

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 10/17/2022

Re: October 2022 Policy and Law Memo

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

Proposed DOE Regulation on 14 DE Admin. Code 601 Schools and Law Enforcement Agencies, 26 Del. Reg. of Regulations (10/01/22).

Proposed DOE Regulation on 14 DE Admin. Code 601 Schools and Law Enforcement Agencies, 26 DE 248 (10/01/22).

The Delaware Department of Education intends to amend 12 DE Admin. Code 601 Schools and Law Enforcement Agencies. The regulation is being amended pursuant to 29 Del. C. § 10407; this requires that regulations be reviewed every four years. The regulation is being amended to correct grammatical and typographical errors to ensure it adheres to the Delaware Administrative Code Drafting and Style Manual. The amendment does not alter the substance or impact of the regulation. The changes consist of approximately 22 grammatical or typographical differences. Practically, this amendment will not have a changed impact.

There is a change to the requirements regarding what must be reported to the DDOE in Section 6.0. The changed regulations restrict reporting of incidents by school personnel to those that occur on school grounds or at school functions. One concern might be those reporting areas where the lines between school/not school could be unclear, particularly if that behavior takes place at least partially online/via text and/or crosses over into school hours/functions. Of particular importance: 6.1.6 (bullying), 6.1.9 (sexual harassment), 6.1.10 (fighting), and 6.1.13 (teen dating violence). Some clarification around cyberbullying might be helpful, especially because most districts have school policies that define cyberbullying and related consequences.

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

14 Del. Admin. Code § 624 requires that instances of cyberbullying be treated the same way as other incidents of bullying and that anti-cyberbullying notices must be provided to students and staff, just as anti-bullying policies would. 14 Del. Code § 4164 requires that should a staff member become privy to an instance of bullying, whether or not the incident is unsubstantiated, it must immediately be reported to the school administration; this extends to cyberbullying, under 14 Del. Admin. Code § 624.

It is crucial that cyberbullying continues to be reported; a 2018 Pew Research study found that almost 60% of teenagers experienced some form of cyberbullying. Clearly, this form of bullying impacts many students and thus it is imperative that schools and the DDOE make efforts to both report and prevent this form of bullying. As the world continues to increase use of technological forms of communication, especially in academic settings, cyberbullying may increase, as well.

Moreover, it is equally important that schools take seriously and continue to report instances of sexual harassment or teen domestic violence. These matters often take place on and off school grounds but nevertheless dramatically impact the emotional and physical wellbeing of Delaware students.

Proposed DOE/Professional Standards Board Regulation on 14 DE Admin. Code 1520 Early Childhood Teacher, 26 Delaware Reg. of Regulations 255 (10/01/22).

The Professional Standards Board (“Board”), acting with the Delaware Department of Education (“DOE”), proposes amendments to 14 **DE Admin. Code** 1520 Early Childhood Teacher. This regulation concerns what is required for an Early Childhood Teacher Standard Certificate. The amendment addresses the disclosure of an applicant’s criminal conviction history and adds language regarding the simultaneously proposed 14 **DE Admin. Code** 1519. 14 **DE Admin. Code** 1519 outlines alternative ways to for an applicant of the Early Childhood Teacher Standard Certificate to demonstrate content knowledge if the applicant does not achieve the minimum score required. Additionally, the proposed amendments include changes that have been implemented in other Standard Certificate regulations.

The proposed amendment adds language that comports with 14 **DE Admin. Code** 1519, allowing the applicant for an Early Childhood Teacher Standard Certificate to meet requirements that are set forth in 14 **DE Admin. Code** 1519 should the applicant not achieve a satisfactory score of 160 on the Praxis Subject Assessment. Moreover, the 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.

Furthermore, the amendment allows the Secretary of Education, upon request from a local school district or charter school, to review applications on an individual basis and grant an Early Childhood Teacher Standard Certificate to an applicant who otherwise does not meet the requirements for the Certificate. The requests sent to the Secretary will be approved by the superintendent of the school district or the head of the charter school.

Additionally, the amendment states that both applicants and educators must update contact information and any name changes, including mailing address, email address and phone number changes. This update must happen within 14 calendar days of the change.

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.

Proposed DDOE Regulations, Limitations on the Use of Seclusion and Restraint, 26 Del. Reg. of Regulations 251 (10/01/22).

The Department of Education (DOE) has proposed updates to existing regulations regarding the use of seclusion and restraint in schools as part of the regular review of agency regulations required by state law (see 29 Del. C. § 10407). The proposed updates are not substantive and only revise terminology, punctuation, and grammar. Language is added in numerous places to clarify that the term “Department” refers to the Department of Education, and that references to school personnel or leadership are inclusive of various types of schools (public schools, private schools, charter schools, etc.). Additionally, the proposed updates would add a definition for “individualized education program” to the subsection containing definitions. The requirements for schools with respect to seclusion and restraint contained in the regulations are unchanged.

Proposed DDOE Regulations, Multiple Measures for Demonstrating Content Knowledge, 26 Del. Reg. of Regulations 254 (10/01/22).

DDOE proposes to alternative methods for assessing subject matter knowledge for teachers when they do not test scores that meet standards. DDOE indicates that these measures will “improve the quality of the educator workforce.” These alternative standards do not apply to certain categories:

1.3.1 14 DE Admin. Code 1522 Elementary School Counselor.

1.3.2 14 DE Admin. Code 1545 Secondary School Counselor.

1.3.3 14 DE Admin. Code 1549 Dance Teacher.

1.3.4 14 DE Admin. Code 1553 Driver and Traffic Safety Education Teacher.

1.3.5 14 DE Admin. Code 1556 School to Work Transition Teacher.

1.3.6 14 DE Admin. Code 1559 Skilled and Technical Sciences Teacher.

1.3.7 14 DE Admin. Code 1561 Bilingual Teacher.

1.3.8 14 DE Admin. Code 1570 Early Childhood Exceptional Children Special Education Teacher.

1.3.9 14 DE Admin. Code 1571 Special Education Teacher of Students with Disabilities.

1.3.10 14 DE Admin. Code 1572 Teacher of Students Who Are Gifted and Talented.

1.3.11 14 DE Admin. Code 1573 Teacher of Students with Autism or Severe Intellectual Disabilities.

1.3.12 14 DE Admin. Code 1574 Teacher of Students Who Are Deaf or Hard of Hearing.

1.3.13 14 DE Admin. Code 1575 Teacher of Students with Visual Impairments.

1.3.14 14 DE Admin. Code 1580 School Library Media Specialist.

1.3.15 14 DE Admin. Code 1581 School Reading Specialist.

1.3.16 14 DE Admin. Code 1582 School Nurse.

1.3.17 14 DE Admin. Code 1583 School Psychologist.

1.3.18 14 DE Admin. Code 1584 School Social Worker.

1.3.19 14 DE Admin. Code 1591 School Principal and Assistant School Principal.

1.3.20 14 DE Admin. Code 1592 Certified Central Office Personnel.

1.3.21 14 DE Admin. Code 1593 Superintendent and Assistant Superintendent.

1.3.22 14 DE Admin. Code 1594 Special Education Director.

The alternative standards rely on 1. having a GPA of 3.50 combined with specific PRAXIS scores; or 2. Having a GPA of 3.0-3.49 and other test scores. DLP defers to GACEC expertise regarding the advisability and suitability of these standards.

Proposed DHSS DMMA Proposed State Plan Amendment regarding Telemedicine, 26 Del. Reg. of Regulations 294 (10/01/22).

With this notice (which is then referred to as a regulation), the Department of Health and Social Services (DHSS), Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Title XIX Medicaid State Plan to remove telemedicine as a state plan service from the Medicaid State Plan. The regulation would apply to services provided on or after September 1, 2022, regarding telemedicine. Written comments, suggestions, or other materials are due by the close of business on October 31, 2022.

Telemedicine is an alternative to the traditional office visit way of providing medical care. In 2012, the Centers for Medicare and Medicaid Services (CMS) approved the Medicaid State Plan (MSP) that DMMA submitted to cover telemedicine services. Later, the CMS stated that since telemedicine is not a service itself but rather is a method for delivery of services, states are not required to submit a separate state plan amendment (SPA) if the state decides to cover telemedicine services as they cover and pay for face-to-face services and visits. Nevertheless, if a state has an existing telemedicine SPA, such as the one DMMA has, the state is required to submit a SPA whenever it makes any changes, including expanding coverage, to how it implements telemedicine coverage.

During the Covid-19 pandemic, rather than submitting a SPA to expand telemedicine coverage, DMMA sought and received emergency approval to expand telemedicine services and to afford greater flexibility to administer those services. Because of the changes announced by the CMS

and because DMMA reimburses telemedicine services in the same amount as they cover and pay for face-to-face services and visits, DMMA does not need the SPA it has to provide telemedicine services. Moreover, if DMMA does not remove or sunset telemedicine from the Medicaid State Plan, the expansion and flexibility that DMMA received during the pandemic will be eliminated because a SPA was not submitted. However, if telemedicine is removed from the Medicaid State Plan, DMMA can continue to cover telemedicine and telehealth services the way it has during the pandemic. The greater flexibility that DMMA now has will enable it to respond more quickly to any changes needed in the way medical services are delivered in Delaware.

This regulation is technical in nature but is necessary to enable DMMA to provide telemedicine services as it is currently doing so. When DMMA sought a SPA to provide telemedicine services, it was required. Subsequently, the requirement was obviated where a state treats and covers telemedicine services the way it covers and reimburses traditional office visits, services, and consultations. Although DMMA covers telemedicine services the way it covers and reimburses traditional office visits, services, and consultations, it did not submit a SPA to expand telemedicine services as required because of the existing SPA that covered telemedicine services. Because of the pandemic, DMMA sought and received emergency approval to expand telemedicine and telehealth services. To keep the expanded telemedicine and telehealth services and enhanced flexibility that DMMA currently has, DMMA needs to remove telemedicine from the Medicaid State Plan. This will enable DMMA to continue to function as it has during the pandemic regarding telemedicine and telehealth services. Although DMMA could submit a SPA to request changes to the way it implements telemedicine, asking for expansion of services and for more flexibility in administering those services, it would be easier and more expeditious to delete or sunset coverage for telemedicine from the Medicaid State Plan. This is the course of action that DMMA has chosen.

The way DMMA has chosen to address the problem appears to be a better and faster way than submitting a SPA for changes in the way it implements telemedicine coverage. DMMA's approach will allow it to maintain telemedicine services without any interruption and avoids the possibility of approval problems if a SPA is submitted to CMS. Telemedicine and telehealth services can help persons with disabilities obtain health care. Councils can and should support this regulation.

Proposed DHSS DMMA Proposed State Plan Amendment regarding Transportation, 26 Del. Register of Regulations 296 (10/01/22).

The purpose of this proposed state plan amendment is for DMMA to attest that it is in compliance with statutory requirements related to the optional emergency and non-emergency transportation benefit as outlined in application regulations and the Social Security Act. There is no need for comment.

Proposed DHSS DMMA Proposed State Plan Amendment regarding Qualifying Clinical Trials, 26 Del. Register of Regulations 298 (10/01/22).

This proposed state plan amendment expressly adds routine costs for items and services associated with participated in qualified clinical trials as a covered benefit under the Medicaid program. Even though these expenses have been covered, CMS regulations were not clear; however, the federal Consolidated Appropriations Act of 2021 expressly adds such costs as a covered benefit. Qualified clinical trials are those as defined in Section 1905(gg)(3). This change does not merit comment.

Proposed DPBHS Regulations, Qualifications for Juvenile Mental Health Screeners, 26 Del. Register of Regulations 305 (10/01/22).

The Division of Prevention and Behavioral Health (DPBHS) seeks to update existing regulations regarding the credentialing and role of juvenile mental health screeners to expand eligibility to serve as a credentialed juvenile mental health screener.

The existing regulations became effective in 2016 and were promulgated following the passage of HB 346, which overhauled Delaware's involuntary civil commitment statute, in 2014. The new statute (codified at 16 Del. C. § 5100, et seq.) required emergency detention of a child or adult, the first stage of the involuntary commitment process, to be initiated by a credential mental health screener, with authority being delegated to the Department of Services for Children Youth & Their Families (DSCYF) to issue its own regulations on credentials for juvenile mental health screeners. In the case of children under the age of 18, emergency detention is permitted under the statute when the child's parent or guardian is not willing to consent to treatment or cannot be identified and located, and the other criteria for emergency detention are met. The statute also gives the Secretary of DSCYF the authority to appoint a psychiatrist to conduct an independent review of the emergency detention of a child. Emergency detentions are limited to 24 hours, however in the case of minors the statute allows for an emergency detention to be extended to 72 hours if the child's parent or guardian is unavailable to the Department (see 16 Del. C. § 5001(8)).

The proposed regulations seek to allow unlicensed mental professionals who are employed by DPBHS's contracted provider for Mobile Response and Stabilization Services (MRSS) to be credentialed as mental health screeners under the supervision of a psychiatrist. The proposed amended regulations would make unlicensed mental health professionals eligible to become mental health screeners if they are currently employed or have a contractual relationship with DPBHS's MRSS provider, have a Master's degree in a mental health related field, and have at least two years of clinical or crisis experience (see proposed regulations at 3.3). It is worth noting that while the civil commitment statute contemplates the use of unlicensed mental health professionals working under the direct supervision of a psychiatrist as credentialed mental health screeners more broadly, DPBHS's existing regulations only allow for licensed professionals to be credentialed as juvenile mental health screeners. While the provided synopsis does not specify

the underlying reasons for the proposed changes, as MRSS provider staff are often the first point of contact when a child is experiencing a mental health crisis, allowing for those individuals to be credentialed as juvenile mental health screeners would help to streamline the process of emergency detention when warranted. Shortages of licensed providers may also have been a consideration.

Additionally, the proposed changes also expand the definition of “eligible entity” to include any Delaware licensed medical hospital, in addition to DSCYF-operated facilities, DSCYF crisis services provider, and a Delaware licensed mental health hospital under contract with DSCYF. Generally non-physicians must be employed by an eligible entity to be eligible for credentialing as a juvenile mental health screener. The proposed regulations also specifically add Board Certified Pediatric Emergency Physicians to the section regarding physician credentialing. As emergency departments and medical hospitals are also a common point of access for children experiencing a mental health crisis, allowing more of the staff at these facilities to serve as credentialed mental health screeners may also help to streamline the process of admission to an inpatient psychiatric facility when that level of care is urgently needed.

While the expanded eligibility of juvenile mental health screeners who are able to initiate emergency detentions for youth may raise potential concerns about an increasing number of youth being involuntarily hospitalized, and potentially unnecessarily institutionalized, the proposed regulations do not affect the procedural rights of juveniles at any stage of the involuntary commitment process, which are dictated by statute (16 Del. C. § 5001, et seq.). On the other hand, delays in authorizing emergency detention may impede the provision of necessary psychiatric care and delay the initiation of process outlined under the civil commitment statute, under which an individual has clearer procedural rights.

The other substantive change proposed by the regulations is language clarifying that in the case of voluntary admission, DSCYF’s Division of Family Services has the authority to give consent for the voluntary admission of children in the division’s custody. This would make the regulations consistent with recent statutory changes. See SB 255 (<https://legis.delaware.gov/BillDetail/89288>), and 16 Del. C. § 5003(f).

The Councils should support the proposed changes to the regulations as they may streamline access to crisis care children experiencing psychiatric emergencies for whom a parent or guardian may be unwilling to authorize care or cannot be immediately located. The expansion of eligibility to include non-licensed mental health professionals working under the supervision of a psychiatrist is consistent with the underlying statute, which already allows for individuals in this category to be credentialed as mental health screeners. From a practical standpoint, it makes sense for individuals employed by the MRSS provider to have the credentials to initiate emergency detention without needing to subject a child in crisis to the delay that may be required in locating a credentialed juvenile mental health screener to initiate the process. Similarly, allowing more emergency department and medical hospital staff to serve as credentialed mental health screeners could potentially help to minimize the time a youth in crisis spends in an emergency room waiting for a transfer to a more therapeutic environment.

Department Of Insurance Proposed Regulation 1404 Long-Term Care Insurance, , 26 Del. Register of Regulations 300 (10/01/22).

Regulation 1404 implements 18 *Del. C.* §7101 *et seq.*, Long-Term Care Insurance. The proposed amendments to regulation 1404 apply to all long-term care policies issued in Delaware. It moves and re-numbers several sections which then changes when certain required disclosures have to be given to policyholders. Written comments are due to the Department of Insurance by the close of business on October 31, 2022. The amendments will be operative ten (10) after they are adopted.

Under the existing regulation, insurers must provide certain information regarding premiums and premium increases to an applicant the earlier of the time of application or of the delivery of the policy. This information included “The current daily benefit amount under the policy” (§8.2.5.1.4); “A comprehensive list of available reduced daily benefit options, and the associated premium for each listed reduced benefit option” (§8.2.5.1.5); and “The contingent non forfeiture benefit available on lapse” (§8.2.5.1.6).

The proposed amendments would only require insurers to provide these disclosures only when there is a premium rate schedule increase. Further, the amendments would require additional information to be provided to policyholders. Specifically, in addition to “[t]he current daily or monthly benefit amount under the policy,” the policyholder must be provided with “customer service contact information where the policyholder can obtain additional information regarding these benefits.” (§8.5.1). In addition to “[a] reasonable list consisting of no less than 3 available reduced daily benefit options, and the associated premium for each listed reduced benefit option,” the policyholder must be provided with “customer contact information where the policyholder can obtain additional information regarding these benefit options.” (§8.5.2). If the policyholder so requests, the insurer shall provide a “comprehensive list of available reduced daily benefits options and the associated premium of each listed reduced benefit option.” (§8.5.2). Finally, in addition to providing the policyholder with “[t]he contingent non-forfeiture benefit available on lapse,” the insurer shall provide “customer service contact information where the policyholder can obtain additional information regarding this benefit.” (§8.5.3).

The proposed amendments are a recognition by the Insurance Department that the disclosures would be more valuable and useful to policyholders when they are facing a rate increase rather than at the inception of the policy. Clearly, providing customer service contact information is helpful to policyholders who want to explore their options. They can find out their daily and monthly benefit under their policy and they can explore reducing their daily benefit with the commensurate savings in premium. The contingent non-forfeiture benefit provision in long term care policies becomes operative due to non-payment of the premium and allows the policyholder to receive a portion of the benefits based on the premiums paid before the policy lapsed. Practically, this information would be more valuable if received during the life of the policy rather than when the policy begins. This regulation benefits all individuals with a long term care policy. Councils can and should support this regulation.

Final Regulations of Interest

DDOE Final Regulation regarding Education Opportunity Fund, 26/ Delaware Register Of Regulations 317 (October 1, 2022).

Councils made some fairly extensive comments with regard to the proposed regulation related to the EOF. DDOE made several significant changes. DDOE modified the definitions of mental health supports to include group counseling , interventions and social skills group interventions. (2.0) They also modified the definition of wrap-around services by dropping “engagement, behavior incidents or referral” and adding the word “designed” so it now reads: “wrap around services means a variety of strategies designed to support the needs of the student in the areas of attendance, academic engagement and behavioral functioning...” (2.0)

DDOE also added payment for supplemental transportation costs for extended day and summer learning (3.1.2.8) and limited expenditures for data systems to those that are specifically designed to increase usability of EL and LIS data for instructional decision-making. (3.1.2.10)

Here is how DDOE addressed council comments:

(1) Concerns with the definitions of "English Learner," "Mental Health Supports," and "Wrap-around Services." Specifically, that the definition does not require either the child's native language be other than English or that the child be from an environment where a language other than English has impacted their level of English. Additionally, there were concerns that mental health supports did not include psychological treatment, and that wrap-around services were narrow in scope.

Response: The Department wishes to use the same definition for "English Learner" or "EL" as defined in 14 Del. Admin. C. §920 for consistency. When Regulation 920 is updated, the Department will consider improving the definition. The Department did clarify the definitions of "Mental Health Supports" and "Wrap-around Services," but did not believe including the term "psychological treatment" was necessary.

(2) Concerns with the list of personnel, contractual services, and supplies and materials for which the Education Opportunity Fund monies may be used. Specifically, there are concerns with no provision to pay for transportation, that data systems to support instructional decisions should not be funded by money intended to enhance services for English Learners and Low Income Students, and that the list of services and supports does not include other licensed psychologists or mental health therapists.

Response: The Department notes that these particular titles of mental health providers are limited in the annual Budget Bill for the mental health portion of the funds and subsection 3.1.1.12 allows for any others that are not limited. Provision to pay for transportation was added in subsection 3.1.2.8, and data systems, as noted in subsection 3.1.2.10, was clarified with more specificity.

(3) Concerns that the use of "such as" and "includes" makes the lists of services, supports and contractual services appear to be non-exhaustive.

Response: These lists are not intended to be exhaustive to allow for the flexible use of funds dependent on the individual needs of students, communities and families. Creating an exhaustive list would not allow for flexibility and could likely miss an innovative use that could prove invaluable to a certain community or individual.

