

## **Memo**

**To: GACEC, SCPD and DDC**

**From: Disabilities Law Program**

**Date: 11/13/2023**

**Re: November 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 14 Del. Admin Code 503 regarding Instructional Program Requirements, 27 Del. Register of Regulations 299 (November 1, 2023).**

The Delaware Department of Education (DDOE) proposes to amend 14 DE Admin. Code 503 Instructional Program Requirements. The following amendments have been proposed.

#### **General Language Changes**

Throughout the proposed regulations, “local school” is changed to “school.” Further, “standards grade level expectations” have been changed to “content standards.”

#### **5.0 Physical Education**

Language was included to clarify that physical education must be provided to kindergarten students (previously, one paragraph includes kindergarten in the requirements, but the following paragraph regarding who must be enrolled in these classes previously only referred to students in grades 1-8).

Additional language is added clarifying that James H. Groves programs are not required to provide physical education (there was already an exemption, the proposed language just further clarifies that these programs are not required to provide physical education).

#### **6.0 Visual and Performing Arts**

Language was included to clarify that visual and performing arts must be provided to kindergarten students (previously, one paragraph includes kindergarten, but the following paragraph about what students must be enrolled in these classes previously only referred to students in grades 1-6).

Additional language is added clarifying that James H. Groves programs are not required to provide physical education (there was already an exemption, the proposed language just further clarifies that these programs are not required to provide physical education).

## **7.0 Career and Technical Education**

Language is removed stating that 7<sup>th</sup> and 8<sup>th</sup> grade career and technical education programs must be provided “no later than the 2017-2018 school year.”

## **9.0 Health Education**

An entire new section is added introducing health education requirements:

### *9.0 Health Education*

*9.1 School districts and charter schools shall provide instructional programs in health education for each grade K through 12 that meet the hours requirements outlined in 14 DE Admin. Code 551. James H. Groves High School program is not required to provide instructional programs in health education to its students and is exempt from the provisions of this subsection.*

*9.2 School districts and charter schools shall provide comprehensive health education programming for each grade K through 8 that demonstrates alignment to the Department of Education's adopted health education content standards.*

*9.3 All public school students in grades 9 to 12 shall complete the credits in health education necessary to graduate from high school through health education programming that demonstrates alignment to the Department of Education's adopted health education content standards.*

## **Conclusions**

Most changes are minor, and primarily clarify existing regulations. The new proposals to require schools to provide instruction in health education is generally a positive change.

However, of concern are the exemptions for James H. Groves programs. The education provided to these students should not be of lesser quality than the education provided to other students in Delaware. Further, while many students voluntarily choose to participate in James H. Groves programs as an alternative pathway to a high school diploma, for other students, such as those in Delaware’s adult prison system, the James H. Groves program is the only option provided to work toward a high school diploma. Eliminating requirements for health/physical education and arts education programs from Groves programs effectively eliminates any opportunity for incarcerated students to benefit from these programs. Further, as discussed below, there is evidence that incarcerated students have unique needs for these programs and would benefit substantially from them.

There is a demonstrated need for health and physical education among students in prison. Formerly incarcerated individuals statistically have worse health outcomes than the general population and have higher rates of many preventable diseases that are often discussed in high school health classes.<sup>1</sup> Research suggests that health education programs for incarcerated

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<sup>1</sup> See *Social Determinants of Health Literature Summaries: Incarceration*, OFF. DISEASE PREVENTION & HEALTH POPULATION, <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature->

students increase knowledge and understanding of critical health information and susceptibility to at-risk behaviors.<sup>2</sup> Further, evidence suggests that structured opportunities for physical movement in prisons settings have significant positive health outcomes among incarcerated individuals. Research indicates that physical activity programs in prisons “improve[] the mood and anxiety of inmates as well as overall health.”<sup>3</sup>

Incarcerated individuals have also been shown to benefit substantially from arts programs. Research suggests that arts programs help students “develop better mental outlooks,” reduce[] violence within the prison system,” and “decreas[e] parolees’ recidivism.”<sup>4</sup>

Incarcerated students, whose only option for a high school diploma program is a Groves program, arguably have the most need for these programs and would uniquely benefit from them. Groves programs should not be exempted from requirements to provide these critical programs; rather, the Department of Education should prioritize how to make these programs available in alternative and adult education settings.

**Recommendation: Councils should generally support the proposed regulation but may wish to question DDOE’s exclusion of Groves students from the health education, arts, and physical education requirements.**

- **Proposed Delaware Department of Education (DDOE) regulation to amend 14 Del. Admin Code 1001 regarding Participation in Extra Curricular Activities, 27 Del. Register of Regulations 308 (November 1, 2023).**

The DDOE proposes to repeal the entirety of 14 Del. Admin. Code 1001 Participation in Extra Curricular Activities. DDOE gives the explanation that the regulations “is no longer necessary” as “academic eligibility criteria for middle and high school students’ participation in extracurricular activities is established by the Delaware Interscholastic Athletic Association (DIAA) Board” pursuant to 14 Del. C. § 304(3)(listing as one of the DIAA’s duties, powers, and authority to “[d]etermine the existence of a violation of the regulations by a member school, athlete, coach, administrator, official, or spectator and penalize a violation by official reprimand,

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summaries/incarceration (“When compared to the general population, men and women with a history of incarceration are in worse mental and physical health. Data from the Bureau of Justice Statistics found that, in 2011, 44 percent of people who are incarcerated had a mental health disorder.14 Studies have shown that when compared to the general population, people of both sexes who are incarcerated are more likely to have high blood pressure, asthma, cancer, arthritis,15 and infectious diseases, such as tuberculosis, hepatitis C, and HIV.”)

<sup>2</sup> See Jean N. Clark, Richard N. Van Eck, Afreda King, Brenda Glusman, Annie McCain-Williams, Sandra Van Eck. Frances Beech, *HIV/ AIDS education among incarcerated youth*, 28 J. CRIM. JUS. 5 (2000), [https://doi.org/10.1016/S0047-2352\(00\)00056-8](https://doi.org/10.1016/S0047-2352(00)00056-8).

<sup>3</sup> L. Gomez Pastor & SD Bravo Cucci, *Physical activity in prison: Should it be a first-line healthcare intervention?*, 20 REV. ESP. SANID ENIT 1 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6279183/#:~:text=Three%20groups%20were%20used%3A%20cardiovascular,as%20overall%20mental%20health%203%20>.

<sup>4</sup> See Robert Jerome Sullivan, *Breaking Into Prison: Art Education in Action*, (Master’s degree dissertation, University of Florida) (2013) <https://nicic.gov/resources/nic-library/all-library-items/breaking-prison-art-education-action>, see also Danielle Maude Littman and Shannon M. Sliva, *Prison Arts Program Outcomes*, 71 J. CORR. ED. 3 (2020), <https://www.jstor.org/stable/27042216>; Amanda Gardner, Lori L. Hager, & Grady Hillman, *Prison Arts Resource Project: An Annotated Bibliography*, NAT. ENDOWMENT ARTS (2014).

placement on probation, fine, suspension, or other action as the Board deems appropriate.”) Previously the regulation that is to be struck read:

Local school districts and charter schools shall establish their own academic eligibility criteria for participation in all extra curricular activities except for interscholastic athletics. The academic eligibility criteria for interscholastic athletics is established in 14 DE Admin. Code 1009.2.6 DIAA Senior High School Interscholastic Athletics, and in 14 DE Admin. Code 1008.2.6 DIAA Junior High and Middle School Interscholastic Athletics.

Comment: In establishing and implementing academic eligibility criteria applicable to students with disabilities, districts are reminded that some flexibility may be contemplated by Federal guidelines. See 34 CFR Sec. 104.4.

The comment that can be found in DDOE regulation 1001, above, cites to the potential need for eligibility flexibility per 34 CFR Sec. 104.4, which is a U.S. Department of Education regulation implementing Section 504 of the Rehabilitation Act’s prohibition of discrimination based on disability. Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, Delaware’s DIAA must offer an equal opportunity to students with disabilities to participate in sports, which may include the requirement to provide reasonable accommodations such as changes to policies. *In re: Dear Colleague Letter of Jan. 25, 2013* (OCR), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>. Likewise, students with IEPs must be afforded an equal opportunity to participate in extracurriculars, including with supplementary aids and services deemed appropriate and necessary by their IEP team. 34 CFR § 300.107.

Of note to Councils, the last provision of the current regulation, concerning potential eligibility criteria flexibility for students with disabilities, does not appear in the DIAA statutory language, or in other DIAA regulations. The DIAA regulations define an “IEP”, “Student with a Disability” and “Unified Athlete” (student with intellectual disability or autism) but otherwise only discuss eligibility in connection to “unified sports” (a co-ed program that combines students with and without autism or intellectual disabilities), or at what programs / schools students with disabilities who are placed in special schools or programs can participate in. See 14 Del. Admin. C. §§ 1108 and 1009. Of tangential note, § 1009.2.3.3.1 § 1008.2.3.2.1 excludes alternative schools from special schools or programs, although alternative schools are at times used as an IEP placement for a student with a disability, rather than a disciplinary placement.

When school systems have an eligibility requirement for a nonacademic program that is not strictly related to an ability to participate in the program, even with reasonable accommodations, it may rise to discrimination if the requirement tends to screen out students with disabilities. See, e.g., *Mowery v. Logan County Bd. of Educ.*, 58 IDELR 192 (S.D. W.Va. 2012) (allowing a student who was prohibited from attending his school's senior class dance on the basis that he was on homebound instruction to pursue Section 504 and Title II claims against his district). Likewise, eligibility criteria that are inflexibly tied to discipline may have discriminatory impact against students whose behavior problems may be a manifestation of their disability. See, e.g., *Ontario-Montclair (CA) Unified Sch. Dist.*, 24 IDELR 780 (OCR 1996) (instructing a district to modify its eligibility criteria where they had a behavior standard that made students with a

specific number of disciplinary actions ineligible, to respond to the individual needs of students with behavioral health disabilities); and *Chrysalis (CA) Charter Sch.*, 113 LRP 27944 (OCR April 11, 2013) (concluding that because a district banned a child from recess, field trips, etc., based on grades and behaviors related to disability, it violated Section 504's antidiscrimination provisions).

**Councils may wish to recommend that DDOE, rather than striking DDOE/DIAA regulation §1001 in its entirety, maintain a modified statement of non-discrimination here, such as: “In establishing and implementing academic eligibility criteria applicable to students with disabilities, ~~districts are reminded that some flexibility may be necessary to ensure that students with disabilities have an equal opportunity to participate in extracurricular activities, as contemplated by Federal guidelines. See e.g., 34 CFR Sec. 104.4 and 34 CFR § 300.107~~” (subtractions shown by strikethrough and additions by underlining), or DDOE could otherwise incorporate such a statement elsewhere in the DIAA regulations.**

- **Proposed Delaware Health and Social Services (DHSS)/Division of Public Health (DPH) regulation to amend 16 Del. Admin Code 4459A, regarding the Childhood Lead Poisoning Act, 27 Del. Register of Regulations 315 (November 1, 2023).**

The Delaware Health and Social Services (DHSS)/Division of Public Health (DPH) proposed regulations to “establish standards for blood lead level screening and testing of children between 12 and 24 months of age.” However, the majority of what is published in this proposal has already been adopted as a final regulation as of August 1, 2023. This includes the requirement for blood testing, the frequency of that testing, religious exemptions, and reporting requirements. There is only one substantive change in the proposal: DPH’s investigation and reporting obligations.

The proposal would add a 60-day timeline for investigating instances when a child’s blood level is elevated. In such cases, the Division “shall determine: the child’s residential address from birth through testing, the site of the child’s lead exposure, and the property owner of the site at which the child became exposed to lead.” Any confidential health information would not be publicly accessible. Additionally, “[w]ithin 10 days of identifying the site of lead exposure, the Division shall notify the Delaware State Lead-Based Paint Program of the location and contact information of the property owner.” These communications will be obtainable under the Freedom of Information Act.

First in terms of privacy, it is important to note that lead exposure data has recently stirred controversy. See e.g., <https://newjerseymonitor.com/2022/07/13/newborn-screening-program-used-to-aid-criminal-investigation-public-defender-says/>. Presently, this regulation addresses that documents will be confidential but it does not address sample retention, nor safeguard this information from potential subpoenas such as what was utilized in the New Jersey news article.

Most importantly, however, is the 60-day timeline for investigation. Although once the site of lead exposure is definitively identified, DPH’s next steps must be within 10 days, DPH has 60 days to get to the point of triggering the 10-day timeline (note: this is consistent with 16 Del. C. §

2610). If a child is still at risk of exposure in their current home, such a lengthy timeline can prolong and increase the lead exposure the child faces, which can have long-term health implications and increase the potential for disability. For information about environmental lead exposure and impact on children's health, see: <https://www.yalemedicine.org/conditions/lead-poisoning-in-children> and <https://www.cdc.gov/nceh/features/leadpoisoning/index.html>.

Considering the potential impact, and compounding risk of continued exposure, it is confounding why this time-period is so long. Although this 60-day period is consistent with the floor set by statute, DPH could shorten the timeframe, excepting extraordinary circumstances that require the full 60-days.

#### **Recommendations:**

- 1) **Councils may wish to inquire as to DPH's policy with respect to storage and destruction of blood samples or information that could identify sensitive genetic and health information, and steps DPH takes to safeguard samples from uses not contemplated by the lead poisoning law.**
- 2) **Councils should support investigative and reporting requirements generally as a brain injury prevention effort, but Councils may wish to question the 60-day timeline that DPH is establishing for investigations and urge DPH to shorten the timeline except for extraordinary circumstances.**

## **II. FINAL STATE REGULATIONS**

- **Final Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) RULEMAKING to amend Title XIX Medicaid State Plan regarding Pharmacy Over the Counter (OTC) & Physician Administered Drugs (PAD), 27 Del. Register of Regulations 338 (November 1, 2023).**

The Delaware Health and Social Services (DHSS)/ Division of Medicaid and Medical Assistance (DMMA) proposed to amend Title XIX Medicaid State Plan regarding pharmacy Over the Counter (OTC) and Physician Administered Drugs (PAD). The purpose of this amendment is “to align Delaware's Medicaid State Plan with current reimbursement policy, provide for future flexibility with less administrative burden, and to update the State Plan in anticipation of future OTC drugs/drug classes that Medicaid will be required to cover, thus reducing the need to submit multiple State Plan Amendments.” DHSS/DMMA states that these changes are partially to allow flexibility in programs because they anticipate that Medicare programs will be required to cover new over the counter products, including OTC naloxone and OTC oral contraceptives. No changes were made from the proposed version of this rulemaking. Previously, Councils provided support for these proposed changes. DMMA thanked Councils for their support.

- **FINAL DEPARTMENT OF HEALTH AND SOCIAL SERVICES DIVISION OF MEDICAID AND MEDICAL ASSISTANCE PUBLIC NOTICE REGARDING GROUND EMERGENCY MEDICAL TRANSPORTATION, 27 Del. Register of Regulations 340 (November 1, 2023).**

Department of Health and Social Services (DHSS), Division of Medicaid and Medical Assistance (DMMA) proposed to amend Title XIX of the State Medicaid Plan about Ground Emergency Medical Transportation (GEMT). Specifically, this rulemaking would increase

reimbursement for emergency transportation providers. The proposed regulation will increase the reimbursement rate for GEMT. No changes were made since this regulation was originally proposed. According to the notice, GACEC submitted comments in support of the changes. DMMA thanked the GACEC for its support.