Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 3/14/2022

Re: March 2022 Policy and Law Memo

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

House Bill 300- An Act to Amend Title 14 of the Delaware Code Relating to Free Public Schools

House Bill 300 proposes "creat[ing] Mental Health Services Units for school districts and charter schools serving students in grades 6-8." The bill would provide increasing funding for social workers or counselors each year from 2023 to 2025, at a rate of:

- 1 unit for 400 full-time 6th-8th grade students in 2023
- 1 unit for each 325 full-time 6th-8th grade students in 2024
- 1 unit for each 250 full-time 6th-8th grade students in 2025

The bill proposes 1 unit for each full-time 6th-8th grade students (no incremental increase).

This proposed funding is very similar to the school mental health funding formula for K-5th grade students codified in Del. C. § 1716E (except the incremental scale for funding counselors or social workers started in 2022).

The proposed act:

> stipulates that funds shall only be provided at a level necessary to satisfy the ratio requirements, and funding levels shall be determined after considering funds already received from the Opportunity Fund or any other funding already applied toward mental health support personnel. Further, funds allocated under this Act may not supplant mental health funding from another source unless ratios are already met and an approved application for supplanted funds is granted by the Department of Education.

This may mean that schools already funding mental health providers at the ratios required under this bill would not receive additional funding. While the bill describes a process where schools could request to use this funding to supplant other funds already used for mental health services, there is no process for schools to request using this funding to supplement funds already used for mental health services if the district has already met the baseline established in this bill.

It may be beneficial to permit schools to request to use these funds to supplement existing funding if there is need for more extensive mental health services in their school or district.

Councils may wish to support this bill, but advocate for more funding based on demonstrated need above the ratios established in the bill. As written, if a school district or charter has greater need for mental health supports than the required ratios in this bill, and is already funding mental health support at these ratios, that school district or charter school would not benefit from this funding.

House Bill 301: An Act To Amend Title 14 Of The Delaware Code Relating To Mental Health Educational Programs

This act would require "The Department of Education [to] establish and implement statewide mental health educational programs for each grade [K-12] in each school district and charter school in this State." The act provides only minimal requirements for the mental health education programs. The instruction must:

(1) …includ[e] instruction in mental health and the relationship between physical and mental health to enhance student understanding, attitudes, and behaviors that promote health, well-being, and human dignity.
(2) Be taught by appropriately trained certified educators.
(3) Be comprehensive, developmentally appropriate, and sequential in nature.
(4) The act also requires that the school district or charter school provide in-service training on the new instructional program

While the act has limited requirements for the new instructional program, it does require the Department of Education to "consult with mental health experts, including individuals with the Department of Health and Social Services, Department of Services for Children, Youth, and Their Families, Mental Health Association of Delaware, Delaware Guidance Services, National Alliance of Mental Illness Delaware, and National Council for Behavioral Health." The act also empowers the Department of Education to "adopt regulations to implement and enforce this section." Future regulations may provide more specific guidance on the mental health curriculum.

Councils may wish to support this act, but to engage in the development of the instructional programming and subsequent regulations because as written, the act may have potential benefit but is vague as to what actual school programming may look like.

House Bill 303- Required Coverage of Behavioral Well Check

House Bill 303 is an Act that would amend several titles of the Delaware Code. First, it would amend two (2) chapters of Title 18, the Insurance Code, Insurance. It would amend Chapter 33, Health Insurance Contracts, General Provisions, by adding Section 3370E and

Chapter 35, Group and Blanket Health Insurance, Group Health Insurance, by adding Section 3571Z.

In addition, the Act would amend Title 31 Welfare, In General, Chapter 5, State Public Assistance Code by adding Section 530.[1] It would also amend Title 29, State Government, Public Officers and Employees, Chapter 52, Health Care Insurance, by amending Section 5215.

The Act would require all insurance carriers in the state to provide coverage for annual well visits for behavioral health. The coverage is mandated in all plans, including group plans, Medicaid, and plans for State government officers and employees.

The behavioral health well check is to be provided pre-deductible annually, by a "licensed mental health clinician with at minimum a masters level degree." (Sections 1, 2, 3, and 4; 18 *Del. C.*§ 3370E.(a)(1); 18 *Del. C.*§3571Z.(a)(1); 31 *Del. C.*§530.(a)(1); and 29 *Del. C.*§5215.(a)). The requirements of the visit are broad and comprehensive, and "must include but is not limited to a review of medical history, evaluation of adverse childhood experiences, use of appropriate battery of validated mental health screening tools, and may include anticipatory behavioral health guidance congruent with stage of life using the diagnosis of 'annual behavioral health well check.'" (Sections 1, 2, 3, and 4; 18 *Del. C.*§ 3370E.(a)(1); 18 *Del. C.*§3571Z.(a)(1); 31 *Del. C.*§530.(a)(1); and 29 *Del. C.*§5215.(a)).

House Bill 303 also establishes an advisory committee for the design and implementation of the of the annual behavioral health well check created by the Act. (Section 5). The committee would consist of nine (9) members. The members shall include two (2) "actively practicing pediatric behavioral health clinicians, one of whom shall specialize in the treatment of adolescents;" two (2) "actively practicing adult behavioral health clinicians, one of whom shall specialize in the treatment of geriatric populations;" one (1) "actively practicing women's behavioral health clinician;" two (2) behavioral health policy advocates, one of whom is a specialist in behavioral health policy advocacy at the national level and one of whom is a specialist in behavioral health policy advocacy at eh local level;" and two (2) "actively practicing primary care physicians." (Section 5).

This Act implements and expands upon the requirements of the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).[2] This Act is also a belated recognition by the legislature that Delaware citizens are entitled to coverage for mental health and substance abuse disorders on a par with physical health services. As stated in the preamble to the Act, Delaware

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[1] This reviewer was also asked to review and analyze House Bill 317, which is an Act would provide health coverage for children that are not otherwise covered. This Act would also amend Chapter 5 of Title 31 by adding Section 530. The section designation of either the Act created by House Bill 317 or the Act created by House Bill 303 would need to be changed as they could not both have the same section number, namely 530.

[2] Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, Pub. L. No. 110-343 §511 (codified at 29 U.S.C.A. §1185a (2010)). This federal law generally prevents group health plans and health insurance carriers that provide coverage for mental health or substance abuse disorders from providing less favorable benefits than for physical health benefits. This law does not apply to Medicare. There is parity in Medicare through the Medicare Improvements for Patients and Providers Act of 2008, Pub. L. No. 110-275 (enacted July 15, 2008) (MIPPA).

ranks 35th in the nation for mental illness and substance abuse disorders. The situation was exacerbated by the COVID-19 pandemic. Mental health issues cost "almost $200 billion in lost wages and almost $100 billion in healthcare costs nationally." (Preamble to the Act). The failure to address childhood trauma through treatment and screening leads to an increase in mental health illnesses and substance abuse disorders and an increase in incarceration and other negative health behaviors. (Preamble to the Act). There is also the stigma associated with mental health disorders and the intent of the Act is to help change those perceptions by encouraging individuals to seek care and treatment by mandating insurance coverage.

This is a bill that Councils should consider endorsing as it will require parity in coverage for mental health and substance abuse disorders and medical coverage.

House Bill 306 – Driver's Licenses for Individuals Registered as Sex Offenders

HB 306 was introduced and assigned to the House Public Safety & Homeland Security Committee on March 3, 2022. The bill proposes to revise existing law related to the issuance of driver's licenses for registered sex offenders[3]. Currently, state law requires that individuals required to register as sex offenders for a felony conviction must surrender their driver's license to the sentencing court, be issued a temporary license, and report to the Division of Motor Vehicles (DMV) for issuance of a new license where letter code "Y" indicating sex offender status appears in the "restrictions" area of the card. See 21 Del. C. § 2178(e). The law also states the person will need to pay $5.00 fee for issuance of the new license.

The bill proposes to change the coding that appears on the license to "SO" indicating sex offender. It is not clear from the synopsis of the bill provided why the change in coding has been proposed, though presumably "SO" would more clearly indicate the individual is a registered sex offender.

The bill also imposes a requirement that individuals who must register as a sex offender for a felony conviction who have a nondriver identification card follow the same process of surrendering the identification card to the court, receiving a temporary card, and reporting to the DMV for issuance of a new card that has the same coding ("SO" indicating sex offender). In these circumstances the individual would also need to pay a $5.00 fee to the DMV for issuance of the new card.

While in most cases the underlying offense that would result in a person would be a felony, there are some circumstances contemplated by the relevant statute (11 Del. C. § 4120) where a person could be required to register based on one or more misdemeanor convictions. In

[3] Although the exact data is unclear, there is substantial evidence that there are a disproportionate number of individuals with intellectual disabilities who are convicted sex offenders. Callahan, Jeglic, et al, ***Sexual Offenders With Intellectual Disabilities: An Exploratory Comparison Study in an Incarcerated U.S. Sample*** https://journals.sagepub.com/doi/10.1177/0306624X211066825 (12/2021).

those cases, the requirement to obtain and carry a new driver's license with the letter code to indicate sex offender status would appear to not apply.

Several other states require some designation for registered sex offenders on state-issued licenses, and in some states these laws have faced legal challenges. In 2019, a federal trial court found that the state of Alabama's requirements for labelling of driver's licenses and state IDs for registered sex offenders violated individuals' First Amendment rights. *Doe v. Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. 2019). Similarly, in 2020, the Louisiana Supreme Court similarly found that laws requiring that registered sex offenders to carry ID cards branded "sex offender" and criminalizing alteration of such cards were unconstitutional because they constituted "compelled speech" and were not the "least restrictive means" of serving the state's interest in public safety. *State v. Hill*, No. 2020-KA-03232020, WL 6145294 (La. 2020). Louisiana filed a petition for a writ of certiorari with the U.S. Supreme Court in 2021, however this petition was denied without a written opinion on October 4, 2021. It is important to note, however, that in both cases the required labelling was far more obvious (in Alabama the law had required driver's licenses be labelled "Criminal Sex Offender" in bold, red text, and in Louisiana, IDs were required to be labeled "Sex Offender" in all capital, orange text) as opposed to a letter code as used on Delaware's licenses; in the Alabama case the Court actually mentioned Delaware's use of the letter "Y" to label driver's licenses in a footnote as an example of a more subtle means of enabling law enforcement to identify individuals registered as sex offenders while "reducing the unnecessary disclosure of information to others." *Doe* at 1327.

It is unclear whether changing the letter coding to "SO" rises to the unconstitutional level of compelled speech found in the Alabama and Louisiana cases. It certainly will increase the likelihood that others will be made aware of a person's status as a sex offender, as at least anecdotally, there are many circumstances in public life where presentation of identification is a requirement.

Should the Councils choose to take a position on this bill, they may wish to oppose given the myriad of restrictions and public disclosure already required for individuals required to register as sex offenders. It might be helpful to inquire what state interest is served by identifying sex offenders to third parties in this manner, when law enforcement and others can already identify them with the restriction "Y" if necessary.

House Bill 311- Amendments to the Equal Accommodations Statute

HB 311 adds language to Title 6 Chapter 45 , otherwise known as the Delaware Equal Accommodations Statute ("DEAL"). DEAL was originally enacted in 1953. Over time, the legislature has added protected classes to the statute, including disability in 1986. It has been amended a number of times. Over many years, the state agency that enforces the law, the Division of Human Relations (DHR) within the Department of State, has taken an increasingly narrow view of what types of discrimination against people with disabilities are illegal under

DEAL. Specifically, it unilaterally decided that DEAL does not cover cases in which a person is asking for a reasonable modification (or reasonable "accommodation", which is often used interchangeably) of a policy or practice, or for a physical alteration of a structure. DHR has often said it "doesn't enforce the ADA[4]" and has generally, though not always, refused to take any case where the person might also have an ADA claim, even though there is nothing in the statute to support this. DHR dismisses these cases for lack of jurisdiction without doing any investigation whatsoever. [5]

This interpretation has essentially cut off access to DEAL for people with disabilities in the state, who, most of the time, do not encounter direct discrimination (i.e. I won't serve you because I don't like people with disabilities and I don't want you here) but encounter barriers to access. These barriers are sometimes physical, but are often intangible- such as policies and practices that have to be altered to allow access.

CLASI has had some success appealing some of these denials of jurisdiction, most recently in a case that resulted in excellent language clarifying that yes, DEAL covers requests for reasonable accommodations. CLASI remains concerned that DHR may continue to slam the door on disability discrimination cases. Legislators and others felt it prudent to introduce HB 311 to make it abundantly clear that the law's scope is inclusive of all discrimination based on disability. HB 311 does the following:

1. Using the same terms and definitions for those terms as in the ADA
2. Clarifying that places of public accommodation must make reasonable modifications in policies, practices, and procedures, sometimes referred to as "reasonable accommodations", unless doing so would fundamentally alter the program, business, or service.
3. Clarifying that a public accommodation must provide auxiliary aids and services, unless doing so would fundamentally alter the program, business, or service or be an undue burden.
4. Clarifying that places of public accommodation must remove physical barriers if doing so is readily achievable (done without much expense).

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[4] DHR does not appreciate that the ADA enforcement is difficult and expensive. The US Department of Justice accepts a fraction of complaints filed for investigation; the only alternative is to file a case in federal court, which is a lengthy and expensive process. Most of these disputes can be resolved cheaply, simply and often amicably.

[5] CLASI has no idea how many complaints DHR has rejected in this manner. However, CLASI has taken cases involving access to deaf interpreters in a hospital setting, curb ramps, and more recently, a child seeking a medical examination and multiple cases against child care providers, including refusing to allow a Medicaid funded nurse to accompany a toddler with diabetes, a child with developmental delay who was not yet "potty-trained" who was denied admission, and a child who was deaf who was denied admission.

5. Clarifying that state investigations of complaints must apply the requirements under state law in a manner consistent with equivalent requirements under federal laws.

6. Clarifies that an individual does not have to use the exact terms in DEAL to request a reasonable modification or auxiliary aids and services for the request to be covered by DEAL

7. Extends the time to file a complaint under DEAL to 1 year.

8. Allows the Commission to waive the cost of transcript, upon application by a party.

9. Makes corresponding changes to the requirement under § 10006A of Title 29 that a public body allow a member with a disability to use electronic means of communication to attend a meeting because "reasonable modification" is the term now used under § 4504 of Title 6. The term "reasonable accommodation" is retained because that is the term used under state and federal law in employment contexts, which might apply to a member of public body.

Councils should consider strong endorsement of this bill. Currently, most disability discrimination cases are not being heard by DHR and this avenue for relief, which is quick, inexpensive for both sides, and which offers conciliation, is not available to Delawareans with disabilities. HB 311 will prevent DHR from continuing to exclude (without legal justification) claims by people with disabilities under DEAL.

HB 314: An Act To Amend Title 10 Of The Delaware Code Relating To Mandatory Sentences For Juveniles.[6]

House Bill 314 ("HB 314") seeks to amend Chapter 9, Title 10 of the Delaware Code relating to Mandatory Sentences for Juveniles by amending § 1009(k)(1) to clarify that a 6- or 12-month mandatory commitment to Level 5 incarceration or institutional confinement for a juvenile only applies to adjudications of delinquency for the charge of Robbery First Degree or Possession of a Firearm During the Commission of a Felony if the offense was committed *after the child's 16th birthday*. The bill was introduced in the Delaware House of Representatives on March 3, 2022, sponsored by Rep. Heffernan, Sen. S. McBride, and Reps. Dorsey Walker and Longhurst.[7]

It was subsequently assigned to the House Judiciary Committee, which will hold a hearing within twelve (12) legislative days.

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[6] https://legis.delaware.gov/BillDetail?LegislationId=79162.
[7] HB 314 is co-sponsored by Sen. Gay and Rep. Baumbach.

Specifically, this bill is a clarification to House Amendment 1 to HB 307 ("HA 1") from the 49th General Assembly,[8] and adds language to 10 Del.C. § 1009(k)(1) providing that the mandatory commitment applies only where the youth was over the age of sixteen (16) when they committed the offense of Robbery First Degree or Possession of a Firearm During the Commission of a Felony. This clarification will help to ensure that youth who commit either of these offenses while under the age of sixteen (16) do not receive a mandatory sentence 6- or 12-month incarceration or confinement.

Although children with disabilities are not specifically mentioned in the bill, data shows that such children will likely be impacted by its passage (or failure). According to a 2015 white paper, 65-70 percent of justice-involved youth have a disability.[9] The number is likely similar in Delaware. Furthermore, in its Juvenile Justice Guide Book for Legislators focused on reentry and aftercare, the National Conference of State Legislatures reports that "[a]bout 70 percent of juveniles in the system are affected with at least one mental illness."[10]

As written, the clarification aligns with Delaware's trend toward recognizing young people, including those with disabilities, as separate and distinct from adults. Therefore, Councils may wish to support the bill as written. However, Councils may wish to recommend that the Legislature review whether Delaware law should even include mandatory minimums for youth adjudicated delinquent as was the original intent of HB 307.

HB 307 sought to repeal and remove *all* mandatory minimum sentencing scheme for juveniles adjudicated delinquent in Family Court. Recognizing that young people are inherently different than adults, HB 307's sponsors put forth a bill which would allow Family Court judges and commissioners to fashion sentences which are appropriate for each individual youth. This reasoning is in line with several U.S. Supreme Court decisions from the last several decades, including *Miller v. Alabama*[11] (holding that mandatory life without parole for a youth was unconstitutional), *Roper v. Simmons*[12] (holding that a death sentence for a crime committed when the individual was under the age of eighteen (18) was unconstitutional), and *Graham v. Florida* (holding that it was unconstitutional for a young person to be sentenced to JLWOP for a crime not involving homicide.[13]

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[8] https://legis.delaware.gov/BillDetail?LegislationId=26279.

[9] The Arc's National Center on Criminal Justice and Disability. "Justice Involved Youth with Intellectual and Developmental Disabilities: A Call to Action for the Juvenile Justice Community." (2015). https://thearc.org/wp-content/uploads/forchapters/15-037-Juvenile-Justice-White-Paper_2016.pdf.

[10] https://www.ncsl.org/documents/cj/jjguidebook-reentry.pdf.

[11] 567 U.S. 460 (2012). Holding that young people cannot be sentenced to life without the possibility of parole ("LWOP") for homicide crimes where LWOP is the only option for sentencing. Further, mitigating factors must be considered before a young person can be sentence to juvenile LWOP ("JLWOP"), such as their age, age-related characteristics, background, and mental and emotional development.

[12] 543 U.S. 551 (2005). Considering the social and neuroscience literature at the time, the U.S. Supreme Court recognized three general characteristics that separated young people from adults: (1) lack of maturity and possession of an underdeveloped sense of responsibility, which result in impetuous and ill-considered actions and decisions; (2) more vulnerable and susceptible to negative influences and outside pressures; and (3) early stages of character development.

[13] 560 U.S. 48 (2010).

These, and other similar cases, stand on scientific literature differentiating a child's develop*ing* brain from an adult's develop*ed* brain. So, the original text of HB 307 made *sense* when considering the line of U.S. Supreme Court cases and available science around the development and growth of a youth's brain. The House Judiciary Committee agreed on March 28, 2018 with six (6) Favorable[14] votes and three (3) votes On Its Merits[15]. However, on April 19, 2018, Rep. J. Johnson, HB 307's primary sponsor, introduced HA 1, which was placed with the bill immediately prior to a vote by the House. HA 1 retained the mandatory minimum sentences for Robbery First Degree and Possession of a Firearm During the Commission of a Felony.

Retaining the above two (2) mandatory minimum sentences flies in the face of the available literature and U.S. Supreme Court precedent. Although not unconstitutional, it prevents Family Court Judges and Commissioners from adequately considering everything that makes a youth a youth and an individual, including those youth-specific characteristics.

Therefore, although HB 314 follows the current trend in Delaware, Councils may wish to provide their support with the recommendation that the Legislature consider revisiting whether retaining the two mandatory minimum sentences for juveniles adjudicated delinquent is necessary or warranted.

HB 315: An Act To Amend Title 14 Of The Delaware Code Relating To Free Public Schools for Substitute Teachers.[16]

House Bill 315 ("HB 315") seeks to amend Chapter 17, Title 14 of the Delaware Code relating to State Appropriations by adding a new section of the code, § 1716F, which would provide unit funding for substitute teachers. HB 315 also seeks to amend Chapter 12, Title 14 of the Delaware Code relating to Educator Licensure, Certification, Evaluation, Professional Development, and Preparation Programs by amending § 1210 to provide a pathway to initial licensure for individuals providing long-term teaching under proposed § 1716F. The bill was introduced in the Delaware House of Representatives on March 3, 2022, sponsored by Rep. Heffernan, Sen. Sturgeon, and Reps. Dorsey Walker, Griffith, and K. Williams.[17]` It was subsequently assigned to the House Education Committee, which will hold a hearing within twelve (12) legislative days.

Specifically, this bill does a few distinct things: (1) provides unit funding for full time employees who are hired to provide permanent substitute teaching support in Delaware schools[18]; (2) requires the Delaware Department of Education ("DDOE") to develop a professional development program specifically for substitute teachers; and (3) creates a new pathway to initial licensure for substitutes under the proposed § 1716F.

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[14] A favorable vote means the legislator recommends the full Chamber pass the legislation.

[15] A vote On its Merits means the legislator recommends the full Chamber take action on the legislation, but the legislator does not take a position on what action should be taken.

[16] https://legis.delaware.gov/BillDetail?LegislationId=79164.

[17] HB 315 is co-sponsored by Sens. Gay, Hansen, Hocker, S. McBride, Pinkney, Walsh; and Reps. Baumbach, Bolden, Briggs King, Carson, Longhurst, Mitchell, Osienski, and Ramone.

[18] It is unclear whether this is specifically for designated high needs schools or *all* Delaware public schools. This confusion is discussed in more detail in the analysis below.

In essence, HB 315 is an attempt to solve one of the oldest and most consistent issue seen by school systems all over the country: the shortage of substitute teachers. The COVID-19 pandemic only served to exacerbate the issue, causing some Delaware schools to even close their doors or provide virtual instruction on days where there were no substitutes to cover the number of teachers who were absent.[19] An article for WMDT cites unpredictable schedules, inadequate training, and daily pay rates as reason why substitute teachers have been so difficult to hire.[20] HB 315, it seems, would address all three of the reasons cited by the WMDT article.

Although HB 315 seems beneficial on its face and a no-brainer for support, Councils will need to consider the possible unintended consequences of its enactment and whether more time, care, and consideration needs to be taken before giving support.

Unit Funding for Permanent Substitute Teaching Support

Beginning the 2023-24 school year, HB 315 would provide for full time substitute teachers based on the number of students counted in the September 30 unit count for elementary, middle, and high schools. The September 30 unit count determines the number of teachers a school and school district are allocated, and therefore how the general assembly determines its appropriations. The appropriations are divided into three "Divisions" with teachers being funded with Division I monies.[21]

HB 315 would allow schools, based on the number of Division I units – teachers – to hire full-time substitutes. Specifically,

- A school with 25-29 teachers would receive .65 of a full-time substitute unit;
- A school with 30-49 teachers would receive 1 full-time substitute unit;
- A school with 50-54 teachers would receive 1.65 full-time substitute units; and
- A school with 55 or more teachers would receive 2 full-time substitute units.

HB 315 further states that any "fractional" units could be used to support full-time substitute teachers throughout the district. It is unclear how this particular provision will function and how it will affect how full-time substitute teachers would be used throughout the district. For example, if the "fractional" units from the schools within the district are then combined at the district level to provide for full units, who determines where these "district" full-time substitutes would go? Would they be stationed at *one* school for the duration of the year, or would they become *floaters* to be used as the district sees fit? The latter would be counter to what full-time substitutes are supposed to provide: stability and continuity for the students and the school.

One of the other concerns is that HB 315 provides for a "cash option" that would allow a District to essentially *trade-in* up to thirty (30) percent of the full-time substitute units for $35,000 per unit. Although the funds would be required to be used to support substitute teaching

[19] https://www.delawareonline.com/story/news/2022/01/12/some-delaware-schools-go-virtual-close-covid-staffing-shortages-substitutes-covid-19/9171770002/.
[20] https://www.wmdt.com/2022/03/a-bill-to-find-a-solution-for-the-substitute-shortages/.
[21] Title 14, Chapter 17 of the Delaware Code.

or reducing class size, how does this help accomplish the goal of ensuring there are enough substitute teachers available? This question becomes more salient when considering the pay and benefits for full-time substitute teachers under HB 315.

HB 315 requires that full-time substitute teachers hired under consistent with these provisions would be paid from state funds for ten (10) months consistent with 14 Del. C. 1305. Specifically, full-time substitute teachers must be paid at a starting salary equitable to a no degree step 1 salary, which is .96171. As an illustration, the lowest salary for a teacher in the 2019-2020 school year was $42,338.[22] A no degree step 1 salary for the 2019-2020 school year would then be $40,716.88. In stark contrast, the range of pay for substitute teachers in 2019-2020 was anywhere from $66 per day to $104 per day.[23] So the district has to weigh: do I want to pay one person approximately $40,000 to be at one school? Or do I want to take the cash option and pay substitute teachers *per day* at all my schools? The cap of thirty (30) percent of the units available for trade-in helps ensure that most of the funds are used for full-time substitutes, but why allow the cash option at all?

Another issue concerns whether HB 315 would apply to *all* elementary, middle, and high schools or whether it is specifically for those schools who are defined as "high needs." There is one reference to high needs schools which is (b)(1), where it identifies the number of full-time substitute units to which schools would be entitled. This is the only mention of "high needs" schools within the entire bill. It is unclear whether the bill is intended to only affect those schools identified as "high needs" or whether there was a mistake made in drafting, or both. There are two recommendations for this (b)(1) section that Councils may want to consider.

1. The citation to the "high needs" definition included in the bill is 14 Del. C. § 1726. This is an incorrect citation and should be changed to 14 Del. C. § 1102A(5)(b). However, this correction may be unnecessary if it was a mistake to restrict these full-time substitute units to high needs schools.
2. The drafters label this section as (b)(1) yet there is no (b)(2); the next section after (b)(1) is (c). In general, if there is a (b)(1), there is going to at least be a (b)(2). It is possible that the drafters intended there to be separate unit count determinations for schools considered "high needs"; or that was the original thought and was subsequently abandoned. Councils may wish to recommend that the drafters clarify whether the bill would apply to *all* schools, just those identified as "high needs," or both with different allocations as well as whether charter schools are included.

The distinction between which schools will qualify for full-time substitutes and how many is extremely important when considering the cost of the bill. It should be noted that as of March 11, 2022, there is no fiscal note yet attached. In an attempt to provide some idea of the cost, this reviewer did a rough approximation for what this number may look like.[24]

[22] https://www.doe.k12.de.us/page/1490. "Average Salary of Full-Time Staff 2019-2020."
[23] https://www.delawarepublic.org/education/2019-04-19/state-seeks-solution-to-substitute-teacher-shortage.
[24] These are just approximations. The calculation assumes the cash option is not used and includes a percentage of a salary; approximate number of total full-time substitute units was 225.25 for *all* elementary, middle, and high schools and 28.3 for *high needs* elementary, middle, and high schools. The calculation does not include charter schools. The data for the number of teachers used to determine the full-time substitute unit count came from

- If HB 315 applies to *all* elementary, middle, and high schools: $ 9,171,477.22
- If HB 315 applies *only* to "high needs"[25] elementary, middle, and high schools: $ 1,152,287.70
- If HB 315 applies to *all* elementary, middle, and high schools but with different allocations for each: ?????

It should also be noted that the salary for full-time substitutes would not be paid completely from state appropriations, but rather in some combination of state and local funds.

<u>Professional Development Program for Substitutes</u>

The second thing HB 315 would do is require that DDOE develop a professional development program no later than May 30, 2023 specifically targeted at substitute teachers. This program would be for both district and charter school use and would be required to include, at a minimum, training on:

- Implementing lesson plans;
- Classroom management;
- Student behavior, including disability awareness and behaviors that may manifest because of disabilities; and
- Basic understanding of Individualized Education Plans and Section 504 Plans.

The bill would also make all individuals hired as full-time substitutes subject to state, district, and building level professional development requirements as well as to the provisions found in Title 14, Chapter 41 of the Delaware Code.[26] Finally, it allows the full-time substitute to use the hours spent doing professional development training as credits toward a standard teaching certificate.

Councils may wish to generally support the inclusion of a professional development requirement in a bill relating to substitute teachers, especially for full-time substitute teachers. One of the concerns heard often in terms of substitute teachers is that they are not well-versed in what happens – or should happen – within the classroom. And students may exhibit more maladaptive behaviors when a substitute is in the classroom when compared to their actual teacher. Equipping substitute teachers with training specifically related to classroom management and addressing student behaviors is nothing short of a much needed, great idea.

However, Councils may wish to recommend that the drafters consider whether there should be a requirement that DDOE consult with the Delaware Center for Teacher Education[27] at the University of Delaware in developing the training and professional development program. A collaboration such as this would help ensure consistency in training for those teaching in Delaware schools.

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https://www.doe.k12.de.us/page/1490 "Number of FTE Staff 2019-2020". The salary number used was $40,716.88, which is 96.171% of the lowest salary teacher in 2019-2020.

[25] https://www.doe.k12.de.us/Page/4495.

[26] These provisions include a wide range of items including training on school bullying prevention, suicide prevention, and child abuse and safety awareness.

[27] https://www.dcte.udel.edu/.

Pathway to Licensure

Finally, HB 315 would provide for a pathway to licensure for full-time substitutes. Specifically, it would allow those full-time substitutes to use their time in the classroom as an alternative to student teaching, which is a prerequisite to receiving initial licensure. On its face, this idea makes sense and Councils may wish to support this general premise and the language in the bill with a few minor recommendations.

In attempting to include this additional pathway in Chapter 12, Title 14 of the Delaware Code, the drafters may have inadvertently made a fairly substantial change to the alternatives to student teaching requirements. The current text of 14 Del. C. 1210(a)(1), which is the first of four (4) alternatives to student teaching, reads:

> One year of teaching experience consisting of a minimum of 91 days of long-term teaching experience in 1 assignment, except that this paragraph (a)(1) does not apply to applicants seeking an initial license to teach in a core content area. For the purposes of this section, "core content area" means any subject area tested by the state assessment system, including mathematics, English/language arts, science, and social studies. Experience in an alternative routes for teacher licensure and certification program or the Special Institute for Teacher Licensure and Certification Program may not be used to meet this alternative.

HB 315 would change 14 Del. C. 1210(a)(1) to read:

> One year of teaching experience consisting of a minimum of 91 days of long-term teaching experience in 1 assignment or 3 years of long-term teaching experience consisting of 91 days of long-term teaching experience per year in multiple assignments under § 1716F of this title. Experience in an alternative routes for teacher licensure and certification program or the Special Institute for Teacher Licensure and Certification Program may not be used to meet this alternative.

In making these changes, the drafters removed the carve-out for applicants seeking an initial license to teach in a core content area. Councils may wish to recommend that the drafters retain this carve out and instead place the specific provision related to an alternative route for full-time substitutes as the fifth alternative to student teaching rather than included in one of the already-existing alternatives.

In general, Councils may wish to offer cautious support for HB 315 consistent with the concerns expressed within this analysis. In addition, Councils may wish to question why retired teachers and / or current students within a teacher education program were not provided for within a push for hiring substitute teachers, similar to Pennsylvania's recently proposed legislation.[28]

House Bill 317- Cover All Delaware Children Act

[28] https://www.bctv.org/2021/12/17/psea-welcomes-legislation-that-will-ease-substitute-teacher-shortage/.

House Bill 317 is called the "Cover All Delaware Children Act." The Act would amend Title 31 Welfare, In General, Chapter 5, State Public Assistance Code by adding Section 530.[29] The Act would provide medical coverage to children who reside in Delaware, regardless of their immigration status, and who are not eligible for Medicaid or other medical coverage.

The Department of Health and Human Services would create and operate the program to provide benefits that mirror the benefits of the Medicaid and Children's health Insurance Program (CHIP). The coverage would be comprehensive and would include "hospital, medical, dental, and prescription drug benefits." (Section 530(c)). In essence, this Act creates a state funded insurance program for children whose immigration status of not being documented prevents them from being eligible for Medicaid. Upon passage and signing by the Governor, the coverage required by the Act would begin on January 1, 2023.

Councils should support the creation of a program that provides health insurance coverage to children who, but for their immigration status, would qualify for coverage through Medicaid or CHIP. All children, including those that are not documented or that have disabilities, should be insured in Delaware. The inevitable consequences of children going without preventative or critical health care will result in more significant health issues in the future. An investment in health care now will contribute to cost saving outcomes in the future, such as utilization of emergency rooms for primary care and forgoing care until a medical need becomes urgent.

Although the proposed legislation is certainly laudable, the concern that Councils should have is that the creation and operation of the health program is dependent upon annual appropriations. (Section 530(a)). To achieve the purpose of the Act, the program must be funded fully and become an entitlement. If the program is subject to appropriations each year, it could be defunded, essentially eliminating the program without repealing the legislation. If the program is only partially funded, the program would be forced to implement some means to limit cost, such as capping individual coverage or utilizing a waitlist. Those measures would result in an inequitable administration of benefits and defeat the purpose of the Act, which is to fully cover all children in Delaware. Councils should favor and insist that funding for the program be ongoing and not subject to yearly requests from the legislature.

On March 1st, a fiscal note prepared by Victoria Brennan, Office of the Controller General, was attached to the bill. According to the note, the Division of Medicaid and Medical Assistance (DMMA) estimated that there are 2000 eligible children in Delaware that are not qualified for Medicaid of other health insurance programs. DMMA estimates that 1,000 children would be enrolled and covered in 2023, with the balance and total enrollment achieved in 2024

[29] This reviewer was also asked to review and analyze House Bill 303, which is an Act would provide coverage for annual well visits for behavioral health. This Act would also amend Chapter 5 of Title 31 by adding Section 530. The section designation of either the Act created by House Bill 303 or the Act created by House Bill 317 would need to be changed as they both could not have the same section number, namely 530.

and 2025. Unfortunately, it will take approximately three (3) years for all the children to be enrolled. This is not fast enough, and Councils should insist on specific language in the bill to promote the program and facilitate enrollment. Moreover, there does not appear to be any consideration given to the cost and funding the program if the number of undocumented children is higher than the DMMA estimate or increases in the coming years. The total cost of the program, including administrative costs, for 2023 (the inception year) is $2,050,000.00. For 2023 the total cost is $6,950,000. And for 2025, the total cost is $7,310,000. These are estimates; however, if it turns out that they are inadequate to fully fund the program, the funding should be increased so that every child is covered.

House Bill 319 -Constitutional Amendment Regarding Parental Rights

HB 319 synopsis describes itself an act proposing an amendment to Article I of the Delaware Constitution to affirm that Delaware parents and legal guardians have a fundamental right to the care, custody, and control of their children. The Act indicates this amendment would require government officials to prove that State interference with these rights is a necessary "compelling interest" and the least intrusive means. It purports to fill a void in the Delaware constitution and caselaw.

While the synopsis sounds compelling a closer read of the statute reveals that in fact it would undo a Delaware Supreme Court case, that has been crucial to many parents, including those with disabilities, to have their children returned to their care once concerns about their "fitness" to parent have been addressed; Tourison v. Pepper, 51 A.3d 470 (Del. 2012). HB 319, notably, extends parental rights as a fundamental right to not only biological and adoptive parents but also legal guardians. Tourison, has been used by many parents who have regained fitness to parent, to terminate a legal guardianship that gave care and custody to another party.

The assertion that there is a void in the Delaware constitution and caselaw protecting parental rights is inaccurate. The Delaware Supreme Court has affirmed that parents have a fundamental right to make decisions concerning the care, custody, and control of their children. Tourison, citing Troxel v. Granville, 120 S. Ct. 2054 (2000); Shepherd v. Clemens, 752 A.2d 533, 541; Black v. Gray, 540 A.2d 431, 435 (Del. 1988). Therefore, what HB 319 adds, substantively, is extending this same right to legal guardians, by adding "or legal guardian" to section (b) of this bill is what is problematic for individuals with disabilities, and others, who have had their children placed into a guardianship. This amendment to the Delaware Constitution would put legal guardians on equal footing with parents in asserting rights to raise the child. Likely this would result in more parents with disabilities being deprived of the right to raise their own children.

Secondly, the evidentiary standard in infringing upon parental rights in Delaware is a "clear and convincing" whereas HB 319 uses a "compelling" State interest standard (also called "strict scrutiny"), which would helpful to parents with disabilities in asserting rights to their

children. However, as discussed above, applying these rights equally to legal guardians would be incredibly problematic for parents with disabilities. It also may be utilized to protest public health and safety mandates in schools, such as mask wearing, and vaccination requirements. Masking during periods of high transmission, and immunization against preventable diseases protect Delaware children with disabilities who are medically fragile.

Extending equal rights to legal guardians would create conflict between State law and the U.S. constitution. This could result in numerous court challenges, wasting the time of parents with disabilities and delaying the adjudication of their rights, as well as taxpayer dollars and court resources.

Councils should consider opposing the bill as drafted.

House Bill 324 – Criminal Penalties for Assault of Health Care Workers

HB 324 seeks to amend existing provisions in the Delaware Code to broaden the statutory definition of assault in the second degree at 11 Del. C. § 612 to include qualifying offenses committed against a wider range of health care workers. This bill was reported out of Committee in the House on March 9, 2022.

Prior to the passage of HB 214 in 2016, an assault that would otherwise be considered a third degree assault (a misdemeanor) would automatically be considered a second degree assault (a felony) in cases where the perpetrator had recklessly or intentionally caused injury to a law enforcement officer, first responder, or public transit operator. See 11 Del. C. § 612(3)). In 2016, the Legislature passed HB 214, which expanded the automatic re-designation to assault in the second degree to include cases in which the perpetrator had intentionally caused physical injury to a "the operator of an ambulance, a rescue squad member, licensed practical nurse, registered nurse, paramedic, or licensed medical doctor while such person is performing a work-related duty," as well as "any other person… rendering emergency care." See 11 Del. C. § 612 (4)-(5).

HB 324 proposes to further expand the conditions in 11. Del. C. 612 (3)-(4), to include hospital constables, in addition to "any person providing health care treatment or employed by a health care provider while such person is performing a work-related duty." This language is extremely broad, and in many cases would essentially include anyone employed by a particular facility or program. Perhaps most of interest to the Councils, this would potentially include direct service professionals serving individuals with disabilities in community settings, as well as all employees at facilities such as group homes and psychiatric hospitals. Presumably the perpetrator in the vast majority of such cases would be a patient or service recipient, a person with a disability, most likely a behavioral health related disability. As second degree assault is considered a felony, the consequences could be significant for individual defendants in terms of sentencing as well as the collateral consequences of a felony conviction.

Notably, a nearly identical bill, HB 144, was introduced in March of 2020 just prior to the COVID-19 pandemic. At that time, The News Journal had published two op-eds relating to the bill. The first, by Karen Lantz, Esq. of the ACLU of Delaware and Jack Guerin of the ACLU's Coalition for Smart Justice, criticized the bill, stating that it "[would move] Delaware in the wrong direction on criminal justice reform." They also referred to the alternative strategy of "workplace violence prevention programs" and mentions that legislation has passed in numerous other states requiring hospitals to have workplace violence prevention programs as opposed to increasing criminal penalties for assault. A rebuttal, penned by Wayne Smith of the Delaware Healthcare Association and Marcy Jack of Beebe Healthcare, contended that the strategies of workplace violence prevention and broadening the criminal statute are complementary and should be pursued together. Mr. Smith and Ms. Jack cited to statistics regarding the widespread occurrence of assaults on health care workers and asserted that not amending the statute to include all health care workers would result in a situation where workers are not equally valued, as the same incident occurring within a health care facility would be considered a felony in some cases and not in others, depending on the job title of the victim. Finally, the rebuttal emphasized that acts covered by the statute would need to be "intentional" to be considered assault, and therefore the amended statute would not unfairly target individuals experiencing a behavioral health crisis.

Advocates on both sides of the issue agree that the assault of health care workers is a serious problem that needs to be addressed. It has been widely reported that approximately 75% of workplace assaults take place in health care settings. See e.g., ABC News coverage available at https://abcnews.go.com/Health/epidemic-75-workplace-assaults-happen-health-care-workers/story?id=67685999. Additional strain on the health care system caused by the COVID-19 pandemic as well as controversies surrounding masking and vaccination policies have only increased concerns about threats and violence toward health care workers. See, e.g., PBS News Hour, "Health care workers once saluted as heroes now get threats," Sep. 29, 2021, available at https://www.pbs.org/newshour/nation/health-workers-once-saluted-as-heroes-now-get-threats. At the same time, staffing and retention of health care workers is a growing concern. See, e.g., Ed Yong, Why Health Care Workers Are Quitting in Droves, The Atlantic, Nov. 16, 2021, available at https://www.theatlantic.com/health/archive/2021/11/the-mass-exodus-of-americas-health-care-workers/620713/. The inability of health care providers to maintain staffing also impacts people with disabilities, potentially compromising safety and quality of care in a variety of settings.

While an act must be "intentional" to be deemed an assault in the second degree, this threshold would not clearly protect individuals with behavioral health conditions from unnecessary criminalization in all situations. There is no explicit exception in the statute for individuals with mental health conditions or other conditions that may impact behavior in circumstances that may increase the likelihood of such incidents. Some individuals may be easily agitated or prone to bursts of aggression as a result of their condition but could still legally

be found to have "intentionally" caused injury to another person. Incidents involving individuals receiving inpatient care at psychiatric facilities are already often reported to police; expanding when such incidents would be considered felonies may encourage further reporting of these incidents and increasing criminalization of these individuals, as opposed to focusing on treatment and supporting the development of appropriate behaviors and coping skills.

In programs and facilities serving individuals with disabilities, inadequate staffing and poor training of direct care staff often contribute to incidents escalating to the level of physical assault. Staff may not be paying sufficient attention to an increasingly agitated individual or may not feel empowered to de-escalate conflict when an individual starts behaving aggressively. In these situations, the alleged perpetrators should not face greater punishment for not receiving the appropriate care. Further, as the ACLU's op-ed regarding the prior bill pointed out, alleged perpetrators of assault in these circumstances would still face consequences such as prison time or a fine for the misdemeanor charge. Saddling often vulnerable individuals with felony convictions would potentially create larger obstacles to employment as well as certain types of housing and residential programs.

There has been a push for similar legislation around the country, often led by nursing unions and other trade organizations. In Massachusetts, after similar legislation was enacted, advocates proposed an amendment making it clear that any individual who was being transported or held in a psychiatric facility under the provisions of the state's civil commitment law or has otherwise been "determined by mental health providers to need psychiatric evaluation or treatment" could not be charged with a felony under the Massachusetts statute. This bill, H.1342, was scheduled for hearing in October 2019 but does not appear to ever have been voted on.

Balancing the safety of health care workers with the rights and wellbeing of the individuals they serve is always a delicate balance. The DLP suggests that the Councils oppose this bill without language such as that which appears in the Massachusetts bill. This language could be introduced to further clarify that the new provisions would not apply in certain circumstances where an individual is actively receiving psychiatric treatment or other behavior related support.

Senate Bill 232- Required Civics Curriculum and Assessment

Senate Bill "SB 232" seeks to require that each school district and charter school serving high school students administer in Grade 10 and again in Grade 12 an assessment of United States history, government, and civics that includes all the following: (1) The nature, purpose, principles, and structures of United States constitutional republic. (2) The principles, operations, and documents of the United States government. (3) The rights and responsibilities of citizenship. This proposed Act would require that school districts and charter schools report information regarding the implementation of this Act to the Department of Education

(“Department”) and that the Department report that information to the Governor and members of the General Assembly and post the report on the Department’s website.

No doubt participation in civics education in the 21st century will empower students to be well-informed and help student develop beliefs and behaviors needed to participate in civil life. However, the DDOE has existing civics and history curriculum standards that already cover all of the subject matter included in SB 232. https://www.doe.k12.de.us/Page/2548; This includes instruction on the three branches of government, how bills become law, and the obligations of citizenship etc. Broadly the curriculum is described as follows:

> *Civics directly addresses citizenship education within the context of political systems. Students study the assumptions upon which governments are founded, and the organizations and strategies governments employ to achieve their goals. With specific respect to the United States, students learn the underlying principles of representative democracy, the constitutional separation of powers, and the rule of law. They need to comprehend that an essential premise of representative democracy is the willingness of citizens to place a high premium on their own personal responsibility for participation in social decision-making. Students develop the skills which citizens must possess in order to discharge those responsibilities while protecting their rights and the rights of others. The study of civics prepares students to translate their beliefs into actions and their ideas into policies.*

A Social Studies Assessment is given in grades 4, 7 and 11. https://www.doe.k12.de.us/domain/518;. Assessment data is available on the DDOE website if legislators wish to evaluate it.

Councils should consider opposing SB 232 as duplicative of existing DDOE-established state standards and assessments for Social Studies, which includes civics. Legislative oversight is neither appropriate nor necessary.