Memo

To: GACEC, SCPD and DDC

From: Disabilities Law Program

Date: 9/15/2023

Re: September 2023 Policy and Law Memo

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

I. PROPOSED STATE REGULATIONS

- **DDOE REGULATION ON 901 DISPUTE RESOLUTION PROCESS FOR EDUCATIONAL PLACEMENT FOR CHILDREN AND YOUTH EXPERIENCING HOMELESSNESS, 27 DEL. REGISTER OF REGULATIONS 137 (SEPTEMBER 1, 2023)**

The Delaware Department of Education ("DDOE") proposes to amend 14 Del. Admin. C. § 901, which describes the dispute resolution procedures and processes for educational placement for children and youth under the McKinney-Vento Homeless Assistance Act ("McKinney-Vento"). DDOE is proposing to amend this regulation to align definitions with those in 14 Del. Admin. C. § 255 and to make corrections to grammar and style to bring it into compliance with the *Delaware Administrative Code Drafting and Style Manual*.

There are no proposed changes which substantively impact the regulation. However, there are a few instances where DDOE's regulations differ from what is required under McKinney-Vento. This analysis will focus on those areas of divergence and recommendations for changes to language to bring them into compliance.

By way of background, McKinney-Vento was enacted to guarantee educational rights and supports for children and youth experiencing homelessness. McKinney-Vento established a dispute resolution framework and process when parents, guardians, or unaccompanied youth disagree with schools regarding their eligibility for services, school selection, or school enrollment. The dispute resolution procedures are designed so as to provide each party with the opportunity to be heard and that the views are considered objectively. There are dispute processes at the local (school district) level and at the state level.

Under McKinney-Vento, where a dispute arises over eligibility, school selection, or school enrollment, a school district must (1) immediately enroll the child in the school in which enrollment is sought, pending final resolution of the dispute; (2) provide the parent, guardian, or unaccompanied youth with a written explanation of the district's decision as well as the rights to appeal the decision; and (3) refer the parent, guardian, or unaccompanied youth to the local liaison responsible for carrying out the dispute resolution process. 42 U.S.C. § 11432(g)(3).

Under the current (and proposed) 14 Del. Admin. C. § 901, DDOE is only compliant with the second requirement above related to providing notice of the written decision and the right to appeal. These regulations are out-of-sync with McKinney-Vento on the first requirement because the regulations provide that the student must be immediately enrolled in "either the school of origin or the school of residence in which enrollment is sought[.]" 14 Del. Admin. C. § 901.4.2. The current language would be improved if it were amended to require that the school at which enrollment is sought immediately enroll the student, pending final resolution of the dispute.

Likewise, these regulations do not comply with the third requirement related to referring the parent, guardian, or unaccompanied youth to the local liaison. Instead, the current (and proposed) regulations merely state that the written explanation and notice include "[c]ontact information for the LEA homeless liaisons and state coordinator, with a brief description of their roles[.]" 14 Del. Admin. C. § 901.4.1.2. The current language would be more beneficial to students if it were to be amended to require that the school affirmatively refer the parent, guardian, or unaccompanied youth to the school's homeless liaison, rather than putting it on the parent, guardian, or youth to make the affirmative contact.

Councils may wish to provide support for the proposed changes with two recommendations:

1) **Councils may wish to recommend that the current language be amended to require that the school at which enrollment is sought immediately enroll the student, pending final resolution of the dispute.**
2) **Councils may wish to recommend that the current language be amended to require that the school affirmatively refer the parent, guardian, or unaccompanied youth to the school's homeless liaison rather than putting it on the parent, guardian, or youth to make the affirmative contact.**

- **PROPOSED 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 147 (SEPTEMBER 1, 2023).**

The Delaware Health and Social Services (DHSS)/ Division of Medicaid and Medical Assistance (DMMA) proposes 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 made changes to language relating to requirements for outpatient drugs covered by Medicaid (Attachment 3.1-A.1). The following proposed changes were included under otherwise excluded or restricted drugs that must be covered by Medicaid:

- (a) from "agents when used for anorexia weight loss, weight gain (see specific drug categories below)" to "agents when used for anorexia, weight loss, weight gain as listed on the Delaware Medicaid Preferred Drug list located on the agency's website"
- (c) from "agents when used for cosmetic purposes or hair growth (See specific drug categories below)" to "agents when used for cosmetic purposes or hair growth only when the state has determined that use to be medically necessary"
- (d) from "agents when used for the symptomatic relief cough and colds (see specific drug categories below)" to "agents when used for the symptomatic relief cough and colds as listed in the Delaware Medicaid pharmacy provider manual"
- (e) from "prescription vitamins and mineral products, except prenatal vitamins and fluoride (see specific drug categories below)" to "prescription vitamins and mineral products, except prenatal vitamins and fluoride as listed in the Delaware Medicaid pharmacy provider manual."
- (f) from "nonprescription drugs (see specific drug categories below)" to "nonprescription drugs as listed in the Delaware Medicaid pharmacy provider manual"
- The "specific drug categories" referenced above were removed.

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.

DHSS/DMMA made the following changes to its schedule for drug reimbursement (Attachment 4.19-B): changing from "[f]or drugs where the maximum cost is less than $50, the cost will be based on direct price of Average Sales Price plus 6%" to "[f]or drugs where the maximum cost is less than $50, the cost will be based on direct price or the Medicare fee schedule." DHSS/DMMA states this proposed change is due to changes in quarterly Centers for Medicare and Medicaid Services (CMS) Medicare fee schedules and to avoid unnecessary administrative work.

Councils should consider supporting these technical changes to more easily allow for anticipated changes in drug coverage, reimbursement policies and requirements.

- **PROPOSED DEPARTMENT OF HEALTH AND SOCIAL SERVICES DIVISION OF MEDICAID AND MEDICAL ASSISTANCE PUBLIC NOTICE REGARDING GROUND EMERGENCY MEDICAL TRANSPORTATION, 27 DEL. REGISTER OF REGULATIONS 149 (SEPTEMBER 1, 2023).**

Department of Health and Social Services (DHSS), Division of Medicaid and Medical Assistance (DMMA) proposes 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. Comments are due by October 1, 2023. The proposed changes would take effect for services effective July 1, 2023.

DHSS explains in the Public Notice that the "Delaware legislature has introduced a bill" to revise the reimbursement under Medicaid for ground emergency medical transportation services

(GEMT), which would be effective in state fiscal year 2024.[1] Despite a diligent search, DLP could not find the bill referred to in the notice. However, the purpose of the bill as stated in the Public Notice is to increase Medicaid reimbursement for GEMT.[2] It would increase "the present percentages of the Medicare rates that Medicaid pay for the services to 75% of Medicare across the board."[3]

This regulation proposes to amend Attachment 4.19-B page 3 of the Title XIX Medicaid State Plan. It would delete the specified percentage reimbursement of the Medicare fee schedule for five (5) services: ground mileage; emergency transport for advanced life support; emergency transport for basic life support; one way transport for conventional air services; and rotary wing air mileage. This amendment would accommodate the changes that have occurred in the percentages of Medicare rates upon which the Medicaid reimbursement is based. Since the reimbursement rates are based upon the Medicare rates, the amendment will also provide flexibility in implementing future changes when the rates change.

The proposed regulation will increase the reimbursement rate for GEMT. Since the regulation prescribes reimbursement in terms of "State-specified percentages of the Medicare Fee Schedule,"[4] if the bill mentioned above passes, the reimbursement rated will be seventy-five percent (75%) of the Medicare rates. If the State rates change in the future, the proposed regulation will allow for the changes without having to seek further amendment of the State Medicaid Plan.

Under the existing regulation, the five (5) services were reimbursed at varying rates from thirteen percent (13%) up to thirty-nine percent (39%). Although more costly, the proposed regulation will bring uniformity and parity to the covered services.

This proposed regulation to amend Attachment 4.19-B page 3 of the Title XIX Medicaid State Plan is a prophylactic way of providing for the impending increase in reimbursement rates for GEMT as well as any future increase in reimbursement. **Councils may wish to support this regulation.**

II. Final State Regulations

FINAL DSAMH REGULATIONS: 6002 CREDENTIALING MENTAL HEALTH SCREENERS AND PAYMENT FOR VOLUNTARY ADMISSIONS, 27 DEL. REGISTER OF REGULATIONS 185 (SEPTEMBER 1, 2023).

DHSS has published final regulations relating to the credentialing of mental health screeners, which will be effective January 1, 2024. Delaware's civil commitment statute, codified at 16 Del. C. § 5000, et seq., requires credentialed mental health screeners to make the underlying determination authorizing the emergency detention of an individual with a mental health condition as part of the involuntary civil commitment process. Proposed regulations, which

[1] Statement contained in the SUMMARY OF PROPOSAL, Background section of the Public Notice of this regulation.
[2] *Id.*
[3] *Id.*
[4] Proposed amendment to Attachment 4.19-B, section 1.

sought to amend existing regulations, were previously published in the June 2023 Delaware Register of Regulations, for which GACEC and SCPD submitted comments.

The decision ordering the final regulations acknowledges and responds to comments received from GACEC and SCPD. DHSS notes the Councils' support of the proposed regulations' creation of credentialing requirements for psychiatrists to act as mental health screeners. In response to the concerns noted by the Councils related to the simplification of the training requirements for mental health screeners, DHSS asserts that the fact that DSAMH has to approve the training for screeners is "sufficient to ensure the proper training of screeners." DHSS also specifically notes that the amended regulations reflect a shift away from relying on continuing education hours ("CEUs") to meet hours requirements "in favor of training specific to Delaware's laws." DHSS argues that "standardizing the Division-approved training across screeners will result in a more uniform system and decrease inappropriate detentions." It should be noted the now-finalized regulations are not that specific about the nature or contents of the training. They simply state that to become credentialed an individual must "complete[] the Division-required training" and "achieve[] a satisfactory on the Division's examination" (see final regulations at 8.1.3-8.1.4). While there may be advantages to streamlining a training process, and a testing component would presumably help to ensure individuals seeking to become mental health screeners have the requisite knowledge in order to do so, it is still not clear what the parameters of this training would be or what it would be required to include. The regulation does not include any requirement for re-training for renewal of a mental health screener's credentialing (renewal must take place every two years). Mental health screeners encounter individuals with mental health conditions in especially sensitive and vulnerable situations, and it is concerning that there is not a clear directive as to what training they need to receive.

DHSS also notes the concerns expressed by the Councils regarding the elimination of language regarding a review process for hospitalizations, both voluntary and involuntary, paid for with State funds. In response to these concerns, DHSS provides the further explanation that "language establishing a review process for payments the current regulation is inappropriate and the proposed regulation remedies this error." As mental health screeners cannot actually admit an individual to a hospital (although an emergency detention for purposes of involuntary commitment may only be initiated by a credentialed mental health screener as noted at 16 Del C. § 5004(a)), DHSS asserts that including provisions relating to the review of admission decisions are "not germane" to the regulation. DHSS specifically points out to language at 16 Del C. § 5005 which states "[a] person shall not be admitted to a hospital except pursuant to the written certification of a psychiatrist." The referenced language specifically refers to a "provisional admission" at the completion the 24-hour emergency detention period, which is the next stage of the involuntary commitment process. DHSS further asserts that a payment review process exceeds the authority of 16 Del. C. § 5004, which specifically addresses emergency detentions by credentialed mental health screeners. While DHSS says it "shares the commenters' concern that State funds be expended only for appropriate admissions," DHSS does not address whether the payment review process that is being eliminated from the existing regulations would be incorporated into regulations elsewhere.

DHSS appears to have adopted the proposed version of the regulations published in June's Register of Regulations without any revisions. The final regulations will impose new registration requirements for psychiatrists who wish to act as mental health screeners, as well as simplify the training requirements for credentialing of mental health screeners. The final regulations also remove all language in the existing regulations related to payment for voluntary and involuntary admissions.

While DSAMH provided responses to Council's comments the following items remain unclear: 1) it is still not clear what the parameters of this training would be or what it would be required to include; and 2) DHSS does not address whether the payment review process that is being eliminated from the existing regulations would be incorporated into regulations elsewhere. However, as this is a final regulation, further comments would only reiterate what Councils previously commented.

III. Federal Regulations

NONDISCRIMINATION ON THE BASIS OF DISABILITY; ACCESSIBILITY OF WEB INFORMATION AND SERVICES OF STATE AND LOCAL GOVERNMENT ENTITIES." SEE 88 FED. REG. 51,948 (AUG. 4, 2023) (TO BE CODIFIED AT 28 C.F.R. PT. 35).

On August 4, 2023, the Department of Justice (DOJ) published a notice of proposed rulemaking in the Federal Register titled "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities." *See* 88 Fed. Reg. 51,948 (Aug. 4, 2023) (to be codified at 28 C.F.R. pt. 35). Through the Americans with Disabilities Act (ADA), the DOJ has broad authority to enact regulations to enforce nondiscrimination of individuals with disabilities, including through Title II, which prohibits disability discrimination by state and local governments. *See e.g.* 42 U.S.C.A. § 12101 *et seq.* (2009). In enacting such regulations, the DOJ must publish the proposed rules and seek public comment on the rules. This rulemaking has a comment period open until October 3, 2023.

The proposed rule is lengthy, nearly 75 pages in the published version of the document. However, there are some key themes to focus on, which will be briefly summarized below.

Justification for the Regulation

The DOJ explains several reasons why these new web accessibility regulations are necessary in order to protect people with disabilities. *See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*, 88 Fed. Reg. 51,954 (Aug. 4, 2023). First, the DOJ points to the increasing use of web content by state and local governments and their agents for many if not most of their public-facing functions. *Id.* Unfortunately, the DOJ points out, individuals with disabilities often face a barrier in accessing those services due to inaccessible web platforms. Second, the DOJ raises the increased use of mobile applications as a reason behind this rulemaking. *Id.* At 51,955. Due in large part to the pandemic, the use of such applications have become essential to access governmental services, many of which are otherwise not accessible or less accessible on traditional web platforms, including Global Positioning System (GPS)- based content and emergency alert and

preparedness systems. *Id.* Third, the DOJ writes that Assistive Technology (AT) is now used by millions of Americans with disabilities in a number of ways in order to aide in their access to the web. *Id.* Unfortunately, the compatibility of these devices with many current webpages or mobile apps is lacking, with many failing to provide accessible options for individuals with disabilities.

Finally, although the Department's position on Title II applying to web-based content has been consistent since at least 1996, policy or regulation enforcement was lacking. *Id.* at 51,956. However, while their position here was strong, any policy or regulation to enforce it was lacking. In this dearth of controlling policy, many voluntary initiatives put forth by national and international nonprofits and non-governmental organizations were developed, and many entities did adopt these standards. *Id.* However, program participation was a choice and as such was low, as was success. Further, these measures, when used, were often inadequate in ensuring access to individuals with disabilities. *Id.* Thus, DOJ sees a need to promulgate cohesive regulations that can be enforced, as other federal organizations, such as the Department of Education, have done *Id.*

Compliance

Standards to Be Utilized

The Department announced that the standards it would rely on are standards set forth by the World Wide Web Consortium (W3C). *Id.* at 51,959. They have published the Web Content Accessibility Guidelines (WCAG) in several iterations, the first of which was in 1999. *Id.* The DOJ proposes to adopt the most recent version of the guidelines, WCAG 2.1, published in 2018. *Id.* They specify that version 2.1 Level AA is what would be proposed, which is the intermediate level of accessibility guidelines, adopting those of Level A beneath it, and including additional guidance for web developers. *Id.* However, these guidelines stop short of the strictest standards, set forth in Level AAA. *Id.* These guidelines are already widely-used. *Id.*[5]

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[5] ***The Web Content Accessibility Guidelines***

The WCAG 2.1 recommendations were published on June 5, 2018. *See* WORLD WIDE WEB CONSORTIUM, *Web Content Accessibility Guidelines (WCAG) 2.1*, (June 5, 2018) https://www.w3.org/TR/2018/REC-WCAG21-20180605/ (hereinafter: "W3C, *WCAG 2.1*"). W3G also published a companion quick reference guide which summarizes the WCAG recommendations and lists the modifications or accommodations by Levels A-AAA. *See* WORLD WIDE WEB CONSORTIUM, *How to Meet WCAG (Quick Reference)*, (last accessed Sept. 1, 2023) https://www.w3.org/WAI/WCAG21/quickref/?showtechniques=111 (hereinafter: "*WCAG Quick Reference Guide*"). The guidelines are broken down into four conformance categories:

1. perceivable- the information and interface must be presented in a way the use can perceive;
2. operable- the interface and site navigation must be operable;
3. understandable- the information presented and user interface must be comprehendible; and
4. robust- the content must be robust enough to be interpreted through a wide array of assistive technology.

W3C, *WCAG 2.1*.

Each broad category is broken down into sub-categories, which each contain specific items for conformance based on the level of conformance desired. *WCAG Quick Reference Guide.* The Quick Reference Guide lists each of these sub-categories and their requirements. *Id.* For example, the perceivable guidelines for the time-based media sub-category include pre-recorded audio and video only (Level A), pre-recorded captions (A), an audio description or media alternative (A), live captions (AA), and audio descriptions for pre-recorded media (AA). *Id.*

The WCAG 2.1 recommendations does include its own conformance standards, but the primary standard for Level AA conforming sites is that they meet all the standards for each category and sub-category for Levels A and AA.

Timeframe: Larger and Smaller Public Entities
The proposed regulations differentiate between two groups of public entities, determined by their relative population size, which is drawn from the most recent census data available. *Id.* at 51,963. If an entity itself does not have census data but is connected with a population area that does, that population data is what is used to make the determination. *Id.* The regulations also note that entities are classified based on the total population, not just the population that could benefit from the services their offer (i.e. school districts are classified by the population data of their geographical area, *not* the number of school-age students). *Id.* at 51,963-4.

Larger public entities, those with a population of over 50,000, would have two years after the final publication of the rules to come into conformance with the standards. *Id.* at 51, 964. Smaller public entities would have three years from the final publication date to come into conformance. *Id.* The justification between the different timelines is the assumed difference in resources. *Id.* The rules would contain similar limitations as seen in Title II regulations, including undue financial hardship and fundamental program alteration. *Id.* at 51,965.

Exceptions
The Department identified some *limited* exceptions where the compliance rules would not apply. These exceptions include:

1. archived web content;
2. preexisting conventional electronic documents;
3. web content posted by third parties on a public entity's site;
4. third-party web content linked from a public entity's site;
5. course content behind a password wall for admitted students enrolled in a course at a public postsecondary institution;
6. the same type of content behind a password wall for students in public elementary and secondary schools; and
7. password-protected documents related to a specific individual or their property or account.

Id. at 51,966.

The Department will also allow for "conforming alternate versions" of online documents or webpages in some limited circumstances. *Id.* at 51,978 (following WCAG standards). The notice stresses that this is to be the exception and not the rule, and that segregation such as this should be avoided generally. *Id.* The DOJ also allows for "equivalent facilitation," meaning that technically nonconforming sites will still meet the regulation so long as their accessibility features meet or exceed the WCAG 2.1 Level AA guidelines. *Id.*

Measuring Compliance
The Department included another section titled "Additional Issues for Public Comment," which addresses how to measure compliance. *Id.* at 51980.

The DOJ makes clear that standards do not have much meaning without enforcement and compliance methods in place. *Id.* The notice then surveys various attempts at conformance, noting that the Department of Transportation delayed compliance until well after implementation of their regulations. *Id.* Further, some states have their own requirements, though they do not

seem to specify how conformance could be met. *Id.* at 51,981. Here, the DOJ has not set a specific approach, and are in fact seeking input into how conformance might be achieved. *Id.* They are considering using a percentage compliant system, but that faces many feasibility and implementation issues. *Id.* Another possible approach is to limit compliance obligation where nonconformance does not hinder anyone from accessing the site. *Id.* at 51,983.

Cost Estimation Discussion

The final section of the notice includes a discussion about costs associated with bringing nonconforming websites into substantial conformance. *Id.* at 51,986. The notice admits that there would be initial costs to be borne by local and state entities, however, those costs are cabined by several caveats. First, retrofitting an existing website is far more expensive that designing a new conforming one, so the cost could be reduced as entities redesign their old websites. *Id.* Second, these costs would tend to be a one-time expense, as entities would bring their current sites into conformance, and there would be less costs after this adjustment. *Id.* at 51,987. There would be a large impact, however, as the Department estimates that 109,983 websites and 8,805 applications would be impacted. *Id.*

The Notice further reports, that costs would be greatly outweighed by the benefits of conforming. These benefits include greater accessibility for individuals with disabilities, less maintenance in the long term for sites, a larger labor market pool, and decreased litigation costs. *Id.* The financial savings were estimated in several annual figures, all in the billions of dollars. *Id.* The notice provided several tables breaking down the financial savings in greater detail. *See id.* at 51,988. The figures indicated also include the different conformance time periods for large and small entities. *Id.*

Analysis and Examples- What Does this Notice Mean for Delaware?

As far as conformance, the state and local entities will have either two or three years to meet the standards. Conforming with the standards will likely present a challenge, which the below examples illustrate. There are a number of websites which will measure sites' accessibility and will identify issues. The author used accessibilitychecker.org to survey a variety of state and local sites to measure their current compliance. These examples included Capital School District in Dover, the Delaware Courts Webpage,[6] the State's Webpage, and the City of Wilmington Webpage.[7]

None of the webpages surveyed met full compliance. The State's website fared the best, scoring partly compliant with no critical issues identified. However, the other three sites did not fare as well. All of them scored as not compliant. For the Courts and Capital School District, there were critical issues with the way that images were coded, making it difficult for AT to identify. For the City of Wilmington, a huge issue was the contrasting used in backgrounds, making foreground text harder to read and objects more difficult to identify.

[6] The Disabilities Law Program is aware that the Administrative Office of the Courts knows of some accessibility concerns and is actively engaged in making their website more accessible.

[7] These accessibility reports are easy to generate. Simply visit https://www.accessibilitychecker.org/ or a similar website and paste a site's URL into the provided box. The checker will produce a report and give the site a score for accessibility.

These brief examples represent the process that every state and local site will have to undergo. It will be a lengthy process, but compliance can be achieved.

Recommendations

First, the Department's Notice lacks any definite stance on conformance measures. While it lists what other agencies have done in the past for conformance as well as what even some states and countries have done, it settles on no clear winner among them. Historically, conformance measures alone are difficult with the WCAG 2.1 guidelines. *See Automated WCAG Testing is Not Enough for Web Accessibility ADA Compliance*, USABLENET, (June 28, 2018) https://blog.usablenet.com/automated-wcag-testing-is-not-enough-for-web-accessibility-ada-compliance.[8] Specifically, automated processes for reviewing websites are insufficient; manual review is either partially or fully required for the majority of the standards. *Id.* For levels A and AA, which would be applicable here, only four of the 50 standards are reviewable by fully automated processes. *Id.* A further twelve are partially reviewable by automated process, leaving 34 that can only be reviewed manually. This includes important standards like live captions, sensory characteristics, no keyboard "trapping," and page navigation consistency. *Id.* This may be something the Council wants to focus on, especially since the Notice lacks any sort of consideration for it. Conformance to the standard is very important, and how the Department might measure compliance to it could make or break whether the regulation is effective.

Lastly, the Department allows for several exceptions for compliance. One such exception is the preexisting documents exception. Essentially, documents that were already on the site before compliance measures were in place do not have to conform to these regulations. The Council should consider whether exceptions like these create equitable implications for website access (and consequently access to governmental services). The Department admits that governmental webpages are used for exactly this purpose on its general web accessibility page for the ADA. *See* U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, *Accessibility of State and Local Government Websites to People with Disabilities* (Feb. 28, 2020) https://www.ada.gov/resources/accessibility-govt-websites/#for-more-information. Given these physical barriers to services also apply to using government websites online, any exceptions the Department is proposing should be considered in light of this. Council may wish to encourage the Department consider alternatives to full exemption, such as longer time frames to bring existing documents into compliance.

Conclusion

The DOJ's notice of proposed rulemaking seeks to require Title II entities – state and local governments – to ensure web accessibility for people with disabilities. The method articulated to achieve this goal is to adopt the Web Content Accessibility Guidelines 2.1 Level AA for Title II sites. While the DOJ has some concrete ideas in place, they are seeking input on almost every aspect of the plan, with special emphasis on conformance measures. For the convenience of the Council, all of the specific questions asked for feedback are reproduced in Appendix A.

[8] One study concluded that over 98% of websites analyzed failed. Id. See WE ANALYZED 10,000,000 PAGES AND HERE'S WHERE MOST FAIL WITH ADA AND WCAG 2.1 COMPLIANCE, ACCESSIBE (Nov. 6, 2019) https://accessibe.com/blog/knowledgebase/we-analyzed-10000000-pages-and-heres-where-most-fail-with-ada-and-wcag-21-compliance.