

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 1/18/2022

Re: January 2022 Policy and Law Memo

Please find below per your request analysis of pertinent regulations from the January Register of Regulations as well as proposed legislation.

1. Proposed DSHS Regulation on 801 Regulations of the Delaware Council on Police Training, 25 Del. Register of Regulations 673 (January 1, 2022)

The Delaware Department of Safety and Homeland Security's Delaware Council on Police Training ("COPT") is proposing to amend 1 Del. Admin. C. § 801, which describes the rules for the operation of the COPT. The COPT is proposing to amend this regulation to add § 801.26, which will set mandatory standards for the use, activation, electronic storage, and dissemination of body worn cameras ("BWC"). The proposed amendments were voted on during a public meeting of the COPT on November 17, 2021 and are the result of the passage of House Bill 195, which was signed by the Governor on July 21, 2021.¹ The proposed regulations seek only to set the standards which agencies employing officers using BWCs will use to develop required policies around BWCs; the agencies are "encouraged to expand and to customize th[e] policies..."²

At a bird's eye level, the proposed regulations include standards for:

1 Del. Admin. C. § 801.26.3 – which officers are typically required to wear BWCs as well as those typically *not* required

§§ 801.26.4-26.8 – when BWCs should be activated

§§ 801.26.9-26.10 – training and inspection of BWCs

§§ 801.26.11-26.13 – recordings and prohibitions on recording

§ 801.26.14 – storage of digital files

§§ 801.26.15-26.17 – dissemination of BWC recordings

Although the proposed regulations are consistent with the required actions outlined in HB 195, they are inconsistent with many of the current recommended best practices. Where individuals

¹ <https://legis.delaware.gov/BillDetail/68664>. HB 195 requires certain police officers and other employees of the Delaware Department of Correction and the Delaware Department of Services for Children, Youth, and Their Families to use BWCs to record interactions with members of the public. It also requires the COPT to promulgate regulations for BWCs to ensure consistent use by 2022.

² Proposed § 801.26.2.

with disabilities are specifically impacted, the discrepancies will be discussed, along with suggested revisions.

Although the proposed regulations do not explicitly touch upon the disability community, it is undeniable that individuals with disabilities, especially those with developmental or mental health related disabilities, are at an increased risk for both fatal and non-fatal police interactions.³ This reality also holds true for students with disabilities.⁴ A 2021 American Psychological Association article indicates that two separate studies found that “[s]ince 2015, close to a quarter of people killed by police officers in the United States had a known mental health condition and...that 20% to 50% of law enforcement fatalities involved an individual with a mental illness.”⁵ Relatedly, a report by the Treatment Advocacy Center finds that “people with untreated mental illness are 16 times more likely to be killed during a police encounter[.]”⁶

BWCs, when implemented properly, can be a *win-win* for both law enforcement and communities. BWCs have been shown to strengthen the accountability and transparency of law enforcement agencies⁷ – a positive for both law enforcement and the communities in which they serve. Despite the benefits of BWCs, their use also raises several concerns which include, most notably, the intrusion into the privacy of citizens in the community as well as the impact on the relationship between law enforcement and the community.⁸

The following includes a discussion of the relevant concerns raised by the use of BWCs, if and how the COPT proposed regulations touch upon those concerns, and instances where the proposed regulations are either not aligned with best practices / recommendations from the field or with the best interests of individuals with disabilities. Councils may wish to recommend these suggested changes.

For ease, the following entities, their recommendations, and how they will be referred to in the below review are included here:

1. (“ABA”) American Bar Association, [ABA Principles on Law Enforcement Body-Worn Camera Policies](https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/604.pdf),
<https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/604.pdf>
2. (“PERF”) Police Executive Research Forum, [Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned](https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf),
<https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>

³ <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016>. Bureau of Justice Statistics brief finding nearly 2 in 5 state and federal prisoners had at least one disability in 2016.

⁴ See generally the Civil Rights Data Collection, <https://ocrdata.ed.gov/>. Because the proposed regulations include BWC requirements for school resource officers (“SROs”), the implications for students with disabilities will be discussed.

⁵ See <https://www.apa.org/monitor/2021/07/emergency-responses>.

⁶ See <https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness/2976-people-with-untreated-mental-illness-16-times-more-likely-to-be-killed-by-law-enforcement>.

⁷ See <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

⁸ See <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all> and <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

3. (“ACLU”) American Civil Liberties Union, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL, <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>
4. (“FOP”) Fraternal Order of Police, BWC RECOMMENDED BEST PRACTICES, <https://files.fop.net/wp-content/uploads/2021/03/nfop-body-worn-camera-recommended-best-practices.pdf>
5. (“NACDL”) National Association of Criminal Defense Lawyers, POLICING BODY CAMERAS: Policies and Procedures to Safeguard the Rights of the Accused, <https://www.nacdl.org/Document/PolicingBodyCamerasPoliciesToSafeguardRights>
6. (“DPCC”) Delaware Police Chiefs’ Council, Body Worn Cameras-Model Policy, <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2018/03/Model-Policy-Body-Worn-Cameras.pdf>

BWCs, unlike many traditional surveillance methods, allow law enforcement to record in ways and areas never before possible – such as recording of both audio and video; capturing close-up images that could be used for facial recognition; and the ability to record inside private homes. This expansion necessitates policy considerations for when law enforcement should have their BWCs activated (addressed more fully below due to the impact on individuals with disabilities), how the recordings are stored and for how long, as well as if, when, and under what circumstances the recordings should be disseminated. The difficulty in crafting policies around the use of BWCs lies with striking the right balance between ensuring transparency and accountability on the one hand and the Constitutionally protected right to privacy on the other.

Privacy Considerations & When BWCs Should be Activated / Deactivated

Proposed §§ 26.4-26.7 and 26.13.

The proposed regulations require that BWCs be active “to record contacts with citizens in the performance of official duties, including:

- 26.4.1 During calls for service;
- 26.4.2 Where an arrest or detention appears to be likely;
- 26.4.3 Where use of force appears to be likely;
- 26.4.4 Where it appears doing so may promote the safety of people and property; and
- 26.4.5 Where doing so may be helpful to preserve evidence.

...

26.6 BWC shall remain activated until the entire contact is completed in order to ensure the integrity of the recording unless the contact moves into an area restricted by these regulations.

26.7 If BWC are not activated for an entire contact, or a recording is interrupted, the officer shall document why a recording was not made, was interrupted, or was terminated.

...

26.13 Recording Prohibitions. BWC shall be used only in conjunction with official law enforcement duties and to record interactions with the public and, absent exigent circumstances, shall not be used to record:

- 26.13.1 Private communications with other police personnel without the permission of the Chief;
- 26.13.2 Encounters with undercover officers or confidential informants;
- 26.13.3 Moments while on break or otherwise engaged in personal activities;

- 26.13.4 Any location where individuals have a reasonable expectation of privacy, such as a restroom or locker room;
- 26.13.5 A strip search;
- 26.13.6 Court proceedings by non-court personnel officers, except where an incident occurs during a court proceeding; and
- 26.13.7 Any other situation where applicable law or regulation provides for confidentiality including but not limited to:
 - 26.13.7.1 HIPAA;
 - 26.13.7.2 Conversations between medical treatment providers and patients;
 - 26.13.7.3 Conversations with counsel or union representatives; and
 - 26.13.7.4 Any other privileged conversations.”

Suggested Changes Based on Best Practices and Recommendations from the Field.

There are numerous recommended best practices which are absent from the proposed regulations. While the proposed regulations do recommend that law enforcement agencies expand upon and customize these standards to their particular needs, Councils may wish to recommend that the following suggested changes be adopted across the board and included in COPT’s proposed regulations to protect the rights and privacy of individuals with disabilities.

- 1. The proposed regulations must include a requirement that, where feasible, officers announce and / or notify individuals when they are recording.⁹**
 This not only helps address privacy concerns but has also been shown to improve the interactions between law enforcement and community members. As explained by many of the recommended policies, this notification does not need to be verbal, but can also be accomplished by other means such as an easily visible pin or sticker indicating that a camera is in operation or a red blinking light. This would help in situations where it is not safe or practical to verbally notify as well as for interactions with individuals who are deaf, hard of hearing, or are otherwise unable to process verbal information.
- 2. The proposed regulations must include a requirement that, where feasible, officers obtain consent prior to recording (1) in a private home during non-exigent circumstances; (2) interviews with crime victims and witnesses; and (3) interviews with community members wishing to report or discuss criminal activity in the neighborhood. This consent should be recorded by the BWC or in writing. Where consent is not obtained upfront, officers must stop recording when requested by the individual.¹⁰**
- 3. The proposed regulations must expand its list of instances and locations where BWC activation is prohibited, to include mental health treatment facilities (e.g., in- and out-patient treatment facilities, counseling centers) and medical treatment facilities (e.g.,**

⁹ Recommended by the ABA, PERF, ACLU, NACDL, and DPCC.

¹⁰ Recommended by the ABA, PERF, ACLU, NACDL, FOP, and DPCC. *See also* Aequitas, To Record or Not To Record: Use of Body-Worn Cameras During Police Response to Crimes of Violence Against Women, <https://aequitasresource.org/wp-content/uploads/2018/09/To-Record-or-Not-To-Record-Use-of-Body-Worn-Cameras-During-Police-Response-to-Crimes-of-Violence-Against-Women-SIB29.pdf>

hospitals, in- and out-patient treatment centers) unless the officer is lawfully present (such as the instances enumerated in proposed §§ 26.4).^{11 12}

The proposed regulations at § 26.13.7 *do* include a prohibition on recordings where “law or regulation provides for confidentiality,” which includes the Health Insurance Portability and Accountability Act (“HIPAA”) and conversations between medical treatment providers and patients. However, the proposed regulations, as written, fail to contemplate or consider those instances where bystanders, such as other patients, could be captured on BWC recordings. Including more specific prohibitions around the use of BWCs in medical and mental health treatment facilities will help individuals with disabilities, especially those hospitalized, retain their privacy rights. Councils may wish to recommend that COPT consider Section 7.1 of the BWC Policy from the State of New Jersey as an exemplar.¹³

4. The proposed regulations must explicitly and unequivocally prohibit the activation of BWCs in childcare or educational settings where minors are present (e.g., elementary, middle, and high schools) unless the officer is responding to an imminent threat to life or health.¹⁴

The proposed regulations at § 26.3.3 require that “School Resource Officers [(‘SROs’)] performing in a law enforcement capacity and not an educational capacity shall follow Section 26.0 of this regulation.” There are several privacy and community-relations concerns which arise with the proposed use of BWCs by SROs. First, the use of BWCs in schools contributes to the already over-surveilled environment in which students are educated. Most, if not all, Delaware public schools have surveillance technology installed. Secondly, the risk of recordings of childhood mistakes being shared online outweighs any conceivable benefits – and as is now well known, it is essentially impossible to remove anything from the Internet. Furthermore, many of the BWC recordings of students currently circulating around the Internet are of children with disabilities – including those in the middle of a behavioral crisis. It is imperative that we craft policies which protect our most vulnerable, not put them on display for the world to see. It should be noted that BWCs *do* provide the benefit of being able to identify where students with disabilities have been improperly restrained or otherwise abused by SROs; however, as noted above, the costs do not outweigh the benefits.¹⁵ Thirdly, the U.S. Department of Education exempts BWC recordings by SROs from the privacy protections of the Family Educational Rights and Privacy Act because it is considered a “law enforcement unit record.”¹⁶

In support of restricting or otherwise prohibiting the activation or use of BWCs by SROs, it should be noted that PERF’s publication on recommendations for BWCs is completely silent on the use of BWCs by SROs or in school settings; there is no mention of it anywhere. The use of BWCs by SROs is also absent in a report by the U.S. Department of Justice Office of Community Oriented Policing Services which recommends ten actions to improve school

¹¹ Recommended by the FOP.

¹² See <https://www.brennancenter.org/our-work/research-reports/police-body-camera-policies-privacy-and-first-amendment-protections>, which includes a sampling of BWC policies around the country.

¹³ See <https://www.nj.gov/oag/dcj/agguide/ag-Directive-2021-5-BWC-Policy.pdf>, pg. 15.

¹⁴ Recommended by the ACLU.

¹⁵ See <https://www.fox13news.com/news/bodycam-video-shows-elementary-school-student-handcuffed-after-shoving-deputy>.

¹⁶ See https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.

safety.¹⁷ Instead, the recommended actions focus on building a positive school climate which encourages students to come forward with concerns – an action which BWCs have repeatedly been shown to discourage. Similar to the above recommendation, Councils may wish to recommend that COPT consider Section 7.1 of the BWC Policy from the State of New Jersey as an exemplar.

If COPT refuses to recognize the obvious issues with SROs using BWCs and insists on retaining the proposed language, Councils may wish to recommend that COPT clarify what it means by the terms “law enforcement capacity” and “educational capacity” by including definitions for each. A cursory search of Delaware code and regulations do not yield any clarity on their meanings nor are examples of either provided within this proposed regulation. Including examples of where these roles change could prove useful as well. However, Councils may wish to express the preference for SROs being prohibited from activating their BWCs while on school grounds absent the imminent threat to life or health over the clarifying of language.

The following are additional suggested changes to the proposed regulations, which are critically important to the interests of *all* Delawareans but which pose less of a specific concern or issue for Delawareans with disabilities. The suggested changes are in line with the best practices and policies put forth by the entities noted above: ABA, PERF, ACLU, NACDL, FOP, and DPCC. It should be cautioned that not every recommendation listed below was or is endorsed by every entity; for most suggestions, at least a majority has put it forth as a best practice or policy for adoption.

- 1. The proposed regulations must include an officer statement on camera, where feasible, when deactivating the BWC during an encounter.**
- 2. The proposed regulations must include a requirement that all BWCs be equipped with, and at all times have activated, a pre-event buffering mode.**
- 3. The proposed regulations must include a specified timeframe in which the officer has to download and tag the BWC recordings.**
- 4. The proposed regulations must prohibit officers from using privately-owned BWCs while on duty.**
- 5. The proposed regulations must include a prohibition on activating cameras to gather evidence based on First Amendment protected speech, associations, or religion.**
- 6. The proposed regulations must include a clear and unequivocal ban on using BWC recordings with facial and biometric recognition technologies.**
- 7. The proposed regulations must include disciplinary measures for officers who fail to comply with the regulations and their agency’s policies around the use of BWCs.**
The proposed regulations merely indicate that enforcement of the policies is within the discretion of the law enforcement agencies. There should be more concrete consequences for an officer’s violation of the proposed regulations and their departmental policies concerning BWCs. “[R]esearchers report that compliance rates with body camera policies are as low as 30%.”¹⁸

¹⁷ Ten Essential Actions to Improve School Safety, <https://cops.usdoj.gov/RIC/Publications/cops-w0891-pub.pdf>.

¹⁸ ACLU, <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>.

8. **The proposed regulations must include a requirement for the creation and maintenance of an audit trail documenting any editing, redaction, or deletion of BWC data as well as the identity of any individual who viewed, accessed, copied, transmitted, redacted, or deleted any BWC data and the date of such action.**
9. **The proposed regulations must require prompt deletion of BWC recordings following the retention period unless preservation is required for litigation or other appropriate purposes.**
10. **The proposed regulations must include a requirement for no less than annual re-training on the use of BWCs.**
11. **The proposed regulations must include a requirement that all Delaware law enforcement agencies publish their policies and guidance concerning BWCs and recordings in a way that is easily and readily accessible by the community.**
12. **The proposed regulations must provide for the public release of BWC recordings where relevant to the public interest (e.g., incidents of police use of force or if the subject of a police complaint), with exceptions for specific circumstances.**
These would include circumstances such as interviews with children, victims of sexual assault, and individuals experiencing a mental health crisis (unless consent is provided).¹⁹
13. **The proposed regulations must include a requirement that agencies collect statistical data concerning the use of BWCs.**

Councils may wish to support the development of a comprehensive policy concerning BWCs provided they address the concerns posed to individuals with disabilities, including students with disabilities. To that end, Councils may wish to recommend the COPT revise its proposed regulation to be consistent with the suggestions included herein as well as with best practices and standards from the field. Councils may also wish to suggest that COPT engage with relevant stakeholders in revising their proposed regulations, including the disability community.

2. Proposed Department of Insurance Regulation 1322, Requirements for Mandatory Minimum Payment Innovations in Health Insurance, 25 Del. Register of Regulations 684 (January 1, 2022)

This regulation implements Senate Substitute No. 1 for Senate Bill No. 120, which was signed into law on October 21, 2021. This law addressed a number of healthcare issues by placing greater emphasis on primary care as a way to keep individuals healthy, to move to a patient-centered outcome approach, and to control healthcare costs. This reviewer was asked to address regulation 1322, which implements the amendments to 18 *Del. C.* §§ 334, 2503, 3342B, and 3556A. This regulation will be effective on March 11, 2022.

The purpose of the regulation “is to establish a process through which carriers must demonstrate compliance with requirements for mandatory minimum payment innovations, including alternative payment models, provider price increases, carrier investment in primary

¹⁹ See DelawareOnline Editorial [Delaware police will wear body cameras. Great — but the footage must be public.](https://www.delawareonline.com/story/opinion/2021/08/06/delaware-police-body-camera-footage-must-public/5490827001/)

care, and other activities deemed necessary to support a robust system of primary care by January 1, 2026” (2.0).

The vehicle to establish mandatory minimums for payment innovations and alternative payment models is the Office of Value-Based Health Care Delivery (OVBHCD). Section 334 created the OVBHCD within the insurance department for the purpose of “reduc[ing] health-care costs by increasing the availability of high quality, cost-efficient health insurance products that have stable, predictable, and affordable rates.” 18 *Del. C.* §§ 334(a).

The regulation defines primary care services or primary care as “the provision of integrated, accessible health care services by primary care providers and their health care teams who are accountable for addressing a large majority of personal health care needs, developing a sustained partnership with patients, and practicing in the context of family and community. The care is person-centered, team-based, community-aligned, and designed to achieve better health, better care, and lower costs.” (4.0).

The regulation defines primary care provider (PCP) as “an individual licensed to provide health care, with whom the patient has initial contact and by whom the patient may be referred to a specialist. This definition includes family practice, pediatrics, internal medicine, and geriatrics. (4.0).

Because of the emphasis on primary care, insurance carriers in their rate filings are required to provide spending on primary care as a percentage of the total cost of medical care in at least the minimum amounts as follows: Seven percent (7%) in their rate filing in 2022 for plan year 2023 (6.1.1); eight and a half percent (8 ½ %) in their rate filing in 2023 for plan year 2024 (6.1.2); ten percent (10%) in their rate filing in 2024 for plan year 2025 (6.1.3); and eleven and a half percent (11 ½ %) in their rate filing in 2025 for plan year 2026 (6.1.4). The plans must also include how the insurance carriers will make progress toward having participation by seventy-five percent (75%) of PCP’s for 2023 and the progress made by the insurance carriers toward the seventy-five percent (75%) goal for 2024, 2025, and 2026. (6.2.2.1; 6.2.2.2.).

The regulation also requires rate filings by insurance carriers with more than 10,000 members to have fifty percent (50%) of the total cost of care tied to an alternative payment model that meets the Health Care Payment Learning and Action Network (HCP-LAN)²⁰ definition for shared savings or shared savings with a downside risk by 2023, with a minimum of twenty-five percent (25%) of total cost of care covered by an alternative payment model that meets the definition of HCP-LAN, which includes only contracts with downside risk. (8.2).

²⁰ “The Health Care Payment Learning and Action Network (LAN) is a group of public and private health care leaders dedicated to providing thought leadership, strategic direction, and ongoing support to accelerate our health care system’s adoption of alternative payment models (APMs). It was launched by U.S. Department of Health and Human Services (through CMS) in March 2015 to align with public and private sector stakeholders in shifting away from the current FFS [fee for service], volume-based payment system to one that pays for high-quality care and improved health. The LAN mobilizes a network of over 7,000 payers, providers, purchasers, patients, product manufacturers, policymakers, and others in a shared mission to promote APMs and reduce the barriers to APM participation, as ways to lower care costs and improve patient experiences and outcomes.” <https://innovation.cms.gov/innovation-models/health-care-payment-learning-and-action-network>. “The LAN conducts a national assessment every year to measure the growing adoption of APMs over time and track progress towards the LAN’s goals. The Measurement Effort has evolved to incorporate data from a large sample of payers that represent nearly 80% of covered Americans, and serves as the most comprehensive snapshot available for measuring progress on payment reform.” *Id.*

The regulation also requires the inclusion of affordability standards in the benefit plan reimbursement structure and fee schedule submitted by all insurance carriers. (9.1). These standards include an increase in primary care expenditures (in accordance with section 6.0), a limit in price increases for non-professional services (in accord with sections 7.0 and 7.1.3), and the adoption of an alternative payment model (in accordance with section 8.0).

The Department of Insurance is charged with monitoring the compliance by the insurance carriers with this regulation. (10.0). The Insurance Commissioner has the authority to enforce compliance and can impose restrictions and administrative penalties and fines. (10.4).

As stated above, this regulation implements Senate Substitute No. 1 for Senate Bill No. 120, which was a law aimed at strengthening the delivery of primary healthcare services in the state. The law and bill create the OVBHCD within the insurance department to reduce health-care costs through the development of innovative and affordable health insurance products. The regulation incrementally increases spending yearly for primary care services; reigns in price increases for non-professional services; and requires the adoption of an alternative payment model.

The law and regulation are laudable attempts to improve the health of all Delawareans. The emphasis is to use primary care providers and primary care services to engage patients, build upon the relationship between a PCP and his or her patient, and provide quality care to find and treat illnesses or medical problems in the early stages rather than when the problems become severe and require hospitalization and have poorer outcomes.

Councils can and should support this regulation as written.

Final Regulations

1. DDOE Section 615 School Attendance, FINAL REGULATION, DELAWARE REGISTER OF REGULATIONS, VOL. 25, ISSUE 7, SATURDAY, JANUARY 1, 2022 700.

Councils filed comments on the proposed regulations which were published in October, making a number of observations and suggesting several improvements. These included creating mental health excused absences and providing copies of attendance policies to parents in advance of infractions rather than just posting them online. DDOE responded as follows:

Comments received which were pertinent to the subject matter of the regulation suggested the following:

(1) Further amendments addressing student health and wellness as it extends to attendance in light of COVID-19 and as students return to in-person instruction following remote learning during the COVID19 crisis. Response: The Department does not believe need further amendments are warranted at this point, but should student health and wellness gaps become apparent, the Department will consider future regulation changes. The language is intentionally broad to provide LEAs opportunities to work with students and their families.

(2) Policies to provide more proactive, non-punitive supports for students and families who are experiencing chronic absenteeism, or who have experienced frequent absenteeism since March 2020 during periods of remote instruction. Response: The Department intentionally wants the language to be broad. Most LEAs are already providing these types of support. (3) The attendance policy be provided to each parent each year. Response: LEAs didn't believe providing the attendance policy to each parent each year was necessary. This policy will be on LEAs websites and shared as needed, much like other forms.

First, the DDOE does not acknowledge who filed comments, which is something that needs to be addressed, particularly as it is a statutory function of both the GACEC and the SCPD to analyze and report on proposed regulations.

Second, the DDOE continues to ignore virtually all GACEC comments, without explanation. For example, it is not an answer that the LEAs don't want to do something. GACEC suggested that parents need to know about these resources before problems occur, not afterward and that parents should receive a written copy of the policy and not just be told it is available online. DDOE should know better than any agency that many parents lack access to computers, internet service and printers. DDOE was non-responsive to this observation.

Third, DDOE did not address at all the suggestion of creating mental health excused absences. Perhaps DDOE did not think this was a "pertinent" suggestion, but it might be worth pursuing this further with DDOE, not only on the merits but also as a matter of procedure.

Proposed Legislation

HB 271 – Young Adults Aging Out Of Foster Care

HB 271, which has been voted out of Committee as of January 13, 2022, proposes to revise existing portions of the Delaware Code pertaining to the services provided by the Department of Services for Children, Youth & Families ("DSCYF") and its Division of Family Services ("DFS") to young adults aging out of foster care.

In most cases, youth in Delaware who are placed in foster care through DFS age out of care following their eighteenth birthday, however DFS provides a variety of supports to young adults transitioning out of these arrangements; currently by law eligibility for such supports extends through age 21. As described by the existing statute, these supports include "financial stability, housing supports, medical, employment and training, education, and connection to resources and individuals... that will assist youth with their successful transition to adulthood." 29 Del. C. § 9003(a)(14). Specifically, the supports include need-based stipends through DFS's Achieving Self Sufficiency & Independence through Supported Transition (ASSIST) program to help support young adults transition to living independently after exiting care.

HB 271 proposes two revisions to existing law. First, the proposed revisions would add the words "transitional and" in multiple places where "independent living services" are referenced. According to the bill's synopsis, this change would be consistent with how services are referred to by DFS (the bill's synopsis points out that "DFS recently changed the name of the

Independent Living Program to the ‘Transitional and Independent Living Program’”) and to better describe the nature of the services that DFS provides for this population. Second, and more substantially, the bill proposes to extend eligibility for transitional and independent living services through age 23. In response to the COVID-19 pandemic, as part of legislation passed in 2020, the federal government had issued a moratorium on youth aging out of foster care and provided additional funding to states to support eligible young adults up to age 27 who had been in foster care after the age of 14. As a result of this funding, according to the bill’s synopsis, Delaware’s DFS Director issued a mandatory directive expanding eligibility for transitional and independent living services to age 27. The federal relief measures lapsed at the end of September 2021, and while there have been some attempts to enact new legislation in Congress to extend relief (see H.R.5661 - Continued State Flexibility To Assist Older Foster Youth Act, which was passed by the U.S. House of Representatives in October but has yet to be considered by the U.S. Senate), currently there is nothing in place at the federal level. When DFS’s first mandatory directive ended in October 2021 after federal relief expired, DFS issued a new mandatory directive to continue to extend eligibility for young adults up to age 23, “because of the success observed on behalf of youth” with extended eligibility. As the more recent directive will expire in September 2022, the proposed legislation would permanently extend eligibility for transitional and independent living services through age 23.

Children and youth with disabilities and complex medical needs who encounter the child welfare system may be disproportionately likely to be placed in foster care, according to the Child Trends report *Children and Youth with Special Health Care Needs in Foster Care*, released in December 2020 (available at https://www.childtrends.org/wp-content/uploads/2020/12/CYSHCN_ChildTrends_Dec20-2.pdf). This same report cites to data indicating that 63% of the children and youth in foster care in Delaware have special health care needs (which are defined include intellectual disabilities, physical disabilities, and emotional disabilities, as well as “other medically diagnosed condition[s] requiring care” such as chronic illnesses) which is among one of the highest percentages nationally.

According to Casey Family Programs, among the children who exited foster care in Delaware in 2019, 24% had aged out (see State Fact Sheet Delaware, <https://caseyfamilypro-wpengine.netdna-ssl.com/media/delaware-fact-sheet-2021.pdf>). Youth aging out of foster care are often at risk of homelessness due to the lack of stability and available familial support following their exit from care. See, e.g., Jim Casey Youth Opportunities Initiative, *From Foster Home to Homeless: Strategies for Preventing Homelessness for Youth Transitioning from Foster Care*, June 2014, available at <https://assets.aecf.org/m/resourcedoc/JCYOI-FromFosterHometoHomeless-2014.pdf>. In addition to legislation that Governor Carney signed into law in October 2021 which guarantees tuition support to youth aging out of foster care accepted to a state university (see HB 123, now codified at 14 Del. C. § 3414A, et seq.), the effect of this bill would be expanded options for financial support and longer-term stability for this population. As this legislation would undoubtedly impact young adults with disabilities, the Councils should support this legislation to permanently expand the availability of support for young adults exiting foster care.

SENATE BILL 210, amending ABLE Act statute

This bill will amend the state ABLE plan and bring it into compliance with the final federal regulations published in November 2020. 85 *FR* 74010.

By way of background, ABLE accounts were created by the Stephen J. Beck, Jr., Achieving a Better Life Experience Act of 2014, which was signed into law by President Obama on December 19, 2014. Pub. L. No. 113-295, 128 Stat. 4056 et seq. The act amends the IRC. 26 *U.S.C.* §529A. The purpose of the act was to increase the financial independence and improve the quality of life for persons with disabilities while easing the financial hardships faced by these individuals and their families. ABLE accounts are tax-advantaged saving accounts for eligible persons with disabilities (called beneficiaries). Although the designated beneficiary is the owner of the account, contributions can be made by anyone (including family, or friends) using after-tax monies. While contributions are not tax deductible for federal income tax, monies in the plan can accumulate earnings on a tax-free basis and distributions are not subject to federal taxation when used for qualified disability related expenses (QDE). QDEs are broad and expansive, and include “education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary under regulations and consistent with the purposes of this section.” 26 *U.S.C.* §529A (e)(5).

In Delaware, the ABLE plan is known as the Delaware Achieving a Better Life Experience Saving Accounts. 16 *Del. C.* §§ 9601A-9608A. The changes that the bill will make are subtle but significant. The account owner would change from the eligible individual or parent or legal guardian of an eligible incapacitated individual or an eligible individual under eighteen (18) to the designated beneficiary. 16 *Del. C.* § 9602A(2). The designated beneficiary includes the individual for whom the account was opened or the individual “who has succeeded the former designated beneficiary in that capacity.” 16 *Del. C.* § 9602A(4). The hierarchy of a successor, who will have signature authority over the account under the federal regulations, consists of the individual selected by the eligible individual or if the individual is not able to or declines to exercise authority, the eligible individual’s agent under a power of attorney, conservator or legal guardian, the spouse, a parent, a sibling, a grandparent, or a representative payee (whether an individual or organization) appointed by the Social Security Administration. 26 *C.F.R.* §1.529A-2(c)1-2; Summary of Comments and Explanation of Provisions 2.A. Establishment and Signatory of an Able Account.

Another change concerns who can open or establish the account. The account can be opened by an eligible individual. 16 *Del. C.* § 9605A(a)(1). In addition, and similar to successor of a designated beneficiary, the account can be opened by a person chosen by the eligible individual or if the eligible individual “is unable to establish his or her account, the eligible individual’s agent under a power of attorney or, if none, by a conservator or legal guardian, spouse, parent, sibling, grandparent of the eligible individual, or a representative payee appointed for the eligible individual by the Social Security Administration, in that order.” 16 *Del. C.* § 9605A (2)-(3). This change limits the exiting provision, which provides that an account can be opened “by any person” who wants to pay the QDE’s of an eligible individual and makes an initial contribution to the individual’s account. 16 *Del. C.* § 9605A(a).

Lastly, the bill would limit the QDE's to expenses incurred while the designated beneficiary is an eligible individual. Although obvious, any expenses incurred while the person was not blind or disabled would not be a QDE. 16 *Del. C.* § 9602A(8).

Because of the federal regulations, this bill to amend Delaware's ABLE plan is required to be in compliance with the regulations. Councils can and should endorse this bill as the State plan must comply with federal law.