Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 5/11/2023

Re: May 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.

Proposed DHSS Regulations Personal Assistance Services Agencies, 26 Del. Register of Regulations 909 (May 1, 2023)

In the Delaware Register of Regulations issued April 1, 2023 (Volume 26-Issue 10), the Department of Health and Social Services (DHSS), Division of Health Care Quality (DHCQ) issued a notice proposing amendments to the regulations regarding Personal Assistance Service Agencies. In accordance with the notice provisions required for state agencies, stakeholders were given until the close of business on May 1, 2023, to submit written comments, suggestions, compilations of data, testimony, briefs, or other materials.

However, on April 17, 2023, DHSS Secretary Molly K. Magarik issued an emergency order to take effect on May 1, 2023, adopting the amendments for Personal Assistance Services Agencies. The order will remain in effect for one hundred and twenty (120) days and can be renewed once for up to an additional sixty (60) days. The reason given for the emergency order was "[a]s more services are being provided in the home and community setting, it is necessary to ensure adequate oversight of the home care agency's workers providing in-home services."[1] Any interested person can submit a petition with recommendations or revisions of the order and DHSS/DHCQ will consider and respond to them.

This reviewer analyzed the amendments to the regulations as originally proposed. As the amendments are the same, and only the way they were implemented changed, this reviewer's analysis is copied below.

Under the existing regulations, a "'Personal Assistance Services Agency' means any business entity or subdivision thereof, whether public or private, proprietary or not-for-profit, which refers direct care workers to provide personal assistance services to individuals primarily in their home

[1] Delaware Register of Regulations, May 1, 2023, Volume 26-Issue 11, page 909.

or private residence."[2] (16 **DE Reg** 1.1). Under the existing regulation, "'Personal Assistance Services' means the provision of services for compensation that do not require the judgment and skills of a licensed nurse or other professional. The services are limited to individual assistance with/or supervision of activities of daily living, companion services, transportation services, homemaker services, reporting changes in consumer's condition, medication reminders and completing reports. Medication administration is permitted if all of the requirements under subsection 5.4.3 of these regulations are met. These services do not require physician's orders." (16 **DE Reg** 1.1).

As a result of the COVID-19 pandemic, the way in which in-home health services are being provided has expanded; the range of in-home services has increased; and the workers that provide these services have been affected. The proposed regulations allow for increased services to individuals in their homes while bolstering the requirements for a director of a personal assistance services agency. The proposed regulations also raise the time from three (3) months to twelve (12) months for an employee to have a physical exam prior to being employed. (Proposed 16 **DE Reg** 4.4.2.6.5.1.).

The proposed regulations add three (3) new terms in the definition section: Healthcare Experience; Home Care Experience; and Telehealth Mechanism. These new terms expand the services that can be provided to patients and in the case of Healthcare Experience define the participants.

Healthcare Experience is defined as "the direct participation of an individual in the maintenance or improvement of health via the prevention, diagnosis, treatment, recovery, or cure of disease, illness, injury, and other physical and mental impairments in patients." (Proposed 16 **DE Reg** 1.1).

Home Care Experience is defined as "the provision of services that do not require the judgment and skills of a licensed nurse or other healthcare professional. The services are limited to individual assistance with, or supervision of activities of, daily living and instrumental activities of daily living." (Proposed16 **DE Reg** 1.1).

Telehealth Mechanism is defined as "the use of information exchange from 1 site to another via an electronic interactive telecommunication system. Telehealth is provided with specialized equipment at each site including real-time streaming via the use of video streaming and audio equipment. The telecommunications must permit real-time encryption of the interactive audio

[2] A "'Direct Care Worker' means those individuals (aide, assistant, caregiver, technician or other designation used) employed by or under contract to a personal assistance services agency to provide personal care services, companion services, homemaker services, transportation services and those services as permitted in 24 *Del. C.* Section 1921(a)(15) to consumers. The direct care worker provides these services to an individual primarily in their place of residence." (16 **DE Reg** 1.1).

and video exchanges with the personal assistance services agency. The consumer must consent to the use of telehealth." (Proposed 16 **DE Reg** 1.1).

To counterbalance the expanded services and who is providing said services, the proposed regulations change the required experience need for the director's position. The director in the existing regulation is the person responsible for the "overall management of the personal assistance services agency." (Proposed 16 **DE Reg** 1.1). While the director needed to have an associate's degree and two (2) years of healthcare supervisory experience, the proposed regulation adds "or home care supervisory experience" for directors employed after June 1, 2020. (Proposed 16 **DE Reg** 1.1).

The proposed regulations also require the written appointment by the director of a "similarly qualified person to act in the director's absence." However, any appointments that have occurred prior to the final publication of the regulations will be exempt from the requirement. (Proposed 16 **DE Reg** 4.1.2).

In addition, the proposed regulations change the requirements for home visits. Under the existing regulations, the initial home visit and evaluation had to be performed by the agency director or his or her designee in the patient's home. The home visit is required prior to the provision of any services to make sure the personal assistance services agency can provide the needed services. (16 **DE Reg** 5.2.1 and 5.2.2). Although follow-up visits were permitted, the proposed regulations require every other home visit to be in person. (Proposed 16 **DE Reg** 5.2.4.1). Those follow up home visits not in person must be completed through the telehealth mechanism. (Proposed 16 **DE Reg** 5.2.4.2).

The proposed regulations are a recognition that the delivery of health care services has changed. Specifically, in-home services have expanded, and the composition of the workforce is different than it was in the past. The proposed regulations also recognize that with the expansion of in-home services comes the need for increased flexibility by the personal assistance service agency providing the in-home services to ensure safe and accomplished care. Councils can and should support these regulations.

An interested person can submit a petition with recommendations or revisions of the order. Councils should consider submitting a petition to DHSS/DHCQ recommending that the amendments be made permanent in accordance with the notice provisions of the Delaware Code.

Proposed DHSS Regulations Skilled Home Health Agencies, 26 Del. Register of Regulations 912 (May 1, 2023)

In the Delaware Register of Regulations issued April 1, 2023 (Volume 26-Issue 10), the Department of Health and Social Services (DHSS), Division of Health Care Quality (DHCQ) issued a notice proposing amendments to the regulations regarding Skilled Home Health Agencies. In accordance with the notice

provisions required for state agencies, stakeholders were given until the close of business on May 1, 2023, to submit written comments, suggestions, compilations of data, testimony, briefs, or other materials.

However, on April 17, 2023, DHSS Secretary Molly K. Magarik issued an emergency order to take effect on May 1, 2023, adopting the amendments for Skilled Home Health Agencies. The order will remain in effect for one hundred and twenty (120) days and can be renewed once for up to an additional sixty (60) days. The reason given for the emergency order was "[a]s more services are being provided in the home and community setting, it is necessary to ensure adequate oversight of the home care agency's workers providing in-home services."[3] Any interested person can submit a petition with recommendations or revisions of the order and DHSS/DHCQ will consider and respond to them.

This reviewer analyzed the amendments to the regulations as originally proposed. As the amendments are the same, only the way they were implemented changed, this reviewer's analysis is copied below.

Under the existing regulations, a "'Home Health Agency' or 'HHA' means any business entity or sub-division thereof, whether public or private, proprietary or not-for-profit, which provides, to an individual primarily in their place of residence, two (2) or more home care services, one of which must be either licensed nursing services or home health aide services."[4] (16 **DE Reg** 1.0). Under the existing regulations, "'Skilled services' means those services provided directly by a licensed professional for the purpose of promoting, maintaining, or restoring the health of an individual or to minimize the effects of injury, illness or disability. Skilled services must be ordered by a physician or an allowable provider." (16 **DE Reg** 1.0).

As a result of the COVID-19 pandemic, more health care services are being provided in the home and the workers that provide these in-home services have been impacted. The proposed regulations authorize the use of telehealth mechanisms. (Proposed 16 **DE Reg** 1.1.). The proposed regulations also raise the time from three (3) months to twelve (12) months for an employee to have a physical exam prior to being employed. (Proposed 16 **DE Reg** 5.6.1.1.).

Telehealth Mechanism is defined as "the use of information exchange from 1 site to another via an electronic interactive telecommunication system. Telehealth is provided with specialized equipment at each site including real-time streaming via the use of video streaming and audio equipment. The telecommunications must permit real-time encryption of the interactive audio and video exchanges with the home health agency. The consumer must consent to the use of telehealth." (Proposed 16 **DE Reg** 1.1).

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[3] Delaware Register of Regulations, May 1, 2023, Volume 26-Issue 11, page 912.

[4] "'Home health care services' means services, provided to an individual primarily in her/his place of residence, that include but are not limited to: (A) licensed nursing services; (B) physical therapy services; (C) speech therapy services; (D) audiology services; (E) occupational therapy services; (F) nutritional services; (G) social services; or (H) home health aide services." (16 **DE Reg** 1.0). "'Home health aide services' means services, provided to an individual primarily in their place of residence, that are limited to personal care services, companion services, homemaker services, medication reminders and tasks delegated by a licensed nurse as permitted by 24 **Del. C.** Ch. 19." (***Id***.).

In addition, the proposed regulations change the requirements for home visits. Under the existing regulations, the initial assessment must be "performed by a registered nurse or qualified professional." (16 **DE Reg** 6.2.1). A home visit is required prior to the provision of any services to make sure the home health agency can provide the needed services. (16 **DE Reg** 6.2.2.5.). Patient reevaluations must be conducted by a "registered nurse, or a qualified professional of the appropriate discipline," and must be conducted "no less often than every sixty (60) calendar days." (16 **DE Reg** 6.2.4.). The proposed regulations require every other patient reassessment to be completed in person. (Proposed 16 **DE Reg** 6.2.4.1). Those follow up reassessments not in person must be completed through the telehealth mechanism. (Proposed 16 **DE Reg** 6.2.4.2).

Under the existing regulations, when home health aide services are being provided by a home health agency, they must be "provided under the supervision and direction of the clinical director or the appropriate qualified professional." (16 **DE Reg** 6.6.4.1). For patients who are receiving home health aide services and another skilled service, "a registered nurse (or another professional therapist if the patient is not receiving nursing services) must make an on-site supervisor visit to the patient's residence no less frequently than every two (2) weeks." (16 **DE Reg** 6.6.4.2.1). However, if only home health aide services are being provided, "a registered nurse must make an on-site supervisory visit to the patient's residence (while the home health aide is providing care) no less frequently than every sixty (60) calendar days.")16 **DE Reg** 6.6.4.2.2). The proposed regulations require every other supervisory visit to be completed in person. (Proposed 16 **DE Reg** 6.6.4.2.3). Those supervisory visits not in person must be completed through the telehealth mechanism. (Proposed 16 **DE Reg** 6.6.4.2.4).

The existing regulations require the home health agency to maintain a record or file for each patient containing extensive information about the patient. (16 **DE Reg** 6.7.1 and 6.7.1.1). The proposed regulations increase the time that notes must be entered into the patient's file from two (2) weeks to thirty (30) days. (Proposed 16 **DE Reg** 6.7.5).

The proposed regulations are a recognition that the delivery of health care services has changed. Specifically, in-home services have expanded, and the composition of the workforce is different than it was in the past. The proposed regulations also recognize that with the expansion of in-home services comes the need for increased flexibility by the home health agency providing the in-home services to ensure safe and accomplished care. Councils can and should support these regulations.

An interested person can submit a petition with recommendations or revisions of the order. Councils should consider submitting a petition to DHSS/DHCQ recommending that the amendments be made permanent in accordance with the notice provisions of the Delaware Code.

Proposed DHSS DSS Regulations Subsidized Child Care Policy, 26 Del. Register of Regulations 930 (May 1, 2023)

With this notice, the Department of Health and Social Services (DHSS), Division of Social Services (DSS), is proposing amendments to the Delaware Social Services Manual (DSSM) regarding the requirements for a relative to provide child care services. Specifically, the proposed regulations concern Section 11006.7. Comments are due by the close of business on May 31, 2023. The proposed regulations are the latest foray of DHSS/DSS into the world of who can be an in-home child care provider.

By way of background, in May 2022, DHSS/DSS sought to amend regulation 11003.5,[5] regarding requirements for a relative to provide in home childcare through the purchase of care program. The proposed amendments restated the four family member restriction, requiring a minimum of four children and a maximum of five children. The proposed regulations also required that the children being cared for all be siblings. The proposed regulations also eliminated the exception for special needs children and restricted the care to non-traditional work hours that are not normally available.[6]

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[5] The existing regulation in the DSSM provided:

11003.5 In-Home Child Care

See Administrative Notice: A-7-99 Child Care Issues

The Fair Labor Standards Act requires that in-home child care providers be treated as domestic service workers. As a result, DSS must pay these providers the federal minimum wage. Paying the federal minimum wage would make the cost of in-home care disproportionate to other types of care. As a result, DSS has placed a limit on parental use of the in-home care option.

A. As of July 1994, in-home care has been limited to:

1. families in which four or more children require care, or

2. families with fewer children only as a matter of last resort.

B. Examples of "last resort" may include:

1. the parent works the late shift in a rural area where other types of care are not available, or

2. there is a special needs child for whom it is impossible to find any other child care arrangement.

Federal regulations define in-home care as child care provided in the child's own home. In-home care also includes situations where the caregiver and the child share a home.

EXAMPLE 1: Ms. Jones lives at 100 Main Street in Newark. Ms. Jones goes to Mrs. Johnson's house at 200 Main Street in Newark to provide dependent care for Mrs. Johnson's children. Because in-home care is provided, Ms. Jones must be paid at least the federal minimum wage. Ms. Jones must, therefore, be providing dependent care to at least four children.
EXAMPLE 2: Ms. Smith and Ms. Kelly live in the same house at 500 DuPont Street in Wilmington. Ms. Smith provides dependent care for Ms. Kelly's only child in this house. The federal minimum wage provisions do not apply. Ms. Smith would receive the established rate for the one child even though the rate is below the federal minimum wage. 16 **DE Reg** 11003.5.

[6] The proposed regulations provided:

11003.5 Defining Relative In-Home Child Care
Statutory Authority 45 CFR 98.2

~~See Administrative Notice: A-7-99 Child Care Issues~~
~~The Fair Labor Standards Act requires that in-home child care providers be treated as domestic service workers. As a result, DSS must pay these providers the federal minimum wage. Paying the federal minimum wage would make the cost of in-home care disproportionate to other types of care. As a result, DSS has placed a limit on parental use of the in-home care option.~~
~~A. As of July 1994, in-home care has been limited to:~~
~~1. families in which four or more children require care, or~~
~~2. families with fewer children only as a matter of last resort.~~

CHSS/DSS received and responded to the comments it received from The Governor's Advisory Council for Exceptional Citizens (GACEC) and The State Council for Persons with Disabilities (SCPD). The comments and agency response are as follows:

Comment: The Governor's Advisory Council for Exceptional Citizens (GACEC) would like to reiterate concerns that were shared when the regulations were revised in 2018 and request information on why the regulations only apply to families with at least four children.

Agency Response: DSS appreciates your observations and recommendations regarding the proposed policy. The proposed policy is being amended to clearly define relative in-home care. Families requesting "special needs" for their children are reviewed on a case-by-case basis. When all eligibility requirements are met, the relative may care for the child outside of the non-traditional hours as notated in policy. DSS is aware that many families have "special needs". DSS prides itself on determining eligibility on a case-by-case basis for these families, and children with disabilities are no exception. For their safety and well-being, children with "special needs" will continue to be determined eligible on a case-by-case basis. DSS will amend the language in this policy and policy 11006.7 Determining Relative Child Care to reflect the fact that "special needs" children are determined eligible on a case-by-case basis.

DSS policy 11003.5 regarding in-home care has been revised to address your concerns and is being submitted for final publication. The policy will now allow a provider to care for a minimum of one child and a maximum of five children in the child's home. Again, DSS will determine eligibility for "special needs" or other extenuating circumstances on a case-by-case basis.

Comment: The State Council for Persons with Disabilities (SCPD) has reviewed the proposed revisions. Of significant concern to SCPD is that DSS appears to be restating the provisions limiting Relative In-

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~~B. Examples of "last resort" may include:~~
~~1. the parent works the late shift in a rural area where other types of care are not available, or~~
~~2. there is a special needs child for whom it is impossible to find any other child care arrangement.~~
~~Federal regulations define in-home care as child care provided in the child's own home. In-home care also includes situations where the caregiver and the child share a home.~~
~~EXAMPLE 1: Ms. Jones lives at 100 Main Street in Newark. Ms. Jones goes to Mrs. Johnson's house at 200 Main Street in Newark to provide dependent care for Mrs. Johnson's children. Because in-home care is provided, Ms. Jones must be paid at least the federal minimum wage. Ms. Jones must, therefore, be providing dependent care to at least four children.~~
~~EXAMPLE 2: Ms. Smith and Ms. Kelly live in the same house at 500 DuPont Street in Wilmington. Ms. Smith provides dependent care for Ms. Kelly's only child in this house. The federal minimum wage provisions do not apply. Ms. Smith would receive the established rate for the one child even though the rate is below the federal minimum wage~~.

This policy applies to Relative Care providers who provide care in the children's home.
1. Federal regulations define an in-home child care provider as an individual who provides child care services in the child's own home.
2. The Division of Social Services (DSS) limits in-home child care to Relative Care providers only (refer to DSSM 11006.7 for Relative Child Care requirements).
3. In-home child care in the children's home is limited to Relative Care providers who are:
A. Caring for a minimum of four children in the home. The total number of children who are cared for in the home may not exceed a maximum of five children.
B. Caring for no more than two children under two years of age.
C. Caring for the children of one family member. The children must be related as siblings.
D. Only providing care during non-traditional hours, such as evening and weekend work hours, that are not normally offered through a licensed child care provider. Delaware Register of Regulations, May 1, 2022, Volume 25-Issue 11, page 1012.

Home Care to families with four or more children and eliminating the "last resort" exception to the role for special needs children when other childcare cannot be found.

Agency Response: DSS appreciates your observations and recommendations regarding the proposed policy. The proposed policy is being amended to clearly define relative in-home care. Families requesting "special needs" for their children are reviewed on a case-by-case basis. When all eligibility requirements are met, the relative may care for the child outside of the non-traditional hours as notated in policy. DSS is aware that many families have "special needs". DSS prides itself on determining eligibility on a case-by-case basis for these families, and children with disabilities are no exception. For their safety and well-being, children with "special needs" will continue to be determined eligible on a case-by-case basis. DSS will amend the language in this policy and policy 11006.7 Determining Relative Child Care to reflect the fact that "special needs" children are determined eligible on a case-by-case basis.[7]

In response to the comments that DHSS/DSS received, DSS adopted the proposed changes to Section 11003.5 with additions.[8] The minimum number of children was reduced from four (4) to one (1). In addition, language was added that special needs children and newborns will be reviewed on a case-by-

[7] https://regulations.delaware.gov/register/may2023/final/26%20DE%20Reg%20961%2005-01-23.pdf

[8] 11003.5 Defining Relative In-Home Child Care
Statutory Authority 45 CFR 98.2
~~See Administrative Notice: A-7-99 Child Care Issues~~

~~The Fair Labor Standards Act requires that in-home child care providers be treated as domestic service workers. As a result, DSS must pay these providers the federal minimum wage. Paying the federal minimum wage would make the cost of in-home care disproportionate to other types of care. As a result, DSS has placed a limit on parental use of the in-home care option.~~

~~A. As of July 1994, in-home care has been limited to:~~

~~1. families in which four or more children require care, or~~

~~2. families with fewer children only as a matter of last resort. POLICY AMENDMENT Delaware Department of Health and Social Services Division of Social Services Policy and Program Development Unit~~

~~B. Examples of "last resort" may include:~~

~~1. the parent works the late shift in a rural area where other types of care are not available, or~~

~~2. there is a special needs child for whom it is impossible to find any other child care arrangement.~~

~~Federal regulations define in-home care as child care provided in the child's own home. In-home care also includes situations where the caregiver and the child share a home.~~

~~EXAMPLE 1: Ms. Jones lives at 100 Main Street in Newark. Ms. Jones goes to Mrs. Johnson's house at 200 Main Street in Newark to provide dependent care for Mrs. Johnson's children. Because in-home care is provided, Ms. Jones must be paid at least the federal minimum wage. Ms. Jones must, therefore, be providing dependent care to at least four children.~~

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This policy applies to Relative Care providers who provide care in the children's home.
1. Federal regulations define an in-home child care provider as an individual who provides child care services in the child's own home.
2. The Division of Social Services (DSS) limits in-home child care to Relative Care providers only (refer to DSSM 11006.7 for Relative Child Care requirements).
3. In-home child care in the children's home is limited to Relative Care providers who are:

A. Caring for a minimum of [~~four children~~ one child] in the home. The total number of children who are cared for in the home may not exceed a maximum of five children.

B. Caring for no more than two children under two years of age.

C. Caring for the children of one family member. The children must be related as siblings.

D. Only providing care during non-traditional hours, such as evening and weekend work hours, that are not normally offered through a licensed child care provider.

[i. Children with "special needs" as defined in DSSM 11003.7.8 and newborns will be reviewed on a case-by-case basis for exemption to the non-traditional hours requirement.] *Id.*

case basis regarding an exemption to the non-traditional hours requirement. The regulations become effective May 11, 2023.

The above background is necessary to put the proposed amendments to regulation 11006.7 in context. The proposed amendments follow up on the statement that DSS made in its response to the comment about amendments to regulation 11003 that it would amend policy 11006.7 Determining Relative Child Care. The proposed amendments will make section 11006.7 conform with the requirements for an individual to provide childcare services in the child's home contained in section 11003.5 of the DSSM. Section 11006.7 3. adds the language: "Children with 'special needs' as defined in DSSM 11003.7.8[9] and

[9] Section 11003.7.8 provides:

11003.7.8 Determining Special Needs for Child Care

45 CFR 98.20(a)

This policy applies to parents and caretakers requesting Special Needs Child Care for themselves or for their children.

1. Families requesting Special Needs Child Care must meet the Special Needs eligibility requirements.

A. DSS will determine a parent or caretaker to be eligible for Special Needs Child Care if:

i. The parent or caretaker has a condition that causes the parent or caretaker to be unable to care for his or her child for some portion of the day; and

ii. The parent or caretaker is financially eligible for child care assistance.

B. DSS will determine a child to be eligible for Special Needs Child Care if:

i. The child is under 19 years of age;

ii. The child is physically or mentally incapable of self-care; and

iii. The parent or caretaker has a need per DSSM 11003.8 and is financially eligible for child care assistance.

C. DSS requires documentation of the special need.

i. The family can verify the special need by submitting:

•DSS Form 611 "Child Care Medical Certification Form"; or
•Written documentation completed by a physician or medical professional that details the special need and the required care.

D. DSS considers children who are active with and referred by the Division of Family Services (DFS)

newborns will be reviewed on a case-by-case basis for exemption to the non-traditional hours requirement." 16 **DE Reg** 11006.7 3. In addition, the minimum requirement for a provider to provide childcare in the child's home is being reduced from four (1) to one (1). 16 **DE Reg** 11006.7 5.

These changes have been advocated by Councils for a long time. With the changes to section 11003.5 and the proposed changes to section 11006.7 of the DSSM, parents and especially parents of children with special needs will have increased access to childcare. Councils can and should support the proposed regulations. Although cases with special needs children and newborns are fact driven, Councils should advocate for some guidelines or factors to be considered to aid in the determination of whether an exemption to the non-traditional hours requirement exists. Without any objective criteria for making the determination, the decision would likely be a subjective one.

SS1 for SB 2 – Handgun Qualified Purchaser Permit

SS1 for SB2 was adopted in lieu of the original SB 2 on May 2, 2023, and was reported out of the in the Finance Committee in the Senate and passed by the Senate on the same day. It has since been assigned to the Judiciary Committee in the House.

SS1 for SB2 seeks to create a requirement for a person to hold a handgun qualified purchaser permit to be able to purchase a handgun. Currently no permit is required to legally purchase a handgun in Delaware, however sellers are required to conduct a background check to verify a person is not prohibited from owning a gun under state or federal law before a sale. 11 Del. C. § 1448A. As of May 2023, there are thirteen other states which require a permit to purchase a

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to have met the need criteria for Special Needs Child Care.

i. Children referred by DFS:

•Are not required to meet the financial criteria for child care assistance; and
• May receive child care services regardless of their citizenship status.

E. DSS considers parents and caretakers who are active with the Transitional Work Program (TWP)

to have met the need criteria for Special Needs Child Care.

i. Parents and caretakers participating with TWP:

•Must be financially eligible for child care assistance; and
•Are not required to submit documentation of a special need to DSS.

ii. TWP staff will request child care for clients who are participating with the program and

will determine the amount of care needed.

Note: DSS case workers must select the individual approved for the Special Needs Child Care in the "Child Care Additional Demographics" screen in the eligibility system. Selection of the incorrect individual will result in an improper payment error.

handgun. See Wilson, Nick, et al., "Fact Sheet: Delaware Lawmakers Can Reduce Gun Violence by Passing a Permit-to-Purchase Law," Center for American Progress, May 5, 2023, available at https://www.americanprogress.org/article/delaware-lawmakers-can-reduce-gun-violence-by-passing-a-permit-to-purchase-law/. The bill would require existing law to be modified so that both licensed and unlicensed gun sellers would be required to verify that an individual had a valid permit before selling them a handgun in addition to the existing requirement to conduct a background check.

Under the proposed legislation, the State Bureau of Identification (SBI) would upon receipt of an application, issue permits to anyone not specifically disqualified under the provisions of the law, as well as to qualified current and retired law-enforcement officers. To be eligible for a permit, a person must be 21 years of age or older and have completed a qualifying firearms training within the previous five years. Qualified current or former law enforcement officers would be exempt from the age and training requirements. A person would be ineligible if they are prohibited from purchasing, owning, possessing, or controlling a deadly weapon under 11 Del. C. § 1448 or under other state or federal law. The bill also contains a quite broad provision that "if supported by probable cause, a person who poses danger of causing physical harm to self or others by owning, purchasing, or possessing firearms" could be ineligible for a permit (see proposed legislation at 11 Del. C. § 1448D(f)(3)). As discussed further below, this is provision is concerning because it sounds quite like the legal criteria for a person with mental illness to be subject to involuntary commitment but does not require any judicial finding.

The bill establishes the information to be included in a permit application that must be submitted to the SBI, as well as a requirement that the SBI process applications within 30 days. The SBI's investigation of an individual's application would include taking fingerprints and running a criminal background check, as well as contacting the local law enforcement agencies where the individual resides to inquire generally about any other facts and circumstances related to the individual. If issued, a permit would be good for one year. The bill describes circumstances in which an issued permit could become void or be revoked. If an individual denied a permit or has a previously issued permit revoked, the individual would receive written notice of the denial or revocation and have the right to appeal the denial or revocation to the Justice of the Peace Court within 30 days. The bill would require a hearing to take place within 21 days, and a decision by the Justice of the Peace Court could be further appealed to the Superior Court.

The bill would also require the SBI to submit certain data annually to the House and Senate Judiciary Committees. Additionally, the bill contemplates the establishment of a voucher to cover the cost of required firearms training for low-income individuals seeking to obtain a permit.

There are many reasons why gun control measures should be encouraged. Firearms are one of the leading causes of deaths by suicide. According to Everytown for Gun Safety, 53% of gun deaths in Delaware are suicides. Everytown for Gun Safety, "Gun Violence in Delaware," February 2020, available at https://maps.everytownresearch.org/wp-content/uploads/2020/04/Every-State-Fact-Sheet-2.0-042720-Delaware.pdf. It is also worth noting the role of guns in traumatic brain injury (TBI). According to the American Association

of Neurological Surgeons, "firearms are a leading cause of TBI in people aged 25-34 nationwide," and "of all TBIs, 12% are attributable to firearms." See https://www.aans.org/en/Patients/Neurosurgical-Conditions-and-Treatments/Gunshot-Wound-Head-Trauma. Commonsense gun control laws are necessary to prevent these deaths and injuries.

Consistently, however, people with certain disabilities, particularly people with mental illness, are unfairly scapegoated for gun violence. For further data, see, e.g., Autistic Self-Advocacy Network, "Make Real Change On Gun Violence: Stop Scapegoating People With Mental Health Disabilities," available at https://autisticadvocacy.org/policy/briefs/gunviolence/. While in many ways this legislation appears to create a reasonable scheme for helping gun sellers verify that a person is legally eligible to purchase a gun, the catch-all provision that the SBI can disqualify someone based on "probable cause," which is not otherwise defined by the statute, that the person could pose a danger to self or others, is potentially problematic. It is not clear what the source of this "probable cause" could be based on the information that would be at SBI's disposal except for potentially anecdotal information received by law enforcement or information obtained by other means not explicitly allowed for in the statute. Without further clarification of this specific provision, the bill may be inviting the SBI to make its own subjective judgment as to whether a person is a "danger to self or others," and would potentially open the door to denying permits on the basis of disability. Having been civilly committed is already a legal barrier to gun ownership, and there are already clear statutory provisions about when a Court finding related to an individual's mental illness, including a civil commitment order, should be reported to the appropriate entities so that it will be indicated when a background check is conducted of a person seeking to purchase a firearm. See 11 Del. C. § 1448. While the Councils may wish to otherwise support this bill, they should question this provision which potentially invites discrimination against people with disabilities and encourage further clarification of how this probable cause would be identified.

HB 7 – Pediatric Behavioral Health Enhancement

HB 7 was introduced and assigned to the Health & Human Development Committee in the House on April 25, 2023. HB 7 seeks to require carriers providing coverage under Medicaid to pay an enhanced rate for inpatient behavioral health care for a patient 18 years of age or younger who meets at least one of the following criteria: 1) has a diagnosis of autism spectrum disorder, 2) receives services from the Department of Service for Children, Youth and their Families (or potentially the Department of Health and Human Services for an 18-year-old), 3) requires ongoing medical care for chronic conditions, 4) requires specialized programming, 5) is dangerous to self or others and requires a single room, or 6) is unhoused or at risk of being unhoused. This enhanced rate would be for facilities as defined under the civil commitment statute, which are public or private psychiatric hospitals as well as "any psychiatric emergency receiving facilities that provide mental health screenings, evaluations, treatment, and referral services." 16 Del. C. § 5001(6). The enhanced rate must be at least 30% more than the ordinary per diem rate, and at least another 5% more for every inpatient day that is a Saturday or a

Sunday. This enhanced rate cannot be paid for more than 14 days, though it is not entirely clear whether that is per admission or during a set period of time.

In addition to requiring the enhanced rate, the bill would require the creation of a Quality Oversight Committee "to identify quality metrics for facilities admitting patients 18 years of age or younger," and make ongoing recommendations to the Joint Finance Committee related to "eligibility categories and enhancement rates." See proposed legislation at 31 Del. C. § 532(f). The Committee would review data including but not limited to the number of patient rejections, the number of reduced emergency room visits and readmissions and the length of stay at the facility. *Id*. Notably it does not appear the Committee would examine any indicators relating to services available outside of a hospital, and the Committee would only consist of representatives from state government and the healthcare industry.

While there is no indication in the synopsis, this legislation is presumably in response to the increasing numbers of youth presenting at emergency departments due to mental health crises, and in many cases waiting extended periods of time for care or transfer to an inpatient psychiatric facility. See, e.g., Richtel, Matt, "Emergency Room Visits Have Risen Sharply for Young People in Mental Distress, Study Finds," *New York Times*, May 1, 2023, available at https://www.nytimes.com/2023/05/01/health/adolescents-mental-health-hospitals.html. Frequently these youth are experiencing suicidal ideation or have attempted suicide or other self-harm. *Id*. This in turn may be affecting the availability of pediatric beds for children with other medical needs. See, e.g., Zdanowicz, Christina, "Pediatric hospital beds are in high demand for ailing children. Here's why," CNN, March 17, 2023, available at https://www.cnn.com/2023/03/16/health/pediatric-hospital-bed-shortage-ctrp/index.html. Medical hospitals and inpatient psychiatric facilities alike face particular challenges in providing inpatient psychiatric care to children in the categories identified in this bill, as they frequently require additional staffing to manage identified risks or care needs, and specialized treatment and discharge planning.

While it is essential to minimize the time children in mental health crisis are spending in emergency departments awaiting needed care and it is important to ensure that facilities admitting children with complex needs have sufficient resources to address those needs, to treat simply paying inpatient psychiatric facilities more for admitting certain patients as a solution to what is clearly a broader systemwide crisis is short-sighted. In addition to children waiting in emergency rooms for admission to inpatient psychiatric facilities targeted by this legislation, many children are experiencing prolonged stays (in many cases well beyond 14 days) in the facilities targeted by this legislation or are cycling in and out of these facilities on an ongoing basis because a lack of available services in the community. Children in this situation would potentially exhaust the enhanced rate for inpatient treatment contemplated here quickly. There are very limited services available for children who have co-occurring intellectual or developmental disabilities (including autism spectrum disorders) and mental health needs, or for children who exhibit significant physical aggression, leaving many families to feel like repeated hospitalization of their child is the only available option. Due to staffing shortages, there are waiting lists for needed services through the Division of Prevention and Behavioral Health

Services (DPBHS) that are more intensive and specialized than traditional outpatient mental healthcare, however families are frequently encountering long waiting times for initial appointments for more traditional outpatient treatment as well. Until the gaps in the services available in the community are meaningfully addressed, increasing the rate paid to hospitals will do nothing to decrease the larger issue of a surge in demand for hospital beds or the frequency of youth experiencing mental health crises. It arguably may be far more effective to focus on the rates paid for community-based services, including but not limited to therapy, respite, and mobile crisis response.

It is not clear whether the bill intentionally includes 18-year-olds (when the cutoff or dividing line for many applicable services is generally a child's 18th birthday), however as the transition to adult services can be a period where many young people experience gaps in care, there is no reason to object to their coverage by the advanced rate. Additionally it is not clear whether the bill intends to include children in the custody of or otherwise being served by the Division of Family Services (DFS) or the Division of Youth Rehabilitative Services (YRS) as children "receiving services from the Department [of Services for Children, Youth, and their Families]," or it was just intended to cover children served by the DPBHS, however again there is no reason to object to their inclusion as children served by DFS and YRS may encounter additional barriers in accessing appropriate behavioral healthcare.

The Councils should question why enhanced payment rates for community-based services cannot be included in this bill. The Councils may also wish to question whether the stated goals of the Quality Oversight Committee could potentially be accomplished by one of the existing groups examining mental health care in Delaware, which generally consist of a more diverse array of stakeholders. The required membership of the Committee does not include any party without a financial stake in how inpatient psychiatric treatment is provided and paid for.

Senate Bill 82, Effective Communication

This bill seeks to improve communication assistance for individuals with disabilities and those with limited English Proficiency. It incorporates a number of concepts found in federal law related to effective communication and auxiliary aids for people with disabilities and meaningful access for limited English Proficiency (LEP). [10] The bill requires certain state departments as well as five other programs selected by the Department of Justice to report as follows:

Beginning [December 1 following 30 days after enactment of this Act] until the reporting requirements under subsection (c) of this section begin, the report must provide all of the following information:

(1) The steps taken by the program to comply with federal and State law and regulation to provide meaningful access to individuals with LEP and effective communication for individuals with disabilities.

(2) The types of translation or interpretation services or tools used by the program.

[10] [10] Americans with Disabilities Act, Section 504 of the Rehabilitation Act (disability), and the Civil Rights Act (LEP)

(3) Estimate of the program expenses associated with compliance with federal and State law and regulation to provide meaningful access to individuals with LEP and effective communication for individuals with disabilities.

(4) Estimate of the number of individuals with LEP served by the program.

(5) Estimate of the number of individuals with disabilities served by the program.

(6) How the availability of free language assistance and auxiliary aids are communicated to the public.

(7) Description of staff training and frequency of training on working with individuals with LEP or disabilities.

(8) Copy of any report submitted to a federal agency within the previous year that contains information about a program's compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

(9) Additional resources, if any, needed to improve program access for individuals with LEP or disabilities.

(c) Beginning [4 years after enactment of this Act], the report must provide all of the following information:

(1) The information required in paragraphs (b)(1), (2), (7), (8), and (9) of this section.

(2) The number of individuals with LEP or disabilities served by the program, disaggregated by individuals with LEP, individuals with disabilities, and individuals with both LEP and disabilities, and the methodology for how that data was collected.

(3) Frequency that individuals with LEP or disabilities access the program in person, disaggregated by individuals with LEP, individuals with disabilities, and individuals with both LEP and disabilities, and the methodology for how that data was collected.

(4) Frequency that individuals with LEP or disabilities receive in-person translation or interpretation services, or in-person auxiliary aids from the program, disaggregated by individuals with LEP, individuals with disabilities, and individuals with both LEP and disabilities, and the methodology for how that data was collected.

(5) Frequency that individuals with LEP or disabilities access the program remotely, disaggregated by individuals with LEP, individuals with disabilities, and individuals with both LEP and disabilities, and methodology for how that data was collected.

(6) Frequency that individuals with LEP or disabilities receive telephonic or other remote translation or interpretation services, or telephonic or other remote auxiliary aids from the program, disaggregated by individuals with LEP, individuals with disabilities, and individuals with both LEP and disabilities, and methodology for how that data was collected.

(7) Frequency that staff offer free language assistance or auxiliary aids and methodology for how that data was collected.

(c) For the purposes of submitting a report under this section to the General Assembly, the reports must be submitted to the Secretary of the Senate, the Chief Clerk of the House, and the Director and Legislative Librarian of the Division of Research

Additionally, the bill requires the Office of Manufactured Housing Ombudsperson to provide interpretation and translation services, or other auxiliary aids, to help tenants with LEP or disabilities to better understand and participate in activities related to leases, evictions and foreclosures , such obligation to expire in two years. The bill sets a monetary cap of $48,000 for expenditures for this part.

The bill appears to be an effort to encourage state agencies to comply with existing federal legal requirements related to effective communication under the ADA and meaningful access for LEPs under the Civil Rights Act by requiring them to report on their activities around communication as well as identifying what they need to provide that access, and eventually specific data on the number of people with disabilities or LEP who are served, in different contexts, as well as methodology of service. Additionally, for a short period, it requires the Office of Manufactured Housing Ombudsperson within the Delaware DOJ to provide translation and interpretation services related to housing issues.

By forcing state agencies to report, we assume that the hope is that these state agencies will improve services and compliance with existing requirements. As such it is laudable, and Council should consider endorsement, but consider whether the bill shouldn't have more enforcement elements.

Final Regulations:

DHSS DMMA Regulation Related to Daily Needs Allowance (Page 957). DMMA noted but rejected suggestion related to clarifying language regarding wages.

DHSS DSS Removal of TANF Family Cap (Page 964). DMMA noted and thanked councils for endorsements.

DHSS DSS In Home Child Care (Page 961) Please see analysis of revised regulation, supra.