**Memo**

**To: GACEC, SCPD and DDC**

**From: Disabilities Law Program**

**Date: 1/15/2024**

**Re: January 2024 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

- **DDOE Regulation on 608 Unsafe School Choice, 27 Del. Register of Regulations 471 (January 1, 2024)**

This is a republication of a proposed DDOE regulation previously published in the October 1, 2023 register of regulations. GACEC commented that language in proposed subsections 3.2 is ambiguous because Title 11 only applies to knowingly possessing a firearm. GACEC further commented that it supports the proposed changes to subsection 3.3 and recommended that the Department "identify which schools are designated persistently dangerous because of the number of unsafe incidents or for failing to comply with reporting requirements. GACEC also commented that the proposed addition of "and attending" to enrollment in subsection 5.1 is inconsistent with 20 U.S.C. § 7912(a). Additionally, GACEC recommended the Department "include additional reporting on unsafe incidents for student victims with disabilities."

As a result of GACEC's comments, the Department revised proposed subsections 3.2 and 5.1. Because the revisions to proposed subsections 3.2 and 5.1 are substantive they were republished this month. The revised portion of 3.2 reads[1]:

> 3.2 Unsafe incidents are set forth in subsections 3.2.1 through 3.2.4.
>
> 3.2.1 The school suspends or expels a student for bringing a firearm to the school in violation of **20 U.S.C. §7961**.
>
> 3.2.2 The school suspends or expels a student for possessing a firearm **at the school in violation of 20 U.S.C. §7961 or while in or on a safe school zone, as defined in 11 Del.C. §1457A(a)(4), pursuant to 11 Del.C. §1457A(f).**

Essentially, the DDOE corrected legal citations in the above to correct the ambiguity noted by GACEC.

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[1] Bold indicate the changed citations from October's version. October's read:
3.2 Unsafe incidents are set forth in subsections 3.2.1 through 3.2.4.
3.2.1 The school suspends or expels a student for bringing a firearm to school in violation of **11 Del.C. §1457A**.
3.2.2 The school suspends or expels a student for possessing a firearm **while in school in violation of 11 Del.C. §1457A.**

With respect to 5.1, that subsection now reads: "A student who is the victim of a ~~Violent Felony~~ violent felony while in or on the grounds of a ~~School in~~ school which the student is ~~enrolled~~ attending shall be allowed to choice to a ~~Safe School~~ safe school in the same school district, including a charter ~~school~~ school, provided that a charter school option exists in that school district's boundaries."[2] Here, "enrolled and attending" was changed to "attending," which is consistent with Councils' suggestion.

**Recommendation: Councils may wish to thank DDOE for making changes to 3.2 and 5.1, while preserving other prior recommendations.**

- **DDOE Regulation on 922 Children with Disabilities Subpart A, Purposes and Definitions, 27 Del. Register of Regulations 474 (January 1, 2024)**

The Delaware Department of Education ("DDOE") proposes to amend 14 Del. Admin. C. § 922, which include the purposes and definitions for Delaware's special education regulations (Delaware's equivalent to the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*.). DDOE is proposing to amend this regulation to add definitions which are intended to help clarify changes made to 14 Del. Admin. C. §§ 923 and 925. DDOE is also proposing to amend §§ 923 and 925 and a review of both is included in this memo.

Because DDOE is also making additional changes to comply with the *Delaware Administrative Code Drafting and Style Manual*, this review will be focused only on those changes which are substantive.

First, DDOE seeks to add the term **"Homebound or hospital placement"** which it has defined as:

> special education instruction is provided to a child with a disability in the home, hospital, or other non-school location as determined by the IEP team. This placement could be the result of medical, disciplinary, or mental health needs. Note that this definition is distinct from supportive instruction provided to general education students as defined in 14 DE Admin. Code 930.

The addition of this definition is largely unnecessary and, more importantly, problematic. IDEA was enacted to combat the perception (and reality) that youth with disabilities were either completely excluded from schools or were languishing inside regular classrooms. IDEA mandates that students with disabilities be educated in the least restrictive environment. That is to say, students with disabilities *must* be educated with students who are not disabled, to the maximum extent appropriate and that removal from this inclusive setting only occur where the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2).

[2] A student who is the victim of a ~~Violent Felony~~ violent felony while in or on the grounds of a ~~School~~ school in which the student is enrolled and attending shall be allowed to choice to a ~~Safe School~~ safe school in the same school district, including a charter ~~school~~ school, provided that a charter school option exists in that school district's boundaries.

DDOE has continued to confuse stakeholders and students with its continued use of **"supportive instruction"** and **"homebound instruction"** interchangeably. Despite this proposed definition including a clarification that it is "distinct from supportive instruction . . . as defined in 14 DE Admin. Code 930", the title of section 930 is "Supportive Instruction (Homebound)". It is possible that DDOE is attempting to introduce an actual definition of homebound instruction as it pertains to IDEA-eligible students; however, the terminology and definition employed is problematic. First, IDEA does not include "homebound" instruction as an LRE placement. Instead, IDEA uses the term "home instruction." *See* 34 C.F.R. § 300.115(b)(1). Second, by explicitly including behavior as a possible reason for this placement, DDOE is condoning a practice that it should be prohibiting. This is one of, if not, the most restrictive placement options available and it should be reserved for those students whose physical or mental health prevents them from otherwise being in a classroom setting or environment. This setting should not be available for districts to use as a method to exclude students with behavioral challenges – a method districts already overuse for this specific purpose.

Therefore, **Councils may wish to recommend that DDOE remove this proposed addition (both term and definition) and urge the Department to more explicitly delineate and separate home instruction (under the IDEA) and supportive instruction. Councils may wish to also encourage DDOE to look at how sister states have separated these two similar, but markedly different, educational options.** *See e.g.* PA Basic Education Curricular, *Instruction Conducted in the Home*, issued September 1, 1997 and reviewed June 2018.[3] Please see the analysis on the proposed 923 regulations (below) for additional information and recommendations on this issue.

DDOE proposes to amend the definition of Individualized Education Program to add the language "in a meeting" to explicitly state that this document is the result of a meeting. This is inconsistent with the rights in 14 Del. Admin. C. § 925.11.4, which allows for revisions to happen without a meeting. **Councils may wish to recommend that DDOE remove the proposed language and / or ask why it believes this additional language is necessary.**

DDOE proposes to add the term "Individualized Family Service Plan" which it has defined as:

> a written plan for providing early intervention services to eligible children and their families that is: A. Based on the evaluation and assessment; B. Implemented with the informed written parental consent for any new service, update, refusal, or removal of a service or goal; C. Developed in accordance with IDEA, Part C, and its implementing regulations at 34 CFR: 1. §303.342 - Procedures for IFSP development, review, and evaluation; 2. §303.343 - IFSP Team meeting and periodic review; and 3. §303.344 - Content of the IFSP. D. Includes early intervention services that are implemented as soon as possible, but no later than

[3] https://www.education.pa.gov/Policy-Funding/BECS/FederalCode/Pages/InstructionConductedHome.aspx#:~:text=Homebound%20Instruction%20is%20described%20in,but%20the%20term%20'urgent%20reasons'

30 days from the date informed written parental consent is obtained for each of the early intervention services in the IFSP.

This proposed definition is largely consistent with how "IFSP" is defined in the IDEA at 34 C.F.R. § 303.20. However, **Councils may wish to recommend that DDOE structures the definition consistent with the structure in IDEA, including the language used. Councils may wish to also recommend that DDOE include reference to § 303.345 (concerning interim IFSPs), consistent with the definition in IDEA**.

DDOE proposes to add a definition for print disability which it has defined as "a child who is identified with a disability and receiving special education services who requires instructional materials in accessible format. This is not a unique disability classification as referred to under 14 DE Admin. Code 925, subsections 6.6 through 6.17." **Councils may wish to inquire as to why DDOE felt it necessary to include this definition. Councils may also wish to recommend that the defined word instead be "child with a print disability" defined using the criteria for the Accessible Instructional Material program, located at https://www.aimdelaware.org/wp-content/uploads/2023/01/AIM-Student-Eligibility-Verification-Form-1-20-23.pdf (Student who: 1) is blind; 2) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or 3) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading).** ~~**with the following definition: "a student with a disability who experiences barriers to accessing instructional material in nonspecialized formats."** This is the definition of student with a print disability used in the Higher Education Act of 1965 (20 U.S.C. § 1140, *et seq*.) at 20 U.S.C. § 1140k.~~

**Recommendations: Councils may wish to recommend that DDOE**

1) **Remove the proposed term and definition "Homebound or hospital placement" and urge the Department to more explicitly delineate and separate home instruction (under the IDEA) and supportive instruction. Councils may wish to also encourage DDOE to look at how sister states have separated these two similar, but markedly different, educational options.** *See e.g.* PA Basic Education Curricular, *Instruction Conducted in the Home*, issued September 1, 1997 and reviewed June 2018.[4] Please see the analysis on the proposed 923 regulations (below) for additional information and recommendations on this issue.
2) **Councils may wish to recommend that DDOE remove the proposed language insertion to the existing definition of Individualized Education Program and / or ask why it believes this additional language, "in a meeting" is necessary, since revisions are otherwise permitted without a meeting (when agreed to).**
3) **Recommend that DDOE make its definition of "Individualized Family Service Plan" consistent with the structure and language of IDEA.**

[4] https://www.education.pa.gov/Policy-Funding/BECS/FederalCode/Pages/InstructionConductedHome.aspx#:~:text=Homebound%20Instruction%20is%20described%20in,but%20the%20term%20'urgent%20reasons'

4) **Councils may wish to also recommend that DDOE include reference to § 303.345 (concerning interim IFSPs), consistent with the definition in IDEA, to the Individualized Family Service Plan definition**.
5) **With respect to the definition of "print disability", Councils may wish to inquire as to why DDOE felt it necessary to include this definition. Councils may also wish to recommend that the defined word instead be "child with a print disability" defined using the criteria for the Accessible Instructional Material program, located at https://www.aimdelaware.org/wp-content/uploads/2023/01/AIM-Student-Eligibility-Verification-Form-1-20-23.pdf (Student who: 1) is blind; 2) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or 3) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading).**

- **DDOE Regulation on 923 Children with Disabilities Subpart A, General Duties and Eligibility of Agencies, 27 Del. Register of Regulations 474 (January 1, 2024)**

The Delaware Department of Education ("DDOE") proposes to amend sections of 14 Del. Admin Code § 923, general duties and eligibility.

Of note, we first turn to **16.0, Placements.** Federal and state law require that students with disabilities be educated in their least restrictive environment and with their nondisabled peers to the greatest extent possible. An IEP meeting is required for any change of placement. The underlined language is the proposed addition to the current regulations regarding educational placement and least restrictive environment. This section reads, with proposed changes noted:

*16.1 In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the LRE provisions of this regulation, including Sections 14.0 through 18.0.*

*16.2 The child's placement shall be determined at least annually; shall be based on the child's IEP; and shall be as close as possible to the child's home.*

*16.3 Unless the IEP of a child with a disability requires some other arrangement, the child shall be educated in the school that he or she would attend if nondisabled.*

*16.4 In selecting the LRE, consideration shall be given to any potential harmful effect on the child or on the quality of services that he or she needs.*

*16.5 A child with a disability shall not be removed from education in ~~age-appropriate~~ age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.*

*16.6 If a child with a disability is a danger to himself or herself or is so disruptive that their behavior substantially interferes with the learning of other students in the class, the IEP team may provide the child with supportive instruction and related services at home in lieu of the child's present educational placement.*

*16.6.1 Services provided under these conditions shall be considered a change in placement on an emergency basis and shall require IEP team documentation that such placement is both necessary and temporary and is consistent with the requirements for the provision of a free, appropriate public education.*

*16.6.2 In instances of parental objection to such home instruction, parents may exercise any of the applicable procedural safeguards in these regulations. 14* ***DE Admin. Code*** *926.*
*16.6.3 To be eligible for supportive instruction and related services, the following criteria shall be met:*
*16.6.3.1 The child shall be identified as disabled and in need of special education and related services and enrolled in the LEA or other public educational program; and*
*16.6.3.2 If the absence is due to a medical condition, be documented by a physician's statement where the absence will be for 2 weeks or longer; or*
*16.6.3.3 If the absence is due to severe adjustment problem, be documented by an IEP team that includes a licensed or certified school psychologist or psychiatrist, and the such placement is both necessary and temporary; or if for transitional in school program, be documented by the IEP team that it is necessary for an orderly return to the educational program.*

*16.6.4 IEPs specifying supportive instruction services shall be reviewed at intervals determined by the IEP team, sufficient to ensure appropriateness of instruction and continued placement.*

*16.6.5 Supportive instruction, related services and necessary materials shall be made available as soon as possible, but in no case longer than 30 days following the IEP meeting. Such instruction and related services may continue upon return to school when it is determined by the IEP team the child needs a transitional program to facilitate their return to the school program.*

These proposed changes enable schools to remove students with disabilities from their classroom setting, and to instead educate them at home. As DDOE is aware, federal law protects the rights of students with disabilities to be educated in their least restrictive environment (34 C.F.R. §114-19). Any change in least restrictive environment must be a determination made by the student's team. (34 C.F.R. §116). There are already explicit procedures in federal law and regulation for emergency procedures to hold an IEP meeting before a change of placement (34 C.F.R. §530). Any suspension or other removal that lasts more than 10 days (consecutive or cumulative through a school year) is considered a change in placement. (34 C.F.R. §530). The IDEA explicitly states that when a student has a suspension that constitutes a change in placement, the IEP team must meet to determine whether a student's violation of school code is a manifestation of the student behavior. (34 C.F.R. §530(e)). A school can only suspend a student for behavioral reasons without first holding an IEP meeting or manifestation determination under

specific special circumstances (if: 1) the student carries a weapon, 2) the student knowingly possess uses illegal substances, or 3) has inflicted serious bodily injury (34 C.F.R. §530)). Even when those circumstances occur, the school may only remove the student for up to 45 days and must provide the student with services in alternative educational placement. (34 C.F.R. §530(g)).

These proposed regulations are much more restrictive and would allow schools to avoid their obligations to students with disabilities. The language of the proposed regulations would provide schools with broad discretion to remove students with disabilities from the classroom in violation of their rights under federal regulations. Behavior characterized as a "danger to himself or herself or is so disruptive that their behavior substantially interferes with the learning of other students in the class" could entail a wide range of behavior that could and should be addressed in the classroom. The school should provide the student with disabilities with supportive services to address these concerns, rather than remove the student from the classroom. This proposed regulation effectively gives staff a means to avoid providing these services to which the student is entitled.

Additionally, the proposed regulations do not appear to give a clear timeline as to when (or if) a student must receive services outside of their regular placement after a removal. The proposed regulations only appear to require instruction to be provided if the IEP team determines that a student needs supportive services. Further, this regulation indicates those services would not need to be in place until 30 days after the IEP team meeting, which would deprive a student of their free appropriate public education (FAPE). There is no clear timeline when (or if) an IEP team meeting needs to take place after the student's removal. There is no clear guidance about the services owed to a student (if any) if the team feels the student doesn't meet the requirements for supportive services. There is no timeline for when the school must consider the student's return to their original placement.

In contrast, under federal regulations, even under the special circumstances that permit a school to remove a student without an IEP meeting or manifestation determination, the school is required to provide services in alternative interim placement during the length of the removal from the student's prior learning environment. The removal itself can only last up to 45 days. But under these proposed state regulations, it appears that schools would not even need to review what a student needs in an alternate placement until they have been removed for 30 days. There also is no proposed ending to this unilateral removal from the student's placement under the proposed regulations.

These regulations would incentivize schools to reframe disciplinary suspensions as behavioral removals. Almost any behavior that could merit a student suspension as a violation of school code, which could require the school to conduct a manifestation determination and/or provide services in alternate placement, could instead be characterized as behavior that presents "a danger to [the student]" or "substantially interferes with the learning of other students in the class. Instead of having to abide by the safeguards in place to protect student rights to education with their peers, schools could unilaterally remove disruptive students with disabilities from the classroom with ease and without any clear requirements to provide them with their IEP services. These proposed regulations would functionally circumvent all protections related to students with disabilities, discipline, and least restrictive environment. Under these proposed state

regulations, a student behavior could result in an immediate removal from school with no services for an indeterminable amount of time, whereas under the IDEA, that same student behavior would require the school to hold a manifestation determination meeting before any removal could take place, or under the most extreme circumstances, remove a student only up to 45 days and require the school to provide the student with services throughout that time. It gives schools a free pass to remove students with behavioral needs without having to provide them the services and protections required by the IDEA.

**Recommendation: in sum, Councils may wish to oppose: these proposed regulations would allow schools to ignore IDEA regulations and the rights of students with disabilities. The proposed regulations would provide schools with incentives to reframe suspensions as a behavioral removal and avoid their obligation under federal statute and regulation to educate students with disabilities in their least restrictive environment, and to provide them a free appropriate public education.**

- **DDOE Regulation on 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs, 27 Del. Register of Regulations 477 (January 1, 2024)**

The Delaware Department of Education ("DDOE") proposes to amend 14 Del. Admin. C. § 925, which describe the requirements for conducting evaluations, determining eligibility, and developing Individualized Education Programs ("IEP") for students with disabilities under Delaware's special education regulations (Delaware's equivalent to the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*.). DDOE is proposing to amend this regulation to "ensure alignment with current practice" and have proposed revisions to several sections which are reviewed below. DDOE is also proposing to amend §§ 922 and 923, which are included in this memo above. Because DDOE is also making additional changes to comply with the *Delaware Administrative Code Drafting and Style Manual*, this review will be focused only on those changes which are substantive.

Throughout the regulation, DDOE proposes to change references to a student's 21st birthday to the student's 22nd birthday. This is consistent with Delaware House Bill 454 of the 151st General Assembly[5], which changed the special education eligibility cutoff age from the end of the school year in which a student turns 21 to the end of the school year in which a student turns 22. Therefore, **Councils may wish to support this change.**

**Additional Requirements for Evaluations and Re-Evaluations (Section 5.0)**

DDOE proposes to amend § 925.5.5 to add to this section a requirement that public agencies conduct an evaluation before changing the educational classification of a student otherwise eligible under IDEA. **Councils may wish to recommend that DDOE remove this proposed addition as unnecessary.** Each of the classification sections includes a requirement that in determining whether a student continues to meet a particular educational classification, the IEP Team must follow the evaluation criteria. This necessarily applies to changing the

[5] https://legis.delaware.gov/BillDetail/109603.

educational classification of a student because the IEP Team is determining whether a student continues to meet the specific educational classification.

DDOE proposes to amend § 925.5.5.2 to add a sentence stating that local education agencies ("LEA") may use the "summary of performance form provided by [DDOE]" when a student is being exited from services due to aging out. This sentence is unnecessary because it is already encompassed in current § 924.1.2 ("[Each public agency providing services to children with disabilities shall use any forms or procedures as from time to time are specifically developed or promulgated by DOE in implementing the requirements of these regulations."). Moreover, it is inconsistent with the language in § 924.1.2 because the proposed regulation uses the term LEA rather than public agency. Therefore, **Councils may wish to recommend that DDOE remove this proposed language as unnecessary.**

**Determination of Eligibility (Section 6.0)**

DDOE proposes to change references to "Speech/Language" to "Speech or Language" throughout this section of the regulations. This proposed change is consistent with how IDEA refers to this eligibility classification. *See* 34 C.F.R. § 300.8(c)(11).

DDOE proposes to amend the age of eligibility section for each educational classification to clarify that a child is eligible for services under IDEA until receipt of a high school diploma or until August 31 of the school year in which the student turns 22. This is consistent with the current definition of "child" at 14 Del. Admin. C. § 922.3.0.

DDOE proposes to amend the eligibility criteria for Autism (Section 6.6) by reorganizing Section 6.6.1 to make clear that current 6.6.1.2.5 ("The displayed impairments or patterns must result in a significant impairment in important areas of functioning and be persistent across multiple contexts, including a variety of people, tasks and settings[.]") and 6.6.1.2.6 ("One (1) or more of the displayed impairments or patterns must have an adverse effect on the child's educational performance[.]") apply to both 6.6.1.1 (related to impairments in social communication and social interaction) and 6.6.1.2 (related to developmentally or age inappropriate patterns of behavior, characteristics, interests, or activities). The way the regulation is currently structured, the two provisions are under only 6.6.1.2 despite seemingly applying to both. **Councils may wish to provide support for this proposed change but recommend that DDOE further amend this regulation for grammatical clarity by moving "the child" from the end of 6.6.1 and adding those words to the beginning of both 6.6.1.1 and 6.6.1.2.** This would ensure that the proposed amended structure is grammatically correct.

DDOE proposes to amend the eligibility criteria for Traumatic-Brain Injury ("TBI") (Section 6.16) by clarifying that a student's eligibility under the TBI classification ends when a student receives their high school diploma or August 31st of the school year in which the child turns 22. The current language states that eligibility ends upon receipt of high school diploma and does not specifically include that eligibility would end at the end of the school year in which the child turns 22. This proposed change is consistent with the IDEA and the current definition of "child" in Delaware.

Although DDOE is not proposing any changes to the references of Multi-Tiered System of Support throughout § 925.9.6, **Councils may wish to recommend that DDOE update the references to "proposed regulation 14 DE Admin. Code 508 Multi-Tiered System of Support (MTSS) (23 DE Reg. 613 (02/01/20))" in 925.6.3.1 to the adopted MTSS regulations at 14 Del. Admin. C. § 508.**

**Individualized Education Program (Section 7.0)**

DDOE is proposing to add an explanatory parenthetical to current 7.1.1 to add clarification to the requirement that IEPs include a statement of the child's present levels of academic achievement and functional performance. The proposed language would clarify that this means "i.e. areas in which there is evidence that the disability causes an adverse effect on educational performance". The abbreviation "i.e." stands for the Latin phrase "id est" which means "that is" or "specifically". By using "i.e.," DDOE is saying that the present levels of academic achievement and functional performance means, *and only means*, areas where there is evidence that the student's disability is causing an adverse effect on educational performance. This language makes this requirement *more* restrictive than that which is in IDEA. Moreover, it asks IEP Teams to consider and identify where the child struggles rather than also considering the student's strengths.[6] Therefore, **Councils may wish to recommend that DDOE remove this parenthetical as overly restrictive, unnecessary, and problematic.**

DDOE proposes to add new 7.3.1, which would make clear that the IEP Team must complete the educational representative form prior to a student's 18th birthday in order for the student to be able to appoint an educational representative or educational surrogate parent. This additional language poses two separate issues. One, the way it is written makes it so that if a student does not complete this form prior to their 18th birthday, they are prevented from appointing an educational representative or educational surrogate after that. Meaning, the student would be unable to appoint someone to act in this capacity after the student turns 18. Second, and related, the way the language is written makes it so the onus is on the student with a disability to know and understand the requirements and obligations of the public agency with respect to this matter in order to exercise their right (rather than putting the onus on the public agency to affirmatively provide this information and inquire as to whether the student wishes to appoint such an individual). **Councils may wish to recommend that DDOE remove this language or otherwise revise the language to put the affirmative obligation on the public agency.**

**IEP Team (Section 8.0)**

DDOE proposes to add new subsection 8.5.2 which would prohibit excusal of required IEP team members for purposes of eligibility determinations. Councils may wish to support this change as it would help to ensure that those individuals with the most pertinent knowledge will be in attendance for meetings at which a student's eligibility with be determined.

**When IEPs Shall Be In Effect (Section 10.0)**

[6] Center for Parent Information & Resources provides a great explanation of Present Levels at https://www.parentcenterhub.org/present-levels/#idea.

DDOE proposes to amend this section by adding a requirement that, where a student transfers from one Delaware public agency to another, the receiving agency must "[a]dopt the child's Evaluation Summary Report from the previous public agency or conduct a new evaluation that meets the applicable eligibility requirements in 14 DE Admin. Code 925, Section 6.0." This additional requirement may pose an undue burden upon receiving agencies with little to no benefit for students with disabilities. In adopting a student's ESR, the receiving public agency would be making another eligibility determination, thus requiring specific individuals to attend the meeting where they otherwise would not be necessary. This may have the unintended consequence of delaying necessary meetings and taking District staff away from other important duties and responsibilities.

When a student transfers from one Delaware public agency to another, the receiving public agency must, within 60 days, either adopt the student's previous IEP or develop and implement a new one. This review necessarily requires a review of a student's ESR and puts the onus on the receiving public agency to determine whether updated evaluations are warranted. An additional requirement that the receiving agency adopt the student's ESR is unnecessary and may lead to negative consequences. Therefore, **Councils may wish to recommend that DDOE remove this proposed additional requirement.**

The second proposed change to this section is to current 10.4.1.1 (which is proposed to be renumbered to 10.4.1.2). Specifically, DDOE seeks to make the following changes (noted in underline and strikethroughs): "Review and adopt the child's IEP from the previous public agency at an IEP meeting convened for that purpose, or develop, and adopt, and implement a new IEP that meets the applicable requirements in Sections 7.0 through 11.0." ~~The first change, adding "Review and" to the beginning of the subsection is unnecessary and redundant. In adopting a student's IEP from a prior agency, the receiving public agency must necessarily review the IEP.~~ The second change, replacing the comma after the word "develop" with the word "and" makes the sentence grammatically confusing. Therefore, **Councils may wish to recommend that DDOE (~~1) not add the words "review and" to the beginning of proposed 10.4.1.2 and (2~~) not replace the comma after the word "develop" with the word "and."**

**Development, Review, and Revision of IEP (Section 11.0)**

DDOE is proposing a single change to this section related to the special factors that IEP Teams must consider in developing a student's IEP. Specifically, it is proposing to change the language in 11.2.6, which concerns students who may need course materials in alternative formats. The current language is "In the case of a child who is blind, visually impaired, or has a physical or print disability, consider whether the child needs accessible instructional materials." DDOE is proposing to replace this language with the following:

> The IEP team shall consider intervention supports and strategies, including instructional materials in accessible formats, for students who have difficulty accessing or using grade-level textbooks and other core materials in standard print formats. This includes children who are blind, visually impaired, or have a physical or print disability (as defined in 14 DE Admin. Code 922, Section 3.0).

DDOE's proposed change does not necessarily substantively change what the IEP Team is supposed to consider. The underlying requirement is still for the IEP Team to consider whether a student needs instructional materials in alternate formats due to the child's disability. The proposed language provides IEP Teams with more information about what "instructional materials" are. **Councils may wish to generally support this proposed change with a request that DDOE make clear that it is not just "grade-level textbooks and other core materials" that districts must consider and adapt – instead, it should be anything that the student would need to enable access to the general education curriculum.**

**Educational Placement in the Least Restrictive Environment (Section 13.0)**

DDOE proposes several changes to Section 13.0 concerning education in a student's LRE, which has resulted in a slight restructuring of the regulations by adding a separate section for students aged 3-5 who are not yet in kindergarten and moving some subsections around. This analysis will not include mention of the regulations which changed subsections but did not substantively change.

DDOE proposes to add section 13.1.1 which states "Except as provided in 14 DE Admin Code 925, subsection 11.12 (regarding children with disabilities in adult prisons), each public agency shall meet the least restrictive environment requirements of 14 DE Admin. Code 923, Sections 14.0 through 20.0." This is consistent with language found in IDEA at 34 C.F.R. § 300.114(a)(1). However, **Councils may wish to recommend that DDOE replace the reference to subsection 11.12, which concerns students in adult prisons participating in general assessments and transition services, with subsection 11.13, which concerns a public agency's ability to modify the IEP of an incarcerated student (including LRE) where there is a bona fide security or compelling penological interest which cannot otherwise be accommodated.**

DDOE proposes to add section 13.2, which concerns students aged 3-5 who are not yet in kindergarten. Part B of the IDEA applies to all students aged 3-22 (inclusive) identified as eligible under this Part. There is no carve-out in Part B of the IDEA for students who are not yet in kindergarten or who are not in a regular school program. Therefore, the LRE requirements of Part B of the IDEA apply to all IDEA-eligible students aged 3-5, regardless of where they are currently being served. DDOE's proposed LRE placements for students aged 3-5 does not comply with the LRE requirements of IDEA. These proposed placements include:

1. (proposed 13.2.1) Children attending a regular early childhood program greater than 10 hours per week with a ratio of at least 50% of children who do not have an IEP and the majority of the special education hours and related services are in (a) the regular early childhood program; or (b) some other location;
2. (proposed 13.2.2) Children attending a regular early childhood program less than 10 hours per week with a ratio of at least 50% of children who do not have an IEP and the majority of the special education hours and related services are in (a) the regular early childhood program; or (b) some other location;

3. (proposed 13.2.3) Children attending a special education program not in any regular early childhood program (*e.g.*, separate special education class or a separate school or a residential facility) and where more than 50% of the children have an IEP; and
4. (proposed 13.2.4) Children attending neither a regular early childhood program nor a special education program included in subsections 13.2.1 through 13.2.3 of this regulation and is receiving the majority of the special education hours and related services (a) at home; or (b) at the service provider's location or some other location not in any other category.

**Councils may wish to recommend that DDOE remove this separate LRE section for this population and inquire as to why it felt it necessary to impose different requirements with respect to this particular population of students even though they are covered under the same requirements and obligations under Part B of the IDEA as eligible students aged 5-22, inclusive.**

DDOE is proposing to move current 13.3, concerning students with disabilities who the LEA considers to be a danger to themselves or whose disruptive behavior interferes with their learning or the learning of others, to Chapter 923. **Please see DLP's legal analysis of this proposed change to Section 923, included above.**

Proposed 13.3 (current 13.1) includes a description of the LRE options available "for school age children." DDOE is proposing to add the quoted language to assist with its erroneous clarification that the LRE requirements for students aged 3-5 (who are not yet in kindergarten) are different than those for students aged 5-22. However, DDOE provides no language to define what it means by "school age children". Throughout this section, DDOE proposes to remove the last sentence of current 13.1.1-13.1.3 (proposed 13.3.1-13.2.3), which provides examples for where the particular setting may be applicable. **Councils may wish to inquire as to why DDOE is proposing to remove this language and whether guidance with examples of how the different settings could look will be provided to districts and parents to aid in IEP development.**

DDOE is proposing to replace much of the description of the "Homebound and Hospital" setting (13.1.6 (proposed 13.3.6)) with a cite to the definition it is proposing to include in Section 922. **Please see DLP's legal analysis of this proposed change to Section 922, included above.**

**<u>Recommendations:</u>**

1. **Councils may wish to support the change of substituting 22 for 21 throughout the regulation, with respect to students' age out.**
2. **Section 5.0**
    a. **Councils may wish to recommend that DDOE remove the proposed addition as unnecessary** (addition of a requirement that public agencies conduct an evaluation before changing the educational classification of a student otherwise eligible under IDEA).
    b. **Subsection** 5.5.2 **Councils may wish to recommend that DDOE remove the proposed language as unnecessary (**to add a sentence stating that local education agencies ("LEA") may use the "summary of performance form

provided by [DDOE]" when a student is being exited from services due to aging out).

3. **Section 6.0 - Councils may wish to provide support for the proposed changes to autism but recommend that DDOE further amend this regulation for grammatical clarity by moving "the child" from the end of 6.6.1 and adding those words to the beginning of both 6.6.1.1 and 6.6.1.2.**
4. **Councils may wish to recommend that DDOE update the references to "proposed regulation 14 DE Admin. Code 508 Multi-Tiered System of Support (MTSS) (23 DE Reg. 613 (02/01/20))" in 925.6.3.1 to the adopted MTSS regulations at 14 Del. Admin. C. § 508.**
5. **Section 7.0**
    a. **Councils may wish to recommend that DDOE remove the parenthetical in proposed section 7.1.1 as overly restrictive, unnecessary, and problematic.**
    b. **Councils may wish to recommend that DDOE remove this additional language in 7.3.1 or otherwise revise the language to put the affirmative obligation on the public agency.**
6. **Section 8.0 – IEP Team – Councils may wish to support.**
7. **Section 10.0**
    a. **Councils may wish to recommend that DDOE remove the proposed additional requirement** that, where a student transfers from one Delaware public agency to another, the receiving agency must adopt the child's Evaluation Summary Report from the previous public agency or conduct a new evaluation as unnecessary and burdensome, as receiving public agencies already must either adopt the student's previous IEP or develop and implement a new one.
    b. **Councils may wish to recommend that DDOE not replace the comma after the word "develop" with the word "and."**
8. **Development, Review, and Revision of IEP (Section 11.0) - Councils may wish to generally support this proposed change with a request that DDOE make clear that it is not just "grade-level textbooks and other core materials" that districts must consider and adapt – instead, it should be anything that the student would need to enable access to the general education curriculum.**
9. **Educational Placement in the Least Restrictive Environment (Section 13.0),**
    a. **Councils may wish to recommend that DDOE replace the reference to subsection 11.12, which concerns students in adult prisons participating in general assessments and transition services, with subsection 11.13, which concerns a public agency's ability to modify the IEP of an incarcerated student (including LRE) where there is a bona fide security or compelling penological interest which cannot otherwise be accommodated.**
    b. **Councils may wish to recommend that DDOE remove this separate LRE section for this population and inquire as to why it felt it necessary to impose different requirements with respect to this particular population of students even though they are covered under the same requirements and obligations under Part B of the IDEA as eligible students aged 5-22, inclusive.**
    c. **Re 13.3, please see DLP's legal analysis of this proposed change to Section 923, included above.**

d. Proposed 13.3 - **Councils may wish to inquire as to why DDOE is proposing to remove the example language and whether guidance with examples of how the different settings could look will be provided to districts and parents to aid in IEP development.**
e. **Re the proposal to replace much of the description of the "Homebound and Hospital" setting (13.1.6 (proposed 13.3.6)) with a cite to the definition it is proposing to include in Section 922, adopt the recommendation of this proposed change to Section 922, included above.**

- **DHHS, DMMA Continuous Coverage for Children Enrolled in Medicaid, 27 Del. Register of Regulations 486 (January 1, 2024)**

The Delaware Department of Health and Social Services ("DHSS") and it's Division of Medicaid and Medial Assistance ("DMMA") proposes to amend the Division of Social Services Manual (incorporated into State regulation at 16 Del. Admin. Code §§ 14000 and 25000, as well as the Medicaid State Plan. Comments are due January 31st. This proposed rulemaking would make children under 19 enrolled in Medicaid eligible for a full 12-month period regardless of change of circumstances with limited exceptions. This rulemaking follows passage of the Consolidated Appropriations Act of 2023, which required States to provide 12 months of continuous eligibility for children under 19, starting January 1, 2024.

Under this proposed rulemaking, children under 19 enrolled in Medicaid under any eligibility program, will have 12 months of continuous eligibility (proposed DSSM § 14810.2). The eligibility period lasts for one year from an applicant's date of eligibility, or, following an annual renewal, from the effective date of the renewal (proposed DSSM § 14810.2). Such continuous eligibility would include kids whose parents did not respond to requests from DHSS for additional information (proposed DSSM § 14800). Covered children include those enrolled in Children's Community Alternative Disability Program (CCADP) (proposed DSSM § 25100.1).

Exceptions to continuous eligibility include: 1) turning 19; 2) a request for voluntary termination; 3) the child is no longer a Delaware resident; 4) the original eligibility was determined to be an error or the result of "fraud, abuse, or perjury" attributed to the child or their "representative" (parent/guardian); or death of the child (proposed DSSM § 14810.2).

There are some additional details regarding self-attested information which are not easy to follow, in part because of missing comma that changes the interpretation of exception #4. Without the comma exception 4 reads: "[t]he agency determines that eligibility was erroneously granted at the most recent determination, or renewal of eligibility because of agency error or fraud, abuse, or perjury attributed to the child or the child's representative" (proposed DSSM § 14810.2). This indicates that termination may occur when 1) eligibility was erroneously granted; or 2) renewal was because of agency error, fraud, abuse or perjury. However, the rulemaking continues by explaining that self-attested information will not be a cause for exclusion from continuous eligibility under exception 4, even once documentation is obtained and found to be contradictory, unless one of the five exceptions applies. This contradicts the

way exception #4 is written, that an exception to continuous eligibility is "eligibility was erroneously granted." **This substantive discrepancy can be rectified with an insertion of a comma following "eligibility": "(4) The agency determines that eligibility was erroneously granted at the most recent determination, or renewal of <u>eligibility,</u> because of agency error or fraud, abuse, or perjury attributed to the child or the child's representative".**

The rulemaking clarifies children receiving benefits under a reasonable opportunity to provide citizenship or immigration status will not fall into this continuous eligibility, as they are considered to not have been determined eligible yet (proposed DSSM § 14810.2). The changes also include continuous eligibility for an eligible pregnant woman, whose eligibility lasts throughout the pregnancy and postpartum period regardless of changes of circumstances or eligibility category (proposed DSSM § 14810.1)

**Recommendation:**

1) **Councils may wish to generally support this amendment as it enables the State to comply with federal law, and provides additional stability in children's health coverage, which helps ensure adequate medical care, essential for both children with disabilities, and for the prevention of disabilities amongst children without disabilities.**
2) **However, Councils may wish to encourage DHSS to insert a comma following "eligibility" in proposed DSSM § 14810.2, exception #4, as follows: "(4) The agency determines that eligibility was erroneously granted at the most recent determination, or renewal of <u>eligibility,</u> because of agency error or fraud, abuse, or perjury attributed to the child or the child's representative".**

## II. Final State Regulations

- **DDOE Regulation on 1001 Participation in Extra Curricular Activities, 27 Del. Register of Regulations 522 (January 1, 2024)**

This regulation repeals an existing regulation which directed school districts and charter schools to establish their own academic eligibility criteria for participation in extracurricular activities except for interscholastic athletics. DDOE explains it is repealing this regulation because academic eligibility criteria for middle and high school students' participation in extracurricular activities is established by the Delaware Interscholastic Athletic Association (DIAA) Board, which schools are required to comply with pursuant to 14 Del.C. § 304(3). Councils' comments focused on the nondiscrimination statement that had been included in this regulation, that did not appear elsewhere in DIAA regulations. DDOE acknowledged Councils' comments but did not make any requested changes.

## III. State Bills

- **HB 106 AN ACT TO AMEND TITLE 21 OF THE DELAWARE CODE RELATING TO THE MOTORCYCLE RIDER EDUCATION ADVISORY COMMITTEE.**

HB 106 codifies the Motorcycle Rider Education Advisory Committee ("Committee"). This committee will receive input from State agencies and the public, assess future needs and recommend improvements to the Motorcycle Rider Education Program ("Program"), and review pending legislation related to the Program or motorcycle use. The Committee must meet at minimum quarterly. Notably, the required membership does not include disability representation. **Councils may wish to encourage amendment to include disability and/or brain injury representation. Councils may wish to advocate for the addition of a specific directive as to helmet usage or other brain injury prevention.** The bill sponsors include: Rep Short, Sen. Sokola, as well as Reps Baumbach, Briggs King, Gray, Hensley, K. Johnson, Osienski, and Sens Pettyjohn and Wilson. The bill was reported out of committee on June 22, 2023.