

Memo

To: GACEC, SCPD and DDC

From: Disabilities Law Program

Date: 12/18/2023

Re: December 2023 Policy and Law Memo

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

I. PROPOSED STATE REGULATIONS

- **Proposed Delaware Department of Education (DDOE) regulation to amend 9 Del. Admin Code 105 regarding Residential Child Care Facilities and Day Treatment Programs, 27 Del. Register of Regulations 370 (December 1, 2023).**

The Delaware Department of Education (DDOE) proposes to amend 9 Del. Admin Code 410 regarding Residential Child Care Facilities and Day Treatment Programs. This is a republication of proposed regulations that councils already filed comments on in May 2023. In general, the DDOE rejected council comments on these proposed regulations. The reason primarily given for refusing to make changes is that a draft of these regulations was discussed by a “task force of stakeholders, licensed facilities and agency representatives.” DLP does not know whether any advocacy or parent groups were part of this task force, and it is possible that the task force may not have received any input from families, consumers or advocates.

Nevertheless, councils may wish to reiterate yet again some of the more pressing concerns with the regulations.

Suggested changes that were not made:

1. Did not change back definition of child to be up to age 25 and left it at 22, to be consistent with special education eligibility.
2. Did not change definition of “physical restraint” to address severity of child’s action, indicating that licensees must follow Regulation 93.2 which outlines when restraints may be used. . Regulation 93.2 is not currently in effect and is part of DDOE’s own proposed regulations here.
3. Did not amend to require OCCL or facilities to inform parents or referring agencies when interviewing youth, indicating that such notification might hinder an investigation. **Councils may wish to inquire again whether OCCL should not inform families unless doing so would hinder an investigation and to clearly limit non-notifications to inspections only.**

4. Did not amend to include specific timeframes for non-compliant licensees to correct deficiencies, indicating that if a corrective action plan needed deadlines, it would have them. **Councils may wish to suggest that the regulation could actually include this requirement if it is the policy.**
5. Did not amend to limit authority to use photos, videos, etc without parental consent for research, fundraising or public relations, indicating “that there may be situations where the referring agency would need authority to provide consent.” DOE gives no examples of this; and one wonders when it would be appropriate to release a photo or video for fundraising or public relations without getting parental consent. **Councils may wish to suggest that release without consent could be limited to those very unlikely scenarios instead of giving the referring agencies carte blanche.**
6. Did not amend to disallow any use of group or collective punishment because the task force wanted to keep it. **Councils may want to reiterate concern that this practice is arcane and out of favor.**
7. Did not amend section regarding reporting excessive timeouts, the justification being that the new number of reporting more than 15 times in a 24 hour period is better than the old requirement of reporting more than 25 time outs in a 24 hour period.
8. Did not amend to require teachers to be qualified for the specific age group, only that they be certified for the age range that the facility is licensed for, the reason being that because of the possibility of mixed age groups in classes, it would be burdensome for the facility to have to hire staff for each group. This of course begs the question about the appropriateness of mixing ages in classrooms in the first place. **Councils may wish to inquire about having mixed aged classes in the first place, and also suggest that, even so, in facilities where ages are not mixed, that a teacher be certified for the age group they are actually teaching.**
9. Did not amend to require a written schedule be provided to parents or referring agencies because one is posted on the wall and that is good enough.
10. Although DDOE amended to include a requirement that a licensee provide reasons for refusal to admit a child orally, with a written explanation upon request, **Councils may wish to reiterate that it is reasonable and not onerous for licensees to provide a written explanation of refusals to admit to parents and referring agencies.** Such a requirement will avoid confusion and misunderstanding and help to prevent arbitrary and potentially discriminatory actions by licensees.
11. Did not amend to require direct workers for Parenting Adolescents to have any specialized training, as it would be burdensome for the facility. There was no discussion about quality of care being a factor in this decision. . **Councils may wish to reiterate their recommendation that the regulations be amended to require specialized training for direct workers.**

12. In Section 93.6 related to restrictive procedures, although DOE changed the definition of what “seriously disruptive” means, **Councils may wish to suggest that the definition is not sufficiently narrow.** DOE proposes to change the language to say that “behavior is seriously disruptive [when] the conduct is so unruly, violent or abusive *that it interferes with* a staff member’s ability to communicate with a child or children, with a child’s ability to learn, or with the effective operation” of the facility. The italicized language requires a qualifier that reflects the extreme circumstances when a restrictive procedure is necessary. Most behavioral outbursts or difficulties can interfere with communication, learning, or operations, and they don’t warrant restrictive measures. **Councils may wish to suggest a strong qualifier such as significant, or substantial.**

Additionally, DOE did not amend 93.2.8 to add prone restraints to the list of prohibited interventions, explaining that licensees must get permission to use any restraint. This implies of course that OCCL would and could approve prone restraints, which misses the point of the Councils’ concerns. A rather large number of states prohibit prone restraints. The US Department of Education recommends that they be banned. They are banned in a number of correctional settings. Prone restraints are too dangerous to ever be utilized. Several years ago, a teenager died in a Delaware facility after a prone restraint. **Councils may wish to reiterate that prone restraints must be clearly prohibited.**

Recommended changes that were accepted:

- a. Amending definition of psychotropic medication to include concept that they can alter behavior.
- b. Amending to include consistent use of term “residential child care facility.”
- c. Amended to add language requiring “authorization to provide routine medical and dental care for the child.”
- d. Amended to add “including” to the list of AT and medical devices, to make the list non-exhaustive.
- e. Amended to add language that a child be released from restraint if a medical condition occurs.

There are several significant areas where DOE was not responsive to Council concerns, and Councils may wish to reiterate them. In particular, DOE was not willing to address concerns about the need to narrow the parameters for allowing the use of restrictive procedures at these facilities.

- **DDOE Proposed Changes to amend 14 DE Admin. Code 902 Gifted Education, 27 Del. Register of Regulations 386 (December 1, 2023).**

An earlier iteration of this proposed change was published in October 2023 and commented on by Councils at the time as follows:

The Delaware Department of Education proposes to amend 14 DE Admin. Code 902 Gifted and Talented Education Plan. There are few primary substantive proposed changes:

1. Throughout the proposed amended regulation, the language has been modified to include charter schools;

2. The amended language makes having a plan for gifted students optional and subject to a school's resources. The proposed changes the degree of obligation schools have to create a plan for gifted and talented students (a change from "each school district shall have a Plan" to "each school district or charter school may have a Plan"). Additionally, throughout the proposed regulation, there is new language that would allow schools to consider their capacity when determining what they offer. The new language includes: "The school districts' or charter schools' capacity to provide the differentiated educational programs or services should also be considered as this varies between school districts and charter schools." and "5.0 School District and Charter School Responsibilities 5.1 Each school district or charter school shall provide a Plan that outlines the anticipated services provided based upon each individual district's capacity. This shall include how each district identifies gifted learners and in which defined ability areas. 2 5.2 Each school district's or charter school's Plan shall be reviewed periodically, but not less than every 5 years, by the Department of Education for compliance with this regulation and equitable practices. Any substantive changes to the Plan shall be provided within 1 year for review for compliance with this regulation."

3. There are minor changes to the language involving charter students. (From schools must "[e]stablish procedures for the identification and placement of a student who was identified as gifted or talented in the school district from which the student transferred" to schools must "[e]stablish procedures for students who transfer into the school district or charter school who have been identified as gifted or talented in their prior school." This minor change suggests that the schools do not need to necessarily identify or place those students, merely to have a plan of what to do when a student previously identified at another school transfers in. The move from mandatory to permissive language is troubling. Either schools have a requirement to provide differentiated educational programming or not for students identified as gifted and talented. Because the proposed language explicitly says that schools can determine their offerings based on their capacity and resources, this inevitably means that under-resourced schools have the option to forgo additional programming, while better resourced schools may choose to offer additional programming. Further, with a shift in educational research and commentary regarding lack of diversity and perpetuation of existing inequities in gifted and talented programs, the Department of Education should be encouraged to reconsider the goals of a gifted and talented program and how these programs can address equity and opportunity

DDOE indicates that the reason that the proposed changes are being republished is to provide "additional clarification... to explain that both school districts and charter schools must have a gifted and talented education plan, but school districts and charter schools could determine the extent of the plan and the areas of giftedness covered."

First, the regulation places the definition of "capacity," which is critical to the entire regulation, in the purpose section of the document. It should be in the definitions section.

Second, the definition of “capacity” is problematic. Capacity is not what services that a district or school can provide after rational assessment (more on the negative consequences of that later.) Capacity “is the ‘way’ in which a school district or charter school chooses to identify its areas of giftedness and the types of services they choose to provide.” DDOE may rather mean method. Regardless, the use of capacity in the regulation appears completely unrelated to actual ability to provide services. The regulation does not set any data-based or reasonable criteria for assessing what services a school or district provides. Here, Capacity is not what a school or district can do, it is what they want to do. And per this regulation, they can do as much or as little as they want to do.

Second, while 3.1 indicates that the district or charter school “must” have a plan, it is entirely up to the district or charter to decide what the plan is, without reference to current or potential student needs. A poorer district (or actually any district) could decide that its capacity is providing an enhanced gym program as its gifted education plan (as “psychomotor ability” is considered a form of giftedness), and that it need not provide any additional services to academically gifted students.

Finally, as was pointed out in the October comments, this approach leads to greater inequities in districts that “have” versus districts that don’t. Schools or districts with resources will provide more robust gifted education services than schools lacking those resources. Instead of enabling this inequity, DDOE should address these discrepancies, so the quality of student education is not completely dependent on where a student happens to live. If DDOE recognizes that students who are gifted required differentiation or services beyond the normally provided ones in order for those students to receive an appropriate and meaningful education, why punt on the issue of the services necessary to reach that goal. That is precisely what this regulation does.

Councils may wish to restate their concerns as articulated in October and ask DDOE to provide objective criteria and resources so that gifted students, wherever they live, have access to appropriate educational services that meet their needs.

- **DDOE Proposed Changes to amend 14 DE Admin. Code 1504 Certificate of Eligibility, 27 Del. Register of Regulations 386 (December 1, 2023).**

The Delaware Department of Education proposes to amend 14 DE Admin. Code 1504 Certificate of Eligibility. A Certificate of Eligibility refers to “credential which may be issued to teachers of students with disabilities if the employing district or charter school establishes that the proposed recipient meets the requirements of 14 Del.C. §1221(2).”

The following amendments have been proposed.

Section 1.0: Content: Previously, these regulations applied to the issuance of a certificate for multiple special education teacher professions. The regulations have been amended to apply to the issuance, “extension and retention” of a Certificate. There is also additional language added clarifying that these regulations do not apply to Emergency Certificate (defined as “a temporary

credential that may be issued to an applicant who is not fully certified in a specific area to serve as the educator of record in that area while the applicant pursues a Standard Certificate.”)

Section 2.0 Definitions: In addition to minor changes in the preface of this section, the definitions for “certification” and “credentialed” have been removed.

Sections 3.0, 4.0, and 5.0 regarding criteria for a certificate of eligibility and application procedures are revised primarily to incorporate procedures for applicants in Department approved Alternative Routes for Licensure and Certification (ARTC) programs and to the role of school districts employing the applicant. Section 4.0 describes the process for individuals seeking a Delaware Initial License or Standard Certificate and 5.0 describes the slightly different process for individuals who hold a Delaware Initial, Continuing, or Advanced License and Content Area Standard Certificate.

Section 6.0 incorporates and expands language stating that a Certificate of Eligibility cannot be extended beyond three consecutive school years.

Section 8.0 changes language stating that a Certificate of Eligibility “is revoked to “may be revoked” for failure to comply with requirements. However, additional language is added stating that the certificate will be revoked if the applicant “made a materially false misleading statement” in their application. Additional language is added ensuring the educator’s right to a fair hearing.

Section 9.0 adds new language about requirements for keeping name and contact information updated in DEEDS.

In general, Councils should consider supporting the revisions. They address opening up eligibility to teach to educators pursuing alternative routes to the classroom and allow for emergency exceptions, but the new regulations introduce new language specifying criteria for content area requirements and progress monitoring for applicants in these programs and outline the role of school employers in ensuring applicants meet instructional criteria. The new regulations attempt to expand the eligible teaching pool while maintaining standards and oversight of instructor quality. Other modifications ensure due process for educators who are disciplined and make recordkeeping improvements regarding teacher licensure information.

- **DHSS Division of Public Health Proposed Changes to 4459A Regulations Governing the Childhood Lead Poisoning Prevention Act. 27 Del. Register of Regulations 409, (December 1, 2023)**

The Division of Public Health made no substantive changes to these proposed regulations. They are re-proposing them as they were in the November publication. See <https://regulations.delaware.gov/register/december2023/proposed/27%20DE%20Reg%20409%2012-01-23.htm>.

II. FINAL REGULATIONS

- **DHSS DMMA State Plan Amendment regarding Doula Services, 27 Del. Register of Regulations 428 (December 1, 2023).**

DHSS thanked Councils for their comments and made suggested edits to clarify the scope of the Doula benefit. Additionally, in response to the request for information about public outreach, DMMA responded as follows:

November 2021: DMMA began regular meetings with Doula Stakeholders to develop the new benefit. • Representatives from the Department of Health also participated in the meetings. • When the doula benefit was determined, the Delaware Certificate Board met with the doula stakeholder group to develop the certification requirements. • In October 2023, DMMA met with Delaware MCOs serving Medicaid members to discuss implementation. MCOs will educate members and the community on the benefit of doula services and how to engage a doula. The Doula Ad Hoc Committee, a subgroup of the Delaware Healthy Mother and Infant Consortium (DHMIC), meets monthly. One aim of the committee is to assist the doulas in the development of a doula support entity.

- **DHSS DMMA regulation regarding pharmacy value-based purchases, 27 Del. Register of Regulations 430 (December 1, 2023).**

DHSS expressed thanks for Council endorsement.