity for CHIP covered children. Because this means DHSS must follow the federal Medicaid program's rules/standards related to EPSDT, and the expansive definition of medical necessity, more services will be available to children with disabilities. **Councils should consider supporting DHSS's adoption of EPSDT medical necessity standards for CHIP children.**

In sum:

- 1) Councils may wish to object to DHSS's noted intention to make changes to the DMAP policies and portal without public notice and comment;
- 2) Council's endorsement of the proposed state plan's covered service changes to included NEMT and more home and community based services, would further Council goals to increase/improve access to a variety of community-based health services for children with disabilities;

- 1) However, Councils may wish to verify that DHSS will be covering inpatient and outpatient mental health and substance abuse services, as well as wrap around and specialty dental care, in other categories, since specific language as to these services were removed; and
- 2) Councils support for DHSS's adoption of EPSDT medical necessity standards for CHIP covered children would be consistent with Councils goals to provide expansive services to children with disabilities.

Final Regulations

Final DMMA Order on State Plan Telehealth Services, 26 Delaware Reg. of Regulations 482 (12/01/22).

DMMA expressed thanks for Council support and committed to ensuring that outcomes for all services will be monitored and that consumers will maintain choice.