

## Memo

**To:** SCPD, GACEC and DDC

**From:** Disabilities Law Program

**Date:** 3/17/2023

**Re:** March 2023 Policy and Law Memo

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

### **DHSS DMMA 20000 Medicaid Long Term Care 20720.1 Daily Needs Allowance 26 Del. Register of Regulations 754, March 1, 2023.**

DMMA proposes to amend this regulation to clarify internal policies and procedures for calculating the Daily Needs Allowance for individuals participating in the Long Term Care Community Services Program. The Patient Pay Calculation is a post-eligibility determination<sup>1</sup> of how much a recipient must pay while receiving either Lifespan or LTCCS and is dependent on setting. A Daily Needs Allowance is calculated, and the amount deducted from income to establish the Patient Pay Amount. Currently, the regulation provides as follows:

- Individuals on the DDDS Lifespan Waiver who are receiving residential habilitation services are entitled to a deduction from income equal to the Adult Foster Care rate<sup>2</sup>. The balance is the Patient Pay Amount, and it is paid directly to the provider.
- Individuals who are receiving LTCCS and in assisted living, get a deduction from income equal to the ADC rate and a deduction for room and board. The balance is the Patient Pay Amount and is paid directly to the facility (room and board is paid separately).
- Individuals on the DDDS Lifespan Waiver who are not in residential habilitation get a deduction equal total income, including income that has passed through a Miller Trust. “All earned income in the form of wages shall be allowed to be protected.” I am not entirely sure what this means when total income is deducted anyway. The way this reads, these individuals do not have a Patient Pay Amount.

For some reason, the regulation was silent about individuals living in the community who are receiving LTCCS and not living in assisted living ( meaning living independently in the community.) DLP believes it has been the practice of DMMA to apply the “total income” rule to people receiving HCBS through DSHP+ who are living in the community. The proposed amendment clarifies this by adding “individuals receiving Medicaid under the LTCCS program

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<sup>1</sup> It is important to distinguish this from how resources and income are counted for eligibility purposes- the rules are very different.

<sup>2</sup> [https://dhss.delaware.gov/dmma/files/an\\_202208.pdf](https://dhss.delaware.gov/dmma/files/an_202208.pdf);

(excluding those residing in an Assisted Living Facility)” to those who are allowed deduction equal to total income.

Allowing all income to be deducted to calculate the needs allowance is critical for individuals living in the community, as the income is needed to pay living expenses, including rent and food. Councils may wish to support the amendment, but perhaps ask DMMA to clean up the ambiguity created by the language regarding wages being totally protected. It is possible that the language relates to individuals who are in res hab and assisted living and not applicable to individuals who are living in the community, whose total income is already deducted. If so, the language should be moved or amended for clarity.

**DHSS DSS DSSM 3008 TANF Family Cap, 26 Del. Register of Regulations 756, March 1, 2023.**

With this regulation, the Department of Health and Social Services (DHSS), Division of Social Services (DSS) is proposing to amend Section 3000 of the Delaware Social Services Manual (DSSM) regarding Technical Eligibility for Cash Assistance. Specifically, this regulation would eliminate Section 3008.2, which placed a family cap on benefits under the Temporary Assistance for Families (TANF) Program. Written comments, suggestions, compilations of data, testimony, briefs, or other materials are due by the close of business on March 31, 2023. The proposed changes would take effect for services provided after May 1, 2023.

TANF is the main financial assistance program in the State. The goal is to ultimately help individuals obtain employment and provide financial assistance until they are employed. A symbiotic relationship is created where the State offers incentives for a family to become economically self-sufficient and the family works toward becoming economically self-supporting and independent. To be eligible for TANF, an individual must be unemployed or underemployed; have a child eighteen (18) years old or younger; or be pregnant; or be under eighteen (18) years old or younger and head of the household. Participation in the program is limited to thirty-six (36) months in most cases.

The amount of the cash assistance benefits a family receives is based upon the size of the family and the family’s net income. At present pursuant to Section 3008.2, if a child is born more than ten (10) months after the date an individual applies for TANF, there would be no increase in the monthly benefit despite the increase in family size. According to the Background section of the proposed regulation, the family cap was intended “to reduce out-of-wedlock pregnancies among recipients.”<sup>3</sup> Unfortunately, the family cap rule has not affected the birthrate for recipients and is more deleterious and deepens the poverty and financial hardship for children and families of color.<sup>4</sup>

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<sup>3</sup> Statement contained in the SUMMARY OF PROPOSAL, Background section of the Public Notice of this regulation.

<sup>4</sup> *Id.*

This proposed regulation would eliminate Section 3008.2 and thereby the impediment to the receipt of additional benefits for the birth of a child that occurs more than ten (10) months after the family applies for (TANF). The result of the family cap was to punish recipients financially for the birth of additional children and make it more difficult for families to escape poverty. The elimination of the family cap would provide additional assistance to around 155 families.<sup>5</sup> “Children who were family capped will receive monthly TANF benefits which will increase their family’s benefit amount.”<sup>6</sup>

Eliminating the family cap contained in Section 3008.2 is a recognition by the legislature that the intended purpose of the cap did not achieve the desired result. Eliminating the family cap will help families in part to escape poverty rather than punish them for the number of children they have. Councils can and should support this regulation.

### **House Bill 79: An Act To Amend Title 10 Of The Delaware Code Relating To Delinquency And Criminal Proceedings Involving Children.<sup>7</sup>**

House Bill 79 (“HB 79”) seeks to amend Chapter 9, Title 10 of the Delaware Code relating to Family Court proceedings in the interest of a child, specifically delinquency and criminal proceedings. The bill would align language in Title 10 with the limitations on transfer of children from Family to Superior Court and clarify that children under twelve may not be arrested or detained pending adjudication, except where the alleged crime is one of the enumerated exceptions ((1) murder in the first or second degree, (2) rape in the first or second degree, or (3) using, displaying, or discharging a firearm during the commission of a violent felony). The bill was introduced in the Delaware House of Representatives on March 8, 2023, sponsored by Rep. Chukwuocha and Sen. Townsend.<sup>8</sup>

The bill was subsequently assigned to the House Judiciary Committee which is next scheduled to meet on March 15, 2023. The current meeting notice does not include any specific bills to be discussed; however, HB 79 is listed as a bill currently in committee.<sup>9</sup> HB 79 does the following:

1. Amends § 1002 to clarify that a child shall not be arrested or detained for conduct occurring when the child was under the age of twelve (except where the alleged crime is one of the enumerated exceptions noted above);
2. Amends § 1007 to add subsection (l) clarifying that no child under the age of twelve may be placed in secure detention except as allowed by § 1002 (where the alleged crime is one of the enumerated exceptions noted above);
3. Amends § 1010 to align with limitations on transfer of youth from the jurisdiction of Family Court to Superior Court to those youth between the ages of sixteen and eighteen.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> <https://legis.delaware.gov/BillDetail?LegislationId=130061>.

<sup>8</sup> HB 79 is co-sponsored by Reps. Baumbach, Bolden, Cooke, Dorsey Walker, Griffith, Heffernan, K. Johnson, Lambert, Longhurst, Lynn, Morrison, and Wilson-Anton and Sens. Brown, S. McBride, Paradee, and Sokola.

<sup>9</sup> <https://legis.delaware.gov/CommitteeDetail?committeeId=593>.

As written, the clarification aligns with Delaware’s continued 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 take this opportunity to encourage the bill’s sponsors to revisit the issue of mandatory minimum sentences, which are still in existence for young people in Delaware.

In 2022, the DLP provided its analysis on HB 314 of the 151<sup>st</sup> General Assembly,<sup>10</sup> a clarification to House Amendment 1 (“HA 1”) to HB 307 (“HB 307”) from the 149th General Assembly,<sup>11</sup> which added language to 10 Del.C. § 1009(k)(1) to provide that the mandatory commitment applies only where the youth was over the age of sixteen when they committed the offense of Robbery First Degree or Possession of a Firearm During the Commission of a Felony. In its analysis, the DLP provided the following information about HB 307, its original intent, and a snapshot of the relevant case law, specifically

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*<sup>12</sup> (holding that mandatory life without parole for a youth was unconstitutional), *Roper v. Simmons*<sup>13</sup> (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).<sup>14</sup>

These, and other similar cases, stand on scientific literature differentiating a child’s developing brain from an adult’s developed 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<sup>15</sup> votes and three (3) votes On Its Merits<sup>16</sup>. However, on April 19, 2018, Rep. J. Johnson, HB 307’s primary sponsor, introduced HA 1, which was placed with the bill

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<sup>10</sup> <https://legis.delaware.gov/BillDetail?LegislationId=79162>.

<sup>11</sup> <https://legis.delaware.gov/BillDetail?LegislationId=26279>.

<sup>12</sup> 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 sentenced to juvenile LWOP (“JLWOP”), such as their age, age-related characteristics, background, and mental and emotional development.

<sup>13</sup> 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.

<sup>14</sup> 560 U.S. 48 (2010).

<sup>15</sup> A favorable vote means the legislator recommends the full Chamber pass the legislation.

<sup>16</sup> 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.

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.

Concerning HB 79, Councils may wish to provide their support for the bill with the recommendation that the bill's sponsors consider whether they should revisit the two required mandatory minimum sentences for youth that still remain in Delaware code.

### **House Bill No. 66 – Proposed Amendment to § 124A, Title 14 of the Delaware Code relating to Public Education Profiles**

House Bill No. 66 proposes to amend § 124A of Title 14 of the Delaware Code. § 124 details the issuance of Delaware Public Education Profiles. Public Education Profiles monitor progress and trends toward Delaware's educational goals and provide citizens with information to make good choices for children while holding the public education system accountable for both performance and use of funds.

Beyond general grammatical and technical corrections, the proposed amendment adds that the "Department [of Education] must put a link to the Education Profiles on all of the following:

- a) The home page of the Department's website.
- b) The school choice website under § 401 of this title."

The amendment then adds, "Education Profiles must compare the data required under this section by each school, school district, and at the statewide level. The Department's Education Profiles website must provide side-by-side comparisons of this data for different schools and school districts so that data for multiple entities can be reviewed at the same time." Moreover, the amendment adds that if it is practicable and informative, the Education Profiles must also show data regarding the national and regional level, as well as data for other states.

Additionally, the amendment adds that proficiency rates and offered career pathways, among the previously required items, must be included in the Education Profiles.

Finally, the amendment adds that the Department's school choice website must contain a link to the website with the Public Education Profiles.

Once concern with the proposed amendment is the subjectivity of what is practicable and informative when comparing Delaware Education Profiles to national, regional, and other state data. To remove subjectivity from the inclusion of what is likely pertinent information, mandatory inclusion of this data should be considered.

Beyond this concern, the proposed amendment should be supported by Councils as it adds clarity and bolsters the value of information provided in Public Education Profiles.

### **House Bill No. 80 – Proposed Amendment to Title 31 of the Delaware Code Relating to the Coverage of Doulas**

The proposed amendment to Title 31 is supported by many data points: the amendment notes that while Black women made up 28% of Delaware live births in 2019, they represent 78% of pregnancy-related fatalities over the 2017-2021 period, aligning with the national trend; Black women are three times more likely to experience pregnancy-related mortality than white women in the United States. The data additionally notes that the Maternal Mortality Review found that the most common accompanying issues to infant death were those related to the provision of support in making medical decisions, the ability to access care, and effective communication with healthcare professionals. The Bill further notes that doulas provide positive and nurturing environments throughout the pregnancy and birthing process and provide care “that is more informed of their patient’s experiences, values, or identities[.]”

Using this data, the amendment adds that beginning on January 1, 2024, all entities that provide health insurance under § 505(3) of Title 31 must provide coverage of doula services that include (1) three prenatal visits of up to 90 minutes; (2) three postpartum visits of up to 90 minutes; (3) attendance through labor and birth. Moreover, the amendment adds that the Division of Medicaid and Medical Assistance (DMMA) “shall establish, in collaboration with stakeholders, a process for doulas to be certified and to enroll as participating providers, as well as a reimbursement rate for doula services that supports a livable annual income for full-time practicing doulas.”

Councils should support this amendment; research shows that with the support and care of birth doulas, many women can “forego epidurals, avoid cesarean births, and have less stressful births.”<sup>17</sup> Pertinently, doula care has been found to more positively affect women who are socially disadvantaged, low income, unmarried, giving birth for the first time, are without a companion, or who experience language or cultural barriers.<sup>18</sup> Finally, doula-assisted mothers were “four times less likely to have a low birth weight [] baby [and] two times less likely to experience a birth complication involving themselves or their baby.” Given the state-wide and national statistics regarding pregnancy-related fatalities, the inclusion of doulas in insurance-coverage is a life-saving effort which will also prevent disability. As such, councils should consider endorsement.

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<sup>17</sup> Kenneth J. Gruber, Susan H. Cupito, & Christina F. Dobson, Impact of Doulas on Healthy Birth Outcomes, The Journal of Perinatal Education (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3647727/#>.

<sup>18</sup> *Id.*

## **SB 52- Amendments to Title 29 Relating to Sterile Needle and Syringe Exchange Program**

SB 52 seeks to amend the current law governing needle exchange programs to support a need- based program, by changing the name of the program from “exchange” to “service” and by removing the requirement of a 1:1 exchange, to dispensing sterile needles and syringes based on need and usage. Needle Exchange Programs began in 2006 as a five year pilot in parts of Wilmington and was made permanent in 2011 and expanded in 2017. Brandywine Counseling runs the needle exchange program.<sup>19</sup> Over the years, Brandywine Counseling has enrolled 5200 IV drug users in the program and dispensed 1.5 million sterile needles.<sup>20</sup>

The CDC issued a comprehensive report on the efficacy and success of needle programs in 2022. “Nearly 30 years of research has shown that comprehensive SSPs are safe, effective, and cost saving, do not increase illegal drug use or crime, and play an important role in reducing the transmission of viral hepatitis, HIV and other infections. Research shows that new users of SSPs are five times more likely to enter drug treatment and about three times more likely to stop using drugs than those who don’t use the programs.<sup>21</sup>” CDS and Brandywine Counseling both refer to these programs as Needle Service programs, not exchanges.

A Sterile Needle and Syringe Service Program is an important component in the state’s response to the opioid crisis, while helping to prevent Hepatitis and HIV infections, preventing disability and death. Councils should strongly consider endorsing this legislation as a critical substance abuse prevention and public health initiative.

## **Senate Bill 58- Purchase of Care Co-Pays**

Senate Bill 58 pertains to the Purchase of Care (POC) Program. The POC Program is a child care subsidy program providing financial assistance to eligible families who need help paying for child care. The Delaware Department of Health and Social Services (DHSS), Division of Social Services (DSS) administers the child care subsidy program.<sup>22</sup>

The POC Program provides support for early childhood and after school education for children of eligible families. POC Program families can use the subsidy and choose from a wide range of child care providers. In order to participate in the POC Program, parents and children

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<sup>19</sup> <https://www.brandywinecounseling.com/ssp/>

<sup>20</sup> [https://www.healthmanagement.com/wp-content/uploads/HMA\\_Delaware\\_Report\\_Final\\_2022.pdf](https://www.healthmanagement.com/wp-content/uploads/HMA_Delaware_Report_Final_2022.pdf), page 93

<sup>21</sup> <https://www.cdc.gov/ssp/syringe-services-programs-summary.html#print>

<sup>22</sup> The regulations for the Child Care Subsidy Program are found at 16 *DE Admin. Code* 11001 *et seq.* and the DHSS Child Care Subsidy Program Policy Manual. The Child Care Subsidy Program “means the program that provides financial support to eligible Delaware families who need assistance paying for child care. The program also assists families who are having difficulty locating care for their children, including children who need care during non-traditional hours, children who are English language learners, and children who have special needs.” *DE Reg* 11002.9.

have to meet eligibility guidelines,<sup>23</sup> and parents may also have to pay a co-payment directly to the child care provider.<sup>24</sup>

During the COVID-19 pandemic and public health emergency, the DSS waived the copayments since April 2020 and families were not required to pay their child care provider. The DSS took this step in part to help families who were impacted through job loss or other deleterious effects of the pandemic.

The actions of the DSS were as stated in the synopsis “successful in stabilizing families and providing early learning program for Delaware’s needy families and children.”<sup>25</sup> This bill would make the changes permanent and not require copays for families earning less than two hundred percent (200%) of the federal poverty line (FPL).

In addition, the bill would help child care providers that accept POC. The bill would reimburse child care providers up to fifteen (15) days per month for each child of eligible families that is absent from and does not attend the day care.

This bill makes permanent the changes implemented by DSS during the pandemic that were successful in helping eligible families with children. By having child care for children not of school age or for children after school is finished, parents would be able to work or in other cases receive training so they could join the workforce. Child care providers who accept POC would receive reimbursement when the child is absent from day care up to the prescribed limits, proving some financial security to the provider.

The proposed legislation is laudable, and Councils can and should support this bill. If the bill becomes law, it will necessitate changing the copayment sections of the DHSS Child Care Subsidy Program Policy Manual.

### **SB 59 – An Act to Establish a Statewide Rate for Purchase of Care**

SB 59 seeks to require DHSS to set a statewide purchase of care rate that is tied to the New Castle County Rate determined by the 2021 Delaware Local Child Care Market Rate Survey<sup>26</sup>. Many parents with disabilities and parents of children with disabilities utilize the POC program to get subsidized child care, to support work and after school care.

Interestingly this bill is more ambitious than Governor Carney’s proposal to raise the rates to 75% of the 2021 market rate. The NCC rate found in the study was higher than the rates in the other counties. The bill has a significant fiscal note.

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<sup>23</sup>The eligibility guidelines are found at *DE Reg* 11002.4(1); 110024(2); and 11003 to 11003.10. To be eligible, a child must be “[u]nder 13 years of age or 13 through 18 years of age and physically or mentally incapable of self-care as determined by a medical professional.” *DE Reg* 11002.4(1).

<sup>24</sup> The criteria that DDS uses to determine copayments are found at *DE Reg* 11004.7.

<sup>25</sup> Synopsis to Senate Bill No. 58.

<sup>26</sup> <https://www.dhss.delaware.gov/dhss/dss/files/2021DelawareChildCareMarketRateSurvey.pdf>



Councils should consider supporting this legislation, as well as the Governor's other initiatives to address child care costs and access, as well as the expansion of the Early Childhood Assistance Program. One concern is tying the POC rate to a study that is already out of date.

#### Other Bills of Interest

SB 8- Medical Debt. Places limits on collection activities related to medical debt, including eliminating interest and late fees for large health care systems and not reporting debt to credit agencies for a year.

HB 90- Requires larger health care facilities to inform uninsured individuals of eligibility criteria for medical assistance and how to apply. Would be nice if they helped people apply....

HB 84- no barking dogs! If you let your dog bark for 15 minutes straight or 30 minutes intermittently, you are subject to fines and potential seizures. Is this a problem for service animals? Probably not.

HCR 16- DOE will evaluate benefits of Virtual Learning in post- pandemic era

HB 83- requiring oral health screening for kindergarteners who have not seen a dentist by start of school, with referrals for care

SB 3- first leg of Constitutional Amendment to delegate to General Assembly the power to set the rules and eligibility for absentee voting, adding a requirement that people sign an oath or affirmation that they have not been subject to "improper influence." They seem to think this is required by recent Supreme Court decision. Requiring a written affirmation is probably ok as long as there are alternative ways for people who cannot sign to comply, but requiring a notary, or even a witness, can be problematic for homebound people.