

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 4/13/2024

Re: April 2024 Policy and Law Memo

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

I. PROPOSED STATE REGULATIONS

➤ **PROPOSED DEPARTMENT OF EDUCATION (DDOE) REGULATION AMENDING 14 DE ADMIN. CODE 101 STATE ASSESSMENTS, 27 DEL. REGISTER OF REGULATIONS 726 (APRIL 1, 2024)**

With this notice, the Department of Education (DDOE), is proposing amendments to 14 *Del. Admin. Code* 730 regarding state assessments. The edits are primarily technical edits and regulatory drafting style edits. Due to time limitations, this regulation was not reviewed in detail. However, it is worth noting that the regulations (and underlying State law) continue to allow for portfolio assessments for students for whom the parent believes the student, even with accommodations, would not produce a valid result through state testing. The regulation indicates that stakeholder groups, and lists Governor's Advisory Council for Exceptional Citizens (GACEC) as a partner stakeholder, should be involved in developing portfolio criteria and standards.

RECOMMENDATIONS:

- 1. While not a proposed amendment, Councils may wish to inquire whether any LEAs or public charter schools are currently utilizing a Portfolio Alternate Assessment.**
- 2. If so, Councils may wish to inquire why the Governor's Advisory Council for Exceptional Citizens has not been involved with updating standards or criteria.**
- 3. Councils may wish to further inquire as to who DDOE's current portfolio assessment provider is.**

➤ **PROPOSED DEPARTMENT OF EDUCATION (DDOE) REGULATION AMENDING 14 DE ADMIN. CODE 603 COMPLIANCE WITH THE GUN-FREE SCHOOLS ACT, 27 DEL. REGISTER OF REGULATIONS 730 (APRIL 1, 2024)**

With this notice, the Department of Education (DDOE), is proposing amendments to 14 *Del. Admin. Code* 730 regarding gun free schools. The proposed regulation adds a new section 1.0 that ties the regulation to the DDOE's regulatory authority to protect the health and physical welfare of students and adds a new section 2.0 for definitions. DDOE's proposed regulation uses the same meaning for "firearm" as that term is defined in the federal Gun-Free Schools Act, 20

U.S.C. § 7961(b)(3), which in turn uses the definition from 18 U.S.C. § 921(a)¹. The proposed amendment makes technical updates including to statutory citations.

Substantively, in section 3.0, the proposed amendment adds a provision requiring the school district or charter school to include a copy of their written Gun-Free Schools policy in their Student Handbook or Code of Conduct. DDOE also moves the discretionary ability to modify an expulsion requirement from the “chief school officer” and gives it instead to the local school board or charter school’s board of directors. This change was made to be consistent with 11 Del. Code § 1457A(f), which places that discretion with school boards and charter school board of directors. **Of note, § 1457A(f) is not consistent with the Gun Free Schools Act, which gives that discretion to the “chief administering officer of a local educational agency.”** 20 U.S.C. § 7961(b)(1). Also of note: while our State law, at 11 Del. Code § 1457A(f), requires a minimum term of expulsion of 180 days, rather than the one year minimum which appears in the proposed regulation, the Gun Free Schools Act requires a one year minimum. 20 U.S.C. § 7961(b)(1). Finally, the regulation removes the requirement to record the expulsion modification in writing and instead requires simply it to be reported to DDOE, while the federal Gun Free Schools Act requires that any modification be “in writing.” 20 U.S.C. § 7961(b)(1). **This could be fixed by adding that the reports required in section 4.0 of this proposed regulation must be in writing. DDOE may wish to review section 3.0 because presently the proposed regulation is inconsistent within section 3.0 with whether it is following the federal or state language.**

DDOE cleans up language and citations in section 4.0 and adds that when school districts and charter schools provide descriptions of expulsions imposed due to firearms, that the district/charter must provide a description of the circumstances surrounding the expulsion, including: 1) the name of the school; 2) the number of students expelled; and 3) the type of firearms. This is required by the federal Gun-Free Schools Act, 20 U.S.C. § 7961 (d).

Section 5.0 is not substantively changed and reminds districts and charter schools that the regulation does not alter their duties under the Individuals with Disabilities Education Act.

Recommendations:

- 1. This proposed regulation makes changes consistent with the federal Gun Free Schools Act and thus generally speaking does not pose new concerns for students with disabilities.**
- 2. However, Councils may wish to recommend that DDOE review section 3.0 because presently the proposed regulation is inconsistent within section 3.0 with whether it is following the federal or state language. Specifically,**
 - a. state law and this proposed regulation differ from the Gun Free Schools Act in that they give modification of expulsion discretion to school and charter boards, while in the federal law that discretion lies with the “chief administering officer of a local educational agency.” 20 U.S.C. § 7961(b)(1).**

¹ 18 U.S.C. § 921(a)(3): “The term ‘firearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.”

- b. the regulation removes the requirement to record the expulsion modification in writing and instead requires simply it to be reported to DDOE, while the federal Gun Free Schools Act requires that any modification be “in writing.” 20 U.S.C. § 7961(b)(1). This could be fixed by adding that the reports required in section 4.0 of this proposed regulation must be in writing.**

➤ **PROPOSED DEPARTMENT OF EDUCATION (DDOE) REGULATION AMENDING STUDENT ATHLETE ELIGIBILITY, 27 DEL. REGISTER OF REGULATIONS 740 (APRIL 1, 2024)**

DDOE seeks to amend regulations related to eligibility for interscholastic athletics. Of specific interest to councils may be a provision, Section 3.3, related to the exclusion of students who are placed in alternative schools or programs for disciplinary reasons through the Comprehensive School Discipline Program, (14 Del. Code 1601 et seq.). The provision reads:

3.3 A student with a disability who is placed in a school or program by the student's school district or charter school shall be eligible to participate in interscholastic athletics as set forth in subsections 3.3.1 through 3.3.4. Subsection 3.3 does not apply to students who are placed in alternative schools or programs for disciplinary reasons through the Comprehensive School Discipline Improvement Program (14 Del.C. §§ 1601 - 1607).

Categorical exclusions such as this raise concerns that the proposed provisions may result in impermissible discrimination against students with disabilities.

The benefits of participation in athletics and sports for students with disabilities is well documented. “The benefits of sports participation are significant for people with disabilities. Physical activity improves academic success, builds self-esteem, and prevents health problems.”² The United States Department of Education has directed districts to ensure that students with disabilities have equal access to such programs.³ 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.

Because some students are placed in alternative schools through the IEP process, and not for disciplinary reasons, it is important that the regulation clearly indicate that such students are not excluded from participation in interscholastic sports. The current language does not adequately clarify this distinction as it can be read to exclude any student placed in an alternative school.

Moreover, 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

² Lawowski, Advancing Equity for Students with Disabilities in School Sports, Journal of Intercollegiate Sport, 2011, 4, 95-100 (<https://journals.ku.edu/jis/article/view/10047/9477>).

³ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>

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).

We know some student populations in Delaware are disproportionately disciplined for behaviors. These groups include students of color and students with disabilities.⁴ Categorical exclusions of students placed in alternative schools for disciplinary reasons can further marginalize some students already subject to discriminatory disciplinary practices.

Recommendation: Councils may wish to express concern about this provision 3.3, and suggest that it be redrafted to reflect that a. some students are placed in alternative schools for reasons other than discipline and should not be excluded; and b. individual considerations may allow a student with a disability who has been placed in an alternative school for discipline to participate in interscholastic sports. This would include any student placed pursuant to an IEP and on an individual basis a student who has been placed as discipline for behaviors that are a manifestation of disability.

II. PROPOSED BILLS

➤ HB 345

HB 345 provides additional doula coverage for additional postpartum doula visits (beyond the three postpartum visits of up to 90 minutes) when recommended by a practitioner or clinician acting in their school of practice. Expansive doula services is supported by many data points. Last year's HB 80 notes that while Black women made up 28% of Delaware live births in 2019, they represent 78% of pregnancy-related fatalities over the 2017-2021 period, aligning with the national trend; Black women are three times more likely to experience pregnancy-related mortality than white women in the United States. HB 80 additionally notes that the Maternal Mortality Review found that the most common accompanying issues to infant death were those related to the provision of support in making medical decisions, the ability to access care, and effective communication with healthcare professionals. HB 80 further notes that doulas provide positive and nurturing environments throughout the pregnancy and birthing process and provide care "that is more informed of their patient's experiences, values, or identities[.]"

Pertinently, doula care has been found to more positively affect women who are socially disadvantaged, low income, unmarried, giving birth for the first time, are without a companion, or who experience language or cultural barriers.⁵ Finally, doula-assisted mothers were "four times less likely to have a low birth weight [] baby [and] two times less likely to experience a birth complication involving themselves or their baby."

⁴ <https://www.delawareonline.com/story/news/education/2023/06/07/delaware-schools-suspension-rates-student-behavior-discipline-restorative-practices/70247312007/>.

⁵ Kenneth J. Gruber, Susan H. Cupito, & Christina F. Dobson, Impact of Doulas on Healthy Birth Outcomes, *The Journal of Perinatal Education* (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3647727/#>.

Recommendation: Given the state-wide and national statistics regarding pregnancy-related fatalities, the inclusion of doulas in insurance-coverage is a life-saving effort which will also prevent disability. As such, councils should consider endorsement.

➤ **HS 1 to HB 293**

House Substitute 1 to House Bill 293 seeks to add a provision to Chapter 2 of Title 15, Elections, requiring the Department of Elections (DOE) to ensure that polling places are accessible. Currently there is a vague provision at 15 Del Code § 4512 which generally requires that polling Previously, Counsel had the following recommendations/observations:

1. *Emergency is not defined. Emergency should be defined, either as a situation where the Governor has issued an Order declaring an emergency, or when a specific polling place is unusable on Election Day due to circumstances beyond the DOE's control and that cannot be remediated.*
2. *There is no enforcement provision in this bill. At a minimum, that language be added providing for a complaint process or some type of judicial enforcement.*
3. *DLP has noted that there have been occasions when accessible locations, often schools, are not accessible on Election Day because a particular feature, such as an accessible door or ramp, has not been made available. Language should be added that requires any polling location make its accessible features fully available on Election Day, or that the DOE makes this a requirement of any contract or agreement that the DOE makes with the owner or operator of a polling place.*

HS 1 addresses each of these recommendations:

- 1) The emergency exception is clarified as “a natural disaster or other emergency that renders a polling site unsafe or unusable.”
- 2) Any person with information that the Department of Elections has not complied with accessibility requirements under this Act can file an administrative complaint with the Department; and
- 3) Add that: “the accessibility features of such [polling] places are available to voters for any election.”

Recommendation: Councils may wish to thank Senator Carson for being responsive to Councils' concerns. Councils may wish to endorse this bill.

➤ **House Bill 348, Concerning Lifeguards at certain pools.**

HB 348 seeks to amend Section 122 of Title 16 to prohibit DHSS from issuing any regulation requiring that a “hotel, private campground facility or pool servicing residential communities including apartments, townhomes or single-family communities provided the pool is not accessible to the general public” have a lifeguard. The Synopsis indicates that hotels, campgrounds and community pools where the pool will be or is owned by residents are already

exempt from any requirement to have lifeguards. The bill extends this exemption to other private community settings, specifically apartment complexes and townhomes. The reason given is that requiring a lifeguard at such facilities increases costs that are passed along as rent. There is no mention whether any tenants of these settings have objected to the increased costs, which are obviously spread over multiple units. There is also no mention of risk to or safety of the residents of these settings in not having a lifeguarded pool.

The Division of Public Health has the responsibility for regulating swimming pools. The regulations are found in 16 Delaware Admin Code Section 4400.⁶ Indeed, in Section 1.4, motels, hotels, private campgrounds and any pool that has been granted private pool status are exempted from the requirement to have a lifeguard on duty. Private pools are defined in Section 2 and include pools that are not open to the general public and intended strictly for the “beneficial owner/s” or their guests. A pool with multiple users can be considered a private pool if it is owned by the homeowners collectively and no pool memberships are available to non-beneficial owners. The pools that HB 348 intends to exempt do not meet the definition of a private pool under the regulation. The pool is not owned or controlled by the residents, and they have no control whatsoever over the operation of the pool or who can use it.

Swimming pool- related accidents are a significant cause of both deaths and serious and frequently disabling injuries. Obviously, death by drowning is a primary risk. Death by drowning is the leading cause of death for children between the ages of 1 and 4 and the third leading cause of accidental death for children ages 5 to 19.⁷ People of color are at significantly greater risk of drowning.⁸ According to the CDC:

For people younger than age 30, drowning rates among Black people were 1.5x higher and among American Indian and Alaska Native people were 2x higher than White people

- Drowning is a leading cause of death among children 1–4 years of age
- Deaths among persons with autism spectrum disorder were nearly 40x as likely to be caused by drowning as deaths in the general population (Injury mortality in individuals with autism, AJPH)⁹

In addition, nonfatal swimming accidents cause a significant number of spinal cord injuries, and brain injuries due either to blunt trauma or anoxia from near-drowning. Diving is especially dangerous and is one of the top five causes of spinal cord injuries.¹⁰ Swimming accidents are one of the top ten causes of brain injury in children under 14.¹¹

⁶[https://regulations.delaware.gov/AdminCode/title16/Department%20of%20Health%20and%20Social%20Services/Division%20of%20Public%20Health/Health%20Systems%20Protection%20\(HSP\)/4464.shtml](https://regulations.delaware.gov/AdminCode/title16/Department%20of%20Health%20and%20Social%20Services/Division%20of%20Public%20Health/Health%20Systems%20Protection%20(HSP)/4464.shtml);

⁷ AAP Policy Statement, Prevention of Drowning, Sarah A. Denny, MD, et al, http://publications.aap.org/pediatrics/article-pdf/143/5/e20190850/1076765/peds_20190850.pdf;

⁸ Id; [https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6319a2.htm#:~:text=Blacks%20aged%205%E2%80%9319%20years%20were%205.5%20times%20more%20likely,times%20the%20rate%20of%20whites](https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6319a2.htm#:~:text=Blacks%20aged%205%E2%80%9319%20years%20were%205.5%20times%20more%20likely,times%20the%20rate%20of%20whites;);

⁹ https://www.cdc.gov/drowning/pdf/CDC-DIP_At-a-Glance_Drowning_508.pdf;

¹⁰ <https://helphopelive.org/5-unforgettable-facts-about-diving-and-spinal-cord-injuries/>

¹¹ <https://www.aans.org/Patients/Neurosurgical-Conditions-and-Treatments/Sports-related-Head-Injury>

Moreover, as of 2021, 19% of Delaware residents lived in multifamily housing and 28% lived in renter-occupied housing.¹² It is also true that African Americans constitute a disproportionately high percentage of renters.¹³ Pools at apartment and condo complexes are attractive nuisances. There are frequently many young families living in these settings. Many users are young, and they are not accomplished swimmers. In every way, pools at multi-family housing complexes resemble community pools rather than private pools owned and maintained by homeowners.

The American Academy of Pediatrics recommends that all community pools have lifeguards, as one layer of protection against drowning and serious injuries.¹⁴ Given the risks associated with unattended swimming, particularly among children and especially children from disadvantaged groups who are more likely to live in apartment complexes, it makes little sense not to require such facilities to provide lifeguards. This is not a decision that should be driven by economics, especially as it is unlikely that the impetus for this bill is coming from tenant complaints.

Recommendation: Councils may wish to suggest that DHSS be allowed to continue to require lifeguards at pools in multi-family complexes including apartments and townhomes as one layer of protection for residents and their guests who access the facilities. Even preventing one serious spinal cord injury or one drowning of a child is well worth the expense of a seasonal lifeguard. This bill is fairly far in the process and Councils should move quickly to provide comment, if they choose to do so.

¹² https://www.destatehousing.com/FormsAndInformation/datastatmedia/ds_delaware_fs.pdf;

¹³ <https://www.nlc.org/article/2023/09/12/housing-for-renters/#:~:text=People%20of%20color%20are%20more%20likely%20to%20be%20renters%2C%20reflecting,in%20the%20lowest%20income%20groups;>

¹⁴AAP Policy Statement, supra.