

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 10/17/2022

Re: November 2022 Policy and Law Memo

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

Proposed DOE/Professional Standards Board Regulation on 14 DE Admin. Code 1522 Elementary School Counselor, 26 Delaware Reg. of Regulations 361 (11/01/22).

The Professional Standards Board (“Board”), acting with the Delaware Department of Education (“DOE”), proposes amendments to 14 **DE Admin. Code** 1522 Elementary School Counselor and what is required for a Standard Certificate. The amendment clarified the education, knowledge and skill requirements and adds the option of a new Praxis Subject Matter Assessment in Sections 4.1.2 and 4.2.2.

The proposed amendment includes language that the applicant must disclose criminal conviction history. Failure to do so, the amendment stipulates, is grounds for denial of the application. 5.2

The proposed amendment adds the requirement that clinical experience requirements must be with a licensed and practicing clinician. 4.1.3 and 4.2.3.

This amendment aims to ensure that the quality of Delaware educators remains high, while giving Certificate applicants a fair means to acquire the Certificate. Moreover, the addition of the criminal conviction history requirement creates an additional safeguard for Delaware schools and educational institutions. Councils may wish to endorse these changes.

DDOE indicates that the education, knowledge, and skill requirements are designed to improve the quality of the educator workforce, which will help to improve student achievement.

Councils may wish to endorse the proposed regulations.

Proposed DDOE Regulation on 915 James H. Groves High School, 26 Del. Register of Regulations 358 (November 1, 2022)

The Delaware Department of Education (“DDOE”) proposes to amend 14 Del. Admin. C. § 901, which describes the operation of the James H. Groves High School (“Groves”), an adult education high school. DDOE is proposing to amend this regulation to add a defined term in Section 1.0, replace “State Director” with “Director of Adult and Prison Education Resources”, and to strike the standardized assessment requirement from subsection 2.1.1.1.2. DDOE also

proposes additional non-substantive changes to ensure the regulation complies with the *Delaware Administrative Code Drafting and Style Manual*.

First, proposed 14 Del. Admin. C. § 915.1.0 would add an additional definition for “In School Credit Program” which is described in existing 14 Del. Admin. C. § 915.2.2. The proposed language defines the In School Credit Program as an “alternative program operated by the James H. Groves High School that provides an opportunity for students who are age 14 or older and enrolled in their local day school to attain credits needed to fulfill high school graduation requirements.” Councils may wish to recommend that DDOE include the word “education” between “alternative” and “program” so as to clearly identify this as an alternative education program and not an alternative program for students facing discipline.

Second, proposed 14 Del. Admin. C. § 915.2.1.1.1.2 removes the standardized assessment requirement as part of the application for enrollment at Groves. Specifically, that section would be changed as follows (indicated by strikethrough): “Qualify as meeting secondary level skills, as determined by the Department, ~~on a standardized assessment.~~” With the change, it is now unclear how DDOE would measure whether a student would qualify as meeting secondary level skills. Furthermore, it could lead to students being measured against different criteria, which can lead to inequitable outcomes. Councils may wish to recommend that DDOE not remove this requirement or if it chooses to remove the specific requirement of a standardized test, that it identify other ways of meeting this secondary skill level.

The additional proposed changes, including the change to the title of the Director of Adult and Prison Education Resources, are non-substantive.

However, there are additional concerns with the regulation outside of the proposed amendments that Councils may want to address. First, the admission criteria do not contemplate those students in the prison education program specifically. Students in prison who are seeking their high school diploma or GED are automatically enrolled in Groves, yet there is no indication in 915 that there is an exception to the admission criteria for those students (or that students enrolled in prison education are enrolled in Groves). Therefore, Councils may wish to recommend that DDOE include language in this regulation that identifies Groves as providing education to incarcerated students and that those students are otherwise exempt from the admission criteria.

Second, current Section 2.3 disallows enrollment of students who have been expelled or are pending expulsion unless he or she receives a waiver from DDOE. Title 14 Del. C. § 4130(d) explicitly exempts Groves from the prohibition on enrolling expelled students. Councils may wish to recommend DDOE reconsider its position on whether expelled students can enroll at Groves without a waiver. Councils have previously made this recommendation in 2006 (10 Del. Register of Regulations 988 (December 1, 2006) and 18 Del. Register of Regulations 561 (January 1, 2015).

Third, current Section 4.2 states that “[s]tudents enrolled in James H. Groves High School courses which have an attendance requirement, shall attend a minimum of 85% of the course

hours to receive a unit of credit. No provision is made for excused absences.” DLP’s Policy and Law Memo to Councils in October 2006 had the following thoughts:

Although not a paragon of clarity, the last sentence could be construed as precluding credit if a student has less than 85% attendance regardless of good cause. This would have a disproportionate impact on students with disabilities, particularly those with chronic health conditions or frequent flare-ups of symptoms. A no-exceptions policy may violate Section 504 and unnecessarily limit the discretion of IEP teams to accommodate students with disabilities. For example, if a student with disabilities achieved A’s in all tests and assignments, but attended only 84% of classes due to a hospitalization, Groves would have no discretion but to deny credit based on the strict regulation. Even on a practical level, Section 3.0 authorizes Groves to grant credit for a lengthy list of non-traditional work with no explicit attendance standards. In contrast, imposing a no-exceptions 85% attendance limit in Section 4.2 appears overly prescriptive.

Councils may wish to recommend DDOE again consider whether having an outright “no excused absences” policy is appropriate in light of federal and state law and regulations regarding the rights of people with disabilities to be free from discrimination.

Proposed DOE/Professional Standards Board Regulation on 14 DE Admin. Code 1545 Secondary School Counselor, 26 Delaware Reg. of Regulations 363 (11/01/22).

The Professional Standards Board (“Board”), acting with the Delaware Department of Education (“DOE”), proposes amendments to 14 **DE Admin. Code** 1545 Secondary School Counselor and what is required for a Standard Certificate. The proposed changes parallel the changes for Elementary Counselor. The amendment clarified the education, knowledge and skill requirements and adds the option of a new Praxis Subject Matter Assessment in Sections 4.1.2 and 4.2.2.

The proposed amendment includes language that the applicant must disclose criminal conviction history. Failure to do so, the amendment stipulates, is grounds for denial of the application. 5.2

The proposed amendment adds the requirement that clinical experience requirements must be with a licensed and practicing clinician. 4.1.3 and 4.2.3.

This amendment aims to ensure that the quality of Delaware educators remains high, while giving Certificate applicants a fair means to acquire the Certificate. Moreover, the addition of the criminal conviction history requirement creates an additional safeguard for Delaware schools and educational institutions. Councils may wish to endorse these changes.

DDOE indicates that the education, knowledge, and skill requirements are designed to improve the quality of the educator workforce, which will help to improve student achievement.

Councils may wish to endorse the proposed regulations.

Proposed DOE/Professional Standards Board Regulation on 14 DE Admin. Code 1575 , Teacher of Students with Visual Impairments, 26 Delaware Reg. of Regulations 364 (11/01/22).

The Professional Standards Board (“Board”), acting with the Delaware Department of Education (“DOE”), proposes amendments to 14 **DE Admin. Code** 1575 Teacher of Students with Visual Impairments (“Teacher”), and what is required for a Standard Certificate. The proposed regulations also reflect commitment to update standards per HB 382 which was enacted as a result of the sunset committee’s review of DVI.

The regulation affirms that a Teacher must have certification if their primary assignment is teaching students with visual impairments in public schools. The added Definitions and many of the standards are identical to those found in other certification regulations.

The routes to a Standard Certificate in this area are: 1. Exceptional Needs Specialist certification through National Board for Professional Teaching Standards; 2. BA or MA with minimum of 30 hours of coursework in teaching visually impaired students; 3. Completion of alternative routes to licensure or certification ; or completion of Department approved education preparation program for instruction for visually impaired students; BA in any content area with 17 hours of specific courses listed in the regulation.

Criminal history must be disclosed on the application or renewal of license. The Secretary of Education may approve a teacher who does not meet requirements on application of a district or charter school.

There is nothing particularly remarkable about these regulations and they don’t appear to deviate from the requirements of other specialized certificates. Councils may wish to object, again, to giving the Secretary the ability to override certification requirements, particularly in an area which requires such a large degree of specialized skill and training.

Proposed DMMA Regulation on Reasonable Income Compatibility Threshold, 26 Delaware Reg. of Regulations 374 (11/01/22).

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DHSS/DMMA) is proposing to amend the Delaware Social Services Manual (DSSM) 14800 regarding the Reasonable Income Compatibility Threshold. The Affordable Care Act required states to compare electronic sources for income information during application and recertification processes. The idea was to reduce documentation requirements that might lead to eligible people not getting services because of difficulties obtaining that documentation.

State agencies have the latitude to set standards for reasonable match of data to what the applicant has attested to. If both the attestation and the data source are at or below the eligibility threshold, the Medicaid agency finds the individual eligible. In these situations, the difference between the attestation and data source does not affect eligibility, because the individual would be eligible using either the electronic data or the attestation. With the approval of the Centers for

Medicare & Medicaid Services (CMS), states can establish a reasonable compatibility standard, which applies when an attestation is at or below the eligibility threshold, but data sources show income above the threshold.

DMMA is proposing to increase the variance standard from 10% to 25%. This change will aid in the passive renewal process of Medicaid members during the PHE and the unwinding period of the PHE. This will decrease the need for manual intervention, decrease the risk for inappropriate terminations, and allow staff the ability to focus on the large caseload of renewals that are unable to be passively renewed.

DMMA is concerned that when the PHE finally ends, (and now we know it won't end at least until Spring 2023) that people may struggle to document income and that people may be terminated who are eligible.

Councils should consider endorsing this regulation as it will assist individuals in recertification and also ease administrative burden on DMMA as it processes all of the recertifications that must take place when the PHE “unwinds.”

DMMA Announcement of Intent Proposed Extension and Amendment of Diamond State Health plan Section 1115 Waiver, 26 Delaware Reg. of Regulations 410 (11/01/22).

DMMA is proposing four new¹ changes in the extension period²:

1. Expanding access by providing three-months of retroactive eligibility to all DSHP 1115 Waiver enrollees. DMMA is requesting to terminate the DSHP waiver of retroactive eligibility. Effective no later than January 1, 2024, with the expiration of the current DSHP 1115 waiver, DMMA will extend retroactive eligibility to all eligible DSHP and DSHP-Plus participants three months prior to the date that an application for medical assistance is made. Delaware will terminate this waiver authority to support our goal of expanding access to coverage, including coverage for those who need immediate care while applying for Medicaid Waiver.

Impact: None. Members months associated with retroactive eligibility will be covered outside of the DSHP 1115 Waiver in Medicaid FFS.

2. Piloting Medicaid coverage of Delaware's Food Box Initiative for postpartum members. DMMA proposes to add Medicaid coverage of our Medicaid Food Box Initiative for postpartum members under the DSHP 1115 Waiver. The objective of the Food Box Initiative is to address

¹ July 2022 Pending Amendment DMMA has proposed five changes to the DSHP 1115 Waiver that are pending in an amendment currently under review by CMS for an effective date of January 1, 2023. The changes in this amendment include: 1. Coverage of two models of evidenced-based home visiting for pregnant women and children. 2. Permanent coverage for a second home-delivered meal for members receiving HCBS in DSHP Plus. 3. Coverage of a pediatric respite benefit as an American Rescue Plan Act (ARP) Section 9817 HCBS Spending Plan initiative. 4. Coverage of a self-directed option for parents on behalf of children receiving state plan personal care services. 5. Coverage of Delaware's Nursing Home Transition Program (formerly Money Follows the Person Demonstration) in the DSHP 1115 waiver.

²https://dhss.delaware.gov/dhss/dmma/files/de_proposed_dshp_1115_waiver_ext_req_pub_notice_nov_2022.pdf

food insecurity and diaper needs as health-related social needs to improve maternal and infant health and reduce health disparities. The proposed demonstration would allow DMMA to use Medicaid funds to expand our current state-funded pilot to provide home-delivered food and diapers to postpartum members, reaching low-income postpartum members with disproportionately high rates of food insecurity and inequitable adverse maternal and birth outcomes.

Waiver Impact: Approximately 8,841 members and \$8.29 million over five years.

3. Adding Medicaid coverage of contingency management services for certain members with a stimulant use disorder and/or opioid use disorder. DMMA is proposing to add coverage of contingency management services for Medicaid members who are: (1) age 18 and over with a stimulant use disorder diagnosis and (2) age 18 and over, who are pregnant or up to 12 months postpartum, with an opioid use disorder diagnosis. Contingency management is an evidence-based practice that allows individuals to earn small motivational incentives for meeting treatment goals, such as negative urine drug tests or medication adherence. The objectives of contingency management services are to expand SUD/OD treatment for eligible Medicaid members with a stimulant use disorder and/or opioid use disorder to help address the rise in fatal drug overdoses throughout Delaware. DMMA also expects this initiative to improve health outcomes and address health disparities.

4. Adding children's state plan dental services under the DSHP 1115 managed care delivery model. Effective January 1, 2024, DMMA is proposing to include children's dental services in the DSHP 1115 Waiver managed care delivery system. The objective of including children's dental services in DSHP managed care is ensure access to high-quality dental care for children and support a coordinated and integrated delivery system. DMMA expects dental managed care for children will result in a positive (or no negative) impact on child dental access, health outcomes and parent/caretaker satisfaction.

Waiver Impact: Beginning in CY 2024, approximately 114,000 Medicaid-enrolled children will begin receiving their dental services through MCOs under the DSHP 1115 Waiver. These expenditures are currently excluded from the DSHP 1115 Waiver. Dental managed care will shift approximately \$327 million in expenditures over five years from FFS to the DSHP 1115 Waiver

The comment period for the proposed amendments is December 13. There will be an additional opportunity when the proposed amendment is filed with CMS. These are all improvements; however, this is also an opportunity to ask for additional changes.

Final Regulations

Final DDDS Regulation on Eligibility, 26 Delaware Reg. of Regulations 391 (11/01/22).

Councils made several suggestions to the DDDS Eligibility Criteria and addressed Council comments as follows:

1. Added clarifying language that five-year bar does not apply to non-Medicaid services (2.1.1.2) and refused to include lawfully residing non-qualifying residents, without explanation.
2. DDDS did not remove restriction of eligibility for children under 3 because they do not want to duplicate services.
3. DDDS added language clarifying the clinical criteria for adaptive functioning in 2.1.3.2.³
4. DDDS indicates it will consider a more functional approach to eligibility in the future.

Final DMMA Regulation on Medicaid Audit Recovery Contractors Program, 26 Delaware Reg. of Regulations 394 (11/01/22).

DMMA responded to Council's query about how DMMA will address fraud as follows:

"DMMA appreciates the support. The Surveillance Utilization Review (SUR) Unit under the Program Integrity Section in partnership with the Delaware Medicaid Fraud Control Unit and our Managed Care Organizations Special Investigation Units continues to increase fraud waste abuse awareness. Improvements in information sharing continues to be ongoing to support the need of investigations."

Final DMMA Regulation on Ambulatory Surgical Center Rate, 26 Delaware Reg. of Regulations 396 (11/01/22).

DMMA expressed thanks for Council support.

³ 2.1.3.2 The applicant must also have significant limitations in adaptive behavior functioning which includes conceptual, social, and practical skills that are learned and performed by people in their everyday lives, as established by the following: 2.1.3.2.1 [Composite score Score] of approximately 70 or below, [on the composite score] or in at least one domain of a standardized adaptive behavior functioning [assessment; assessment.] 2.1.3.2.2 [When If] there are ratings from two different respondents, scores from different raters should be consistent [with one another] and approximately 70 or below as [a composite score or in at least one domain noted in section 2.1.3.2.1].